FEDERAL COURT OF AUSTRALIA

C and S v Minister for Immigration & Multicultural Affairs [1999] FCA 1430

ADMINISTRATIVE LAW – Immigration - Protection visa – Refugee claims by members of Colombian family – Husband's fear of persecution on account of his exposure of criminal activities involving public officials and police – Whether this fear is capable of being regarded as referable to "political opinion" – Failure of Tribunal member to deal with issue – Claimed fear by wife and husband's mother on account of their relationship to husband – Whether this fear is capable of being regarded as arising out of membership of a "particular social group" – Whether a family may constitute a "particular social group" – Failure of Tribunal to consider whether persecution arose out of membership of husband's family.

***Migration Act* 1958, s430(1)(b)**

C and S v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

N556 of 1999

WILCOX J

20 OCTOBER 1999

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N556 of 1999

BETWEEN:	C First Applicant S Second Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	WILCOX J
DATE OF ORDER:	20 OCTOBER 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The decisions of the Refugee Review Tribunal in respect of applications N97/19814 and N98/24283 be set aside and both applications be remitted to the Tribunal for redetermination.

2. The Minister for Immigration and Multicultural Affairs pay the costs of the applicants, C and S, in respect of this proceeding.

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

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BETWEEN:	C First Applicant S Second Applicant
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JUDGE:	WILCOX J
DATE:	20 OCTOBER 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 **WILCOX J:** This is an application for review, under Part 8 of the *Migration Act* 1958, of a decision of the Refugee Review Tribunal refusing applications for protection visas. The application raises once again the questions whether persecution on account of resistance to criminal activities may be said to be persecution "for reasons of … political opinion," and whether a family may be a "particular social group", in each case within the meaning of Article 1A(2) of the *Convention relating to the Status of Refugees*, as amended by the 1967 Protocol.

The facts

2 The applications for protection visas were made on behalf of the two applicants, husband and wife, whom I have permitted to be identified only as

"C" and "S", their two children and C's mother. The applicants are citizens of Colombia. At material times they lived in Cali. From December 1994, C was employed as a waiter in a nightclub owned by a person whom he identified to the Tribunal by name and described as a mafia leader involved in illicit drugs. C witnessed parties at the nightclub attended by mafia leaders and heard conversations between those people and government officials, including police, about such matters as the transportation of drugs and the provision of financial support for the political campaigns of particular people. On 25 December 1995, police raided the nightclub, arrested a number of patrons and seized a quantity of money and guns. Following the raid, C's employer took three employees (including C) aside and told them he believed the police raid was the result of an informant. He took one of the employees out of the club and shot him. When he returned to the club, the employer warned C and the remaining employee to keep their mouths shut or they would be killed.

3 Following this incident, C resigned his employment. In January 1996 he obtained employment in another nightclub in the same city. At that nightclub, he again observed illegal activities involving local politicians, political candidates and officials. He also observed sexual activities between adult men and young girls. He confronted one of the men and threatened to report him to the authorities, to which the man replied he was the authority and showed a police badge. C then learned this nightclub, also, was controlled by his former employer, although he was not the registered owner.

4 During March and April 1996, C made a number of anonymous telephone calls to police in which he reported activities at the nightclub, identifying those involved. One of these people was the local mayor.

5 In April C received several anonymous threatening telephone calls. He was told to "watch out and be careful what you do". C's mother also received a telephone call threatening him. Shortly thereafter, he was assaulted whilst on his way home from work. Four men in a vehicle tried to kidnap him. He resisted. A struggle ensued. The men called him a "sapo", a colloquial term for an informant. A dance was being held nearby and people came to see what was going on. The assailants fled. C recognised one of them as the police officer he had earlier confronted.

6 Soon after the assault, C left Colombia. He travelled to various countries before reaching Israel, where he stayed for 11 months. C came to Australia in March 1997. In May 1997 he applied for a protection visa but the application was refused by a delegate of the Minister for Immigration and Multicultural Affairs, the respondent to this application. By application N97/19814, C sought review of that decision.

