# FEDERAL COURT OF AUSTRALIA

Hellman v Minister for Immigration & Multicultural Affairs [2000] FCA 645

**MIGRATION** – *Migration Act 1958* (Cth) – meaning of 'persecution' – significance of availability of state protection – usefulness of identification of a 'bare causal connection' – proper approach to identification of reason for persecution

*Migration Act 1958* (Cth)

1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees

*Jahazi v MIEA* (1995) 61 FCR 293

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225

*Islam v Secretary of State for The Home Department* [1999] 2 WLR 1015

*Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190

*Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565

*Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 166 ALR 641

*Kanagasbai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205

*Okere v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 112

*March v E. & M.H. Stramare Pty Limited* (1991) 171 CLR 506

*Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19

Professor Hathaway, *The Law of Refugee Status*, Butterworths, 1999

Grahl-Madsen A., *The Status of Refugees in International Law*, A.W. Sijthoff – Leyden, 1996

**DAVID ARYEH HELLMAN v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**

**N 1056 of 1999**

**BRANSON J**

**SYDNEY**

**17 MAY 2000**

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| NEW SOUTH WALES DISTRICT REGISTRY | N 1056 of 1999 |

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| BETWEEN: | DAVID ARYEH HELLMAN<br><br>Applicant |
| AND: | THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS<br><br>Respondent |
| JUDGE: | BRANSON J |
| DATE OF ORDER: | 17 MAY 2000 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. That the decision of the Refugee Review Tribunal be affirmed.

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

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**REASONS FOR JUDGMENT**

**INTRODUCTION**

1 The applicant ("David Hellman") has sought judicial review under s 476 of the *Migration Act 1958* (Cth) ("the Act") of a decision of the Refugee Review Tribunal ("the Tribunal") whereby the Tribunal affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant him a protection visa (s 36 of the Act).

2 David Hellman, who is a citizen of the United States of America, was born on 10 November 1982. He is thus a minor. David Hellman appeared before the Tribunal with legal representation. Before this Court, he did not have legal representation at the time of the hearing. His father ("Mr Hellman") was granted leave to address the Court on behalf of his son.

3 Mr Hellman, an Australian citizen, is divorced from David Hellman's mother, who continues to reside in the United States of America. Mr Hellman and David Hellman adhere to the strand of Jewish belief known as Reform Judaism. David Hellman's mother was described by David's legal representative before the Tribunal as *"an enthusiastic follower of an ultra-Orthodox Jewish sect"*. The Tribunal apparently accepted the accuracy of this description. The issue of the custody rights of Mr Hellman and his wife respectively concerning David has been the subject of litigation in the United States.

4 A criterion for a protection visa is that the decision maker is satisfied that the applicant is a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (hereafter together referred to as "The Convention") (s 36 of the Act and Schedule 2 to the Migration Regulations cl 866.221). Australia has protection obligations to David Hellman if he is a person who:

"… 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 …." (Article 1A(2) of the Convention)

5 I have concluded, having regard to findings made by the Tribunal as to the state protection available to David Hellman in the United States, that Australia does not have protection obligations to David Hellman. The decision of the Tribunal must therefore be affirmed. My reasons for so concluding are set out below.

FINDINGS OF FACT

6 The reasons for decision of the Tribunal record the following findings of fact:

"The essential facts the Tribunal accepts are that the applicant's mother is a member of the cult, she abused him over a long period of time, he was also abused by his foster families and members of the [ultra-Orthodox] religious community, he has knowledge of a murder in the community and of organised criminal activities in the same community, he refuses to become a priest and his Legal Guardian and the judge who ruled over his custody case were members of the same community. On the whole the Tribunal accepts that these facts have been established but not to the extent claimed by the applicant.

The applicant claims that he fears assault and abuse, being forced to become a priest, taken to a foster home and that he will be harmed because of his knowledge of criminal activity within the community. He also fears harm because he does not want to become a priest, due to his insubordination to the school, his unwillingness to get deeply involved in religious matters, membership of his family as a social group and membership of a tight-knit community and his insistent non-conformance."

