

FEDERAL COURT OF AUSTRALIA

Chokov v Minister for Immigration & Multicultural Affairs [1999] FCA 823

MIGRATION – appeal from refusal of RRT to grant a protection visa – citizens of the Russian Federation – whether the Tribunal erred in law in finding that persecution was not Convention-related – whether persecution may be due to more than one reason – a genuine and well founded fear of persecution on a Convention ground makes a person eligible for refugee status even if the persecution is also due to a matter unrelated to the Convention – whether informers against the mafia constitute a particular social group

Migration Act 1958 (Cth)

Racial Discrimination Act 1975, s 18

Sex Discrimination Act 1984, s 8

Disability Discrimination Act 1992, s 10

Chan Yee Kin v The Minister for Immigration and Ethnic Affairs [1990] 169 CLR 379, applied

Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors [1996] 185 CLR 259, applied

Morato v Minister for Immigration, Local Government and Ethnic Affairs [1992] 39 FCR 401, referred to

Ram v Minister for Immigration and Ethnic Affairs [1995] 57 FCR 569, referred to

Jahazi v Minister for Immigration and Ethnic Affairs [1995] 61 FCR 293, followed

Thalary v Minister for Immigration and Multicultural Affairs [1997] 73 FCR 437, considered *Mohamed v Minister for Immigration and Multicultural Affairs* [1998] 83 FCR 234, followed

Applicant A v Minister for Immigration and Ethnic Affairs [1997] 142 ALR 331, followed

Minister for Immigration and Multicultural Affairs v Zamora [1998] 51 ALD 1, referred to

Secretary of State for the Home Department v Sergei Vasilyevich Savchenkov [1996] Imm AR 28, applied

ROMAN CHOKOV & ORS v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS

NG 124 OF 1998

THE HON JUSTICE MARCUS EINFELD AO

SYDNEY

25 JUNE 1999

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 124 OF 1998

-

BETWEEN:

ROMAN CHOKOV

First Applicant

MARGARITA CHOKOVA

Second Applicant

ROMAN POPOV

Third Applicant

VERONIKA CHOKOVA

Fourth Applicant	
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
	Respondent
JUDGE:	THE HON JUSTICE MARCUS EINFELD AO
DATE OF ORDER:	25 JUNE 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. the application for judicial review be allowed
2. the decision of the Tribunal of 28 January 1998 be set aside
3. the case be remitted to the Tribunal for rehearing and redetermination
4. the respondent pay the applicants' costs

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

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 124 OF 1998

BETWEEN: ROMAN CHOKOV

First Applicant

MARGARITA CHOKOVA

Second Applicant

ROMAN POPOV

Third Applicant

VERONIKA CHOKOVA

Fourth Applicant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS

Respondent

JUDGE: THE HON JUSTICE MARCUS EINFELD AO

DATE: 25 JUNE 1999

PLACE: SYDNEY

REASONS FOR JUDGMENT

Introduction

1 The applicants are citizens of the Russian Federation. They arrived in Australia on short stay visas on 1 May 1995 at the suggestion of a travel agent that they join a tour here. On 22 May they lodged combined applications for a protection visa with the Department of Immigration and Multicultural Affairs. On 23 September 1996 a delegate of the Minister refused to grant the requisite visa and on 1 October 1996 the applicants appealed to the Refugee Review Tribunal which affirmed the delegate's decision on 28 January 1998. The applicants have now applied to this Court for judicial review of that decision. The success of their application depends on whether there was relevant legal error in the Tribunal's rejection of their contention that they cannot return to Russia because of a fear of persecution on any of the grounds of race, religion, nationality, membership of a particular social group or political opinion : Art 1A(2) of the 1951 Geneva Convention on Refugees as amended by the 1967 Protocol; ss 5(1) and 36(2) of the Migration Act 1958.

Evidence before the Tribunal

2 From the written and oral evidence of the first applicant to the Tribunal, it may be discerned that Roman Chokov is a 33 year old businessman from Moscow; Margarita Chokova is his wife; Veronika Chokova is their daughter; and Roman Popov is the son of Mrs Chokova from her first marriage. Mrs Chokova's father had been a Tatar nationalist and her mother a Chechen. Whether for that or any other reason, she was herself a Chechen.