7 After C left Colombia, S moved with her children and mother in law to Ginebra. She obtained employment as a housekeeper but, after a few months, learned her employer was an associate of "people from the Cali cartel", as the Tribunal member put it, politicians and policemen. When she heard this, with her children and mother in law, S returned to her former home in Cali. However, she learned that one of her sisters, who lived in the house,

had received anonymous telephone calls in which the caller had asked about the whereabouts of C and S. So, again with her children and mother in law, C went to live with another sister in Minas. They remained there in peace for some time but, in April 1997, the house in which they were living had to be evacuated because of a danger of collapse. The family was evacuated to La Pradera en Decepaz.

8 While she was living in La Pradera, S received a threatening letter containing a sketch of a hanged man. Twice she was visited by an unknown man who asked about her husband's whereabouts. On the second occasion, the man said to her "he has to turn up. If he does not, other things will need to be done." Shortly after this incident, in April 1998, the sister with whom the wife shared the house was raped and murdered. S told the Tribunal that she and her sister looked alike and she believed the sister was killed by mistake for her. At around the time of the sister's funeral, one of her brothers found a note that said "We are sorry we got mixed up. Next time we will not fail."

9 Shortly after the sister's murder, S joined C in Australia, with the children and her mother in law. Applications were made for protection visas. These were refused by a delegate of the Minister. Review was sought (application N98/24283).

The Tribunal's decision

10 The applications for review were considered together. A member of the Tribunal heard evidence from C, S and C's mother. She accepted what they said. The Tribunal member also obtained independent information about the situation in Colombia, in the form of a 1997 report prepared by the United States Department of State and an article published in "The Economist" in August 1998. The Tribunal member commented it was clear from these sources "that notwithstanding the efforts of the Colombian authorities to take action against the drug trade and those involved in it, the crime and corruption that narcotics inevitably leads to seriously contaminates all levels of Colombian society". In setting out her findings and reasons, the Tribunal member said:

"On the face of it the applicants' account of their experiences in Colombia appears plausible. There is nothing about the applicants' account or my understanding of conditions in Colombia which would lead me to conclude that their account is unreliable.

I accept the applicants' account of their experiences in Colombia including that the applicant husband made a series of anonymous telephone calls to the police revealing information about illegal activities which he had observed whilst working in the nightclubs; that a co-worker was killed; that the applicant husband received threatening telephone calls and was assaulted; that the applicant wife's sister was killed in the circumstances which have been described; a number of threatening telephone calls seeking information about the applicant husband's whereabouts were

received by members of his family and that a written threat addressed to the applicant wife was received.

I also accept that the harm the applicant husband has suffered in the past was because he learned about and witnessed illegal activities and he informed the police about those matters.”

11 The Tribunal member turned to C’s claim that the persecution he feared was owing to political opinion, because he had learned about illegal activities engaged in by the mafia, police and politicians. She acknowledged “that ‘persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion’ should not be viewed narrowly and that monetary or criminal motives or civil conflict do not preclude an applicant also being targeted for a Convention reason”. She said the question was “whether there is a purpose behind the harm feared which is referable to a Convention ground”. The Tribunal member added:

“Indiscriminate criminal acts by guerillas or terrorists may be defined by them as political acts, however, the Refugee Convention is concerned with a persecutor’s perception of his or her victim, not the perception of his/her own act. In Ram v Minister for Immigration and Ethnic Affairs (1995)57 FCR 565 at 568, Burchett J said that people are persecuted for something perceived about them or attributed to them by their persecutors. The reason for the persecution must be found in the singling out of one or more of five attributes.

In Ram’s case, Burchett J emphasised that if harmful acts are done purely on an individual basis, because of what the individual has done or may do or possesses, the application of the Convention is not attracted, so far as it depends upon ‘membership of a particular social group’. Rather, the membership of the social group must provide the reason for the persecution.”