REASONS OF TRIBUNAL

7 The Tribunal in its written reasons for decision noted, in effect, that David Hellman's legal representative had submitted that David Hellman has a well founded fear of being persecuted for reasons of his religion, his membership of a particular social group and his wish to live a life different from that of his mother.

8 It appears that the Tribunal was satisfied both that David Hellman has a well founded fear of being harmed if he returns to the United States and that the harm feared by him is sufficiently serious in nature to amount to persecution. However, the Tribunal found that *"the motivation of the different agents of harm is not for a Convention reason."*

9 The Tribunal concluded that neither David Hellman's family, nor his co-religionists who reject the authority of their parents or the tight-knit religious community, constitute a *"particular social group"* within the meaning of the Convention. It found that there was no evidence that the members of David Hellman's family share unifying characteristics which set them apart from the rest of society so as to make them a cognisable group in the United States. The Tribunal further found that the *"American co-religionists of* [David Hellman] *who reject the authority of their religiously conservative parents and the religious community"* would only be identified within their society by reference to the harm feared by them as punishment for disobedience. It thus concluded that this group could not constitute a *"particular social group"* within the meaning of the Convention, first, because the group was only identifiable by reference to the harm feared by the members of the group and, secondly, because such members feared harm because of disobedience, not because of their membership of the group.

10 The Tribunal also considered whether David Hellman's fear of harm arises for reasons of religion within the meaning of the Convention, in the sense *"that he may be regarded as something similar to an apostate."* It concluded that:

"… harm inflicted upon an applicant for failing to hold a particular religious belief or [to] conform to a particular religious practice does not amount to persecution for reasons of religion because the persecutor is not motivated to harm the applicant **because of that applicant's religion**. In such a case the persecutor would be harming the applicant because of the absence of a particular characteristic, and that is not a matter on which the Convention was intended to operate." (emphasis in original)

11 Moreover, the Tribunal concluded that although there was some evidence that the harm that had been suffered by David Hellman was *"religious in origin"*, the connection between religion and that harm had been *"a bare causal connection."* The Tribunal went on:

"The whole of the evidence demonstrates that the motivation for the harm inflicted by the applicant's mother and her community upon the applicant was his consistent non-conformance and violation of their authority. Because persecution implies an element of motivation, a bare causal connection between the harm feared and a Convention ground is not enough (Jahazi v MIEA (1995) 61 FCR 293)."

12 The Tribunal's written reasons include a consideration of whether, assuming that it had arrived at the wrong conclusion as to the motivation behind David Hellman's persecution, there had been a failure of state protection with respect to David Hellman by the United States. It concluded that there had been no such failure. The Tribunal noted that the Convention standard does not require that a state guarantee protection against persecution. It cited Professor Hathaway: *The Law of Refugee Status*, Butterworths, 1991 at 124 in support of the proposition that *"protection through refugee law arises when the degree of protection normally to be expected of the government is either lacking or denied."* The Tribunal concluded that:

"There is … no evidence that the state turned a blind eye or colluded with the applicant's mother or her community to deny the applicant state protection. There is no evidence before the Tribunal to indicate that the previous record of protection would not be available to the applicant in the reasonably foreseeable future. On the whole of this evidence, the Tribunal finds that the applicant has benefited from, and will continue to benefit from, adequate or effective protection from persecution from his mother and her community. Therefore, since the protection of the United States is available, and there is no ground based on well-founded fear for refusing it, the applicant is not in need of international protection and is not a refugee. Not only can he call upon the assistance of the police and related welfare authorities in the area for assistance, he can also access Non-Governmental Organisations and children's helplines, referred to in the Independent Evidence section of this decision, to provide him with protection against his mother, the Community and those acting on their behalf, in the reasonably foreseeable future. In any event, as the most recent [United States] Family Court order … indicates …, the Tribunal finds that the applicant's mother no longer has legal control over the applicant, and cannot therefore force him to become a priest or live in a foster home, which gives him substantially more freedom than prior to this order. Accordingly, her ability to exercise any legal control over the applicant, and thereby inflict any future harm upon him, is not no longer available."