3 In support of the application for a protection visa, Mr Chokov informed the Tribunal that after he had left school he was conscripted into the Army, serving in Belarus in the artillery. He then worked in a state run food shop until 1992 when he set up a small private food shop in his own apartment block. Mr Chokov said that at the time all commercial businesses, money exchanges and banks were divided amongst various mafia or criminal groups which demanded and received large payments from business owners. If requested payments were not made, they risked losing everything. Apparently this situation still exists. The militia has apparently always been aware of this situation, yet because it consists of corrupt officers, it does nothing towards its rectification. In fact an annual fee or penalty has or had to be paid to the militia as well. As a result of all this, businesses are compelled to seek more and more profit for their survival.

4 Mr Chokov said that the "Solntsevskoy" ("Sun") mafia controlled the territory where his shop was located. However, he told the Tribunal that shortly after he set up the business, he was visited by some Chechens, which surprised him because of the presence of the "Sun" group in the area. Mr Chokov alleged that he was "claimed" by the Chechen mafia as a reaction to his wife being of Chechen nationality, and the fact that his marriage was of mixed Russian and Chechen ethnicity. He felt that he had no option but to accept their offer of protection in return for 15 percent of his business

profits. Presumably he also continued to pay the “Sun” group as well. The Chechens also required him to sell some of their stolen goods which he did not want to do. His neighbours who were also his customers were annoyed by the presence of Chechens in and near his shop.

5 In 1992 the Moscow Government banned the selling of alcohol and tobacco products in shops situated within 300 metres of schools or child care centres. Mr Chokov’s shop was affected and he claimed that about four months after opening the business he was forced by the Chechen mafia to sell vodka of dubious quality and safety against his will. He was told to collect the vodka from two railway cars at a railway station. Mr Chokov said that the mafia, through arrangements with the local government, overcame the permit problem. At the same time, the “Sun” group allegedly told the applicant that if he wanted to rid himself of the Chechens, he was simply to report the illegal manufacture and sale of alcohol to the militia, after which he could come under their protection.

6 The applicant stated that he did report the Chechens to the militia who responded by seizing the vodka. The following evening, just outside his home upon his return from work, he was badly injured when shot by an unknown assailant using a shotgun. He was rushed to hospital where he stayed for the next two months and lost the sight of one eye. He told the militia that he believed the Chechen mafia to be responsible for the shooting and a file was opened on his case. Mrs Chokova then abandoned the shop and moved to an apartment in another region of Moscow and in 1993 Mr Chokov established a new successful business selling cheap goods imported from Poland, Turkey and the United Arab Emirates to which he travelled frequently on buying trips. He set up this business in a supermarket which left the dealings with the mafia to the supermarket owner and not to himself.

7 Mr Chokov told the Tribunal that in early April 1995 he was involved in a car accident while driving to his home, which he believed was arranged as a part of a “shakedown”. He was bundled into a car and driven by the other party involved in the accident to a forest where he came face to face with the Chechen he had informed on. He thought he would be killed. In fact he was detained for some time during which he was threatened, beaten and slashed with a knife to remind him of what would happen to him if he did not pay the Chechen mafia \$US100,000 which he was told he owed for the two consignments of vodka confiscated by the militia in 1992. He was told his remaining eye would be gouged out. He was terrified.

8 While Mr Chokov was being detained, a group of Chechens invaded the family’s flat. Mrs Chokova said that they had terrorised her, her mother and her daughter Veronika, the fourth applicant. She said that it was common practice to terrorise people out of their apartments. She was told to prepare to return to Chechnya with the men, that she no longer needed a Russian husband, and that in any case, he would not live long. She believed that the motivation for the terrorisation was also to enable the worth of the apartment to be assessed. Mr Chokov explained that his life was spared because the apartment was assessed at \$US100,000, which was enough to cover the

demand. He believed that once the apartment became the property of the Chechens, he would be killed anyway. On this occasion Mr Chokov was too afraid to go to hospital in case the doctor reported his injuries. He contacted a friend in the militia who told him that they were powerless to protect him from the Chechens and it was therefore advisable that he leave Russia immediately.

9 So far as I can see, the money was never paid because the family left with one suitcase between them, joining a tour to Australia. The Tribunal was informed that subsequently the Chechens have terrorised the Chokovs' parents and confiscated Mr Chokov's car. Possibly the apartment has been seized. Mr Chokov's father has suffered a heart attack, it is suggested, as a consequence of these events. The Chechens are apparently aware that the family is in Australia and Mr Chokov fears that they would murder him if he were to return to Russia.