12 The Tribunal member then set out reasoning critical to her determination of C’s claim:

“Apart from the applicant’s suggestion that his conduct in giving information to the police could be seen as an expression of political opinion contrary to those held by the Mafia, the overwhelming evidence is to the effect that the harm he fears arises out of a perception by the agents of harm of his conduct in informing on their illegal activities to the police. His fear of harm arises from circumstances personal to him and are unrelated to any Convention ground.

Apart from the applicant’s conduct of informing on the Mafia to the police he does not claim, and his evidence does not suggest, that the Mafia displayed any interest whatsoever in him, or in his political opinions. The applicant does not claim, and his evidence does not suggest, that he encountered any difficulties before he began working at the nightclubs. In my view the harm the applicant fears arises out of his particular circumstances namely what he is believed to know, or what he has exposed or what he may expose in the future. It is essentially a harm directed at him as an individual for reasons which are personal to him. There is no suggestion in the

evidence that the applicant was being pursued for adherence to an opinion as such. There is nothing in the evidence to suggest that those who seek to harm the applicant have any interest whatsoever in his actual or imputed political opinion.

The fact that the applicant was aware of, and reported on, illegal activities engaged in by the police, officials and politicians does not assist his case. This does not demonstrate that the harm he fears is for a Convention reason and more particularly that the harm he fears is for reasons of political opinion. I find that the applicant husband is being targeted as an individual because of what he knows, what he has exposed and what he might expose, and not for the reasons of his actual or imputed political opinion."

13 The Tribunal member considered and rejected a possibility, not claimed by C himself, that his fear of persecution stemmed from his membership of a particular social group; namely police informants. The member thought there was no such group, within the meaning of the Convention. This conclusion is not challenged. The member concluded:

"I am not satisfied from the evidence before me that the harm the applicant has endured including threats, physical assault, the tragic deaths of two people (a co-worker and a relative) was owing to the applicant's political opinion or his membership of a particular social group. Having regard to all the circumstances, and without wishing to minimise the depth of the applicant's subjective fear, there is nothing in his own account which suggests that he has been in the past, or that there is a real chance in the future of his being, selected or targeted for harm owing to political opinion, membership of a particular social group or indeed any other Convention reason and I find accordingly.

There being no other Convention grounds which could be said to arise from the evidence before me I am not satisfied that the applicant's fear of harm is owing to a Convention reason. As this is an essential element of the Convention definition of a refugee, I am not satisfied that he is a refugee."

14 The claims of S and C's mother were considered on the basis that they needed to show their fear arose out of their membership of a particular social group, the claimed group being C's family. The Tribunal member commenced to deal with these claims by quoting a passage in the judgment of McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 265-266 and commented:

"It seems that historically, the families which the social group category covered were families of wider groups – the capitalist class, independent businessmen, and so on – which were persecuted because of an attribute which they shared with sections of a nation but which was not shared by the society as a whole.

An examination of cases dealing with the family as a particular social group supports the view that in many cases family membership will only be relevant for the purposes of the Convention where there is a link to a broader relevant group."

After referring to other decisions, the member said:

"Whether or not an applicant's family is a particular social group within a particular society will depend upon the circumstances and the available evidence."

15 After mentioning some other authorities, but without further analysing the evidence, the Tribunal member concluded:

"… there is no evidence before me to suggest that the applicant husband's family is a particular social group in Colombia. There is no unifying characteristic which sets them apart from the rest of society. There is nothing to suggest that they are a cognizable group in Colombia. I am not satisfied that the applicant husband's family constitutes a particular social group in Colombia.

The harm the applicant wife and mother fears is not owing to a Convention reason. I find that the harm the applicant wife and mother fear because of their relationship to the applicant husband does not fall within the scope of the Convention."

