A v Minister for Immigration & Ethnic Affairs [1997] HCA 4; (1997) 190 CLR 225 ; (1997) 142 ALR 331 (24 February 1997)

HIGH COURT OF AUSTRALIA

BRENNAN CJ,

DAWSON, McHUGH, GUMMOW AND KIRBY JJ

"APPLICANT A" & ANOR APPELLANTS

AND

MINISTER FOR IMMIGRATION AND ETHNIC

AFFAIRS & ANOR RESPONDENTS

ORDER

Appeal dismissed with costs.

24 February 1997

On appeal from the Federal Court of Australia.

Representation

T A Game and G P Craddock for the appellants (instructed by T Murphy, Legal Aid Commission of New South Wales)

J Basten QC with N J Williams for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

CATCHWORDS

"Applicant A" & Anor v

Minister for Immigration and Ethnic Affairs & Anor

Immigration - Refugee status - Fear of persecution by forcible sterilisation pursuant to China's "One Child Policy" - Whether persecution feared "for reasons of ... membership of a

particular social group" - Whether legitimate to define particular social group by reference to fear of persecution.

Statutes - Interpretation - Statute incorporating provisions of international treaty - Approach to construction.

Words and phrases - "particular social group" - "for reasons of".

Migration Act 1958 (Cth), ss 4(1), 22AA, 54B.

Migration (1993) Regulations (Cth), reg 2A.5.

Convention Relating to the Status of Refugees, Art 1.

Vienna Convention on the Law of Treaties, Arts 31, 32.

BRENNAN CJ. I have had the opportunity of reading in draft the judgment of McHugh J. I gratefully adopt what his Honour has written relating to the facts giving rise to this appeal and the statutory framework in which the proceedings were taken in the Refugee Review Tribunal and the Federal Court. The question for present determination is, as his Honour states it, whether the appellants are refugees within the meaning of that term in s 4(1) of the *Migration Act* 1958 (Cth) ("the Act") and entitled to have their applications for visas and entry permits considered on that basis.

The term "refugee" is defined by s 4(1) of the Act[1] to have the same meaning as it has in Art 1 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Convention") or in that Article as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Protocol"). I respectfully agree with the principles stated by McHugh J which govern the interpretation of a treaty or a treaty provision enacted in or as part of a domestic statute. But I would add the following comment.

If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty[2]. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way[3].

In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.

In the present case, I would interpret the definition of "refugee" in Art 1(A)(2) of the Convention as amended by the Protocol in the light of the object and purpose appearing in the preamble and the operative text and by reference to the history of the negotiation of the Convention. This leads me to a conclusion different from that at which McHugh J arrives. The points of departure will appear from the reasons which follow.

The first two considerations recited in the preamble contain an indication of the Convention's purpose. They read:

" CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms".

By invoking "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination" and by speaking of the United Nations' "profound concern for refugees" and its endeavour "to assure refugees the widest possible exercise of these fundamental rights and freedoms", the preamble places the Convention among the international instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental rights and freedoms. As it is sadly notorious that, in many parts of the world, governments authorise or are unable or unwilling to prevent persecution, the fourth paragraph of the preamble recognises "that the grant of asylum may place unduly heavy burdens on certain countries". The Convention places on Contracting States a number of obligations the observance of which would afford a refugee who finds himself or herself in the territory of a Contracting State a substantial measure of protection of the refugee's fundamental rights and freedoms.

The protection of fundamental rights and freedoms is an object of the Convention and that object is reflected in the definition of the term "refugee" in Art 1(A)(2) as amended.

The relevant part of Art 1(A)(2) reads as follows:

"... the term 'refugee' shall apply to any person who:

...

(2) Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

When a person has a well-founded fear of persecution, the enjoyment by that person of his or her fundamental rights and freedoms is denied. Forced sterilisation has been seen as a denial of a person's fundamental rights and freedoms[4]. It offends the fundamental human right to the security of the person[5] and it destroys, of course, a person's reproductive capacity[6]. It

has not been argued that, if the other elements of the definition are satisfied, forced sterilisation does not satisfy the element of persecution. The Tribunal found that each appellant had a well-founded fear of forced sterilisation.

However, the object and purpose of the Convention is not simply the protection of those who suffer a denial of enjoyment of their fundamental rights and freedoms; they must suffer that denial by prescribed kinds of persecution, that is, persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion".

The feared "persecution" of which Art 1(A)(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to "the country of his nationality" for protection of his fundamental rights and freedoms but, if "a well-founded fear of being persecuted" makes a person "unwilling to avail himself of the protection of [the country of his nationality]", that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent. Then, Art 1(C)(5) provides that a refugee can no longer "continue to refuse to avail himself of the protection of the country of his nationality" if "the circumstances in connexion with which he has been recognized as a refugee have ceased to exist". As the justification for the refugee's not availing himself of the protection of that country is the existence of the relevant "circumstances", those circumstances must have been such that the country of the refugee's nationality was unable or unwilling to prevent their occurrence. Thus the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality[7].

Secondly, the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in Art 1(A)(2). The persecution must be "for reasons of" one of those categories. This qualification excludes indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim or victims of persecution. Persecution of that kind is a general, non-discriminatory denial of fundamental rights and freedoms. The qualification also excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of "refugee". But the categories of discrimination mentioned in the definition are very broadly stated, especially the category of "membership of a particular social group".

The discriminatory bases of feared persecution prescribed by Art 1(A)(2) were settled at the Conference of Plenipotentiaries held at Geneva from 2 to 25 July 1951. The inclusion of the basis "particular social group" is attributable to an intervention by the representative of Sweden, Mr Petren, who noted[8] that -

"experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included."

Neither the Swedish proposal[9] nor any reported discussion illuminates the intended scope of the term "a particular social group". Later in the Conference, when a draft of what became Art

33 was under consideration, the Swedish representative procured, without substantial discussion, the insertion of the same term in the draft of that Article[10]. The term "a particular social group" was added in order to make express provision covering the persecution of a group that might not fall within any of the other bases of persecution, even though the other categories ("race, religion, nationality ... or political opinion") might have identified the persons subject to persecution for any of those reasons as a "social group". Clearly, the term "a particular social group" is not confined to the groups constituted by the other categories of reference.

There is nothing in the term "a particular social group" which limits the criteria for selecting such a group nor anything in the travaux préparatoires which suggests that any limitation was intended. There is no reason to treat "a particular social group" as necessarily exhibiting an inherent characteristic such as an ethnic or national identity or an ideological characteristic such as adherence to a particular religion or the holding of a particular political opinion. By the ordinary meaning of the words used, a "particular group" is a group identifiable by any characteristic common to the members of the group and a "social group" is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the members of the group from society at large. The persons possessing any such characteristic form a particular social group[11]. If membership of a social group, however constituted, attracts persecution, the enjoyment by the members of that group of their fundamental rights and freedoms is denied, and the denial is prima facie discriminatory. In the definition of "refugee", should the term "a particular social group" be given some meaning more restricted than its words would ordinarily bear?

The leading concept in the definition of the term "refugee" is the "fear of being persecuted" for a discriminatory reason[12]. If a putative refugee's enjoyment of his or her fundamental rights and freedoms is denied by a well-founded fear of persecution for a reason that distinguishes the victims as a group from society at large, it would be contrary to "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". It would therefore be contrary to the object and purpose of the Convention to exclude that putative refugee from the protection which the Convention requires the Contracting Parties to accord. I see no warrant for reading down the categories of discrimination by postulating some a priori factor that restricts the denotation of the phrase "a particular social group", ignoring the actual reason for the feared persecution.

This is a view which commands some, but not universal, support[13]. Perhaps the most cogent argument against this view was stated by La Forest J, speaking for the Court in *Canada (Attorney-General) v Ward*[14]. His Lordship rejected a wide interpretation of the term "a particular social group" which would effectively make it a "safety net to prevent any possible gap in the other four categories"[15] of discrimination. He said[16]:

"Although the delegates inserted the social group category in order to cover any possible *lacuna* left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been superfluous; the definition of 'refugee' could have been limited to individuals who have a well-founded fear of persecution without more."

Although I find other parts of his Lordship's judgment compelling, with great respect I am unable to agree with this aspect. In the first place, the enumeration of the bases restricts the

protection to victims of persecution that is officially practised or tolerated. Next, the enumeration of those bases restricts the protection to members of persecuted groups. But the insertion of the social group category of discrimination in both Art 1(A)(2) and Art 33 of the Convention was intended to include groups that would not be identified by any of the other categories of discrimination, whether or not the term "a particular social group" would be wide enough to encompass those other categories. Thus the inserting of the term was intended to be a "safety net" for any who fell within it. Further, the term "for reasons of" was needed to exclude persecutions that were not based on some characteristic which distinguishes the victims on racial, religious, national, social or political grounds.

In *Canada (Attorney-General) v Ward*, La Forest J identified[17] three possible sub-categories which he accepted as coming within the category of a particular social group:

"(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."

However, in *Chan v Canada*, La Forest J (with the concurrence of L'Heureux-Dubé and Gonthier JJ) accepted[18] that persons who share a characteristic need not be associated one with another before the characteristic attracts persecution. And, for my part, I see no ground for holding that a characteristic must be "innate or unchangeable" before it can distinguish a social group. If a characteristic distinguishes a social group from society at large and attracts persecution to the members of the group that is so distinguished, I see no reason why a well-founded fear of that persecution might not support an application for refugee status. An attempt to confine the denotation of the term "a particular social group" in order to restrict the protection accorded by the Convention would be warranted if it were assumed that the Convention was intended to impose minimal obligations on the receiving State but, if the object and purpose of the Convention is the protection so far as possible of the equal enjoyment by every person of fundamental rights and freedoms, the term "a particular social group" should be given a wide interpretation. The term should be understood simply to connote a group constituted by those who share a common distinguishing characteristic which is the "reason" for persecution that is feared.

In my opinion, the appropriate way to apply the definition in the present case is to find the answer to a series of questions:

1. Does the putative refugee fear persecution?

2. Is the fear well-founded?

3. Is the feared persecution practised or likely to be practised because of a characteristic of the victims that is not common to the members of the society at large?

4. Is the persecution practised officially or is it officially tolerated or is the government of the country of the putative refugee's nationality unable to control it?

5. Is the putative refugee unwilling to avail himself or herself of the protection of the country of his or her nationality?

6. Is that unwillingness due to the feared persecution?

In the present case, the Refugee Review Tribunal found that the appellants were members of a particular social group. The Tribunal said of the female appellant:

"The Tribunal believes that parents in the reproductive age group 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 1970's and the 1980's 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 of parents in the reproductive age group is defined by the government itself and accepted as a possible part of one's identification by China's citizens. It is not defined primarily by persecution since there are official rewards for practising birth control.

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."

Similar findings were made in relation to the male appellant, though the Tribunal spoke of "parents of one child" rather than "parents in the reproductive age group". It is immaterial that the persecution which the appellants fear, namely, forced sterilisation, is practised locally by officials in the area of Bang Hu rather than throughout China. The practice is officially tolerated. It is not indiscriminate persecution that is feared. It is forced sterilisation of those who, being the parents of one child, have not voluntarily adopted one of the birth-preventing mechanisms approved by the local officials. The characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic[19]. It is their membership of that group that makes them liable to sterilisation if they return to Bang Hu. Affirmative answers appear from the findings of the Tribunal to each of the questions above set out. It follows that, on the findings made by the Tribunal, the Tribunal was right to hold that each of the appellants was a "refugee". Sackville J was therefore correct in dismissing the order of review.

I would allow the appeal, set aside the order of the Full Court and in lieu thereof dismiss with costs the appeal from the order of Sackville J to the Full Court.

DAWSON J. The appellants are Chinese nationals who seek asylum in Australia as refugees. They were married in China and lived in a village near Guangzhou. On 5 December 1993 they arrived in Australia by boat and the wife gave birth to a son, their first and only child, shortly thereafter. They were detained upon arrival under s 54B of the *Migration Act* 1958 (Cth) ("the Act") as persons reasonably supposed to have been illegal entrants and were refused entry permits. On 14 December 1993, they lodged applications with the Department of Immigration and Ethnic Affairs for recognition as refugees pursuant to s 22AA of the Act. Those applications were deemed, by reg 2A.5 of the Migration (1993) Regulations (Cth), also to be applications in each case for a Domestic Protection (Temporary) Visa (before entry) and a Domestic Protection (Temporary) Entry Permit (before entry).

The applications were refused by a delegate of the Minister for Immigration and Ethnic Affairs on 31 January 1994. The appellants applied to the Refugee Review Tribunal ("the RRT") for review of that refusal pursuant to s 166B of the Act. The RRT reversed the Minister's decision and held that the appellants were refugees. That conclusion was held by Sackville J on appeal to disclose no error of law. However, his Honour's decision was unanimously reversed on an appeal to the Full Federal Court. The appellants now appeal by special leave to this Court.

The term "refugee" is defined in s 4(1) of the Act as having the same meaning as it has in Art 1 of the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Convention"), as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967. Article 1A(2) of the Convention in its amended form relevantly defines the term "refugee" as:

"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".

The words "race, religion, nationality, membership of a particular social group or political opinion" are generally referred to as "Convention reasons".

The appellants claim that if they are returned to China they face forcible sterilisation pursuant to China's "One Child Policy" under which the Chinese government permits Chinese families to have only one child. The appellants claim, and the respondents do not dispute, that forcible sterilisation is persecution and that they have a well-founded fear of being forcibly sterilised if returned to China. The dispute between the parties is whether the appellants fear persecution "for reasons of ... membership of a particular social group". Before the RRT, the particular social group of which both appellants were found to be members was ultimately identified as follows:

" 'those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised' ... The group exists by virtue of government policy and government action and is thereby cognisable. The persecution feared is precisely because the [appellants are] defined into the group by government policy."

As is clear from that passage, it was by reference to the persecution which the appellants fear that the particular social group to which they were said to belong was defined. Whether that approach exhibits error is the question to be decided in this appeal.

Deciding that question involves the construction of a domestic statute which incorporates a definition found in an international treaty. Such a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law. By transposing the provision of the treaty, the legislature discloses the prima facie intention that it have the same meaning in the statute as it does in the treaty. Absent a contrary intention, and there is none in this case, such a statutory provision is to be construed according to the method applicable to the construction of the corresponding words in the treaty[20].

The general rule of interpretation of treaty provisions appears in Art 31 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), par 1 of which provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Under that rule, the starting point must be the text of the treaty. Of course, the text of a treaty is often couched in fairly general terms due to differences in language and legal conceptions among those to whom it is to be addressed and as part of an attempt to reach agreement among diverse nations. Accordingly, technical principles of common law construction are to be disregarded in construing the text. As Lord Wilberforce said in *Buchanan& Co v Babco Ltd*[21]:

"I think that the correct approach is to interpret the English text ... in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation".

Article 31(1) also allows, indeed requires, recourse to the context, object and purpose of a treaty[22]. Article 31(2) states that the context includes, inter alia, the text of the treaty including its preamble and annexures. Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear. To say as much is, perhaps, to state no more than the accepted canon of construction that an instrument is to be construed as a whole and that words are not to be divorced from their context or construed in a manner that would defeat the character of the instrument[23].

The words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group. For instance, the appellants in this case are each members of at least one recognised particular social group - a family, consisting of them and their son[24] - but it is not their membership of that specific family which motivates their prospective persecutors[25]. The question which arises in this appeal is whether the persecution they fear is by reason of their membership of a particular social group consisting

of all such families who face persecution. That is not only a question about causal nexus, but about what constitutes a "particular social group".

As the Federal Court has recognised[26], the phrase "particular social group" should be given a broad interpretation to encompass all those who fall fairly within its language and should be construed in light of the context in which it appears. A "group" is a collection of persons. As Lockhart J pointed out in *Morato v Minister for Immigration*[27], the word "social" is of wide import and may be defined to mean "pertaining, relating, or due to ... society as a natural or ordinary condition of human life". "Social" may also be defined as "capable of being associated or united to others" or "associated, allied, combined"[28]. The adjoining of "social" to "group" suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word "particular" in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element[29]; the element must unite them, making those who share it a cognisable group within their society.

I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group. Nor is there anything which would suggest that the uniting particular must be voluntary. To the extent that *Sanchez-Trujillo v INS*[30] suggests the contrary I do not think it is persuasive. Furthermore, the significance of the element as a uniting factor may be attributed to the group by members of the group or by those outside it or by both.

However, one important limitation which is, I think, obvious is that the characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention "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*)"[31]. That approach would ignore what Burchett J in *Ram v Minister for Immigration*[32] called the "common thread" which links the expressions "persecuted", "for reasons of", and "membership of a particular social group", namely:

"a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group."

Moreover, if a shared fear of persecution were sufficient to constitute a particular social group, it would render at least three of the other four Convention reasons - race, religion and nationality - superfluous. It is one thing to say that the five Convention reasons can overlap; it is quite another to construe one of them in a manner which renders three of the others unnecessary and the fourth - political opinion - almost so. To construe the term "particular social group" in that way would make it an almost all-encompassing safety net[33], allowing

a persecutory law or practice of general application to constitute those whose actions bring themselves within its terms members of a particular social group. Such a construction would be contrary to the context in which the words "particular social group" appear.

The requirement that the feared persecution be by reason of "membership" of a particular social group was taken by Black CJ (with whom French J agreed) in *Morato v Minister for Immigration*[34] to require that the persecution be on account of "what a person *is* - a member of a particular social group - rather than upon what a person has done or does". But as Black CJ himself recognised[35], that statement should not be taken too far. The distinction between what a person is and what a person does may sometimes be an unreal one. For example, the pursuit of an occupation may equally be regarded as what one is and what one does. At other times, the distinction may be appreciable but not illuminating. For example, the acts of conceiving and bearing a child may be what people do, but the result of those acts - that the persons involved are parents - is quite central to what they are[36].

However, I think that Black CJ's remarks were directed more to the situation of a generally applicable law or practice which persecutes persons who merely engage in certain behaviour or place themselves in a particular situation[37]. For example, a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms. Viewed in that way, Black CJ's distinction between what a person is and what a person does is merely another way of expressing the proposition which I have already stated.