13 The Tribunal summarised its overall view of David Hellman's position as follows:

"… the applicant has been embroiled in a very sad and acrimonious custody dispute, and has been abused by a dysfunctional and fanatically religious mother as well as abusive members of her community. But although the Tribunal sympathises with the applicant's tragic plight, it is not satisfied that the applicant's persecutors have been motivated for a Convention reason or that state protection is not available."

**GROUNDS OF REVIEW**

14 Although David Hellman was not represented by a legal practitioner at the hearing before the Court, he was represented by a solicitor at the time that his application for an order of review was filed. The grounds on which the application was made are as follows:

"1. That the Tribunal erred in law in finding that in the circumstances of the applicant's case he did not have a well founded fear of being persecuted for the Convention reason of religion

**Particulars**

The RRT erred in finding that persecution for not acting in accordance with the tenets or dictates of a certain religion, or of a certain religious institution, does not amount to persecution for reasons of religion for the purposes of the 1951 United Nations Convention Relating to the Status of Refugees, and its 1967 Protocol ("the Convention").

2. That the RRT erred in law in finding that in the circumstances of the applicant's case he did not have a well founded fear of being persecuted for reasons of membership of a particular social group.

**Particulars**

The RRT erred in finding that persecution for reasons of membership of one's own family does not necessarily amount to persecution of membership of a particular social group, namely one's own family, for the purposes of the Convention.

3. That the Tribunal erred in law in failing to find as a matter of fact whether the applicant was at risk of any of the mistreatments in the definition of persecution.
4. That the RRT erred in holding on the basis of the facts found, that the state protection found to be available, was adequate for the purposes of the Convention.

**Particulars**

The RRT implicitly found that the applicant's risk of any of the mistreatments in the definition of persecution was not remote, insubstantial, a far-fetched possibility or fanciful, and was therefore a real chance; and erred in holding that state protection can be adequate for the purposes of the Convention notwithstanding that the applicant has a real chance of being persecuted for a Convention reason, if the states does not provide protection to such a standard for persons in that country who have a real chance of any of the mistreatments in the definition of persecution for a non-Convention-based reason.

5. Alternatively to ground 4, that the RRT erred in law in failing to find whether the objective risk of the applicant's experiencing any of the mistreatments in the definition of persecution, is a real chance."

CONSIDERATION

State Protection

15 A proper understanding of the meaning of the term “persecuted” in Article 1A(2) of the Convention, and its relationship to state protection, is critical to this application for review.

16 Article 1A(2) of the Convention, effectively incorporated into the Act by s 36 of the Act, is to be interpreted in accordance with the requirements of the Vienna Convention on the Law of Treaties (“the Vienna Convention”) *(Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225). Article 31 of the Vienna Convention 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.”

17 As McHugh J pointed out in *Applicant A* at 252-253:

"The first paragraph of the article contains three separate but related principles. First, an interpretation must be in good faith …. Second, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intention …. 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."

His Honour went on at 255-256 to note *"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"* and to observethat"*international treaties often fail to exhibit the precision of domestic legislation*" and for this reason there is a need to adopt interpretative principles which are founded on the view that treaties *"cannot be expected to be applied with taut logical precision."*

> 18 The object and purpose of international refugee law, which presently has the Convention at its heart, has been described by Professor Hathaway in *The Law of Refugee Status*, at p 124 as follows:

"… refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore 'substitute protection' in the sense that it is a response to disenfranchisement from the usual benefits of nationality.' As Guy Goodwin-Gill puts it, '… the degree of protection normally to be expected of the government is either lacking or denied.'"

> 19 It is in the light of the object and purpose of the Convention, which are fairly summarised in the above paragraph, that the ordinary meaning of the words in Article 1A(2) of the Convention is to be determined. That light suggests that Article 1A(2) is concerned with persecution in the sense discussed by Mr Atle Grahl-Madsen in *The Status of Refugees in International Law* A.W. Sijthoff-Leyden, 1966, Vol I at p 189:

"…. The label 'persecution' may, as a rule, only be attached to acts or circumstances for which the government (or, in appropriate cases, the ruling party) is responsible, that is to say: acts committed by the government (or the party) or organs at its disposal, or behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State."