10 Mrs Chokova stated that her mixed parentage and her two mixed marriages have exposed her to constant discrimination on the basis of nationality. Although her appearance is Russian, her documents and patronymic unmistakably indicate her Chechen nationality. Her first marriage ended against this background, her Russian mother in law being abusive and humiliating. With the increase in Chechen nationalist activity and the outbreak of war in Chechnya, her situation worsened and she found herself faced with slanderous Russian neighbours and the impossibility of obtaining employment. She fears that her husband will be killed if they were to return to Russia and that she will be the subject of a blood vendetta. She also fears for her son and daughter, the third and fourth applicants, if they were made to live in Chechnya.

The Tribunal's conclusions

11 The Tribunal accepted Mr Chokov's factual allegations concerning his extortion by the Chechen mafia and his experiences at their hands, including the attempt on his life and his kidnapping and torture. It considered that his claims were consistent with published material which indicated that as much as forty to fifty percent of the Russian economy is controlled by the mafia, that most businesses are forced to make payments to criminal gangs, and that contract killings are not uncommon. Evidence suggested that this situation is unlikely to change despite the Government having announced in 1994 that it would take measures to combat corruption and organised crime. The Tribunal accepted that Mr Chokov had good reason to fear his return to Russia and that the Russian Government did not and probably would not be able to offer protection to him and his family.

12 The Tribunal did not accept, however, that there was any political motivation for the harm inflicted on Mr Chokov, concluding that *“the acts committed against him were criminal acts, motivated by a desire to obtain money and directed against him because he was seen to have money.”* In other words, the Tribunal found that Mr Chokov was the victim of crimes perpetrated for the extraction of money. Said to be on the basis of the judgment of Justice Mansfield in *Thalary v Minister for Immigration and Multicultural Affairs* [1997] 73 FCR 437, the Tribunal stated:

The fear of criminal conduct does not amount to [Convention-related] persecution if it is not shown to be either persecution by institutional conduct on the part of the State nor conduct involved in by reason of the applicant's political beliefs.

13 According to the Tribunal, the acts committed against Mr Chokov were not part of a course of systematic conduct directed against him for any Convention reason. Though sympathetic to his predicament, the Tribunal was unable to find that the harm feared was Convention-related.

14 The Tribunal also accepted that Mrs Chokova was threatened when the Chechen mafia invaded her apartment. It found that the threats were made with the aim of extorting money from her and her husband. Again, this conduct was said to be a criminal act and not for reasons grounded within the Convention. The Tribunal accepted Mrs Chokova's fears that she is and would be the subject of a “blood vendetta”, but found that this fear was not related to any Convention ground because it is a dispute between Chechen families. It accepted that Mrs Chokova was the subject of some incidents of racial abuse but that these incidents themselves fell short of a course of systematic conduct and did not amount to serious harm or oppression. On the other hand, it appears the Tribunal may have found that as she is also a victim of her husband's persecution, in total she was subjected to systematic conduct. On the evidence accepted, it is difficult to see how any other conclusion was open. Death threats, kidnapping, torture and extortion do not have to be repeatedly suffered before refugee status can be considered.

15 In relation to Mrs Chokova's claim that she could not obtain employment, the Tribunal stated that it had no evidence to show what she had done to obtain work (apparently overlooking that her statements are evidence and that corroboration would be virtually impossible to produce) and that she in fact had earned some money through the making and selling of clothes and had participated in business trips made by Mr Chokov. The Tribunal could therefore not accept that her nationality affected her such as to constitute Convention-based persecution.

16 There were no separate specific Convention claims made on behalf of Roman Popov or Veronika Chokova. Thus what the Tribunal found was that the applicants were persecuted, that they would probably suffer further persecution if they were returned, and that they feared this expected persecution, but that the persecution would not be perpetrated by reason of Mrs Chokova's Chechen nationality and the parties' mixed marriage but

because crime was rampant in Moscow, especially extortion of business people.

17 The Tribunal thus concluded that the applicants were not persons to whom Australia has protection obligations under the Refugees Convention and were therefore not entitled to the granting of protection visas. However, it strongly felt that there were substantial humanitarian issues to be considered by those empowered to do so before the applicants were asked to return to Russia.

Application for review

18 The application for review filed by the applicants was made pursuant to paragraphs (a) and (e) of section 476(1) of the Migration Act viz.

- (a) procedures that were required by the Migration Act and Regulations to be observed in connection with the making of the decision were not observed, and
- (e) the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision.