In this case, the reason the appellants fear persecution is not that they belong to any group, since there is no evidence that being the parents of one child and not accepting the limitations imposed by government policy is a characteristic which, because it is shared with others, unites a collection of persons and sets them apart from society at large. It is not an accurate response to say that the government itself perceives such persons to be a group and persecutes individuals because they belong to it. Rather, the persecution is carried out in the enforcement of a policy which applies generally. The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms. The only recognisable group to which they can sensibly be said to belong is the group comprising those who fear persecution pursuant to the one child policy. For the reasons I have given, that cannot be regarded as a particular social group for the purposes of the Convention.

In contending for a construction which would see the particular social group category take on the character of a safety net by allowing a persecutory law or practice of general application to define a particular social group consisting of those who by their actions bring themselves within its terms, counsel for the appellants submitted that the persecution of parents with one child by forcible sterilisation involves the infringement of fundamental human rights. Two were identified in written submissions - a right of personal security and a right to have children, or of reproductive control[38]. The right of personal security is infringed by the intrusion which is involved in the act of forcible sterilisation. The right to have children, or of reproductive control, is destroyed by the consequence of that intrusion, namely, that sterilised persons are unable further to reproduce.

The latter right is said to be based on the "right ... to found a family" as it appears in Art 16 of the Universal Declaration of Human Rights ("the Universal Declaration") and Art 23 of the

International Covenant on Civil and Political Rights ("the ICCPR"). In truth, it involves the contention that that right extends to founding a family of unlimited size, or, in the words of La Forest J in *Chan v Canada (MEI)*[39], "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children"[40]. Whether that accords with the intention of the Universal Declaration and the ICCPR is not clear. Accepting that proposition would mean that a one child policy enforced, for example, only by financial penalties and not by forcible sterilisation would contravene the Universal Declaration and the ICCPR. Governments faced with the dangers of enormous population expansion and limited space and resources may understandably take the view that measures are required to curb or prevent population growth to ensure that basic living standards (not to mention human rights) can be maintained. Indeed, the male appellant himself, in his evidence before the RRT, said that although he strongly objected to the government making the decision for him, he did not object to the limiting of families and believed that two children was a good number.

What the appellants in truth object to is not the one child policy *per se*, but its enforcement by officials in their area by forcible sterilisation. The right to personal security comes closer to sustaining that objection and appears to have a stronger foundation in international law. Article 3 of the Universal Declaration guarantees the "right to ... security of person". The appellants also refer to Art 5 of the Universal Declaration and Art 7 of the ICCPR, which are directed to cruel, inhuman or degrading treatment or punishment. No doubt forcible sterilisation involves significant bodily intrusion without consent and has important consequences.

For my part, however, I do not see how those considerations assist the appellants, since they merely suggest that the persecution which they fear is serious and may infringe internationally recognised human rights. That is not the issue in this appeal. The issue is whether that persecution is for one of the five Convention reasons. As Beaumont, Hill and Heerey JJ in the Full Court of the Federal Court observed in this case[41]:

"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."

They went on to say[42]:

"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."

If I may say so with respect, an example of that kind of reasoning is, it seems to me, to be found in the dissent of La Forest J in *Chan v Canada (MEI)*[43]. In the earlier decision of the Supreme Court of Canada in *Canada (Attorney-General) v Ward*[44], La Forest J had laid down as one guideline for determining the existence of particular social groups "groups whose members voluntarily associate for reasons so fundamental to their human dignity that

they should not be forced to forsake the association". In applying that reasoning in *Chan*, the majority in the Canadian Federal Court of Appeal had held that there was no "voluntary association" between parents with more than one child who disagree with forced sterilisation, referring to La Forest J's distinction in *Ward*[45] between what a person is and what a person merely does[46]. On appeal in *Chan*, La Forest J disagreed with the Federal Court of Appeal's application of his reasoning in *Ward*. His Lordship stated that the guidelines in *Ward* were not to be considered as definitive tests divorced from the "general underlying themes of the defence of human rights and anti-discrimination"[47] which had been the basis of his analysis in *Ward*. That analysis had relied, at least in part, on concepts taken from the Canadian Charter of Rights and Freedoms. Looking at the problem from that perspective, La Forest J in *Chan*[48] found it "difficult to conceive that the associative qualities of having children may be considered so sufficiently analogous to the associative qualities of being a member of a taxi-driver co-operative to warrant any meaningful comparison". Accordingly, in his Lordship's view[49]:

"the question that must be asked is whether the appellant is voluntarily associated with a particular status for reasons so fundamental to his human dignity that he should not be forced to forsake that association. The association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right."

It may be observed that it is the very nature of a human right, especially, one would have thought, a "fundamental" one, that it is common to all humanity. The wish of a number of persons to exercise a right which all persons share and are entitled to exercise at any time can hardly be enough to unite those persons into a particular social group. Something more would be required, and indeed that is why La Forest J's reference to "voluntary association" in *Ward* made sense as far as it went. A fundamental human right could only constitute a unifying characteristic if persons associated with each other on the basis of the right or, it may be added, if society regarded those persons as a group because of their common wish to exercise the right. And in that situation, it would be the unifying aspect of that element, not its character as a fundamental human right, which allowed it to delineate a particular social group. The only relevance of the characterisation of the common element as a fundamental human right is, perhaps, that it might more readily suggest that, because it is fundamental, persons associated for the purpose of asserting the right are united so as to form a particular social group. If that is the case, then to adopt the language of Black CJ in *Morato v Minister for Immigration*[50] and La Forest J in *Ward*[51], the association might be viewed as going to what one is rather than being what one merely does.

But in the absence of such an association, there is nothing to unite a collection of persons in China who do not accept the limits imposed upon their reproductive freedom and who fear forcible sterilisation in apparent contravention of their right to personal security other than their common fear of persecution. I must confess, with respect, that I do not understand La Forest J's reference in *Chan*[52] to the "associative qualities of having children" if one is speaking, as his Lordship appears to be, of disparate couples from all walks of life who do not know each other and may have nothing in common save for the fact that they are parents of one child who do not wish to be forcibly prevented from having more. To say that their behaviour in reproducing and their consequent status as parents have "associative qualities" because the exercise of fundamental human rights is involved is, I think, misleading.

Whether such reasoning has force in Canada, where the Charter of Rights and Freedoms has been seen as relevant, in my view it has no application in Australia and it is not assisted by

reliance on the humanitarian character of the Convention. As I have said, Art 31 of the Vienna Convention directs a court to consider the context, object and purpose of treaty provisions, and, indeed, the construction which I have placed on the phrase "particular social group" is influenced by those considerations. But Art 31 does not justify, to adopt the words of the International Law Commission[53], "an investigation *ab initio* into the intentions of the parties" in order to achieve a result which is thought to further those intentions. In any event, it does not appear that reference to the context, object and purpose of the Convention provides a construction which would assist the appellants.

The humanitarian aims of the Convention are apparent from its preamble, the first of which refers to the affirmation by the General Assembly of the United Nations (in the Charter of the United Nations and the Universal Declaration) of "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". The second preamble refers to the manifestation of the United Nations, on various occasions, of "its profound concern for refugees" and to its endeavours to "assure refugees the widest possible exercise of these fundamental rights and freedoms". In the third preamble the parties speak of their intention to "extend the scope of and the protection accorded by" previous international agreements on refugees.

On the other hand, the fourth preamble recognises that "the grant of asylum may place unduly heavy burdens on certain countries" and the need for international cooperation, whilst the fifth preamble implores all States to recognise "the social and humanitarian nature of the problem of refugees" and "do everything within their power to prevent this problem from becoming a cause of tension between States". By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees.

There are other limitations on the humanitarian scope of the Convention and on the meaning of the term "refugee". However, what I have said is sufficient to illustrate the simple point that despite the reference in the Convention to the concern that persons enjoy the "widest possible exercise of ... fundamental rights and freedoms"[54], there are limits on the extent to which the Convention attempts to translate that concern into practical reality. In that respect, the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs[55]. The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources. No doubt many of those limits in the present context spring from the well-accepted fact that international refugee law was meant to serve as a "substitute" for national protection where the latter was not provided due to discrimination against persons on grounds of their civil and political status[56]. It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.

I should add that the *travaux préparatoires* and the circumstances of conclusion of the treaty[57] do not, in my view, shed any real light on the problems raised by this appeal. Certainly, they do not stand in the way of the conclusions I have reached.

Counsel for the appellants before this Court ultimately accepted that the particular social group for which he contended relied, at least in part, upon the fear of persecution by forcible sterilisation. However, he submitted that there were other elements which delineated the particular social group of which the appellants were said to be members. It appears that the persecution feared by the appellants is not practised throughout China generally, being confined to particular rural localities in which over-zealous officials in the area enforce the one child policy by forcible sterilisation. It also appears that the appellants, as members of the Han majority, do not have the same indulgences afforded to them in relation to the number of children they may have as do the members of certain ethnic minorities. Counsel also referred to the fact that the appellants were a couple of reproductive age and that the one child policy applied economic and other sanctions, short of persecution, to persons in that situation.

This Court is handicapped to some extent by the fact that the RRT's findings on some of these issues are not altogether clear. But I am unable to see how all those couples of reproductive age, who have one child, who are not of a certain ethnicity and who live in a particular location are united by the existence of those characteristics rather than by the fact that they all fear persecution. The existence of economic sanctions in the enforcement of the one child policy is certainly not unique to them and does not unite them or set them apart.

In truth, the social group contended for by counsel for the appellants may be described in these words of Beaumont, Hill and Heerey JJ in the court below[58]:

"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."

As their Honours pointed out, that is an argument which has been rejected by a line of United States cases[59]. The argument amounts to little more than the assertion of common demographic factors. What the appellants need to demonstrate is that circumstances A, B and C, or any one of them, operate to unite people such that they are an identifiable social group apart from the fact that they all face persecution. They have not done so.

I would therefore hold that the appellants are not refugees within the meaning of s 4(1) of the Act. I would dismiss the appeal.

McHUGH J. The question in this appeal is whether the appellants are persons who, "owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group", are outside the country of their origin and are unable or unwilling to avail themselves of the protection of the country of their origin. If they are, they are refugees within the meaning of s 4 of the *Migration Act* 1958 (Cth) ("the Act") and entitled to have their applications for visas and entry permits into Australia considered on that basis. In my opinion, however, they have not established any facts from which it could be concluded that they are "refugees" within the meaning of the Act.

The appellants' personal history

The appellants are husband and wife. They are nationals of the People's Republic of China ("PRC"). Until late in 1993, they lived in Bang Hu, an isolated village some 25 kilometres from Guangzhou City. On 5 December 1993, they arrived in Australia by boat but were detained under s 54B of the Act as persons reasonably supposed to be illegal entrants.

Subsequently, they lodged applications with the Department of Immigration and Ethnic Affairs for recognition as refugees. Those applications were deemed to be applications for relevant entry permits and visas[60].

The statutory framework[61]

Section 22AA of the Act provided:

"If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

Pursuant to this section, the appellants lodged applications for refugee status. Regulation 2A.5 of the Regulations, made pursuant to s 181 of the Act, deemed an application for refugee status to be an application for relevant visas and entry permits[62].

Section 4(1) of the Act defines the term "refugee" as having the same meaning as it has in Art 1 of the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Convention"), as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 ("the Protocol"). Article 1A(2) of the Convention relevantly defines a "refugee" as:

"*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". (my emphasis)

The procedural history

The appellants' applications under s 22AA were refused by a delegate of the Minister for Immigration and Ethnic Affairs ("the Minister"), the first respondent. That decision was reversed by the Refugee Review Tribunal ("the Tribunal"), the second respondent, which held that they were refugees within the meaning of s 4(1) of the Act. The Tribunal ordered the Minister to re-determine the appellants' applications for visas and entry permits. In the Federal Court, Sackville J held that the Tribunal had made no error of law in making its decision. The Full Court of the Federal Court unanimously reversed the decision of Sackville J and affirmed the decision of the Minister's delegate. Pursuant to the grant of special leave, the appellants now appeal to this Court.

The findings of the Tribunal

The Tribunal found the appellants had left the PRC because they feared sterilisation under the "One Child Policy", a government policy that insisted that Chinese families have only one child. The female appellant gave birth to a son on the day after the appellants arrived in Australia. The son was the first child of the marriage. The Tribunal found that there was "evidence that coercive measures are used [in the implementation of the PRC's family planning policy] and that these coercive measures range from forms of civil discrimination to fines and to forced contraception, sterilisation and abortion". The Tribunal found that such actions amounted to persecution for a Convention reason. In its findings concerning the husband, the Tribunal said:

"The Tribunal finds that the criteria laid down for defining a particular social group in the *Morato*[63] 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."

The Tribunal found that the husband's fear of persecution was "well founded" and that he was a refugee.

The Tribunal made similar findings in respect of the wife and declared her to be a refugee.

Interpretative principles

The term "refugee" in s 4 of the Act has the same meaning that it has in the Convention and the Protocol. In Australia, treaties are interpreted in accordance with the requirements of the Vienna Convention on the Law of Treaties ("the Vienna Convention")[64]. Article 31 of the Vienna Convention, referred to in this Court as the "leading general rule of interpretation of treaties"[65], is relevant. It provides:

"Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

The first paragraph of the article contains three separate but related principles. First, an interpretation must be in good faith, which flows directly from the rule *pacta sunt servanda*[66]. Second, the ordinary meaning of the words of the treaty are presumed to be the

authentic representation of the parties' intentions. This principle has been described as the "very essence" of a textual approach to treaty interpretation[67]. Third, the ordinary meaning of the words are not to be determined in a vacuum removed from the context of the treaty or its object or purpose[68].

Commentators differ as to the correct interpretation of Art 31. Differences of opinion exist as to the circumstances in which the "context ... object and purpose" of the treaty may be used to supplement the "ordinary meaning" of the treaty. Inherent in this debate is the question of whether the textual interpretation of the words, embodied in the phrase "ordinary meaning", should be afforded interpretative precedence. Some commentators have argued that the literal meaning has no precedence and that the object of the treaty must always be taken into account[69]; some have argued that the two general levels of inquiry embodied in par 1 of Art 31 have a single combined operation[70]; and some have argued that words and phrases of a treaty are in the first instance to be construed according to their plain and natural meaning and that it is only when the result of such an inquiry is doubtful that one should look to a treaty's context, object and purpose[71].

Australian decisions provide no clear answer as to whether Art 31 *requires* or merely *allows* recourse to the context, object and purpose of a treaty in interpreting one of its terms. It is clear that such recourse is, in some circumstances, permissible. On numerous occasions, Australian courts have sought to discern the purpose of a treaty so as to construe a treaty term[72]. What is not clear from the decided cases, however, are the circumstances which require or allow recourse to the context, object and purpose of a treaty. Nor have those cases clarified the nature of the relationship between the context, object and purpose of a treaty and the "ordinary" textual analysis of one of its provisions.

However, in my view, the opinion of Zekia J in the European Court of Human Rights in *Golder v United Kingdom*[73] states the correct approach for interpreting Art 31. Zekia J stressed that a holistic approach was required by Art 31 of the Vienna Convention. Having considered the text of Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), and having described the textual analysis as "'the primary source of ... interpretation'"[74], he said[75]:

"I pass now to the contextual aspect of Article 6(1). ... [T]he examination of this aspect is bound to overlap with considerations appertaining to the object and purpose of a treaty. There is no doubt, however, that interpretation is a *single combined operation* which takes into account all relevant facts as a whole." (emphasis in original)

Later, having considered the context, object and purpose of the European Convention, he concluded[76]:

"I have already endeavoured to touch the main elements of interpretation in some order. When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted."

Thus, Zekia J emphasised an ordered yet holistic approach. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered. Similar sentiments were expressed by Murphy J in *The Commonwealth v Tasmania (The Tasmanian Dam Case)*[77] where, in reference to the UNESCO Convention for the Protection of the World Cultural and National Heritage, his Honour said:

"The Convention should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose (Art 31(1), Vienna Convention on the Law of Treaties)".

In my opinion, the approaches of Zekia J and Murphy J are correct and should be followed in this country. First, as Brownlie points out[78], Art 31 is headed in the singular: "General rule of interpretation". This use of the singular indicates that Art 31 is to be interpreted in a holistic manner. As the International Law Commission, whose draft articles on the law of treaties exactly mirrored Art 31 of the Vienna Convention[79], commented[80]:

"The Commission, by heading the article 'General rule of interpretation' in the singular ... intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. ... [T]he Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."

Second, taking the text as the starting point is consistent with the basic principle of interpretation that courts should focus their attention on the "four corners of the actual text" in discerning the meaning of that text[81]. The text of the treaty, being the starting point in any investigation as to the meaning of the text, necessarily has primacy in the interpretation process. As the International Law Commission has noted[82]:

"The article ... is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[83]

The need to give the text primacy in interpretation is accentuated by the tendency of multilateral instruments to be the result of various compromises by various States or groups of States. If the subjective intentions of their representatives were the criterion, the interpretation of many international instruments might be impossible.

Third, the mandatory requirement that courts look to the context, object and purpose of treaty provisions as well as the text is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation[84].

Fourth, international treaties often fail to exhibit the precision of domestic legislation. This is the sometimes necessary price paid for multinational political comity[85]. The lack of precision in treaties confirms the need to adopt interpretative principles, like those pronounced by Zekia J, which are founded on the view that treaties "cannot be expected to be applied with taut logical precision"[86].

Accordingly, in my opinion, Art 31 of the Vienna Convention requires the courts of this country when faced with a question of treaty interpretation to examine both the "ordinary meaning" and the "context ... object and purpose" of a treaty.

<u>The meaning of "membership of a particular social group" must be construed in the light of the definition of "refugee" taken as a whole</u>

For the purpose of this appeal, the definitional phrase that the Court is required to construe is neither "membership of a particular social group" nor the more limited phrase "particular social group". The real question, dictated by s 4(1) of the Act, is to ascertain whether the Tribunal erred in law in finding that the appellants are persons:

"who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [are] outside the country of [their] nationality and [are] unable or, owing to such fear, [are] unwilling to avail [themselves] of the protection of that country".

The first respondent has conceded that sterilisation could be the basis of a well-founded fear of persecution by the appellants. But that does not mean that the words "well-founded fear of being persecuted" should be ignored when construing that part of the phrase which is in dispute. The phrase "a well founded fear of being persecuted for reasons of ... membership of a particular social group" is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole.