> 20 The above approach to the interpretation of the word "*persecuted*" in Article 1A(2) of the Convention is supported by Australian jurisprudence. Brennan CJ stated in *Applicant A* at 233:

"The feared 'persecution' of which Article 1A(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."

Although the Chief Justice was in dissent in *Applicant A*, there is nothing in the majority judgments which suggests disagreement with the above paragraph (see also *Islam v Secretary of State for The Home Department* [1999] 2 WLR 1015, considered in *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190).

> 21 It is thus strictly speaking incorrect to speak of a person who has a well-founded fear of being persecuted within the meaning of Article 1A(2) of the Convention nonetheless having available to him or her the protection of the country of his or her nationality. A person who has available to him or her the protection of his or her country of nationality may have a well-founded fear of being harmed in a discriminatory way (see per McHugh J in *Applicant A* at 258) but that feared harm will not amount to persecution within the meaning of Article 1A(2) of the Convention. Persecution in the Convention sense involves discriminatory harm which the putative refugee's country of nationality is not willing or not able to prevent to the degree that is normally to be expected of a country sensibly concerned with the human rights of its citizens.
>
> 22 The Tribunal in this case made factual findings concerning the state protection that would be available to David Hellman were he to return to the United States. After reviewing the evidence given before it by David Hellman, the Tribunal reached the conclusions set out in para 12 above. Although Mr Hellman challenged the appropriateness of the Tribunal's findings in this regard, there is no basis upon which I can interfere with the findings. It cannot be suggested that there was no evidence or other material upon which the Tribunal could reasonably be satisfied of the matters of fact upon which its findings were based. Having regard to its findings, the Tribunal rightly concluded that David Hellman is not a person to whom Australia has protection obligations under the Convention. That is, to use the language of Professor Hathaway (see para 18 above), David Hellman is not a person who has been disenfranchised from the usual benefits of his United States citizenship; there is a reasonable expectation that the United States will protect his core human rights should he return there. The decision of the Tribunal must for this reason be affirmed.

For Reason of Religion etc

> 23 The above conclusion makes it strictly unnecessary to consider any other of the grounds of review set out in the application or advanced orally by Mr Hellman. However, I consider it appropriate to give some consideration to the first of the grounds set out in the application which, as I understand it, is intended to raise the issue, perhaps among others, of the reason or motivation for the harm feared by David Hellman.
>
> 24 On the issue of whether David Hellman has a well founded fear of persecution for reason of religion, the Tribunal observed:

"The ordinary meaning of the word 'persecution' – 'the action of persecuting or pursuing … for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it suggests that 'being persecuted for reasons of

religion' means being persecuted because the person **has** a particular religion. This would preclude claims of harm for **not** adhering to a particular religious belief, or not conforming to a particular religious practice. There is some judicial authority for this view. In Applicant A, McHugh, said:

> 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 are likely to be the victims of international 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. [emphasis added, at 259]

If the same approach is applied to an analysis of persecution for reasons of religion, it would follow that harm inflicted upon an applicant for failing to hold a particular religious belief or conform to a particular religious practice does not amount to persecution for reasons of religion because the persecutor is not motivated to harm the applicant **because of the applicant's religion**. In such a case the persecutor would be harming the applicant because of the absence of a particular characteristic, and that is not a matter on which the Convention was intended to operate. Accordingly, this is the approach the Tribunal has adopted in this case with respect to persecution for reasons of religion." (emphasis in original)

25 In a later passage in its written reasons, the Tribunal stated:

"The fact that the applicant's mother and her community are a particular religion is of no consequence, since it is the religion of the applicant and whether he has been persecuted for reasons of his religion that is the key question. There is, however, some evidence before the Tribunal that the harm suffered by the applicant was 'religious in origin', to use the brother's expression. However, the Tribunal finds that this is a bare causal connection, …. Because persecution implies an element of motivation, a bare causal connection between the harm feared and a Convention ground is not enough (Jahazi v MIEA (1995) 61 FCR 293), and the Tribunal therefore finds that the connection between the harm feared and religion is a bare causal connection. Based on the whole of the evidence, the Tribunal therefore finds that the applicant does not fear persecution because of religion …."