19 It was submitted that a fair understanding of the applicants' case would have informed the Tribunal that their persecution occurred because of the failure of the Russian authorities to protect them from the consequences or effect of Mrs Chokova's Chechen background and her perceived rejection of Muslim laws and customs, inter alia, by her marriage to Mr Chokov, a Russian. The applicants also asserted that the Tribunal was bound to consider the claim by Mr Chokov that he was a victim of reprisals for informing on the Chechen mafia and the failure of State protection. The applicants stated that the Tribunal's failure to allow the claim on the ground of ethnicity, meaning the national, racial and religious origins of the parties, was due to its erroneous understanding of the decision in *Thalary*.

20 The respondent submitted that the Tribunal did not fail to consider ethnicity as a reason for persecution. Rather, having found that the fear of harm of the applicant was not Convention-related, it was not necessary to make any further findings as to whether that fear was not by reason of race, religion, nationality, political opinion or the like. In other words, the general finding encompassed any conclusions that could arise from specific findings. The question is, therefore, whether the Tribunal in fact considered the claims or not.

What *Thalary* decided

21 What Justice Mansfield actually said in *Thalary* was:

For the same reason and for one other reason, in my view the applicant cannot succeed on this aspect of her complaint. The step of converting the clearly offensive and apparently intimidating behaviour of a few members of the Congress Party towards the applicant because of her good work, or because of her complaining about them to the police, into persecution for a Convention reason cannot be taken. It is not shown either to be persecution by any form of institutional conduct on the part of the State in any sense nor is it shown to be conduct engaged in by reasons of the applicant's political beliefs. (emphasis added)

22 His Honour thus put forward two prerequisites for persecution on Convention-related grounds in the particular case – institutional conduct on the part of the State, and conduct involved in by reason of the victim's political beliefs. In the present case it was not suggested that the State was the activist body, but that the State was unable or failed to protect the applicants from the conduct of others. This case was also not, or not significantly, based on persecution for political beliefs.

23 I have carefully considered his Honour's judgment and cannot see how he was seeking to lay down any principle of wide or universal application, even to cases involving fears of serious violence or criminal intimidation. The applicant in *Thalary* was succeeding on other aspects of her application. His Honour was explaining why another aspect of her complaint failed. Just prior to the passage just quoted, he said this:

I do not finally need to decide that question. It was not suggested that the Tribunal had inaccurately or incompletely referred to the applicant's evidence on this topic. On the basis of it, in my view, she would fail in the event as it would not be established that such behaviour as she complains of is institutional in any relevant sense. The behaviour of some men and boys in some villages in which the applicant had preached to some extent is, or may be, criminal conduct. It was not suggested that such conduct was initiated by the State, nor that it was either officially or unofficially tolerated by it. Nor does the finding of such conduct amount to a finding that such conduct is effectively uncontrollable by the Indian authorities.

24 His Honour thus identified that conduct could be criminal and yet attract the protection of the Convention if it was also persecution on a Convention ground and was State-initiated, tolerated by the State, or effectively uncontrollable by the State. Although the case itself involved the Convention ground of political belief, his Honour did not say, and did not mean, that the other Convention grounds were not equally available on the same basis.

The Tribunal's approach

25 This case is not about government-instituted persecution but private persecution uncontrollable or uncontrolled by the government. The Tribunal's view was that the need for protection was crime, not the parties' Chechen

nationality or connections. That finding raised the issue of whether the Chechens only went to homes where at least one Chechen person resided, or whether they went to any home to steal money – especially in areas not otherwise “allocated” or “granted” to them.

26 The Tribunal approached this factual question, first on information taken from Jane’s Intelligence Review:

There are some 5,000 mafiya groupings in Russia, forming a pyramidal structure of criminal activity embracing senior leaders and politicians and homeless beggars and street gang members alike.

27 Then it noted advice from the Department of Foreign Affairs and Trade:

...the Russian mafia engages in a wide range of organised criminal dealings, including drug trafficking, prostitution, embezzlement and extortion. Contract killings are not infrequent, with victims being mafia rivals or uncooperative objects of extortion.