Where the claim is one of a "well-founded fear of being persecuted for reasons of ... membership of a particular social group", the interaction between the concepts of "persecuted", "for reasons of" and "membership of a particular social group" is particularly important. Defining the group widely increases the difficulty of proving that a particular act is persecution "for *reasons* of ... membership" of that group. Thus, if the social group in the present case is defined to mean parents with one child, any involuntary sterilisation of the appellants (which is the relevant persecutory act) would not be "for reasons of ... membership" of that group because, even on the most favourable view of the appellants' case, it would be the particular *refusal* of the appellants to undergo voluntary sterilisation or to comply with government policy - not their membership of the group of parents with one child - that would lead to action against them. As the Tribunal acknowledged, those who complied with the government's policy - whatever their own wishes about having more than one child - were rewarded, not punished. Persons with one child, therefore, are not indiscriminately sterilised for the reason that they have one child. Involuntary sterilisation is neither the policy of the government nor the usual effect of its one child policy. According to the evidence before the Tribunal, involuntary sterilisation occurs mainly in rural areas and is the result of the attitudes of over zealous local officials. It would seem that most Chinese parents are not involuntarily sterilised even when they breach the policy. To succeed in this case, the appellants need to prove membership of a group other than the group of Chinese parents with one child.

Paradoxically, defining the group narrowly may take it outside the concept of "a particular social group" and increase the difficulty of proving that the act relied on is persecution "for reasons of ... *membership*" of the group. If the definition of a group has to be hedged with qualifications to relate it an alleged persecutory act, the proper conclusion may be that the reason for the act was not membership of the group but the conduct of the individual. Prisoners, for example, are arguably a particular social group. If they are routinely beaten because they are prisoners, they may well qualify for refugee status. But narrow the group to prisoners who refuse to obey prison regulations and the case for an applicant becomes so much harder of proof. The applicant will have difficulty in proving the existence of "a

particular social group" and in proving that the persecution (bashings) are "for reasons of ... membership" of that group rather than for his or her refusal to obey the regulations.

When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. Discrimination - even discrimination amounting to persecution - that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be. The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.

Persecution

Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution[87]. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race[88].

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny[89]. In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race,

religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.

In cases concerned with political opinion and the membership of particular social groups, the issue of persecution may often be difficult to resolve when the sanctions arise from the proper application of enacted laws. Punishment for expressing ordinary political opinions or being a member of a political association or trade union is prima facie persecution for a Convention reason. Nevertheless, governments cannot be expected to tolerate political opinion or conduct that calls for their violent overthrow. Punishment for expressing such opinions is unlikely to amount to persecution. Nevertheless, even in these cases, punishment of the holders of the opinions may amount to persecution. It will certainly do so when the government in question is so repressive that, by the standards of the civilised world, it has so little legitimacy that its overthrow even by violent means is justified. One who fled from the regime of Hitler or Pol Pot could not be denied the status of refugee even if his or her only claim to that status relied on a fear of persecution for advocating the violent overthrow of that regime.

The meaning of membership of a particular social group

Courts and jurists have taken widely differing views as to what constitutes "membership of a particular social group" for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.

Records of the Convention's preparation, which are legitimate interpretative material under Australian law[90], reveal that the category of "particular social group" was the last of the enumerated grounds in Art 1A(2) to be added and that it was added with the intention to broaden the reach of the other four grounds[91]. However, nothing in the prior history or the record of the Convention supports the conclusion that the category of "particular social group" was added to provide a safety-net for all persons subject to persecution who did not fall within the other enumerated grounds. Dr Hathaway correctly notes that while "[t]he notion of social group as an all-encompassing residual category is seductive from a humanitarian perspective, since it largely eliminates the need to consider the issue of a linkage between fear of persecution and civil or political status"[92], it ignores the purpose of the instrument's drafters. If they had intended to provide a "catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up"[93], it is more likely than not that they would have amended the draft treaty by eliminating the specified grounds of persecution. Indeed, if the drafters had intended the term "a particular social group" to act as a "catch-all", it is surprising that they did not amend the Convention to provide that any person who had a well-founded fear of persecution was a refugee[94].

Some decisions have interpreted the definition of refugee very narrowly[95]. In *Sanchez-Trujillo v INS*[96], for example, the United States Court of Appeals for the Ninth Circuit, in holding that a "class of young, urban, working-class [El Salvadorian] males of military age who had maintained political neutrality"[97] was not a "particular social group", said[98]:

"The statutory words 'particular' and 'social' which modify 'group,' ... indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase '*particular social* group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a

voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."

The decision, and particularly its employment of the notion of the necessity of a "voluntary associational relationship", has been criticised as an unduly narrow interpretation of the phrase[99].

The reasoning in *Sanchez-Trujillo* can be contrasted with the reasoning of MacGuigan JA in his dissenting judgment in the Canadian Federal Court of Appeal in *Canada (Attorney-General) v Ward*[100]. In *Ward*, the Court of Appeal had to consider whether a former member of the Irish National Liberation Army who had assisted the escape of certain hostages, whom he was guarding, was a member of a "particular social group". His Lordship rejected an approach that would have placed the ordinary meaning of the phrase in a position of interpretative primacy. He said that attempts to derive "an absolute definition in the abstract"[101] were erroneous because they tended to eliminate the "personal element" of the definition. Instead, he preferred a definition of "membership of a particular social group" that included persons who were "united in a stable association with common purposes"[102], reasoning that "[i]n a world fractured by racism and religion, politics and poverty, reality is too complex to be thus limited by conceptual absolutes"[103]. On appeal, the Supreme Court of Canada criticised MacGuigan JA's definition as an example of "a very wide definition" founded on the notion that the Convention's purpose or object in including the category of "membership of a particular social group" was an attempt to provide a safety-net for all persecuted persons who would not fall within the other four categories of persons enumerated in Art 1A(2) of that Convention[104].

In the result, courts and tribunals in the United States and Canada have given many decisions which cannot be reconciled with each other, having regard to their material facts. Thus, courts and tribunals in the United States have held that the following groups were not "particular social groups": a co-operative of taxi drivers in El Salvador[105], cheesemakers in El Salvador[106], family members of deserters from the Salvadorian army[107], women who have previously been raped and bashed by Salvadorian guerillas[108], urban working class males of military age[109], associates of Imelda Marcos in the inner circle of a social and philanthropic group in the Philippines known as the Blue Ladies[110], "poor Yemeni Moslems who were discriminated against because they could not avoid execution by paying 'blood money' to the victim's family"[111], a family in which one member had been killed and another kidnapped[112], Chinese citizens whose flight aboard a vessel had attracted embarrassing publicity for the PRC government[113] and drug traffickers[114]. In *Yang v Carroll*[115] a Federal District Court held that "[o]n the facts of this case, PRC families with more than one child are more appropriately characterized as a demographic division than as a social group". On the other hand, the First Circuit Court of Appeals has held[116] that a student who claimed that she was a member of three groups: (1) the Ashanti tribe; (2) professional, business and educated people; and (3) those associated with a recently overthrown government was a member of "a particular social group". The Third Circuit has also recognised the women of Iran as "a particular social group"[117].

Canadian courts and tribunals have held that former members of a paramilitary terrorist organisation were not a particular social group[118] but that a sports club[119] and Trinidadian women subject to wife abuse[120] were particular social groups. They also have divided on the question of whether Chinese groups similar to those involved in the present

appeal are "a particular social group". In *Cheung v Canada (Minister of Employment and Immigration)*[121], the Federal Court of Appeal held that they were, while in *Chan v Canada (Minister of Employment and Immigration)*[122] a differently constituted court held that they were not.

Persecution as a defining element of "a particular social group"

The concept of persecution can have no place in defining the term "a particular social group". While decisions that have sought to apply the *ejusdem generis* principle to discern the meaning of "particular social group" are problematic because it is difficult to identify a *genus* common to "race, religion, nationality ... [and] political opinion"[123], one factor common to these four categories is that the fact or fear of *persecution* plays no role in understanding their content. If the drafters did not intend persecution to be relevant in defining those four categories, it would seem likely that they did not intend persecution to play any part in defining what is a "particular social group". Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of "fear of persecution", "for reasons of" and "membership of a particular social group" in the definition of "refugee". It would also effectively make the other four grounds of persecution superfluous.

That being so, persons who seek to fall within the definition of "refugee" in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the "particular social group" of which they claim membership[124]. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution. The words of Heald JA, sitting in the Canadian Federal Court of Appeal on a claim for membership of a "particular social group" because of a fear of compulsory sterilisation under the PRC's "One Child Policy", seem as applicable in Australia as they were in Canada. His Lordship said[125]:

"This leads me 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. ... 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." (emphasis in original)

Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of

being left-handed and not the persecutory acts that would identify them as a particular social group.

The fact that the actions of the persecutors can serve to identify or even create "a particular social group" emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the "particular social group" category is the notion of "membership" expressly mentioned. The use of that term in conjunction with "particular social group" connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerillas, for example, are not a particular *social* group.

A group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient that the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. In Roman times, for example, Christians were a particular social as well as religious group although they were forced to practise their religion in the catacombs. If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status. Nor is it necessary that the group should possess the attributes that they are perceived to have[126]. Witches were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft.

The drafting history of the term "particular social group" is meagre but it gives support to a wide reading of that term. The "membership of a particular social group" category was added to the draft Convention on the initiative of a Swedish delegate who said[127]:

"experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included."

It is apparent therefore that the makers of the Convention identified "membership of a particular social group" with persecutions of particular groups which had taken place before 1950 and which were not directed at racial, religious, national or political groups. It seems likely that the category of "particular social group" was at least intended to cover those groups persecuted because of "the 'restructuring' of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families"[128]. In *Bastanipour v INS*[129], Posner J thought that the *kulaks* (affluent Russian peasants) who had been persecuted by Stalin were the sort of group intended to be covered by the term "particular social group". All the foregoing groups are disparate in character. But what distinguishes their members from other persons in their country is a common attribute and a societal perception that they stand apart. Persecution, of course, reinforces the perception that they are "a particular social group" in their country. The historical background therefore supports a wide

reading of the term "particular social group". So too does the humanitarian policy of the Convention which is to protect those sections of a nation who have been deprived of the *de jure* or *de facto* protection of their government.

However, the association of the term "membership of a particular social group" with race, religion and nationality indicates that "a particular social group" was probably intended to cover only a relatively large group of people. The concepts of race, religion and nationality imply groups of hundreds of thousands, in some cases millions, of people. It is unlikely that, in adding "a particular social group" to the Convention categories, the makers of the Convention had in mind comparatively small groups of people such as members of a club or association. The Convention was not designed to provide havens for individual persecutions. It seems unlikely therefore that, having turned their back on individual persecution, the makers of the Convention intended the phrase "a particular social group" to be confined to small groups of individuals "closely affiliated with each other" as is perhaps suggested in *Sanchez-Trujillo*[130]. Further support for this conclusion is given by the fourth paragraph of the Preamble to the Convention which suggests that the Convention was designed to provide refuge for mass movements of persecuted people. That paragraph declares:

"CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."

It follows that, once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as "a particular social group" for Convention purposes.

The "particular social group" that the appellants rely upon is impermissibly defined by reference to persecutory conduct

The exact formulation of the "particular social group" that the appellants sought to rely upon in this Court was not always clear. Ultimately, counsel for the appellants described it as "Han people who are parents [in the PRC prefecture which includes Bang Hu], who have one child and who are in the reproductive age, who wish to have another [child], [and] who are subject to sanctions [that is, enforceable sterilisation] that are carried out by ... particular family planning police". He conceded that the "particular social group" upon which the appellants relied must include, as part of its definition, the persecutory conduct of forcible sterilisation. That being so, this proffered group is not "a particular social group" for the purpose of the Convention.

The Tribunal defined the "particular social group" differently from the way that counsel for the appellant defined it. In dealing with the husband's application, the Tribunal said that it believed "that parents of one child form a social group in China". After referring to the national policy to constrain the growth of the population and the laws and regulations which gave effect to that policy, the Tribunal said:

"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[131] 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."

In dealing with the wife's application, however, the Tribunal did not define the primary social group as "parents of one child". Instead, it said that it believed "that parents in the reproductive age group form a social group in China". After referring to the national policy to constrain the growth of population and the laws and regulations giving effect to that policy, the Tribunal then said:

"Therefore, the group of parents in the reproductive age group is defined by the government itself and accepted as a possible part of one's identification by China's citizens. It is not defined primarily by persecution since there are official rewards for practising birth control.

This group may be sub-divided."

The Tribunal then sub-divided the group in exactly the same way, using the identical language, that it had used in respect of the husband's application. One finding in the Tribunal's reasons that is unique to the wife warrants a brief comment. Towards the end of the paragraph which commences "[t]he Tribunal believes that parents in the reproductive age group form a social group in China", the Tribunal said "the group of parents in the reproductive age group is defined by the government itself and *accepted as a possible part of one's identification by China's citizens*" (emphasis added). Because of the significance of societal perception in defining "particular social group", this could be a finding of some significance. However, in my opinion, it does not advance the wife's case. As appears below, I do not think that the Tribunal held that "parents in the reproductive age group" was a relevant "particular social group" and it is clear that the societal perception referred to in this paragraph is limited to "parents in the reproductive age group".

Although the Tribunal held that "parents of one child form a social group in China" and that "the group of parents in the reproductive age group is defined by the government itself and accepted as a possible part of one's identification by China's citizens", the Tribunal did not, correctly in my opinion, regard either of these groups as relevantly "a particular social group"

for Convention purposes. If it had, it would have erred in law because neither appellant had a well-founded fear of persecution for reasons of membership of either of these groups. It was not membership of either of these groups but the refusal or apprehended refusal to abide by the one child policy that brought about the appellants' fear of involuntary sterilisation.

While Sackville J took a contrary view, I do not think that the Tribunal made a finding that there were two particular social groups for Convention purposes: (1) those who, having only one child, do not accept the limitations placed on them; and (2) those who, having only one child, are coerced or forced into being sterilised. After the Tribunal had held in the case of the husband that "parents of one child form a social group in China" and in the case of the wife that "parents in the reproductive age group form a social group in China", the Tribunal went on to hold that each group might be sub-divided. It then said "[f]or the purposes of the matter before the Tribunal two sub-groups are identifiable". The first of them was "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". The second sub-group was "those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised". It was this sub-group which the Tribunal found satisfied the definition of particular social group as explained in *Morato*. The Tribunal then said that "[t]he group exists by virtue of government policy." This demonstrates to my mind that the Tribunal defined the second sub-group as the relevant "particular social group".

If, as I think is the case, the Tribunal was describing one group whose members had one of two separate attributes, it erroneously defined the second part of the group by reference to persecutory conduct. The reference to those "who are coerced or forced into being sterilised" shows that the Tribunal defined some members of the group by reference to the acts that gave rise to the well-founded fear of persecution. As a matter of law, that group could not be "a particular social group" for Convention purposes. Because the group has been erroneously defined, the Full Court was correct in setting aside the decision of the Tribunal.

If, on the other hand, the second sub-group that the Tribunal described was in substance two separate groups, namely "those who, having only one child, ... do not accept the limitations placed on them" and "those who, having only one child, ... are coerced or forced into being sterilised by the officials of their area of local government", its decision was also erroneous as a matter of law. The second separate group was, as I have said, erroneously defined as "a particular social group" by reference to persecutory conduct and there was no evidence upon which the Tribunal could find that the first separate group was a "particular social group" for Convention purposes.

There is no reason why persons "who, having only one child, ... do not accept the limitations placed on them" and who communicate that view to Chinese society could not be a "particular social group" in some situations. If, for example, a large number of people with one child who wished to have another had publicly demonstrated against the government's policy, they may have gained sufficient notoriety in China to be perceived as a particular social group. Any involuntary sterilisation of a member of the group simply because he or she was a member of the group would be persecution for reasons of membership of a particular social group as well as persecution for "political opinion". But that is not this case.

It is difficult to know exactly what the Tribunal meant when it spoke of "those who ... do not accept the limitations placed on them". In what it describes as the second sub-group, the Tribunal has contrasted these members with those "who are coerced or forced into being

sterilised". If, as is probably the case, the Tribunal meant by "those who ... do not accept the limitations placed on them" those couples who believe that they should be able to have more than one child notwithstanding the government's policy, there is nothing to link the couples so as to create a perception that they constitute a particular social group. There is simply a disparate collection of couples throughout China who want to have more than one child contrary to the one child policy. Some may wish to have a child as soon as possible; some in the near future; and others in the distant future. There is no *social* attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular *social* group for Convention purposes. To classify such couples as "a particular social group" is to create an artificial construct that bears no resemblance to a social group as that term is ordinarily understood. Indeed it is hard to see how such couples are even a group for demographic purposes.

It follows that it was not open as a matter of law for the Tribunal to conclude that the appellants had "a well-founded fear of being persecuted for reasons of ... membership of a particular social group".

Order

The appeal should be dismissed with costs.

GUMMOW J. This litigation has centred upon the question whether the appellants, citizens of the People's Republic of China ("the PRC"), answer the description of persons who, "owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group", are outside the PRC, the country of their origin, and unable or unwilling to avail themselves of the protection of the PRC. The appellants' case has been that they fear forcible sterilisation in implementation of population control measures adopted in the Guangdong Province of the PRC.

The facts and the Regulations

The first and second appellants are respectively husband and wife. They were born in 1967 in Guangdong Province and married there in January 1993. They arrived in Australia by boat on 5 December 1993. On the next day the second appellant gave birth to their child. Upon arrival, they were detained under the powers conferred by s 54B of the *Migration Act* 1958 (Cth) ("the Act") as persons reasonably supposed by an authorised officer to be persons who would, on entry to Australia, become illegal entrants. Section 14(1) provided that, on entering Australia, a person who was not an Australian citizen became an illegal entrant unless that person was the holder of a valid entry permit or the entry was authorised by an entry visa to which s 17 applied[132].

Each appellant became an "unprocessed person" within the meaning of s 54B and as such was taken not to have entered Australia (s 54B(2)). If refused an entry permit, an unprocessed person became a "prohibited person" (s 54D) and, as such, had to be removed from Australia as soon as practicable and until that event was to be kept in custody as directed by an authorised officer (s 54F)[133].