16 In the light of these conclusions, the Tribunal member dismissed the applications for review. It seems she did so with regret. The member commented:

"I am sympathetic to the applicants' situation. Their lives have been dramatically altered by circumstances over which they have had little control. I also accept that they have a strong subjective fear of harm in Colombia and that their fear is well-founded. However, I am not satisfied that their fear of harm is owing to a Convention reason. As this is an essential element of the Convention definition of a refugee, I am not satisfied that they are refugees.

In the light of the violence which has been perpetrated on those close to the applicant and the power of the agents of harm in a country such as Colombia in my view this is a case in which compelling humanitarian grounds are raised. However my role is limited to determining whether the applicants satisfy the criteria for the grant of protection visas. A consideration of their circumstances on other grounds is a matter solely within the Minister's discretion."

Submissions about "political opinion"

17 The case for C and S was argued before me by Mr L J Karp, solicitor. Mr Karp contended the Tribunal member fell into error in respect of both aspects of her findings. In relation to the issue of C's claimed persecution by reason of political opinion, he argued that the Tribunal failed to consider two things: "whether the applicant's actions or his knowledge could have imputed to him a political opinion contrary to that of his persecutors" and "the full ramifications of the term 'political opinion'". Mr Karp referred to *Attorney General of Canada v Ward* (1993) 103 DLR (4th) 1, a decision of the Supreme Court of Canada, and four decisions of this Court: *Saliba v Minister for Immigration and Ethnic Affairs* (1998) 159 ALR 247, *Ranwalage v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 349, *Minister for Immigration and Multicultural Affairs v Y* (unreported, Davies J, 15 May 1998)

and *Voitenko v Minister for Immigration and Multicultural Affairs* [1999] FCA 48. Mr Karp also relied on a statement in Hathaway *The Law of Refugee Status* (1991) at 154:

"Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion."

18 Mr Karp argued that it followed that "an attitude of resistance to systematic corruption can be a 'political opinion'"; it was not necessary this attitude be proclaimed; actions may be indicative of a political opinion. In his Outline of Submissions, Mr Karp said:

"In this case, the Tribunal accepted that the first applicant possessed knowledge harmful to corrupt police and politicians, and informed upon these people. This was in circumstances where the first applicant claimed that his country was controlled politically and socially by drug barons, where there was evidence of police and politicians, and his employer, being involved in organised crime where he had been the victim of threatening calls demanding his silence and where he was kidnapped and assaulted by police. Given these factors it was incumbent upon to [sic: the] Tribunal to address the issues of whether the applicant's knowledge and the actions that he took could have imputed a political opinion to him in the eyes of his persecutors. This it did not do, and the Tribunal therefore erred in law."

[References to the relevant documents are omitted.]

19 Mr Richard Lancaster, counsel for the Minister, contended the Tribunal did not fail to consider whether the persecution feared by C stemmed from an imputed political opinion. He referred to the three paragraphs of the member's reasoning quoted in para 12 above. Mr Lancaster said it was open to the Tribunal to find the harm feared by C "arises out of a perception by the agents of harm of his conduct in informing on their illegal activities". That being so, Mr Lancaster said, it was open to the Tribunal to conclude that C's fear of harm "arises from circumstances personal to him … unrelated to any Convention ground". Mr Lancaster also placed emphasis on the statement made in the middle paragraph: "There is nothing in the evidence to suggest that those who seek to harm the applicant have any interest whatsoever in his actual or imputed political opinion".

Conclusions about "political opinion"

20 The Tribunal was obviously entitled to find C's fear of persecution arose out of the reaction by the agents of harm to his informing activities; had he not informed about the illegal activities he witnessed, he would have been left alone. Unlike many cases that come before the Tribunal, there is here no suggestion of persecution because of support for a particular political party or leader. If that is what the Tribunal member meant by saying there is "nothing in the evidence to suggest that those who seek to harm the applicant have any

interest whatsoever in his actual or imputed political opinion", she was clearly correct.