26 I turn first to the Tribunal's conclusion that Article 1A(2) is concerned only with persecution for reason of the putative refugee's religion, as opposed to the persecutor's religion. This conclusion does not seem to be compelled by the language of the article. The construction adopted by the Tribunal would have the consequence that persecutory conduct by a state which chose to withdraw national protection of core human rights from all of its citizens who did not firmly adhere to the established religion of the state, whether or not they adhered to an alternative religion, would fall outside the ambit of the Convention. Such a result would seem contrary to the object and purpose of the Convention. However, a decision as to the validity of the Tribunal's conclusion in this regard can be left to a case which more directly calls for the issue to be determined.

27 I turn next to the distinction drawn by the Tribunal between harm inflicted because an individual holds a particular religious belief and harm inflicted because an individual does not hold a particular religious belief. In my view, this distinction is a problematic one - both as a matter of logic and as a matter of law. In the circumstances of this case it is not necessary to give it detailed consideration. However, the fact that the Tribunal drew the distinction makes it appropriate for consideration to be given to the evidence and other material before the Tribunal touching on David Hellman's religion.

28 On his application for a protection visa, David Hellman gave the response *"Jewish"* to the question concerning the ethnic group to which he belongs, and the response *"Reformed Jeudism"* (sic) to the question concerning his religion. Before the Tribunal, David Hellman confirmed the accuracy of the description of his religion given in his application. The Tribunal in its written reasons notes that the applicant said in his evidence that the description "Reformed Judaism" is *"as close as you can get to putting a name on it. I don't want to be religious."* The transcript of the hearing before the Tribunal does not confirm the accuracy of the second part of this answer. The transcript reveals that immediately after the answer *"That's about as close as you can get to put a name on it"*, the Tribunal put to David Hellman the question *"What does that mean?"* David's answer to this subsequent question is not fully recorded as the answer was apparently partly indistinct on the tape recording from which the transcript was prepared. However, David's answer of *"No"*, to the question *"But you're not an atheist"* is recorded. Assuming that David Hellman did say that he did not want to be "religious," this response in context could only fairly be understood, it seems to me, as meaning that he does not wish to live an overtly religious, perhaps orthodox religious life: not that he has no religion. To the extent that the Tribunal found as a matter of fact, if it did so find, that David Hellman has no religion, there was, in my view, no evidence, or other material upon which the Tribunal could reasonably have been satisfied of that fact.

29 Finally, I turn to the notion of a "bare causal connection". As is mentioned above, the Tribunal held that a "*bare causal connection*" between the harm feared by David Hellman and a Convention ground is not sufficient to invoke the protection of the Convention. In this regard the Tribunal placed weight on the decision of French J in *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 61 FCR 293. *Jahazi's* case involved circumstances quite different from those which arise in this case. Mr Jahazi was an Iranian National employed by the government-owned Iranian National Shipping Line. He was convicted in Australia of the importation and possession of narcotic drugs. The Tribunal found that Mr Jahazi would be exposed to the risk of severe additional punishment if he returned to Iran after his release from jail in Australia because his offence had a connection with Iran by reason of having been committed while he was a serving crew member on a ship owned by the government of Iran. Mr Jahazi had brought drugs from Iran to Australia with the intention of selling them. It was contended before French J that Mr Jahazi had a well founded fear of being persecuted were he to return to Iran by reason of his membership of a social group constituted by employees of the Iranian Shipping Line.

30 At 299-300 French J stated:

"… the Tribunal's findings supported the inference of a causal connection between the possibility of severe punishment upon Jahazi's return to Iran and his former employment by the Iranian Shipping Line. But a bare causal connection is not, in my opinion, sufficient to attract Convention protection. The question whether a particular causal connection between persecution and membership of a group attracts Convention protection will be resolved not merely by the logic of causality but as a matter of evaluation which has regard to the policy of the Convention. While it is not necessary that the fear of persecution be solely attributable to membership of a relevant social group, the decision maker can have regard to the extent to which membership of the relevant group is a factor in the risk of persecution.