These provisions controlled the entry into Australia of the appellants as persons who are not Australian citizens. They are laws with respect to aliens within the meaning of s 51(xix) of the Constitution[134].

At the relevant time, s 22AA of the Act stated:

"If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

This has been repealed[135], together with other provisions referred to above, but nothing for present purposes turns upon this. In s 22AA the term "may" was used to confer power, not to give a discretion upon fulfilment of the condition that the Minister have the necessary satisfaction[136].

Section 181 confers a general regulation-making power and such regulations may prescribe procedures for the making and consideration of applications for determinations under s 22AA (s 22AB). On 14 December 1993 the appellants lodged such applications. By dint of reg 2A.5 of the Migration (1993) Regulations (Cth) ("the Regulations")[137], the applications for determination of refugee status were deemed also to be applications in each case for the grant of a Domestic Protection (Temporary) Visa (before entry) and a Domestic Protection (Temporary) Entry Permit (before entry).

The applications were refused by a delegate of the first respondent ("the Minister") by decision given on 31 January 1994 and matters were taken to the Refugee Review Tribunal ("the RRT")[138]. The RRT proceeded on the footing that there were before it applications for review of the decisions refusing, in each case, a determination of refugee status and the grant of the visa and entry permit. On 20 May 1994, the RRT made findings of primary facts, and set aside the decision of the delegate. The RRT substituted a decision that the applications for the grant of the visa and entry permit be remitted with a direction that the applicants were refugees in the statutory sense.

The appeal is brought to this Court from the Full Court of the Federal Court of Australia (Beaumont, Hill and Heerey JJ)[139] which allowed an appeal by the Minister against orders of Sackville J[140]. His Honour dismissed an application by the Minister for an order of review pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") in respect of decisions of the RRT. The Minister had contended that the RRT had committed errors of law in determining that the applicants were refugees. Sackville J rejected these submissions.

The Full Court held that the primary judge had erred in law in determining that the RRT had committed no reviewable error in giving the direction to the effect that the appellants be determined under s 22AA as being refugees. It also held that it had not been shown that forced sterilisation formed part of the law or formal government policy in the PRC. Rather, forced sterilisation was carried out at the instigation of over-zealous local officials. The Full Court further determined that, even if the appellants could have shown that there was a law of this nature of general application in the PRC, they would not have been able to establish that persons facing that fate, such as themselves, had a well-founded fear of persecution for reason of membership of a particular social group. The case thus turned upon the meaning given "refugee" as it appears in s 22AA of the Act by the definition in s 4(1).

The term "refugee"

The term "refugee" is defined in s 4(1) of the Act as having the same meaning as it has in Art 1 of the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ("the

Convention") or in that Article as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 ("the Protocol"). It will be noted that the reference is to Art 1 as a whole, not to any one section thereof.

Australia acceded to the Convention on 22 January 1954 with effect on 22 April 1954[141]. It was the sixth state to ratify or accede to the Convention[142]. Australia acceded to the Protocol on 13 December 1973, with effect on that date[143]. It will be apparent that whilst the Act picks up the definition of "refugee" from the Convention and the Protocol, it does so for the purposes of the taking of steps by the Executive, in particular the grant of an entry permit, which will qualify the obligation otherwise imposed by s 54F upon the Executive. This obligation was promptly to remove the appellants from Australia as "prohibited persons" who, being "unprocessed persons" to whom an entry permit has not been granted, were taken not to have entered Australia (s 54B) and who would otherwise, on entry to Australia, have become illegal entrants (s 14).

As was said by a former United Nations High Commissioner for Refugees[144], whilst to speak of refugees is to speak of asylum, an inviolable place where a person pursued takes refuge, the term "asylum" does not appear in the text of the Convention or the Protocol. Rather, as the title of the Convention suggests, it is concerned with the status and civil rights to be afforded to refugees within member states. It is with this in mind that one should read the reference in the Preamble to the Convention to the affirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination".

The predominant view (including that of the Supreme Court of the United States in *Sale v Haitian Centers Council*[145] and the House of Lords in *T v Home Secretary*[146]) is that decisions to admit persons as refugees to the territory of member states are left to those states. In the preparation of the Convention only a limited consensus was reached and expressed in Recommendation D in the Final Act, namely that "Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement"[147]. Hence the recent statement by Lord Mustill[148]:

"[A]lthough it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries."

The Convention resolves in a limited fashion the tension between humanitarian concerns for the individual and that aspect of state sovereignty which is concerned with exclusion of entry by non-citizens, "[e]very society [possessing] the undoubted right to determine who shall compose its members"[149]. After referring to the definition of "refugee" in the Convention and Protocol and to certain other provisions of the Convention[150], Lord Goff of Chieveley and Lord Hoffmann recently stated[151]:

"Refugee status is thus far from being an international passport which entitles the bearer to demand entry without let or hindrance into the territory of any contracting state. It is always a status relative to a particular country or countries."

In similar vein, one commentator has observed of the Convention[152]:

"Its framers sought to guard the sovereign right to determine who should be allowed to enter a State's territory and the instrument was designed to deal with refugees already in third States' territories as a result of World War II and its aftermath. The Convention only obliges State parties to guarantee *non-refoulement* or non return to the place of persecution. It does not guarantee asylum in the sense of permanent residence or full membership of the community, nor does it guarantee admission to potential countries of asylum. Rather, the Convention establishes a regime of temporary or interim protection."

However, as will be apparent from the above outline of the applicable provisions of the Act, Australia, like the United States, the United Kingdom, Canada and New Zealand[153], applies the definition of "refugee" from the Convention and the Protocol as a criterion in its municipal law for the admission of those seeking asylum within its territory.

This appeal illustrates difficulties which arise from the employment, in the ascertainment of rights and liabilities under particular Australian legislation, of criteria designed for an international instrument with related but distinct purposes[154]. The text of the international instrument may lack precision and clarity and may have been expressed in attractive but loose terms with a view to attracting the maximum number of ratifications. The terms of the criteria therein, as is the case here, may be difficult of comprehension and application in domestic law[155]. Moreover, their application in domestic law falls to administrators whose decisions, under the Australian structure of government, are, in the absence of an excess of constitutional authority[156], subject to curial involvement only by the limited processes of judicial review.

Article 1 of the Convention

The English text of Art 1 of the Convention is headed "Definition of the Term 'Refugee'" and is subdivided into ss A-F. Attention usually is directed to par (2) of s A but it is the whole of ss A-F which comprise the definition which is adopted in s 4(1) of the Act. Section A states:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this Section;

(2) *As 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 former habitual residence *as a result of such events*, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

The passages I have emphasised were omitted by Art 1(2) of the Protocol. They had referred, at election of Contracting States, to events occurring before 1 January 1951 "in Europe" or "in Europe or elsewhere". Australia had declared for the narrower formula when it acceded to the Convention[157] but the Protocol gave general effect to the wider formulation.

Section C provides that the Convention shall cease to apply to any person otherwise falling under the terms of s A if one or more of six listed circumstances apply. These include re-availing by that person of the protection of the country of nationality, the re-acquisition of a lost nationality, the acquisition of a new nationality with enjoyment of the protection of the country concerned, and voluntary re-establishment in the country the person left or outside which the person had remained owing to a fear of persecution. Section F states:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The definition of "refugee" in Art 1 is significant for the operative provisions of the Convention which follow and impose obligations upon the state parties with respect to the status of refugees. Those obligations are detailed in particular in Chap 2 (Arts 12-16, headed "Juridical Status"), Chap 3 (Arts 17-19, headed "Gainful Employment"), Chap 4 (Arts 20-24, headed "Welfare"), and Chap 5 (Arts 25-34, headed "Administrative Measures" and dealing with such matters as the issue of identity papers and travel documents).

In the manner I have indicated, the operation of s 22AA of the Act and of the Regulations upon the position of the appellants turns upon the phrase in par (2) of s A "owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group ... 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". Particular difficulty attends the phrase "membership of a particular social group".

It has been suggested in the United States[158] that the terms of Art 1 of the Convention and Protocol are such that any attempt to discern specificity may not be a "reasonable enterprise", and that the application of the criteria therein is left to decision-makers on the basis that they will recognise persecuted social groups when they see them[159]. Such propositions appear to abandon the quest for standards by which administrative decisions may determine the fate of individuals and in respect of the application of which there is judicial review for error of law[160].

It is necessary to begin with the construction of the definition as it appears in the Convention and Protocol. Regard primarily is to be had to the ordinary meaning of the terms used therein, albeit in their context and in the light of the object and purpose of the Convention. Recourse may also be had to the preparatory work for the treaty and the circumstances of its conclusion, whether to confirm the meaning derived by the above means or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results[161]. However, as McHugh J demonstrates by the analysis of the subject in his reasons for judgment, with which I agree, it is important to appreciate the primacy to be given to the text of the treaty.

A perusal of the text of Art 1 discloses the following. First, whilst as a matter of ordinary usage, a refugee might be one whose flight has been from invasion, earthquake, flood, famine or pestilence, the definition is not concerned with such persons. Accordingly, care is needed in resolving any apparent obscurity in the text of the definition by seeing the definition as reflecting, in a broad sense, humanitarian concerns for displaced persons. Secondly, the better view is that the definition reflects particular developments since the end of World War I. It has been said[162]:

"During a period of more than four centuries prior to 1920, there was little concern to delimit the scope of the refugee definition. Groups of refugees tended to be relatively small and many of them chose to migrate to the Americas and other newly-discovered lands. Moreover, the reign of liberalism with its individualistic orientation and respect for self-determination led most European powers to permit essentially uncontrolled and unrestricted immigration."

The international instruments identified in par (1) of s A of the Convention attempted to deal with particular hardships consequent upon the collapse of the Russian and Ottoman Empires, and the advent of the Bolshevik and later the National Socialist regimes. These regimes took measures to render stateless sections of their citizenry, including persons abroad. The process became known as "Denationalization"[163]. Nationals whilst abroad were treated by customary international law as remaining under the supremacy of their home state and in various municipal legal systems matters of personal status were governed by the law of nationality. The stateless refugee thus was left in particularly difficult circumstances.

The Arrangements of 12 May 1926 and 30 June 1928[164], referred to in par (1) of s A, proceeded upon the adoption at the Conference regarding Russian and Armenian Refugee Questions convened at Geneva in 1926, of a definition of "refugee". In the case of Russians this was:

"any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality"[165].

The Convention of 10 February 1938 concerning the Status of Refugees coming from Germany[166] included within the definition of "refugees coming from Germany" the following:

"Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, *in law or in fact*, the protection of the German Government" (emphasis added).

Refugees might suffer hardships in their country of refuge even without loss of their nationality of origin. They might have been denied in fact if not law (as the 1938 Convention postulated) the protection of the law of their country of nationality or be unwilling for good reason to avail themselves of that protection. The international instruments identified above were designed to protect these and stateless individuals until a new nationality had been acquired, and to do so by providing a substitute at least as to some aspects of civil status. Group rather than individual characteristics determined membership of the class of refugees.

However, it was not until after World War II and the adoption of the Constitution of the International Refugee Organization[167] ("the IRO") that there was included as a "valid objection" to the return of specified categories of persons to their country of origin:

"persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations"[168].

There is general agreement among commentators[169] that at the Conference of Plenipotentiaries at Geneva which led to the adoption of the Convention there was some discussion favouring the inclusion of a wider definition of "refugee" than that which appeared from the Constitution of the IRO. The Swedish representative introduced an amendment to include what is now the "social group" category because "experience had shown that certain refugees had been persecuted because they belonged to particular social groups"; this phrase was selected rather than, for example, "ethnic group", "cultural group" or "minority group"[170].

United States and Canadian decisions

The Court was taken to decisions of the United States federal courts and of the Supreme Court of Canada where, in the context of the domestic federal legislation of those countries, consideration has been given to the phrase in the Convention definition "owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group". In *Sanchez-Trujillo v Immigation and Naturalization Service*[171], the Court of Appeals for the Ninth Circuit distinguished a "particular social group" from a "mere demographic division of the population" saying[172]:

"The statutory words 'particular' and 'social' which modify 'group' ... indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase '*particular social* group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."

It is apparent that the Court took demography in its meaning[173] of that branch of anthropology which deals with the life-conditions of communities of people, as shown by statistics of births, deaths, diseases and the like.

In *Gomez v Immigration and Naturalization Service*, the Court of Appeals for the Second Circuit, after referring to *Sanchez-Trujillo*, added[174]:

"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 recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."[175]

The facts in *Yang v Carroll*[176] bear some comparison with those in the present case. After the birth of their second child, the petitioner had been fined by local family planning officials in the PRC and his wife had been involuntarily sterilised. The petitioner's argument was that he faced persecution as a member of a social group "consisting of PRC families having more than one child" and the existence of the second child was a "condition" beyond the power of the petitioner to change. However, the District Court determined[177]:

"On the facts of this case, PRC families with more than one child are more appropriately characterized as a demographic division than as a social group."

The Court pointed out that different population control policies were in effect in different regions of the PRC and that the Government of the PRC imposed different population control policies on different ethnic groups in the country. The result was that couples in the PRC who have more than one child were not a homogeneous or discrete group. Moreover, it was said that "accepting petitioner'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"[178].

A different approach has been taken in the Supreme Court of Canada. The provisions of the Charter of Rights and Freedoms appear to have influenced the reasoning of the Court. In *Canada (Attorney-General) v Ward*[179], in which the judgment of the Court was delivered by La Forest J, reference was made to the embodiment of anti-discrimination law in Canada by s 15 of the Charter and to the decision in *Andrews v Law Society of British Columbia*[180]. There the Supreme Court had held that s 15(1) provides a guarantee of equality before and under the law, as well as equal protection and equal benefit of the law, without discrimination based on grounds analogous to those enumerated therein[181]. It followed that a requirement of Canadian citizenship for admission to the British Columbia Bar of a British subject permanently resident in Canada violated s 15 of the Charter. In *Ward*, La Forest J relied upon what he identified as this "analogous grounds" approach to the application of s 15 as an aid in determining the meaning to be assigned to "particular social group" in the relevant provisions of the migration legislation which picked up Art 1 of the Convention. His Lordship enumerated three possible categories of "particular social group"[182]:

"(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."

La Forest J continued[183]:

"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."

The appellant in *Chan v Canada (Minister of Employment and Immigration)*[184] had violated the "one child policy" with the birth in the PRC of his second child. The majority of the Supreme Court of Canada held that, on the assumption that persons who have a well-founded fear of sterilisation for violating the PRC's "one child policy" are eligible for consideration as Convention refugees, the appellant had not satisfied the requirements for establishing a well-founded fear of persecution. His evidence with respect to his subjective fear of forced sterilisation was equivocal at best. Nor had he provided sufficient evidence that his alleged fear of forced sterilisation was objectively well founded. The minority (whose judgment was delivered by La Forest J) referred[185] to what had been said in *Ward* and determined that the appellant fell within the second category. That did not require the applicant to be in voluntary association with kindred persons. The question was whether an association existed that was so fundamental to the human dignity of members thereof that they should not be required to forsake it. Here, the association existed by virtue of a common attempt made by its members "to exercise a fundamental human right", namely "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children"[186].

"Membership of a particular social group"

I have referred to those aspects of the background to the adoption of the Convention which show the danger in approaching it as designed, on a broad front, to advance humanitarian concerns. Rather, the text of the Convention manifested a compromise between various interests perceived by the Contracting States. As Dawson J points out in his reasons for judgment, the demands of language and context should not be departed from by invoking the humanitarian objectives of the Convention, without an appreciation of the limits placed by the Convention upon achievement of such objectives.

The compromise between various interests is reflected in the definition of "refugee" in Art 1. This contains several limitations upon the meaning of "refugee". First, the existence of "serious reasons" for considering that a person has committed a crime or other acts referred to in s F is sufficient to take that person outside the provisions of the Convention. Secondly, a change in circumstances, as identified in s C, has the result that the Convention ceases to apply.

Moreover, par (2) of s A contains two cumulative conditions which must be satisfied for classification thereunder as a refugee. The first condition contains several elements and the second contains alternatives, one of which refers back to the first condition.

The first condition is that a person be outside the country of nationality by reason of ("owing to") a fear of persecution which is well founded both in an objective and subjective sense[187]. This means that persons who are outside the country of nationality by reason of such causes as natural disasters, war and economic misfortune cannot answer the requirements of par (2).

The second condition is satisfied if a person who meets the first condition is *unable* to avail himself or herself of the protection of the country of nationality. This meets the case of those who are stateless or otherwise denied the protection of that country and they may be compared with those considered refugees under the treaties specified in par (1) of s A. Alternatively, a person who meets the requirements of the first condition will answer the second condition if, for a particular reason, that person is *unwilling* to avail himself or herself of the protection of the country of nationality. That reason is the well-founded fear of persecution identified in the first condition.

Thus, the notion of persecution is a necessary component of the first condition and also of one of the alternatives comprising the second condition.

In ordinary usage, the primary meaning of "persecution" is[188]:

"The action of persecuting or pursuing with enmity and malignity; *esp* the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it; the fact of being persecuted; an instance of this".

Accordingly, I agree with the following formulation by Burchett J in giving the judgment of the Full Federal Court in *Ram v Minister for Immigation*[189]:

"Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution."

In par (2) of s A the notion of "fear of being persecuted" is confined by the use of the phrase "for reasons of". This serves to identify the motivation for the infliction of the persecution and the objectives sought to be attained by it. The reason for the persecution must be found in the singling out of one or more of five attributes, namely race, religion, nationality, the holding of political opinion, or membership of a particular social group.

The juxtaposition of words in par (2) is "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Those of particular race, or nationality, or who are adherents of a particular religion might be said in each case to be members of a particular social group. Political opinions, on the other hand, may be diverse, imprecise, and even idiosyncratic. Thus a refugee may be classified as such if that person is outside the country of nationality owing to a well-founded fear of being persecuted for reasons of political opinion and, owing to such fear, may be unwilling to avail himself or herself of the protection of the country of nationality. That refugee may not be a member of any group but still fall within the definition by reason of the fear of persecution with a view to repression or extirpation of the political opinion adopted by that person.