21 However, the authorities establish that the term "political opinion" in Article 1A(2) of the Convention is not limited to membership of a particular political party or support for a particular party or leader. The statement by Professor Hathaway set out in para 17 above gives the term a much wider application; it extends to "any action which is perceived to be a challenge to governmental authority". In the opinion of the Supreme Court of Canada, even that statement is too narrow; the action may be a challenge to a group opposed to government. Speaking for the Supreme Court in *Ward* at 38-39, La Forest J said:

"Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground 'that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party; see Grahl-Madsen The Status of Refugees in International Law, 1966 at 220. The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen's definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some party having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill The Refugee in International Law, 1983 at 31, i.e. 'any opinion on any matter in which the machinery of state, government, and policy may be engaged', reflects more care in embracing situations of this kind."

La Forest J went on to note two refinements. The first of them was that "the political opinion at issue need not have been expressed outright"; the person's beliefs may be perceived from his or her actions.

22 Decisions of this Court have followed *Ward*: see *Saliba* at 254-255 (Sackville J) and *Ranwalage* at 353 (Heerey J). Although he did not there refer to *Ward,* in *Y* Davies J upheld an approach by the Tribunal that reflected the principles enunciated in that case. Y and others claimed a fear of persecution in Brazil arising out of Y's activities with a friend in investigating and reporting an assault by police. The authorities to whom he made the report took no action. Y and the friend were abducted and tortured. The friend was later killed. Y moved to a different city where he received threatening telephone calls. His wife was abducted and raped and his daughter was threatened.

23 Davies J held that it was open to the Tribunal to hold that Y's fear of persecution was by reason of his political opinion. At 4-5 he said:

"In the context of Refugees' Convention, an opinion could be thought to be a political opinion if it were such as to indicate that its holder, the claimant for refugee status,

held views which were contrary to the interests of the State, including the authorities of the State. A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government, or which are antithetic to the Government and the instruments which enforce the power of the State, such as the Armed Forces, Security Forces and Police Forces or which express opposition to matters such as the structure of the State or the territory occupied by it and like matters."

24 The correctness of *Y* was debated before the Full Court in *Voitenko*. All three members of the Court approved the decision. At paras 16-18 I said:

"As I understand Davies J, as a matter of law it is enough that a person holds (or is believed to hold) views antithetic to instruments of government, and is persecuted for that reason. It is not necessary that the person be a member of a political party or other public organisation or that the person's opposition to the instruments of government be a matter of public knowledge. Of course, the higher the person's political profile, the easier it may be to persuade a tribunal of fact that the person has been persecuted on account of political opinion, rather than for some other reason; but that is a matter going to proof of the facts, not a matter of law.

The other relevant point about Y is that it contains no suggestion of a dichotomy between criminal activity and persecution on account of political opinion. The abduction and torture of Y and his friend, and the abduction and rape of Y's wife, were undoubtedly serious criminal acts, but nobody suggested this prevented them being categorised as persecution on account of political opinion.

I reject the submission that an attitude of resistance to systemic corruption of, and criminality by, government officers **cannot** fall within the description 'political opinion'. Whether particular resistance amounts to an attitude having a political dimension, or whether it is simply a product of other causes such as fear of detection, is, of course, a question of fact for determination in the particular case." [Original emphasis]

Hill J said at paras 32-33:

"The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion. Whether that is the case in Russia is a matter for the Tribunal, not for this Court. …

It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary

democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in Minister for Immigration & Ethnic Affairs v Y … that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case."

Whitlam J dealt with the case on the more limited basis of the Tribunal's failure to make adequate findings about material questions of fact. However, at para 40 he referred without disagreement to the decision of Davies J in *Y.* He said the Tribunal would "do well to bear in mind that, for the purposes of the Convention definition, 'political opinion' may be shown by repeated conduct which is never (or rarely) converted into articulate political protest of the kind familiar to Australian society".