In the present case, the risk to which Jahazi is exposed if returned to Iran arises, on the Tribunal's factual analysis, because the offence of which he was convicted had a connection with Iran. That connection in this case was established by virtue of his employment by the Iranian Shipping Line. Such a connection might be otherwise established in other cases. Membership of the group is the occasion of the connection and to that extent there is a causal connection between that membership and the apprehended harm. But the fear of persecution in this case is not attributable to membership of the group in any sense relevant to the policy of the Convention."

31 It is, in my view, crucial to the proper understanding of the decision of French J in *Jahazi's* case to recognise that his Honour was considering a claim based on asserted membership of a particular social group. As McHugh J observed in *Applicant A* at 264:

"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 reasons of some characteristic, attribute, activity, belief, interest or goal that unites them."

32 In *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 569 Burchett J, with whom O'Loughlin and RD Nicholson JJ agreed, had earlier emphasised the nature of a 'particular social group' in a similar way. His Honour there said:

"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 the reasons of' his membership of that group."

In *Applicant A* at 285, Gummow J expressly approved this passage from the reasons for judgment of Burchett J in *Ram*.

33 In referring in *Jahazi's* case to a *"bare causal connection"*, French J was, as it seems to me, making it plain that while Mr Jahazi would not have been at risk of attracting severe punishment in Iran if he had not committed an

offence with a connection with Iran (which in his case arose from his employment with the Iranian Shipping Line), he did not have a well founded fear of being persecuted for reason of his membership of the group comprised of employees of the Iran Shipping Line. That is, to use the language of Burchett J in *Ram's* case, he was not at risk *"by virtue of his being one of those jointly condemned in the eyes of their persecutors"* for being employees of the Iranian Shipping Line. The same kind of analysis is not easily applied to the facts of the present case so far as David Hellman asserts a well-founded fear of being persecuted for reason of his religion.

34 In *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 166 ALR 164, the Full Court of the Federal Court has stressed that persecution within the meaning of the Convention may occur for more than one reason. In that case the Full Court said:

"In its reasons for decision the Tribunal failed to recognise that one person may be motivated to persecute another for more than one reason. It appears to have acted on the basis that a finding that the criminals were motivated by self-interest to recover the money they believed was owing to them by the Applicant's deceased brother was necessarily inconsistent with a finding that they were motivated by a purpose or desire to harm the Applicant by reason of her family membership or relationship to her brother as such.

As Einfeld J pointed out in Chokov v Minister for Immigration and Multicultural Affairs [1999] FCA 823 at para 30 in the context of extortion by the Chechen mafia:

> … 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 [sic] national origins.

In Kanagasbai v Minister for Immigration and Multicultural Affairs [1999] FCA 205 at para 20 Branson J said:

> I further consider it appropriate to note that, for the reasons discussed by me in Okere v Minister for Immigration and Multicultural Affairs (1998) 157 ALR 678, the Tribunal's finding that the motivation of those who harassed the applicant was to obtain money is not necessarily inconsistent with a finding that the applicant was harassed for reasons of her race or political opinion. It is, of course, the case that extortion based on a perception of the victim's personal wealth, or otherwise aimed at the victim as an individual, will not amount to persecution for a Refugees Convention reason (Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 568-9). However, in this case there was material before the Tribunal capable of supporting a finding that the applicant was selected as a target for extortion by reason of her race or political opinion. That is, it was open to the Tribunal to find that whilst the aim of the harassers was to obtain money from the applicant,

> the true reason why she was selected for harassment was her race or political opinion.

The position was perhaps put more succinctly by the Full Court in Perampalam v Minister for Immigration and Multicultural Affairs [1999] FCA 165 in para 16 where their Honours said:

> Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and Ram does not suggest it can."