I respectfully agree with the emphasis placed in the United States authorities to which I have referred upon the qualification of the term "group" by the words "particular" and "social", as indicating that par (2) of s A is not apt to encompass every broadly defined segment of those sharing a particular country of nationality. No doubt, with respect to what has been said in the Canadian authorities, those sharing a particular country of nationality will include many people, whether or not married couples, who wish to decide entirely of their own accord, and

without governmental restraint, the number, spacing and timing of their children. Those persons, when childless or as parents of one or more children, will fall within one or more of the divisions of the population which may be made for demographic purposes. However, numerous individuals with similar characteristics or aspirations in my view do not comprise a particular social group of which they are members. I agree with the statement in *Ram*[190]:

"There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of ' his membership of that group."

I would assume, for the purposes of the determination of this appeal, that the PRC has a "one child policy", infringement of which attracts, as a matter of governmental decision, the sanctions feared by the appellants. I assume therefore that there exists a policy which is being implemented in a fashion which engulfs a number of persons for whom the PRC is their country of nationality. On that footing, a disparate collection of parents, and those desiring to be parents, who do not accept and have difficulties in complying with a "one child policy" are at risk of the application of a general law of conduct required by the state and, on the assumptions I have made, brutally enforced. But they are not members of a particular social group with a fear of persecution by reason of membership thereof.

Moreover, the text of the Convention as a whole, and Art 1 in particular, shows the deliberate choice not to include as "refugees" all persons who have a well-founded fear of persecution. The submissions for the appellants, in substance, seek to achieve such a result by distorting the framework of par (2) of s A of Art 1, which I sought to outline above.

There is a further fundamental objection to acceptance of couples with no children or one child and who desire two or more children, and who risk sanctions for contravening a "one child policy" of their country of nationality, as members of a "particular social group" by reason of membership of which they have a well-founded fear of persecution. This is that the form the persecution takes should not "be inserted into the definition of the social group"[191]. The point was further explained in the judgment of Heald JA in the Canadian Federal Court of Appeal[192]. Like the majority of the Supreme Court of Canada, on further appeal[193], Heald JA held that the appellant had not established that there was the necessary well-founded fear. However, his Lordship also said[194]:

"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."

Reliance was properly placed upon that passage by the Full Federal Court in the present case[195].

The findings of fact in this case

McHugh J demonstrates in his reasons for judgment that counsel for the appellants sought to identify the "particular social group" to which they belonged in ways which did not correspond with the treatment of the matter by the RRT. With McHugh J, I conclude that the RRT made a finding that the relevant group comprised "those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised". As to those who are so coerced or forced, the RRT erred in law by defining membership of the group by reference to acts giving rise to the well-founded fear of persecution. As to those persons having one child who "do not accept the limitations placed upon them", they were, at best, merely a group for demographic purposes.

Conclusion

The appeal to the Full Federal Court was allowed. The purport of the joint judgment was that there had been no error by the delegate in the application of s 22AA of the Act. In place of the orders of the primary judge, the Full Court ordered that the decisions of the RRT be set aside and the decision of the delegate of the Minister be affirmed.

The appeal to this Court from those orders should be dismissed with costs.

KIRBY J. This appeal concerns a claim by the appellants, nationals of the People's Republic of China ("the PRC"), that they are entitled to remain in Australia because they are persons in respect of whom Australia has protection obligations. The obligations are said to arise under the Refugees Convention[196], now to be read with the Protocol Relating to the Status of Refugees 1973[197]. Australia is a party to each of these international instruments[198]. By its relevant domestic law[199] it has afforded enforceable rights of protection to certain non-citizens who enter or remain in Australia and claim such protection[200].

The appellants, husband and wife, made their claims relying upon the definition of "refugee" in Art 1A(2) of the Convention. They asserted, relevantly, that each of them had a "well-founded fear of being persecuted for reasons of ... membership of a particular social group". The "group" specified by them will be elaborated. Essentially, it was persons like themselves who were liable, in the PRC, to the application of the "one child policy", if necessary by sterilisation or abortion enforced or condoned by the authorities of the PRC.

On 31 January 1994 the Minister for Immigration and Ethnic Affairs ("the Minister"), by his delegate, refused the appellants' application for refugee status. The appellants applied for review of the decision by the Refugee Review Tribunal ("the Tribunal"). The Tribunal concluded[201] that each of the appellants fell within the definition of "refugee" and was entitled to a redetermination of their entitlement to the appropriate visas by the primary decision maker[202].

The Minister applied to the Federal Court of Australia for judicial review of the Tribunal's decision upon the ground that the Tribunal had committed errors of law in concluding that the appellants were refugees[203]. In the Federal Court, Sackville J rejected the Minister's arguments that the appellants did not face "persecution" in the Convention sense if they were returned to China or that any such persecution was not for a reason provided in the Convention. He thus dismissed the application[204].

On the Minister's appeal to the Full Court of the Federal Court, that Court (Beaumont, Hill and Heerey JJ) upheld the Minister's appeal. It ordered that the decisions of the Tribunal be set aside and the decisions of the Minister's delegate be affirmed[205].

By special leave, the appellants have now appealed to this Court seeking to restore the decision of the Tribunal, affirmed by Sackville J.

Factual findings

There were no relevant factual disputes. The Minister was content to prosecute his construction of the law within the findings of fact made by the Tribunal.

The first appellant, described as "A" ("the husband"), was born in 1967 in the village of Bang Hu in the Chinese Province of Guangdong. That village is about 25 kilometres from Guangzhou City. The second appellant, described as "B" ("the wife"), was born in a suburb of that city, also in 1967. The couple were married in January 1993. After the marriage the wife moved to Bang Hu.

The husband gave evidence that they left the PRC by sea in late 1993 at a time when the wife was eight months pregnant. Soon after their arrival in Australia their child was born. He said that he left the PRC because he feared sterilisation under the "one child policy". He understood that policy as requiring that Chinese couples were permitted to have only one child of their union. He gave evidence of seeing Family Planning Police come to a neighbour's home in his village and forcibly attempt to take a male neighbour away for sterilisation. He said that such raids were part of the normal activities of such officials. Almost every affected family had a member who had been forced to undergo sterilisation. The husband and the wife had been obliged to obtain a permit for the wife to have a baby in hospital. This amounted to a form of registration which, he believed, would inevitably be followed by his sterilisation a few months later. Whatever the position elsewhere in the PRC, the husband insisted that, in his village, unconsensual abortion and sterilisation were the primary sanctions to enforce the "one child policy". The local authorities sought to reduce infringements of that policy by an organised programme of sterilisation after a couple achieved one surviving birth.

The Tribunal accepted the husband as a "forthright and consistent" witness. It accepted that it was not possible for him and the wife to have a second child unless the family ran away. Although "more flexible arrangements" were available elsewhere, including in their province and in urban centres, within the isolated village in which they lived much greater powers were enjoyed by the family planning officials. The case was conducted on the footing that, for the couple to run away, would mean loss of household registration. This would present difficulties in their obtaining employment because relocation without a permit was illegal[206]. The Tribunal also accepted that the husband objected very strongly to sterilisation and feared its physical and mental consequences upon him. It concluded that forcible sterilisation was carried out in the village and that, accordingly, as already the father of one child, there was a real chance[207] of the husband's being forcibly sterilised if he returned to the village. It determined that his fear was objectively well founded and amounted to a fear of "persecution" for reasons of his membership of a "particular social group".

The Tribunal also found that the wife objected very strongly to, and feared, forced sterilisation of herself or her husband. It made parallel findings in her case resulting in the conclusion that she too was entitled to protection as a "refugee".

Before this Court, it was conceded for the Minister that forced sterilisation could amount to "persecution" within the Convention. It was also accepted that it constituted heinous mistreatment of the persons involved and a brutal form of enforcement of a government policy of birth control which would not be acceptable in Australia. Although it was not conceded that the particular strategy of enforcement, found to occur in the appellants' village, was condoned, as such, by the Central Government of the PRC, it was accepted that it did not amount to "rogue action", ie the isolated conduct of particular officials pursuing an idiosyncratic strategy of their own. The policy arose under a national law of general application throughout China[208]. It had the tacit acceptance of the government which either could not, or did not, do anything to prevent it occurring[209]. The finding that the appellants had a well-founded fear of compulsory sterilisation if they returned to China was accepted. In this way, some of the earlier disputes canvassed in the Federal Court were cut away. They can be ignored in this appeal.

Decision of the primary Judge

Sackville J addressed most of his attention to an analysis of the meaning of the Convention categories for protection which the appellants had invoked. It is pertinent to set out, in the form applicable at the relevant time, following the deletions effected by the later Protocol, the applicable definition of "refugee" now in dispute:

"[A]ny 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 the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it." (emphasis added)

To assist in ascertaining the meaning of the foregoing definition, and its operation upon the facts as found, Sackville J had regard to the *Handbook on Procedures and Criteria for Determining Refugee Status* (1979)[210]. He examined the comparatively few cases of Australian judicial authority dealing with the definition[211]. Because the Convention is one of international obligation, of obvious importance to other refugee-receiving countries, Sackville J then turned to judicial authority in the United States[212] and Canada[213]. He noted the opinions of various scholars expert in international refugee law, many of whom were the subject of reference in this Court's opinion in *Chan v Minister for Immigration and Ethnic Affairs*[214]. He then proceeded to his conclusion[215]:

"[I]t 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. ... It was also open to the tribunal to find ... 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.

...

[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."

Sackville J entertained no doubt that forced sterilisation would be a clear violation of the "fundamental human rights" of the appellants, such that they did not have a genuine choice whether or not to remain members of the "social group" in question. They could not resign from the "group". This point was made to distinguish the case from those in which a person was liable, upon return to the country of origin, to punishment by reason of breach of the law, whether criminal or otherwise, designed to uphold local *mores*. In this, Sackville J drew on the observations of the Federal Court of Appeal in Canada in *Cheung v Canada (Minister of Employment and Immigration)*[216] that the "social group" in question was united "by a purpose ... fundamental to their human dignity" and to "women's reproductive liberty" as a "basic right". Faced with a threatened violation of such "fundamental human rights", it was unpersuasive to say that the husband and wife could "choose" to forsake a characteristic which united them to the other members of the "social group". They could not. They should not be required to do so.

In the appeal, the Full Court of the Federal Court likewise reviewed the series of cases which preceded the decision of Sackville J, as well as the decision at first instance in *Ram v Minister for Immigration and Ethnic Affairs*[217]. That decision has since been affirmed by the Full Federal Court with a further exposition of that Court's consideration of the definition of "refugee"[218].

The Full Court similarly referred to United States and Canadian authority. But the Court concluded[219]:

"Forcible sterilisation could constitute persecution. But the respondents' fear of that persecution is not for reason of membership of a particular social group.

...

While [China's] 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*,[220] 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."

Approach to the appeal

Before turning to the meaning which I would give to the relevant definition of "refugee", and its application to the facts found, it is helpful to state a number of propositions which affect my approach to the problem before the Court:

1. Although the definition of "refugee" in the Convention (as amended by the Protocol) is incorporated as part of Australia's domestic law, and to that extent the task of the Court is one of statutory construction, it is desirable (so far as possible), and quite possibly necessary, that this Court should adopt a definition which pays appropriate regard to the fact that the definition of "refugee" originates in an international treaty. The Court should thus interpret the words in the context in which, and for the purposes for which, they were devised. Clearly, they are intended to have application to a variety of countries and situations and for the indefinite future. This operation is given emphasis by the deletion, by the Protocol, of the original limitation which was included in the definition, confining its application to the results of "events occurring before 1 January 1951"[221].

2. Although formulated in abstract terms, the Convention, and the national legislation based on it, concerns "human fate". "While the differences in some of the tests ... may be semantic only, it is clearly important that a determination of refugee status be made by the application of a test that is readily capable of comprehension and application. A plethora of tests, indeed what may amount to the same test though expressed in a variety of ways, can only lead to uncertainty and, all too likely, confusion in an area where the future of individuals is at stake"[222]. Thus, the provision of simple rules for application to the large number of persons who invoke the definition of "refugee" is a desirable objective of the courts, including this Court.

3. The time for the determination of whether a person who has sought recognition as a "refugee" is so entitled is the time when that determination is made in response to the claim[223]. The applicant must show a mixture of genuine fear (subjective) which is founded on a real chance (objective) that he or she would be persecuted for one of the stipulated reasons if returned to the country of nationality[224].

4. The starting point for determining the meaning and operation, in the facts found, of "membership ... of a particular social group" is an analysis of the words of that phrase. It is, after all, an ordinary expression of common use[225]. The words used are clearly very broad. This is doubtless deliberate. They derive from the varieties of "despotism, fanaticism, cruelty and intolerance" which cannot be foreseen in all their awful manifestations with complete assurance[226]. This is why Australian courts have resisted attempts to paraphrase or redefine the broad language of the Convention definition. They have expressed the view that it is preferable to approach its application without an attempt to define exhaustively what is meant by "a particular social group"[227].

5. Because the Convention is universal, it does not speak only of the grounds of persecution that have been most familiar to Western countries, ie those that have derived their culture and history from Europe. For such countries, in the past, race, religion, minority nationality and political opinions have been the main grounds for persecution. But in other societies, and in modern times, different cultural norms and social imperatives may give rise to different sources of persecution. The Convention is intended to operate in the context of the problems of refugee displacement which have been such a significant feature of the world, particularly since the events which propelled the international community (including Australia) into the Second World War. It would be an error to construe the definition so as to ignore the changing circumstances of the world in which the Convention now operates. Thus, it was agreed for the Minister that, appearing as it does in a treaty of general application, the phrase "a particular social group" could not be confined to those groups which were in the minds of the drafters of the Convention in 1951. For example, at that time persons having a well-

founded fear of persecution for reasons of their sexual orientation would in many, perhaps most, countries (including Australia) have been identified as criminals. They would have been punished for their conduct, even in private and involving only consensual adults, because it was contrary to their nation's laws. Nowadays, a different content and application of the phrase affords the protection of the Convention deriving from a larger understanding of the "persecution" and the identity of the "particular social group" in question[228]. The concept is not a static one. Nor is it one fixed by historical appreciation.

6. In construing domestic law which, in turn, adopts a provision of an international treaty, it is permissible to have regard to the history of the treaty provisions and such matters as would be available for the construction of the treaty itself[229]. The Vienna Convention on the Law of Treaties is designed to codify and express certain rules of customary international law for the interpretation of treaties[230]. The Convention has been called in aid by this Court[231] as by other courts of high authority[232]. Section 3 of the Convention is titled "Interpretation of treaties". By Art 31 it is provided (sub-art 1) that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". By Art 32 recourse may be had to supplementary means of interpretation. These include "the preparatory work of the treaty and the circumstances of its conclusion" but only "in order to confirm the meaning resulting from the application of article 31" or to determine the meaning where, applying that Article, the interpretation is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". This rule, which is not dissimilar to that now applicable to the construction of federal legislation in Australia, was invoked by the parties to take the Court to the travaux préparatoires explaining how the definition of "refugee" in the Convention came to include the reference to "membership of a particular social group".

7. Whilst by international law it is permissible to apply a principle of construction known in the common law as the *ejusdem generis* rule, and whilst it is therefore appropriate to give meaning to the reference to "membership of a particular social group" in the context of the other specific grounds of persecution catalogued in the definition, care must always be observed in the application of that canon of construction for reasons often mentioned[233]. In the particular case of the Convention definition of "refugee" it is difficult to find a *genus* which links the categories of persecution unless it be persecution itself. Yet this conclusion, together with the obeisance usually given to the need to offer a wide and flexible interpretation, and to avoid a narrow one, has led some commentators to view "membership of a particular social group" as a "safety-net". They suggest that it is a category designed to embrace a very wide range of other grounds of persecution not specified in the particular reasons mentioned[234]. The difficulty with this view has been identified in texts[235] and judicial decisions[236]. Had it been intended that persecution for *any* reason would satisfy the definition of "persecution" in the definition of a "refugee", it would have been simple for the drafters of the Convention to have deleted altogether the particular categories of persecution. They would have been superfluous[237]. The drafters could have relied on nothing more than proof of persecution itself, for whatever reason. This would have been a viable, even arguably desirable, approach given the variety of irrational causes that can give rise to large-scale persecution. However, it is not the approach which the Convention took. Compliant to the requirements of the Vienna Convention as to the interpretation of treaties, the duty of a court applying a treaty provision is to give meaning to the definition, keeping in mind the specificity of the grounds of persecution which alone qualify a putative "refugee" to protection under the Convention. Further emphasis is given to this point by the use of the

phrase "for reasons of". Whilst other reasons may contribute to the "well-founded fear"[238], proof of one or more of the specified reasons is a pre-condition to attracting the Convention.

8. The requirement to show that the persecution in question is "for reasons of" one of the specified grounds has led to the argument that this postulates an assumption that the ground pre-existed the manifestation of the persecution. In the case of a "particular social group", the argument runs, the definition of the group, and membership of it, must therefore have pre-existed the persecution. The persecution could not itself define the "particular social group". This point will need to be considered. But in considering it, it is useful to remember, as Burchett J commented in *Ram*[239], that self-identity as a member of a particular group cannot be a universal prerequisite. Thus, many German citizens of Jewish ethnicity did not, in the 1930s, identify themselves as "Jews". They conceived of themselves as Germans. Yet this did not prevent their being members "of a particular social group" and persecuted for that reason (as well as for reasons of race and religion).

9. Whilst the search for a uniform and, if possible, consistent and international approach to the meaning of a part of the definition of "refugee" in the Convention is desirable, so that it is helpful to have regard to United States, Canadian and other foreign authority on the point, care must be observed in the use of such authority. Sometimes it can only really be understood in the context of the background of constitutional rights and statutory provisions which affect the courts and tribunals involved and the approaches which they take[240]. A municipal court, giving meaning to the Convention, will be well advised to draw upon the international jurisprudence which has collected around a crucial provision, such as the definition of "refugee" here in question. It may take into account the defence of relevant human rights and the avoidance of discrimination which lie at the heart of the international effort to protect refugees, including by the Convention[241]. But where legal rights are claimed, a court cannot give effect to sympathy for or against the predicament of those who assert "refugee" status. It must simply perform the functions familiar to it. By reference to the language of the law in question, it will decide whether the facts proved attract, or fail to attract, the application of that language.