> 25 Judgment was given in *Voitenko* only one month before the Tribunal's decision in the present case. Perhaps that explains the Tribunal member's failure to refer to the decision in her reasons. It is more difficult to understand the omission of a reference to *Y*, which had been decided twelve months earlier and concerned a case with considerable factual similarity to the case of C. Of course, it is not essential for a Tribunal member to refer by name to any particular case; what is essential is that the member act in accordance with the principles enunciated in the relevant cases. However, the failure of the Tribunal member to cite any of *Saliba*, *Ranwalage* or *Y*, when she cited many less relevant authorities, leads naturally to the suspicion that she was unaware of those cases. That suspicion tends to support the belief that, in her reasons, the Tribunal member used the term "political opinion" to refer only to the type of political opinion commonly manifested in Australian society; that is, adherence to a political party or support for its policies. Had she been alive to the point that resistance to systemic corruption of, or criminality by, government officers might be regarded as a manifestation of political opinion, depending upon the circumstances, the Tribunal member would surely have gone on to consider whether C's conduct should be so characterised. It would have been an inadequate response for her to say, as she did, that C's fear "arises from circumstances personal to him … unrelated to any Convention ground". Of course, the fear arose from his own activities but whether those activities were related to a Convention ground was the matter requiring determination.
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> 26 If, contrary to my impression, the Tribunal member did understand that resistance to systemic corruption and illegality might be a manifestation of political opinion, she failed to indicate why C's activities did not answer that description. If that failure occurred, it was a contravention of s430(1)(b) of the

Act whereby the Tribunal is required to "prepare a written statement that … sets out the reasons for the decision".

27 In either event the decision of the Tribunal concerning C is attended by legal error. It must be set aside and the matter remitted to the Tribunal for redetermination.

Submissions about "particular social group"

28 Mr Karp did not challenge the Tribunal's statement that "[w]hether or not an applicant's family is a particular social group within a particular society will depend upon the circumstances and the available evidence". But he did challenge the statements that there was "no evidence … to suggest that the applicant husband's family is a particular social group in Colombia" and there is "nothing to suggest that they are a cognizable group in Colombia". He said it was not made clear why a family related by blood and living together is not cognisable.

29 Mr Lancaster contended that Mr Karp's submission overlooked the Tribunal's finding that the evidence did not establish the necessary unifying characteristic.

Conclusions about "particular social group"

30 The question whether a family may constitute a "particular social group", within the meaning of Article 1A(2) of the Convention, was considered by Hely J in *Sarrazola v Minister for Immigration and Multicultural Affairs* [1999] FCA 101, a decision recently affirmed by a Full Court: see [1999] FCA 1134. In that case the applicant claimed to fear persecution from Colombian underworld figures who asserted that her brother owed them $US40,000. After threats made to him, the brother was killed. Shortly afterwards, a stranger came to the applicant's house. He said he was from the group who had killed her brother and, as he was now dead, the applicant was responsible for his debt. The man demanded the applicant and her husband sell their house in order to pay the debt. He threatened to kill their children if they did not comply. The applicant and her husband decided to leave Colombia. Before they could raise the money to do so, they received a further demand and threat. The applicant eventually came with her family to Australia and sought a protection visa. The Tribunal upheld a refusal decision on the basis that the harm feared by the applicant was not for a Convention reason. Upon application for review of that decision, Hely J referred to several authorities including the following statement of a Full Court in *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 51 ALD 1 at 6-7:

"… to determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals;

persecution or a fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community."