28 These and other similar statements apparently founded a factual conclusion by the Tribunal that it does not matter what the nationality or origin is of the victim concerned. The concept appears to be that these mafias were, and probably are still, out to establish areas of exclusive control, and that they do so by stealing money from individuals and businesses whoever or whatever they are. In particular terms, what the Tribunal seems to have found is that it is more or less coincidental that people who happen to be Chechens, such as Mrs Chokova, or are married to Chechens, such as Mr Chokov, are extorted by Chechens even in some other group’s exclusive areas. It appeared to the Tribunal that extortion in such circumstances would take place regardless of the nationality of the person or persons being extorted. When it said that:

The Tribunal does not accept that there was any political motivation for the harm...

it was deciding that Mr Chokov was the object of extortion for reasons other than his marriage to a Chechen woman, and that he was chosen because he was a shopkeeper, a position generally believed to handle a substantial amount of cash. This was a finding of fact. The question for this Court is whether it was actuated by an error of law, including that it was unsupported by or was completely contrary to the evidence. I ignore the reference to “political motivation” despite my belief that this case lies in one of the other Convention criteria.

Mix of grounds for persecution

29 On the evidence accepted by the Tribunal, Mr Chokov and his family were certainly the subject of a course of systematic conduct by a group not generally operating in or assigned to their area. I have discerned no explanation by the Tribunal for the finding that this state of affairs was

coincidental, and no evidence before the Tribunal of any other examples of such intrusive coincidence. Findings of fact, especially crucial to the outcome of the case, must be either inherently likely, evidence-based or otherwise satisfactorily explained. The Tribunal's determination on the coincidence question did not say which applied here. It identified no evidence on the matter and did not attempt to explain this particular finding. It is not inherently likely.

30 Moreover, as *Thalary* and other cases (for example, *Mohamed v Minister for Immigration and Multicultural Affairs* [1998] 83 FCR 234 (Hill J); *Jahazi v Minister for Immigration and Ethnic Affairs* [1995] 61 FCR 293 (French J)) have recognised, persecution may be due to more than one reason. In other words, the Chechen mafia may have chosen to extort Mr Chokov as opposed to another person because of his association with his Chechen wife and the attacks may also have been motivated by the criminal procurement of money. The existence of a criminal motive does not mean that the crimes were not also related to Mrs Chokova's national origins. As it seems to me, this possibility was not considered by the Tribunal thus giving rise to the error of law of relying on *Thalary* for something for which it does not stand.

31 I believe, on a fair reading of its judgment, that the Tribunal should not be taken to have rejected any racial, national or religious contribution to the conduct complained of and to the cause of any future fear but to have decided that *Thalary* prevented it from doing so because crime was also a factor. The two factors are not competitive or mutually exclusive. In a given case they may both exist. The normal legal result of such a finding would be an allowance of the claim. Indeed a number of federal statutes operating in similar areas expressly provide for such a result in those areas : s.18 Racial Discrimination Act 1975, s.8 Sex Discrimination Act 1984, s.10 Disability Discrimination Act 1992. Parliament has thus repeatedly spoken on such issues of principle. In this case, there was evidence to support such a conclusion and none to dispute it. The delegate had originally found a connection with the Convention of at least some of the past persecution and harassment. Indeed, as might be expected on the stark facts accepted, and persecution, past and likely future, found, by the Tribunal, it appears to have presupposed an acceptance of both elements. It is ultimately a matter for the Tribunal as to whether it so finds but nothing in *Thalary* or in the evidence presented to and accepted by it prevented or prevents it from allowing the applicants' application.

32 The Tribunal is obliged to give proper weight to any credible account of the objective circumstances given by the applicants and reach an honest and reasonable decision by reference to broad principles which are generally accepted within the international community: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1990] 169 CLR 379 at 413; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* [1996] 185 CLR 259 at 281. The question for determination is and must always be whether there is a fear of persecution on a Convention ground. If there is, and the fear is genuine and well founded, the fact that the fear is also caused by persecution

on a non-Convention ground does not make the individual concerned ineligible for protection as a refugee. The failure of the Tribunal to approach the matter from such a standpoint, indeed its decision to exclude a conclusion on any such basis, constitutes an error of law on a matter fundamental to the case.

Particular social group

33 The applicants also submitted that they should be considered as likely to suffer persecution by reason of Mr Chokov's membership of a particular social group, being informers against the Chechen mafia or the mafia generally. This contention was not part of the original application but it was fully argued and I should therefore rule on it.

34 It has been said that a social group is defined by reference to what a person is, not what a person does: *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] 39 FCR 401. As Chief Justice Black explained at 404:

A critical element in the present case is that the fear of persecution relied upon must be a fear for reasons of membership of a particular social group. It is not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. The primary focus of this part of the definition is upon an aspect of what a person is – a member of a particular social group – rather than what a person has done or does.