Matters not in issue

It is now appropriate to list a number of considerations, given voice during argument, or *sub silentio*, which are not, in my opinion, relevant to the determination of this appeal:

1. The appeal is not about "fundamental human rights" as such, although clearly, upon one view, they are affected. The appellants seek no more than the enforcement of Australia's domestic law. That law affords them certain rights if they can establish that they are "refugees" within the Convention definition. That definition is, in turn, to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights[242] and the International Covenant on Civil and Political Rights[243]. But the law actually invoked is that of an Australian statute.

2. Whether the law and policy of the PRC on family planning and population limitation are wise, just and conformable to fundamental human rights are not matters upon which this Court has jurisdiction to pass. The enormous problem of global population growth is well known. It is most acute in China which has a fifth of the world's population. China's population is said to be 1.25 billion people[244]. Human rights arguments addressed to the

rights of future generations of all people living on this planet, have been, and are, mounted to defend the "margin of appreciation" enjoyed by the government of a country, such as China, entitling it to adopt effective measures to limit the growth of its population, with inevitable consequences for the rights of individuals of reproductive age. This Court is not involved in a judgment on these questions.

3. Nor is the appeal concerned with differences between the policies of the Central Government of the PRC and the suggested over-enthusiasm of local government officials in villages such as that of the appellants. This is because of the way in which the case has been litigated and because of the concessions properly made by the Minister. Although the Central Government may not affirmatively support forced sterilisation and abortion as means of upholding the "one child policy" there can be little doubt that such strategies are tacitly accepted. Certainly, according to the findings made, they are not effectively stopped and punished. In that sense, they are condoned by, and may be attributed to, the Central Government of the PRC. They are relevant to the circumstances which the appellants would have to face were they to be returned to China.

4. The mere fact that, potentially, very large numbers of persons might qualify for refugee status in Australia if the appeal to this Court were upheld and the primary decision confirmed, is not, of itself, sufficient to show that decision was wrong. The history of refugee movements in the period out of which the Convention arose, is one involving very large numbers of persons indeed. More than 40 million refugees were said to have been displaced by the events surrounding the Second World War. The number of Jewish refugees in Central Europe alone, for example, would have comprised millions. The fact that, potentially, millions of people of reproductive age in China are affected by the "one child policy" is not, of itself, sufficient to render the definition inapplicable to them, if otherwise it applies by the language and imputed purpose of the Convention. Its application, in the proved circumstances, has been upheld in Canada in *Cheung v Canada (Minister of Employment and Immigration)*[245]. It was not suggested that this has resulted in an intolerable flow of refugees of this category into Canada or that the decision had caused the breakdown of the operation of Canada's *Immigration Act* (1985). Membership of the "particular social group", even if proved, is insufficient, under the definition, to attract refugee status without more. The definition is hedged about with other limiting pre-conditions. There must be a "well-founded fear" of persecution. This must be "for reasons of" membership of the group. The person affected must get himself or herself to another country, with all the practical, legal and administrative difficulties which this presents. That person must then run the gauntlet of litigation which may be as prolonged and testing as the present. Upholding the appellants' claims to "refugee" status (resting as they do very much upon the particular evidence of peremptory enforcement of sterilisation in their village which occasioned the well-founded fear of compulsory sterilisation found in their favour) does not necessarily demonstrate that other applicants, deriving from other parts of the PRC, would similarly succeed. The appellants clearly proved persecutory behaviour which gave rise, in their case, to their well-founded fear. Other applicants, relying upon different facts, might not be so successful.

5. The "particular social group" upon which the appellants relied was not that comprised by all persons in China subject to the "one child policy". As ultimately expressed in these proceedings, it was much narrower. It was constituted by persons who:

(i) were in the reproductive age group;

(ii) were a couple and had given birth to a surviving child;

(iii) desired to have another child;

(iv) were fertile and therefore likely, unless prevented, to have another child or children;

(v) were members of the Han majority ethnic group and thus not entitled, on grounds of ethnicity or any other ground, to exception from the general policy;

(vi) could not, under the law in force in their particular prefecture have a second child without official permission; and

(vii) were liable, in the evidence, to be subjected to unconsensual sterilisation or enforced abortion to prevent the realisation of their desire for another child or more children.

Although there was no association, society or club to represent the interests of that social group as defined, in the prefecture of the PRC in which the appellants lived, this is hardly surprising given the nature of the society described in the evidence. However, according to that evidence, other persons of reproductive age were in a position identical to the appellants. Their argument was that this was sufficient to constitute the pre-existing "particular social group", membership of which was the source of the reasons for the persecutory conduct. It led to their well-founded fear that such persecution would follow in their case if they were returned to China.

The Minister denied that there was any such "particular social group" or that "membership" of any such "group" was the reason for the well-founded fear on the part of the appellants. According to the Minister, that fear derived from the individual characteristics of the appellants and the application to them of the domestic law of the PRC. It was not the consequence of what they *were* but what they *did*, contrary to that law. It therefore fell outside the limited and defined "reasons" for persecution which alone gave rise to the enforceable rights under the Convention, as applied by Australian law.

Origins of the "social group" category

Enough has now been said to indicate the nature of the controversy before the Court. It derives from the ambiguity of the reference to membership of "a particular social group" in the Convention definition. It is therefore legitimate (if not essential), both by Australian and international law, to have regard to the travaux préparatoires which record the history of the development of the Convention and the discussion of its text as it was being refined[246].

The Refugee Convention was developed after the Genocide Convention, another result of the post-War resolve to respond to the human sufferings then fresh in memory. But the Genocide Convention had been criticised as being unduly narrow in its language[247]. As the Refugee Convention was being prepared, there was a stated intention to avoid the mistakes revealed by the earlier experience.

Even before the Second World War a definition of the term "refugee" had been developed to deal with the problem of refugees from Germany. This was adopted by the Inter-Governmental Committee on Refugees formed in 1938. It defined refugees as those who "must emigrate on account of their political opinions, religious beliefs or racial origin"[248].

The 1951 Convention built upon this definition. But, naturally enough, it responded to the political restructuring of Europe which had occurred after 1945. Until amended by the Protocol, it was necessary for the refugee to establish that the "well-founded fear" relied upon had resulted from events occurring before 1 January 1951. Further, contracting states could, at their option, limit their obligations to those refugees who were fleeing conflicts in Europe[249].

For a time, the last-mentioned limitation appeared to threaten the success of the draft, until it was made optional. What then happened is described by Compton[250]:

"Into this atmosphere, the Swedish delegation introduced the notion of social group-based persecution to add a further dimension to the definition of 'refugee'. The Swedish representative maintained that such cases existed and that the Convention should mention them explicitly. The conference records contain no discussion from other delegations that might further illuminate the meaning of 'particular social group', but the lack of comment indicates that this new category presented little controversy.

...

Sweden's position in the geographic limitation debate demonstrates that the term 'social group' was meant to have a broad application ... If the Swedes' notion of social group persecution was not changed by limiting the Convention to refugees from Europe, then the examples they had in mind of this type of persecution must have come from European events before 1951. Otherwise, if the social groups they sought to protect had been outside of Europe, the Swedes undoubtedly would have opposed the geographic limitation. The most well-known examples of social group-based persecution at this time occurred in Eastern Europe following the rise of the Communist regimes. Subsequent cases from European courts of nations party to the Convention have recognized, for example, the 'capitalist class' and 'independent businessmen' and their families as valid social groups in granting refugee status to persons fleeing Eastern Europe. Examples such as these are probably what the Swedes had in mind."

The new category was included by resolution of the preparatory committee by 14 votes in favour to none against, with 8 abstentions[251]. Clearly enough, the category was intended to broaden the previous definition and practice[252].

The meaning of the Convention is not, any more than an Act of Parliament, confined to what its drafters, subjectively, had in mind at the time of its making[253]. Nevertheless, some guidance as to its purpose can be found in the way the relevant phrase was added and the object then stated for it. The mere fact that "groups", as wide and diverse as "capitalists and independent businessmen", were nominated as justifications for the added criterion, demonstrates that a relationship in the nature of a voluntary association, society or club was not considered to be a necessary factor for the existence of such a "group"[254]. United States authority suggesting the contrary[255] should not be followed. Indeed, the Minister did not support such authority, conceding, properly, that such associational membership was neither necessary nor sufficient to establish the existence of the requisite "group". It is now well established, in virtually all discussion of the Convention definition, that it is not necessary for the individual applicant to have been a member of a concerted body or association affirming group identity. In some cases, such as homosexuals in certain countries, such a requirement could be extremely perilous to the members of the group and self-defeating[256].

Not a great deal of guidance is therefore afforded by resort to the travaux. But they do make it clear that the purpose was to expand the other heads of persecution which, of their nature, are more specific[257]. A degree of flexibility was envisaged by the failure to be more precise about the kinds of "social groups" covered. The requirement of particularity clearly emphasises the distinction being drawn between a particular social group and a crowd or section of the population lacking sufficient common identifiers or experience[258]. This concept is reinforced by the word "group" itself. Whilst not limited to members of an association, it does import the notion that those who constitute the "group" must be recognisable. They must be definable by reference to common pre-existing features. Yet they need not be known as members of the group, even to each other, because the very persecution which helps to define or reinforce the "group" may, in some cases, make such identification dangerous[259].

In 1979, the United Nations' High Commissioner for Refugees published the *Handbook on Procedures and Criteria for Determining Refugee Status*[260] used by Sackville J ("the Handbook"). Its purpose was to assist parties to the Convention and Protocol in determining claims to refugee status. It drew on the experience of the High Commissioner's office as well as the practices of contracting states after the Convention came into force in 1954. The Handbook is frequently cited in refugee decisions in the United States. Upon the precise issue in hand, it has been criticised as unhelpful[261]. It may be used in Australia to assist in the interpretation of the Convention[262] so long as it does not purport to usurp the function of the court or tribunal in giving meaning to the words of the Convention definition[263].

Regarding the phrase "particular social group", the Handbook says:

"77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, ie race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."

As revealed in the evidence, the policies of the government of the PRC concerning the "one child" family limitation are promoted both by inducements and rewards and by more drastic means such as compulsory sterilisation and abortion. Clearly enough, such policies would be seriously impeded if a sufficient number of persons in the suggested "group" resisted the imposition of that policy. The very existence of a "group" of persons, inclined to oppose, evade and flee the imposition of such a policy, would suggest a strain upon the loyalty of group members to the government of the PRC. It would postulate the potential willingness of such group members to resist the imposition of that country's law and policies. The actual loyalty of such a "group" to the government might be different from the government's perception of that loyalty[264]. A potential danger of the group lies in the perceived risk of alienation from the government which, in turn, could give rise to a governmental response and to a well-founded fear of persecution.

Decisions of national courts

A large number of municipal decisions, in courts and tribunals of states party to the Convention, were placed before the Court or referred to in the course of argument. Doubtless, each of these cases depended on its own facts. There are dangers in attaching too much importance to the identification of particular groups, membership of which has been the subject of successful or unsuccessful claims to refugee status. However, a glance at the enormous variety of the groups relied upon helps to bear out the comment that the phrase "particular social group" is a specially flexible one. It is impossible to delimit it by a precise definition.

Thus, the following categories have been upheld as particular social groups, the membership of which gave rise to a well-founded fear of persecution: members of the nobility of a former Eastern European kingdom[265]; members of the landed gentry in pre-communist Romania[266]; farmers in areas of military operations in El Salvador[267]; a former funeral director and his wife engaged in the private sector in pre-communist Poland[268]; a woman from Trinidad subject to spousal abuse over 15 years[269]; homosexual and bisexual men and women in countries where their sexual conduct, even with adults and in private, is illegal[270]; dispossessed landlords who have abandoned their claim to property after revolution, but are still subject to stigma[271]; unmarried women in a Moslem country without the protection of a male relative living in that country[272]; members of the Tamil minority fleeing from Sri Lanka[273]; young males who have evaded or deserted from compulsory military service in countries engaged in active military operations condemned by the international community[274]; members of stigmatised professional groups and trade unions[275]; soldiers of the army of the former regime in South Vietnam[276]; Roman Catholics and ethnic Chinese fleeing from Vietnam[277]; and Freemasons escaping from Cuba[278].

On the other hand, claims have been rejected where based on membership of the following groups: the "capitalist class" in a former East European country[279]; an Indian woman who had married out of her caste[280]; members of a recreational club[281]; a person accused of corruption in Ghana[282]; a person who had been a member of an Irish terrorist group and was suspected, in Ireland, of permitting hostages to escape[283]; a Bolivian migrant drug offender fearful of punishment as a drug informant if he were returned to Bolivia[284]; a member of the wealthy Sikh community returning to the Punjab with money which would be subject to the risk of robbery and extortion[285]; an Iranian seaman imprisoned in Australia for importation of illegal drugs liable to further heavy punishment if returned to Iran[286]; and a stepson of a Columbian storekeeper whose shop was blown up by a drugs cartel when he refused to trade for them[287].

In an attempt to provide guidance to courts and administrators applying the Convention definition of refugee, appellate courts in the United States and Canada have offered tests to be applied to the facts found.

The Court of Appeals for the Ninth Circuit in the United States in *Sanchez-Trujillo v Immigration and Naturalization Service*[288] had before it a claim by young male petitioners who asserted that they were suspected by the Government of El Salvador of being involved with urban guerillas because they had declined or failed to join the armed forces and, instead, had fled to the United States. Their claim to refugee status was refused at first instance. The Court of Appeals applied a four-part test to evaluate the "social group" claim. This was, first,

the "cognizability" of the group; secondly, proof that the petitioners were members of that group; thirdly, proof that the group was the target of persecution on account of its characteristics as a group; and fourthly, proof of "special circumstances" warranting the grant of asylum on the basis of social group membership alone.

With respect, I consider that these criteria or guidelines, however well intended, constitute an impermissible substitution for the words of the Convention. The test propounded unduly restricts the application of the Convention construed according to its terms. Membership of a voluntary association is not required by the language of the Convention. It is contradicted by the very sources of persecution which may make such association perilous or even impossible[289]. There is no mention whatever in the Convention of "special circumstances".

In Canada, a different four-part test was adopted in the Federal Court of Appeal in *Mayers v Canada (Minister of Employment and Immigration)*[290]. As expressed by Mahoney JA[291]:

"[A] particular social group means (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."

This test was approved by La Forest J, writing for the Supreme Court of Canada in *Canada (Attorney-General) v Ward*[292]. His Lordship refined the "possible categories" emerging from the application of the "particular social group" criterion to three, after taking 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"[293]. The three categories which La Forest J discerned were[294]:

"(1) [G]roups 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."

Still other attempts have been made to differentiate those who are, and are not, entitled to rely on the "particular social group" category by reference to a supposed distinction between what people *are* and what they *have done*[295]. Such distinctions are artificial. What people *have done* contributes to making them who they *are*. In respect of group identity, what people do reinforces the existence and special features of the group. Oppressors typically target what

people do, for what they think or feel, or believe (although clearly relevant to their group status and consequent susceptibility to persecution) is not so easily identified by the agents of the state.

The categories mentioned in the Canadian and United States decisions, whilst valiant efforts to offer clarity to the application of an inherently unclear concept, do not, in my view, accurately categorise, or exhaustively define, the "particular social groups", membership of which may attract the Convention definition. The Canadian approach has been described as "delphic", with language "so opaque, and the procedural posture ... so convoluted, that it is difficult to predict what effect [it] will have on the development of the social group concept in Canadian jurisprudence"[296].

In the result, I agree with the opinion of Professor Fullerton citing the conclusions of Graves[297]. Some of the groups to which the definition applies are voluntary; others are not. Some are cohesive; others are not. Some are homogeneous; others are not. Some involve immutable characteristics; others do not. Some involve characteristics central to the members' identities; others do not. Professor Graves urges that courts and agencies should turn away from attempts to formulate abstract definitions. Instead, they should recognise "particular social groups" on a case by case basis[298]. This approach conforms to the refusal of German courts to attempt a definition, or exhaustive description, of the category of "particular social groups"[299]. It accepts that an element of intuition on the part of decision-makers is inescapable, based on the assumption that they will recognise persecuted social groups of particularity when they see them[300]. Whilst this is not an entirely satisfactory conclusion, it is preferable to an attempt by courts unduly to narrow the operation of the Convention or to impose upon its deliberately broad and ambulatory language categories which are by no means exhaustive of the actual words used. The development and expression of such categories, at least in the first instance, is the province of administrators and review tribunals with experience of refugee claims. It is not the task of appellate courts to whom these cases are but occasional visitors.

Conclusions

No decision of an equivalent court in another country gives convincing guidance on the approach to the appellants' claim for refugee status under the Convention definition. There is no holding which should be followed by this Court, in the present appeal, in order to promote a consistent approach to claims to refugee status by Chinese nationals, out of the PRC, who prove a well-founded fear that, on their return, they may be subjected to unconsensual sterilisation or abortion to prevent further reproduction. The decisions on such claims in Canada and the United States are equivocal[301]. They reflect the differences of opinion which have occurred in the Federal Court of Australia in this case and, perhaps, differences in factual findings at first instance.

The phrase "particular social group", where used in the Convention, does not provide a "general safety-net" to cover *any* form of persecution. But it is clearly a phrase with a wide denotation. It appears in a context which suggests that the "group" is of a kind that will be subject to the same type of persecution, leading to attempted escape and claim for refuge, as has happened in the past on grounds of race, religion, nationality and political opinion.

Can it be said that the class of person identified by the features demonstrated by the appellants represent such a "particular social group" of that character? Once it is remembered that

associational membership is not essential; that precise knowledge of the identity of other members of the group is not required; and that identification *as* a member of the "group" is not universal, acceptance that persons such as the appellants may be members of a "particular social group" becomes much easier. In my view, there is a "particular social group" of the kind suggested, defined by the objective characteristics which exist in the case of the appellants. Such membership exposes them to the well-founded fear of persecution, including possibly by enforced sterilisation and abortion. Clearly, they are not alone, either in their fear or in their risk of persecution. A comparison of their "group" with many which have been recognised in other circumstances (set out above) as falling within the definition confirms this conclusion.