31 Hely J then referred to conflicting views in the High Court in *Applicant A* as to whether the term "particular social group" was reserved for large agglomerations of people. He also mentioned that, in *Guo Wei Zing v Minister for Immigration and Ethnic Affairs* (unreported, 10 December 1998) a Full Court seemed not to doubt that a family may constitute a particular social group. Hely J went on:

"Of course, recourse to the text of Article 1A(2) is paramount, though, in view of the fact that the Article is a provision of an international convention, that text must be construed in light of the objects and purposes of the Refugees Convention. Having made this observation, the wording of Article A2(2) provides no real guidance as to what constitutes 'a particular social group'. Nor does there appear to be any materials which elucidate the objects and purposes of the Refugees Convention so as to indicate the parameters of 'a particular social group'.

In view of the preceding discussion, and in the absence of decisive authority to the contrary, in my opinion, a family can constitute a particular social group within the meaning of Article 1A(2) of the Refugees Convention. A family is cognisable as a group in society such that its members share something which unites them and sets them apart from the general community. Membership of a family is a characteristic which distinguishes members of that family from society at large. In other words, family members possess a common unifying element which binds them together as a particular social group."

32 In its reasons for dismissing the Minister's appeal against the decision of Hely J, the Full Court (Einfeld, Moore and Branson JJ) noted the necessity for a causal relationship between membership of the particular social group and the feared persecution. Their Honours went on:

"In the context of family members being persecuted for reason of one family member having refused to join the mafia … the first question for an Australian decision-maker would be whether, independently of the persecution being experienced by the family members, the family was recognised within society as a group, or as part of a group, set apart from the rest of society.

It may be that such a case might be found in a society in which the recruitment activities of the mafia were publicly known, and in which the retaliatory actions of the mafia against persons who rebuffed invitations to join it were so notorious, that the families of those persons had become recognised in the society as together constituting a particular social group (see the hypothetical consideration by McHugh J in Applicant A at p264 of persecuted 'left-handed men'). If an applicant in such circumstances had a well-founded fear of persecution for reason of being a member of the particular social group constituted by the families of persons who had rebuffed invitations to join the mafia, it would be illogical and wrong, in our view, to engage in the further refinement of asking whether the applicant was fearful of being

persecuted by reason of a personal link with an individual who had rebuffed the mafia or by reason of his or her membership of the social group."

The Court agreed with Hely J that the Tribunal had erred in concluding that "the Convention was not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition". The Court therefore dismissed the appeal.

> 33 It was unnecessary for the Full Court in *Sarrazola* to deal with the correctness of the statements of Hely J that "[m]embership of a family is a characteristic which distinguishes members of that family from society at large. … family members possess a common unifying element which binds them together as a particular social group". However, it seems to me the statements are plainly correct. That which binds together the members of a family is not the suffering of persecution but a relationship of blood and marriage; membership of a family is something that exists independently of any persecution the members may suffer. Moreover, in almost every society, familial links are recognised and families are identifiable. Unless one subscribes to the view, taken in *Applicant A* only by McHugh J, that the term "a particular social group" was "probably intended to cover only a relatively large group of people", there is no reason to exclude its application to a family. Such an application is surely well within the spirit of the Convention. Family members may be targeted for persecution simply because of that membership, and not because of their own actions. I respectfully agree with the passage in the reasons of Hely J in *Sarrazola* quoted in para 31 above. It follows I conclude the Tribunal member erred in holding in this case that "family membership will only be relevant for the purposes of the Convention where there is a link to a broader relevant group". There apparently being no question but that S, her children and C's mother were within a particular social group that might properly be described as C's family, the critical question for the Tribunal was whether the persecution they feared arose out of their membership of that group. The Tribunal failed to consider that issue.
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> 34 The decision of the Tribunal in relation to S's application must also be set aside and the matter remitted for redetermination.

Orders

> 35 I propose to order that the decisions of the Tribunal in respect of both applications be set aside and the applications remitted to the Tribunal for redetermination. The Minister must pay the applicants' costs of this proceeding.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons

for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 20 October 1999

Counsel for the Applicant:	L Karp
Solicitor for the Applicant:	McDonells
Counsel for the Respondent:	R Lancaster
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	7 October 1999