The respondent submitted that the applicants were targeted because of what they did, viz. inform on the Chechen mafia, rather than who or what they are.

35 On the other hand, there is with respect a difficulty in making a strict division in all cases between what one is and what one does in order to ascertain whether a person is a member of a particular social group. In some circumstances it is not possible to separate what or who a person is from what they do, as actions can confer identity on a person. Indeed, actions, as suggested by Dawson J in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] 142 ALR 331 at 342, are quite central to what or who a person is and “[t]he distinction between what a person is and what a person does may be an unreal one”. Dawson J noted that Chief Justice Black himself recognised in *Morato* (at 406) that his statement should not be taken too far. He went on to say:

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 difficult situation.

36 The High Court said in *Applicant A* that it is not permissible to define a “particular social group” by reference to the act that gave rise to the well-founded fear of persecution. Dawson J observed at 341 that:

...not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.

...

...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 member 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.

37 Justice McHugh agreed at 358 and stated that:

The concept of persecution can have no place in defining the term “a particular social group”.

38 At 359 his Honour said:

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. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.

39 And at 361:

...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 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...

His Honour said that prisoners for example may qualify if they are routinely beaten because they were prisoners.

40 At 375 Justice Gummow stated that

...numerous individuals with similar characteristics or aspirations in my view do not comprise a particular social group of which they are members.

His Honour agreed with the statement of a Full Court of this Court (Burchett, O’Loughlin and Nicholson JJ) in *Ram v Minister for Immigration and Ethnic Affairs* [1995] 57 FCR 569 at 568 that:

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.

41 Brennan CJ, who was in the minority in *Applicant A* along with Justice Kirby, stated his view of the constitution of a particular social group at 335:

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.

42 And at 393, Justice Kirby said that particular social groups should be determined on a case by case basis but that the members of the group will be subject to the same type of persecution.

43 A Full Court of this Court (Black CJ, Branson and Finkelstein JJ) gave its interpretation of the decision in *Applicant A* in *Minister for Immigration and Multicultural Affairs v Zamora* [1998] 51 ALD 1 at 6-7:

In our view Applicant A’s case is authority for the following propositions. 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 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.

44 That synopsis is applicable to the situation of the applicants in this case. The evidence disclosed that they informed on the Chechens once only. They did so because of their fear of persecution by the Chechens. It would be circuitous even vacuous to say that their present fears are actuated by persecution visited upon them on racial and nationality grounds because they informed on people persecuting them for those reasons. This view is supported by the English Court of Appeal’s exclusion from a social group of similar factual circumstances in *Secretary of State for the Home Department v Sergei Vasilyevich Savchenkov* [1996] Imm AR 28 at 29:

...those who were approached by the mafia to co-operate with it, and refused to do so, did not constitute a social group for the purposes of the Convention. They had disparate characteristics and interests: the only common characteristic was a fear of persecution because of their refusal to co-operate with the mafia.

45 There is no doubt as stated by the Tribunal that the case raises serious humanitarian issues but in my opinion, it is not possible to speak of the applicants' persecution as arising from their membership of the particular social group of informers.

Conclusion

46 I can detect no error of law on the part of the Tribunal in reaching the conclusion that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention as members of a particular social group. However, I conclude that the Tribunal erred in law by not considering, allowing for, or giving any weight to, the possibility that asylum could be granted because of the applicants' fear of persecution on Convention-related grounds, on the basis that it was also, albeit partly, caused by the Convention-unrelated ground of widespread indiscriminate crime within Russia. There was, in other words, no evidence and no explanation to support the finding that the nationality of Mrs Chokova was irrelevant to the treatment that she and her husband received from the Chechen mafia and no inherent likelihood that it was irrelevant. The evidence, and reasonable inferences from it, were entirely to the contrary.

47 The application for judicial review is allowed. The decision of the Tribunal of 28 January 1998 is set aside. The case is remitted to the Tribunal for rehearing and redetermination. The respondent will pay the applicants' costs.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marcus Einfeld AO.

Associate:

Dated: 25 June 1999

Counsel for the Applicant: Mr J. R. Young

Solicitor for the Applicant: Teakle Ormsby George

Counsel for the Respondent:	Ms A. F. Backman
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	28 May 1998
Date of Judgment:	25 June 1999