Every word of the definition is important. "Membership of a particular social group" is not alone sufficient to attract the definition to the appellants. Relevantly, such persons must show three additional matters. Two of them are accepted in this case: that the appellants have a well-founded fear of being persecuted, in the sense of being submitted to compulsory sterilisation, if they return to the PRC; and secondly that it is owing to such fear that they are unwilling to return to their country of nationality. That leaves the third, and crucial, requirement. It is contained in the words "for reasons of". They must show that the persecution they fear is "for reasons of" the established membership of the "particular social group".

Here is the ultimate dilemma of this appeal. Is the persecution of the appellants "for reasons of" their membership of the "particular social group" so defined? Or is it simply because the law of the PRC, as arbitrarily administered in their particular village, results in the likelihood that they, individually, will be sterilised against their will?

The task of the Court is one of characterising the "reasons" for the "persecution". I accept that there are arguments for both viewpoints. For the Minister it is not membership of the "group" that is critical. For the appellants the "group" defines the very persons who will be, and are, persecuted.

Once it is decided that the "particular social group" to which the appellants belong is that which is susceptible to enforced sterilisation or abortion and that this is the kind of "group" to which the Convention definition might apply, the establishment of the causal connection between the well-founded fear of persecution and membership of that group is not difficult to discern. The error in the Minister's contention lies in its emphasis upon the word "membership", as if it imported the associational connection which was certainly not intended as the history of the introduction of this category clearly demonstrates. A reflection on the "groups" set out above, membership of which has been held in the courts of this and other countries to attract the definition, negates the requirement of such an associational participation or even consciousness of such group membership.

The conduct which the appellants fear is conduct targeted at them precisely because of the characteristics which they have as members of their community. Yet it is those characteristics that constitute them as members of a "particular social group" within that community. Their vulnerability to enforced sterilisation or abortion arises precisely because they have those characteristics. As such, they would be quite visible in their village. The appellants' circumstances are readily distinguishable from those in which a national, who has broken the law, is in danger of punishment on return. Their cases bear no analogy to those of the return of a person to Ghana to face charges of corruption, or to Iran to face possible punishment for

drug dealing or to Bolivia or Ireland to face possible retaliation from erstwhile compatriots. The law and policy which the appellants resist is of such a character, and so incompatible with their basic dignity and physical integrity, that they should not be forced to submit to it. Like infractions of a person's race, religion, nationality or political opinion, the impugned persecutory conduct, as found, attacks features of their very existence as human beings which are fundamental and beyond any country's legitimate law and policy. It both explains and justifies their "well-founded fear".

This conclusion supports the original determination of the Tribunal and the opinion of Sackville J confirming it. It requires correction of the orders of the Full Court of the Federal Court. Having regard to this conclusion, it is unnecessary to consider the alternative challenge to the rejection by the Tribunal of the appellants' claim that they were entitled to succeed on the basis of persecution for reasons of political opinion. However, I see no error in the Tribunal's determination in that regard.

Orders

I agree in the orders proposed by Brennan CJ.

[1] Inserted by s 3(e) of the *Migration Amendment Act* 1991 (Cth).

[2] *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 265.

[3] *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 413.

[4] *Secretary, Department of Health and Community Services v JWB and SMB. Marion's Case* [1992] HCA 15; (1992) 175 CLR 218 at 253, 265-266, 275, 309-310; *Re Eve* (1986) 31 DLR (4th) 1 at 34; *Cheung v Canada* (1993) 102 DLR (4th) 214 at 221-222; *Chan v Canada* (1995) 128 DLR (4th) 213 at 242-243, 249 per La Forest J (diss).

[5] Universal Declaration of Human Rights, Art 3; International Covenant on Civil and Political Rights, Arts 6 and 9; *Cheung v Canada* (1993) 102 DLR (4th) 214 at 221-222.

[6] *Chan v Canada* (1995) 128 DLR (4th) 213 at 249 per La Forest J (diss).

[7] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 16-17.

[8] United Nations General Assembly Conference of Plenipotentiaries of the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at Geneva, 3 July 1951, A/Conf 2/SR 3 at 14.

[9] United Nations General Assembly Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons held at Geneva, 2 July 1951, A/Conf 2/9.

[10] See Weis, *The Refugee Convention, 1951*, (Cambridge Univ Press 1995) at 334, 335.

[11] See *Morato v Minister for Immigration* [1992] FCA 637; (1992) 39 FCR 401 at 415-416; [1992] FCA 637; 111 ALR 417 at 431-432 per Lockhart J.

[12] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 14.

[13] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 25-27.

[14] (1993) 103 DLR (4th) 1.

[15] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 25.

[16] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 28.

[17] (1993) 103 DLR (4th) 1 at 33-34.

[18] (1995) 128 DLR (4th) 213 at 248-249 (dissenting).

[19] *Cheung v Canada* (1993) 102 DLR (4th) 214 at 219-220.

[20] See *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 265 per Brennan J.

[21] [1978] AC 141 at 152.

[22] cf *Acts Interpretation Act* 1901 (Cth), s 15AA.

[23] See *The Commonwealth v Tasmania* (the *Tasmanian Dam Case*) [1983] HCA 21; (1983) 158 CLR 1 at 302; *Victoria v The Commonwealth* (1996) 70 ALJR 680 at 736; 138 ALR 129 at 211.

[24] See *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 396.

[25] Contrast the position of a person who is a member of a political family and faces persecution from the family's political opponents.

[26] See *Morato v Minister for Immigration* [1992] FCA 637; (1992) 39 FCR 401; 111 ALR 417; *Ram v Minister for Immigration* [1995] FCA 1333; (1995) 57 FCR 565; 130 ALR 314.

[27] [1992] FCA 637; (1992) 39 FCR 401 at 416; [1992] FCA 637; 111 ALR 417 at 431.

[28] *The Oxford English Dictionary*, 2nd ed (1989), vol XV at 905.

[29] cf *Morato v Minister for Immigration* [1992] FCA 637; (1992) 39 FCR 401 at 416; [1992] FCA 637; 111 ALR 417 at 431 per Lockhart J.

[30] [1986] USCA9 2002; (1986) 801 F 2d 1571.

[31] *Chan v Canada* [1993] 3 FC 675 at 692-693 per Heald JA.

[32] [1995] FCA 1333; (1995) 57 FCR 565 at 568; [1995] FCA 1333; 130 ALR 314 at 317.

[33] See *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 26-29 per La Forest J.

[34] [1992] FCA 637; (1992) 39 FCR 401 at 404-405; [1992] FCA 637; 111 ALR 417 at 420.

[35] [1992] FCA 637; (1992) 39 FCR 401 at 406; [1992] FCA 637; 111 ALR 417 at 422.

[36] See *Chan v Canada (MEI)* (1995) 128 DLR (4th) 213 at 248.

[37] See *Morato v Minister for Immigration* [1992] FCA 637; (1992) 39 FCR 401 at 405-406; [1992] FCA 637; 111 ALR 417 at 420-422.

[38] cf *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218 at 253-254.

[39] (1995) 128 DLR (4th) 213 at 249.

[40] La Forest J also relied upon the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Art 16(1)(e).

[41] [1995] FCA 1305; (1995) 57 FCR 309 at 319; [1995] FCA 1305; 130 ALR 48 at 56.

[42] [1995] FCA 1305; (1995) 57 FCR 309 at 319; [1995] FCA 1305; 130 ALR 48 at 56-57.

43 (1995) 128 DLR (4th) 213. See also *Cheung v Canada (MEI)* (1993) 102 DLR (4th) 214.

[44] (1993) 103 DLR (4th) 1 at 34, 37.

[45] (1993) 103 DLR (4th) 1 at 33.

[46] See *Chan v Canada* [1993] 3 FC 675 at 690-691, 717, 721.

[47] (1995) 128 DLR (4th) 213 at 247.

[48] (1995) 128 DLR (4th) 213 at 248.

[49] (1995) 128 DLR (4th) 213 at 249.

[50] [1992] FCA 637; (1992) 39 FCR 401 at 404; [1992] FCA 637; 111 ALR 417 at 420.

[51] (1993) 103 DLR (4th) 1 at 33.

[52] (1995) 128 DLR (4th) 213 at 248.

[53] "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 220.

[54] Which, it must be said, is a reference to the concerns of the United Nations rather than a sure guide as to the intentions of the High Contracting Parties.

[55] See *Rodriguez v United States* [1987] USSC 36; (1987) 480 US 522 at 525-526: "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative

choice - and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."

[56] See *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 28. See generally Hathaway, *The Law of Refugee Status*, (1991) Ch 5.

[57] See Vienna Convention, Art 32; cf *Acts Interpretation Act* 1901 (Cth), s 15AB.

[58] [1995] FCA 1305; (1995) 57 FCR 309 at 319; [1995] FCA 1305; 130 ALR 48 at 57.

[59] See *Chavez v INS* [1984] USCA9 84; (1984) 723 F 2d 1431; *Zepeda-Melendez v INS* [1984] USCA9 1455; (1984) 741 F 2d 285; *Sanchez-Trujillo v INS* [1986] USCA9 2002; (1986) 801 F 2d 1571; *Gomez v INS* [1991] USCA2 1119; (1991) 947 F 2d 660.

[60] Regulation 2A.5 of the Migration (1993) Regulations (Cth) ("the Regulations").

[61] Much of the Act and Regulations have been repealed subsequent to the current proceedings being initiated. My discussion is limited to the Act and Regulations as they applied at the relevant time.

[62] Referred to as a Domestic Protection (Temporary) Visa and a Domestic Protection (Temporary) Entry Permit.

[63] *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401; 111 ALR 417.

[64] *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 265; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* [1983] HCA 21; (1983) 158 CLR 1 at 93, 177. Pearce and Geddes have recently questioned whether "[a] statute [which] provide[s] that an international agreement, or part thereof, shall have the force of law in Australia" should, where relevant, be interpreted by reference to Arts 31 and 32 of the Vienna Convention as opposed to ss 15AA and 15AB of the *Acts Interpretation Act* 1901 (Cth). Whatever be the merits of their contention, it is not relevant to this case having regard to the definition of "refugee" in s 4(1) of the Act and the fact that the Convention is not annexed to the Act. See further Pearce and Geddes, *Statutory Interpretation in Australia*, 4th ed (1996) at 45-47.

[65] *Koowarta* [1982] HCA 27; (1982) 153 CLR 168 at 265 per Brennan J.

[66] "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 221.

[67] "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 221.

[68] Described by the International Law Commission as a principle both of "common sense and good faith": "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 221.

[69] O'Connell, *International Law*, 2nd ed (1970), vol 1 at 253.

[70] Brownlie, *Principles of Public International Law*, 4th ed (1990) at 628; Ris, "Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties", (1991) 14(1) *Boston College International & Comparative Law Review* 111.

[71] Shearer, *Starke's International Law*, 11th ed (1994) at 435-436.

[72] *Koowarta* [1982] HCA 27; (1982) 153 CLR 168 at 265-266; *Thiel v Commissioner of Taxation* (1988) 21 FCR 122 at 160; 85 ALR 80 at 119-120; *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 413; *SS Pharmaceutical v Qantas* [1991] 1 Lloyd's Rep 288 at 295-299.

[73] (1975) 1 EHRR 524.

[74] *Golder* (1975) 1 EHRR 524 at 544.

[75] *Golder* (1975) 1 EHRR 524 at 544.

[76] *Golder* (1975) 1 EHRR 524 at 547.

[77] [1983] HCA 21; (1983) 158 CLR 1 at 177.

[78] Brownlie, *Principles of Public International Law*, 4th ed (1990) at 628.

[79] Art 27.

[80] "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 219-220.

[81] Shearer, *Starke's International Law*, 11th ed (1994) at 435-436.

[82] "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 220.

[83] The International Law Commission also noted that the affording of primacy to textual interpretation in a generally holistic paradigm was, at least in 1966, the opinion of a majority of jurists: "Reports of the Commission to the General Assembly", [1966] 2 *Yearbook of the International Law Commission* 169 at 218.

[84] *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* [1980] HCA 51; (1980) 147 CLR 142 at 159 per Mason and Wilson JJ; *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 412-413 per Gaudron J; *Buchanan & Co v Babco Ltd* [1978] AC 141 at 152.

[85] See Bennion, *Statutory Interpretation*, 2nd ed (1992) at 461.

[86] *Buchanan* [1978] AC 141 at 154.

[87] *Yang v Carroll* (1994) 852 F Supp 460 at 467.

[88] cf *Korematsu v US* [1945] USSC 43; (1944) 323 US 214. But the sanction must be appropriately designed to achieve some legitimate end of government policy. Thus, while detention might be justified as long as the safety of the country was in danger, lesser forms of treatment directed to members of that race during the period of hostilities might nevertheless constitute persecution. Denial of access to food, clothing and medical supplies, for example, would constitute persecution in most cases. It need hardly be said that a law or its purported enforcement will be persecutory if its real object is not the protection of the State but the oppression of the members of a race, religion, nationality or particular social group or the holders of particular political opinions.

[89] cf *Shapiro v Thompson* [1969] USSC 85; (1969) 394 US 618 at 634; *City of Cleburne v Cleburne Living Center Inc* [1985] USSC 191; (1985) 473 US 432 at 440.

[90] *Thiel v Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338 at 356-357.

[91] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 923-926.

[92] Hathaway, *The Law of Refugee Status*, (1991) at 159.

[93] Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 45.

[94] See further *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 26-29.

[95] *Sanchez-Trujillo v INS* [1986] USCA9 2002; (1986) 801 F 2d 1571; *De Valle v INS* [1990] USCA9 568; (1990) 901 F 2d 787; *Gomez v INS* [1991] USCA2 1119; (1991) 947 F 2d 660; *Saleh v US Department of Justice* [1992] USCA2 454; (1992) 962 F 2d 234.

[96] [1986] USCA9 2002; (1986) 801 F 2d 1571.

[97] *Sanchez-Trujillo* [1986] USCA9 2002; (1986) 801 F 2d 1571 at 1571.

[98] *Sanchez-Trujillo* [1986] USCA9 2002; (1986) 801 F 2d 1571 at 1576.

[99] See, for example, Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 921-923; Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 555-556; Godfrey, "Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees", (1994) *3 Journal of Law and Policy* 257 at 266-268.

[100] (1990) 67 DLR (4th) 1.

[101] *Canada (Attorney-General) v Ward* (1990) 67 DLR (4th) 1 at 19.

[102] *Ward* (1990) 67 DLR (4th) 1 at 18.

[103] *Ward* (1990) 67 DLR (4th) 1 at 19.

[104] *Ward* (1993) 103 DLR (4th) 1 at 25-29.

[105] *Matter of Acosta*, Board of Immigration Appeals (1985) Interim Decision 2986.

[106] *Alvarez-Flores v INS* [1990] USCA1 324; (1990) 909 F 2d 1.

[107] *De Valle* [1990] USCA9 568; (1990) 901 F 2d 787.

[108] *Gomez* [1991] USCA2 1119; (1991) 947 F 2d 660.

[109] *Sanchez-Trujillo* [1986] USCA9 2002; (1986) 801 F 2d 1571.

[110] *Rodriguez v INS* No 91-70226, 1992 WL 116029 (9th Cir 29 May 1992) cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 542, n 222.

[111] *Saleh* [1992] USCA2 454; (1992) 962 F 2d 234 at 240.

[112] *Estrada-Posadas v INS* [1991] USCA9 337; (1991) 924 F 2d 916.

[113] *Si v Slattery* (1994) 864 F Supp 397.

[114] *Bastanipour v INS* [1992] USCA7 1280; (1992) 980 F 2d 1129.

[115] (1994) 852 F Supp 460 at 470.

[116] *Ananeh-Firempong v INS* [1985] USCA1 256; (1985) 766 F 2d 621.

[117] *Fatin v INS* [1993] USCA3 1406; (1993) 12 F 3d 1233. In that case, however, the Court held that there was no "persecution".

[118] *Ward* (1993) 103 DLR (4th) 1.

[119] *Astudillo v Minister of Employment and Immigration* (1979) 31 National Reporter 121 cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 535, n179.

[120] *Canada (Minister of Employment and Immigration) v Mayers* [1993] 1 FC 154. The Canadian Court of Appeal upheld a finding that a Trinidadian woman who had been abused by her husband for many years was a refugee because she was a member of a particular social group. The decision must surely be wrong even if the definition of refugee is given a very liberal interpretation. It is difficult to see how the designated group was a particular social group for Convention purposes. However, it seems to have been common ground between the parties that the relevant group was "Trinidadian women subject to wife abuse". Nevertheless, it does not follow that the applicant was abused because of her *membership* of that group.

[121] (1993) 102 DLR (4th) 214; [1993] 2 FC 314.

[122] [1993] 3 FC 675 at 692-693.

[123] Art 1A(2) of the Convention.

[124] *Secretary of State for the Home Department v Savchenkov* [1995] EWCA Civ 47; [1996] Imm AR 28 (Court of Appeal (Civil Division)).

[125] *Chan* [1993] 3 FC 675 at 692-693.

[126] *Hernandez-Ortiz v INS* [1985] USCA9 2060; (1985) 777 F 2d 509 at 517.

[127] Statement of Mr Petren, UN Doc A/CONF 2/SR3 at 14.

[128] Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 46.

[129] [1992] USCA7 1280; (1992) 980 F 2d 1129 at 1132.

[130] [1986] USCA9 2002; (1986) 801 F 2d 1571.

[131] *Morato* [1992] FCA 637; (1992) 39 FCR 401.

[132] Sections 14 and 17 were repealed by s 7 of the *Migration Reform Act* 1992 (Cth) ("the 1992 Act"), but with effect from 1 September 1994 by reason of the amendment to s 2(3) of the 1992 Act by s 5 of the *Migration Laws Amendment Act* 1993 (Cth) ("the 1993 Act").

[133] Sections 54A-54H were repealed by s 12 of the 1992 Act but, by reason of s 5 of the 1993 Act, with effect from 1 September 1994.

[134] *Nolan v Minister for Immigration and Ethnic Affairs* [1988] HCA 45; (1988) 165 CLR 178. It is unnecessary to consider whether these provisions also may be supported as laws with respect to immigration (s 51(xxvii)) or external affairs (s 51(xxix)).

[135] Sections 22AA-22AD were repealed by s 9 of the 1992 Act with effect, by reason of s 5 of the 1993 Act, from 1 September 1994.

[136] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 274.

[137] The Regulations were repealed by Statutory Rules 1994 No 261.

[138] The RRT was established by s 31 of the 1992 Act.

[139] [1995] FCA 1305; (1995) 57 FCR 309.

[140] [1994] FCA 1534; (1994) 127 ALR 383.

[141] The text appears in *Australia. Treaty Series, 1954*, No 5.

[142] Weis, "Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees", (1953) 30 *The British Year Book of International Law* 478.

[143] The text of the Protocol appears in *Australia. Treaty Series, 1973*, No 37.

[144] Sadruddin Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons", (1976) 149 *Recueil des Cours*, Pt 1, 287 at 316-317.

[145] [1993] USSC 89; (1993) 125 L Ed 2d 128, criticised by Jones, *Note*, (1994) 88 *American Journal of International Law* 114.

[146] [1996] UKHL 8; [1996] AC 742.

[147] See Krenz, "The Refugee as a Subject of International Law", (1966) 15 *International and Comparative Law Quarterly* 90 at 106. See also Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 510; and *Sale v Haitian Centers Council* [1993] USSC 89; (1993) 125 L Ed 2d 128 at 152-155. The contrary view, that the obligations contained in the Convention arise whenever a State acts, with no exceptions for State conduct that occurs outside the territory or territorial waters of the State, had been put to the Supreme Court in *Sale* in the Amicus Brief filed by the United Nations High Commissioner for Refugees. This is reproduced at (1994) 6 *International Journal of Refugee Law* 84.

[148] *T v Home Secretary [1996] UKHL 8;* [1996] AC 742 at 754.

[149] *Robtelmes v Brenan* [1906] HCA 58; (1906) 4 CLR 395 at 413.

[150] Article 31.1 states:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Article 33.1 provides:

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

[151] In their dissenting judgment in *Nguyen Tuan Cuong v Director of Immigration [1996] UKPC 43;* [1997] 1 WLR 68 at 79. Those comprising the majority of the Board (Lord Mustill, Lord Cooke of Thorndon and Sir John May) did not find it necessary to deal with the text of the Convention.

[152] Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia", (1994) 15 *The Australian Year Book of International Law* 35 at 54-55.

[153] See, respectively, s 243 of the *Immigration and Nationality Act of 1952* (8 USCS SS1253); *Asylum and Immigration Appeals Act* 1993 (UK); s 2(1) of the *Immigration Act* (RSC), 1985, c I-2; and s 35 of the *Immigration Act* 1987 (NZ) and the executive arrangements described in *Khalon v Attorney-General* [1996] 1 NZLR 458 at 460-462.

[154] cf *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at 287-288, 298-299; *Minister for Foreign Affairs v Magno* [1992] FCA 566; (1992) 37 FCR 298 at 303-305.

[155] cf *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 406-407.

[156] As in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

[157] *Australia. Treaty Series, 1954*, No 5 at 4.

[158] Graves, "From Definition to Exploration: Social Groups and Political Asylum Eligibility", (1989) 26 *San Diego Law Review* 739 at 770, 789-790, a paper referred to in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 at 730; (1993) 103 DLR (4th) 1 at 27.

[159] cf *Roth v United States* [1957] USSC 100; (1957) 354 US 476 at 489-492; *Jacobellis v Ohio* [1964] USSC 164; (1964) 378 US 184 at 197.

[160] cf *Liversidge v Sir John Anderson* *[1941] UKHL 1;* [1942] AC 206 at 244-245.

[161] These rules of interpretation are applicable both under customary international law and as it is now stated in the Vienna Convention on the Law of Treaties: see *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338 at 348-350, 356-357.

[162] Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 348.

[163] The decrees of the Soviet Government affected some 2 million people: Williams, "Denationalization", (1927) 8 *The British Year Book of International Law* 45 at 46. The National Socialist laws which withdrew nationality on racial and political grounds are described by Holborn, "The Legal Status of Political Refugees, 1920-1938", (1938) 32 *American Journal of International Law* 680 at 690-692; and see *Oppenheimer v Cattermole* [1976] AC 249 and Mann, "The Present Validity of Nazi Nationality Laws", (1973) 89 *Law Quarterly Review* 194.

[164] The text of which appears respectively in *League of Nations - Treaty Series*, vol 89 at 47, 53. These "Arrangements" were anomalous instruments; although in treaty form they did not contain categorical stipulations, but merely recommendations that a particular course of conduct be followed: Jennings, "Some International Law Aspects of the Refugee Question", (1939) 20 *The British Year Book of International Law* 98 at 99.

[165] The definition in corresponding terms was accepted in respect of Armenians who had been subjects of the Ottoman Empire.

[166] The text appears in *League of Nations - Treaty Series*, vol 192 at 59.

[167] *Australia. Treaty Series, 1948*, No 16 signed by Australia 13 May 1947 with effect from 20 August 1948.

[168] Annex 1, Pt 1, s C(1)(a)(i); see Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 375.

[169] Borne out by perusal of the *Summary Record of the Third Meeting of Plenipotentiaries* held at Geneva on 3 July 1951 (United Nations Document A/CONF.2/SR.3, 19 November 1951).

[170] See Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 40-44. Professor Fullerton notes that the delegations appeared far more concerned with restricting the geographical and time limits for the definition of refugee than with discussing the categories of persecution: "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 509-510. These restrictions later were removed by the Protocol.

[171] [1986] USCA9 2002; (1986) 801 F 2d 1571.

[172] [1986] USCA9 2002; (1986) 801 F 2d 1571 at 1576.

[173] *The Oxford English Dictionary*, 2nd ed (1989), vol 4 at 444.

[174] [1991] USCA2 1119; (1991) 947 F 2d 660 at 664.

[175] See also *Saleh v US Department of Justice* [1992] USCA2 454; (1992) 962 F 2d 234 at 240; *Bastanipour v Immigration and Naturalization Service* [1992] USCA7 1280; (1992) 980 F 2d 1129 at 1132.

[176] (1994) 852 F Supp 460.

[177] (1994) 852 F Supp 460 at 470.

[178] (1994) 852 F Supp 460 at 471. cf *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; (1988) 165 CLR 30 at 45-46, 52-53.

[179] [1993] 2 SCR 689; (1993) 103 DLR (4th) 1.

[180] 1989 CanLII 2 (SCC); [1989] 1 SCR 143; (1989) 56 DLR (4th) 1.

[181] Namely, "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[182] [1993] 2 SCR 689 at 739; (1993) 103 DLR (4th) 1 at 33-34.

[183] [1993] 2 SCR 689 at 739; (1993) 103 DLR (4th) 1 at 34.

[184] [1995] 3 SCR 593; (1995) 128 DLR (4th) 213. The Supreme Court decision postdates that of the Full Court in the present case.

[185] [1995] 3 SCR 593 at 642-643; (1995) 128 DLR (4th) 213 at 246-247.

[186] [1995] 3 SCR 593 at 645-646; (1995) 128 DLR (4th) 213 at 249.

[187] *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379.

[188] *The Oxford English Dictionary*, 2nd ed (1989), vol 11 at 592.

[189] [1995] FCA 1333; (1995) 57 FCR 565 at 568. Judgment in *Ram* was delivered after that of the Full Court in this case.

[190] [1995] FCA 1333; (1995) 57 FCR 565 at 569.

[191] Macklin, "*Canada (Attorney-General) v Ward*: A Review Essay", (1994) 6 *International Journal of Refugee Law* 362 at 377; see also Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 359-360.

[192] *Chan v Canada (Minister of Employment and Immigration)* [1993] 3 FC 675 at 693.

[193] *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593; (1995) 128 DLR (4th) 213.

[194] [1993] 3 FC 675 at 692-693. See also the remarks of French J in *Jahazi v Minister for Immigration* (1995) 61 FCR 293 at 299-300 and the decision of the English Court of Appeal in *Secretary of State for the Home Department v Savchenkov* [1995] EWCA Civ 47; [1996] Imm AR 28.

[195] [1995] FCA 1305; (1995) 57 FCR 309 at 324-325.

[196] Convention Relating to the Status of Refugees signed at Geneva, 28 July 1951; *Australia Treaty Series* (1954), No 5.

[197] Signed at New York, 31 January 1967; *Australia Treaty Series* (1973), No 37.

[198] Australia was one of the original signatories.

[199] *Migration Act* 1958 (Cth), s 4(1) (definition of "refugee") and Part 2 Div 1AA ("Refugees"). References are to the provisions of the Act as they applied at the time the current proceedings commenced.

[200] See analysis by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 423-431.

[201] Unreported, 20 May 1994.

[202] Domestic Protection (Temporary) Visa (Before Entry) and Domestic Protection (Temporary) Entry Permit (Before Entry); see *Migration Act* 1958 (Cth), ss 23 and 33; Migration (1993) Regulations (Cth), regs 2.1, 2.2.

[203] Pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 16.

[204] *Minister for Immigration and Ethnic Affairs v Respondent A* [1994] FCA 1534; (1994) 127 ALR 383.

[205] *Minister for Immigration and Ethnic Affairs v Respondent A* [1995] FCA 1305; (1995) 57 FCR 309.

[206] cf *Ram v Minister for Immigration and Ethnic Affairs* [1995] FCA 1333; (1995) 57 FCR 565 at 569, where Burchett J noted that it may have been open to the applicant to relocate his residence out of the Punjab, a point of distinction from this case.

[207] *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 389, 427-431.

[208] cf *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214 at 221.

[209] *Chan v Canada (Minister of Employment and Immigration)* [1993] 3 FC 675 at 686.

[210] See *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 392, 424-426; *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401 at 414.

[211] *Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* [1993] FCA 493; (1993) 45 FCR 418; *Kashayev v Minister for Immigration and Ethnic Affairs* [1994] FCA 1111; (1994) 122 ALR 503. See also *Lo, Fu Shuang v Minister for Immigration and Ethnic Affairs* (1995) 134 ALR 73.

[212] *Sanchez-Trujillo v Immigration and Naturalization Service* [1986] USCA9 2002; (1986) 801 F 2d 1571; *Matter of Acosta*, Interim Decision 2986, Department of Justice, Board of Immigration Appeals, 1 March 1985; see Parish, "Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee", (1992) 92 *Columbia Law Review* 923 at 940-944.

[213] *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214; *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1.

[214] [1989] HCA 62; (1989) 169 CLR 379 at 423-431.

[215] [1994] FCA 1534; (1994) 127 ALR 383 at 404-405, 406.

[216] (1993) 102 DLR (4th) 214 at 220.

[217] [1995] FCA 1119; (1995) 128 ALR 705.

[218] [1995] FCA 1333; (1995) 57 FCR 565.

[219] [1995] FCA 1305; (1995) 57 FCR 309 at 325.

[220] [1992] FCA 637; (1992) 39 FCR 401.

[221] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 915.

[222] *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 407.

[223] *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379; *Ram v Minister for Immigration and Ethnic Affairs* [1995] FCA 1333; (1995) 57 FCR 565 at 566.

[224] cf *Reg v Home-Secretary; Ex parte Sivakumaran [1987] UKHL 1;* [1988] AC 958; *Immigration and Naturalization Service v Cardoza-Fonseca* [1987] USSC 32; (1987) 480 US 421.

[225] Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 51 citing Powell J in *Blue Chip Stamps v Manor Drug Stores* [1975] USSC 155; (1975) 421 US 723 at 756.

[226] *Ram v Minister for Immigration and Ethnic Affairs* [1995] FCA 1333; (1995) 57 FCR 565 at 568.

[227] *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401 at 416.

[228] Hathaway, *The Law of Refugee Status*, (1991) at 43.

[229] *Acts Interpretation Act* 1901 (Cth), s 15AB(2)(d) read with the Vienna Convention on the Law of Treaties.

[230] Vienna Convention on the Law of Treaties, adopted 22 May 1969 - UN doc A/Conf 39/27.

[231] eg *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338 at 356.

[232] eg *Fothergill v Monarch Airlines Ltd [1980] UKHL 6;* [1981] AC 251 at 281-282, 293.

[233] See discussion in *Matter of Acosta,* Interim Decision 2986, Department of Justice, Board of Immigration Appeals, 1 March 1985; cf *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* [1982] HCA 2; (1982) 148 CLR 88 at 94.

[234] Helton "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 49-50.

[235] Hathaway, *The Law of Refugee Status* (1991) at 159-160.

[236] See for example *Matter of Acosta,* Interim Decision 2986, Department of Justice, Board of Immigration Appeals, 1 March 1985 at 37-39; *Sanchez-Trujillo v Immigration and Naturalization Service* [1986] USCA9 2002; (1986) 801 F 2d 1571 at 1576.

[237] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 26-29.

[238] cf *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 133 ALR 437 at 443.

[239] *Ram v Minister for Immigration and Ethnic Affairs* [1995] FCA 1333; (1995) 57 FCR 565 at 569.

[240] *Ram v Minister for Immigration and Ethnic Affairs* [1995] FCA 1333; (1995) 57 FCR 565 at 567.

[241] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 29.

[242] esp Arts 3, 5 and 16.

[243] esp Arts 7, 23.

[244] Brown, *Who will Feed China*? *Wake up Call for a Small Planet* (1995) Ch 2; United States of America, Bureau of the Census, *World Population by Country and Region 1950-1990*, (1993), fig 2-4.

[245] (1993) 102 DLR (4th) 214.

[246] The Swedish delegate, Mr Petren, doubted that the International Court of Justice would look at the history. See "United Nations, General Assembly, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons", *Record*, 26 November 1951; UN doc A/Conf 2/SR 19, 13-15.

[247] Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39.

[248] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 924. See also Kahn, "Legal Problems Relating to Refugees and Displaced Persons", (1976) 149 *Recueil des Cours* 287. See also discussion in *Canada (Attorney-General) v Ward* (1993) 103 DLR 1 at 27.

[249] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 924 referring to the Convention, Art 1 par B(2).

[250] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 925-926.

[251] A/Conf. 2/SR.23 at 8.

[252] Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 509.

[253] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 926.

[254] Compton, "Asylum for Persecuted Social Groups", (1987) 62 *Washington Law Review* 913 at 926.

[255] *Sanchez-Trujillo v Immigration and Nationalization Service* [1986] USCA9 2002; (1986) 801 F 2d 1571 at 1575-1578.

[256] Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 525 fn 125.

[257] *Matter of Acosta*, Interim Decision 2986, Department of Justice, Board of Immigration Appeals, 1 March 1985 cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 545.

[258] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 922; cf Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 48-50.

[259] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 926.

[260] UN Doc HCR/PRO/4 (1979).

[261] *Sanchez-Trujillo v Immigration and Naturalization Service* [1986] USCA9 2002; (1986) 801 F 2d 1571 at 1576.

[262] *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 392.

[263] *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401 at 414.

[264] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 929.

[265] Grahl-Madsen, *The Status of Refugees in International Law* (1966) at 219; Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 515.

[266] Judgment of the Saarland Administrative Court of 10 December 1982, No 10 K 115/80, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 532.

[267] CRDD T89-02579, 8 December 1989, Federal Court of Appeal of Canada, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 539.

[268] Judgment of the Gelsenkirchen Administrative Court, 29 March 1995, No 17 K 10.343/83, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 531-532.

[269] *The Minister of Employment and Immigration v Marcel Mayers*, A-544-92, 5 November 1992, Federal Court of Appeal of Canada, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 537 but criticised at 539; Godfrey, "Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees", (1994) 3 *Journal of Law and Policy* 257.

[270] eg Judgment of the Wiesbaden Administrative Court, 26 April 1983, No IV/I E O6244/81, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 534 (Iran); *Re GJ*, Refugee Status Appeals Authority (New Zealand), Refugee Appeal No 1312/93, 30 August 1995.

[271] Hathaway, *The Law of Refugee Status* (1991) at 166.

[272] *Re Incirciyan*, United States Immigration Appeal Board decision, M87-1541X, 10 August 1987, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 520.

[273] IRB Decision M89-01213, June 1989, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 539.

[274] CRDD T89-03954, 16 March 1990, Federal Court of Appeal of Canada, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 539.

[275] Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 50.

[276] Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 526-527.

[277] Helton, "Persecution on Account of Membership in a Social Group As a Basis for Refugee Status", (1983) 15 *Columbia Human Rights Law Review* 39 at 50.

[278] CRDD T89-03344, 5 February 1990 (Federal Court of Appeal of Canada), cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 539.

[279] *Grundul v Bryner & Co, GMBH and Richteramt III Bern* 24 ILR 483, Switzerland, Federal Court, 27 March 1957, cited in Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 928.

[280] Ansbach Administrative Court, No AN1269-XII/79, 4 January 1985, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 532.

[281] Hathaway, *The Law of Refugee Status* (1991) at 168; Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 522.

[282] Hanover Administrative Court, No 1 OVGA 91/82, 6 June 1984, cited in Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 533-534.

[283] *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1.

[284] *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401.

[285] *Ram v Minister for Immigration and Ethnic Affairs* [1995] FCA 1305; (1995) 57 FCR 309.

[286] *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 133 ALR 437.

[287] *Quijano v Secretary of State for the Home Department*, unreported, Court of Appeal (England), 18 December 1996.

[288] [1986] USCA9 2002; (1986) 801 F 2d 1571.

[289] Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar", (1987) 62 *Washington Law Review* 913 at 921.

[290] (1992) 97 DLR (4th) 729.

[291] (1992) 97 DLR (4th) 729 at 737.

[292] (1993) 103 DLR (4th) 1 at 33.

[293] (1993) 103 DLR (4th) 1 at 33.

[294] (1993) 103 DLR (4th) 1 at 33-34.

[295] *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401.

[296] Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 539.

[297] Graves, "From Definition to Exploration - Social Groups and Political Asylum Eligibility", (1989) 26 *San Diego Law Review* 739.

[298] Graves, "From Definition to Exploration - Social Groups and Political Asylum Eligibility", (1989) 26 *San Diego Law Review* 739 at 789-792.

[299] Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 533.

[300] Graves, "From Definition to Exploration - Social Groups and Political Asylum Eligibility", (1989) 26 *San Diego Law Review* 739 at 789; see also Fullerton "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group", (1993) 26 *Cornell International Law Journal* 505 at 530.

[301] cf *Chan v Canada (Minister of Employment and Immigration)* (1995) 128 DLR (4th) 213 at 219; *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214 at 221.