35 *Okere v Minister for Immigration and Multicultural Affairs* is now reported in 87 FCR 112. Mr Okere was a national of Nigeria and a Roman Catholic. The Tribunal had accepted his evidence that he had fled Nigeria to escape clan violence and also to avoid being forced to head a satanic sect, from whose violent members the Government of Nigeria was unwilling to protect him. His evidence was that if he returned to his village and failed to assume the leadership of the satanic sect he would be killed. To assume the leadership would, of course, have been contrary to his religion. Yet the Tribunal concluded that there was a *"bare casual connection"* between Mr Okere's religious belief and the persecution feared by him. It concluded that the harm that Mr Okere feared was harm because of what he had done as an individual (ie his refusal to head the satanic sect).

36 It was against this factual background, and a submission that "indirect discrimination" can never fall within the terms of Articles 1A(2) of the Convention, that I stressed in *Okere's* case the need for the Tribunal to identify the true reason for the apprehended persecution applying common sense to the facts of the case having regard to the object and purpose of the Convention. At 117-118 I said:

"Persons who seek to invoke the protection afforded by the Refugees Convention by placing reliance on their membership of a particular social group, necessarily face the hurdle, discussed above, of showing that the persecution that they fear is persecution for reason of their membership of that social group. However, I find nothing in the ordinary meaning of Article 1A(2), considered in the light of the context, object and purpose of the Refugees Convention, which suggests against the question of whether an individual has a well-founded fear of persecution for reason ofhis or her race or religion being answered by "applying common sense to the facts of each case": cf. March v E. & M.H. Stramare Pty Limited (1991) 171 CLR 506 per Mason CJ at 515. I appreciate that the March v Stramare test is a common law test of causation, but having regard to the principles of interpretation of treaties referred to above, it reflects, in my view, an appropriate approach to the construction of this aspect of Article 1A(2) of the Refugees Convention. It is, in my view, only to put the same test in different words to invite the identification of the true reason for the persecution which is feared: cf. Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165 per Deane and Gaudron JJ at 176-177 and Dawson J at 184."

37 Incidentally, I am unclear as to why the approach to the identification of the reason for persecution taken by me in *Okere's* case, and in

*Kanagasbai's* case in which I adopted a similar approach, has been characterised as an application of the "'but for' common law test of causation" (see Mark Leeming: *When is Persecution for a Convention Reason?* (2000) 7 AJ Admin L 100 at 102). I do not accept that the determination of whether a person has *"a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"* within the meaning of Article 1A(2) of the Convention calls for an application of a "but for" test of causation. The difficulties involved in using the "but for" test of causation in the area of tortious liability as other than a negative criterion of causation are well illustration by Mason CJ in *March v Stramare* at 515-517. In *Islam v Secretary of State for the Home Department* at 1036 Lord Hoffman has illustrated comparable difficulties with the adoption of a "but for" test of causation for the purposes of Article 1A(2) of the Convention. While in some cases it has been found to be convenient to describe the test called for by Article 1A(2) of the Convention as a test of causation, the Convention test is to be differentiated from the common law test of causation applicable in tort law (see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19 per Kirby J at para 68). In my view, the preferable course for the Tribunal to adopt is to focus on the actual wording of Article 1A(2) of the Convention.

38 In reaching a determination as to whether an applicant has *"a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"*, the Tribunal will, in my view, gain little assistance from attempts to distinguish "bare causal connections" from other connections between the feared persecution and one or more of the Convention grounds. As Gleeson CJ, Gaudron, Gummow and Hayne JJ pointed out in *Chen Shi Hai's* case at para 24, a common thread links the expressions *"persecuted"*, *"for reasons of"* and the several grounds specified in Article 1A(2) of the Convention, namely, *"race, religion, nationality, membership of a particular social group or political opinion."* Their Honours went on to observe in paras 25-27:

"As was pointed out in Applicant A, not every form of discriminatory or persecutory behaviour is covered by the Convention definition of "refugee". It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct.

The need for different analysis depending on the reason assigned for the discriminatory conduct in question may be illustrated, in the first instance, by reference to race, religion and nationality. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.

The position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups -–for example, terrorist groups – which warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views – for example, those who advocate violence or terrorism – differently from other members of society."

39 In considering whether an applicant faces persecution for a Convention reason, it will, I suggest, be appropriate for the Tribunal to give consideration first to the context in which its determination is to be made. That is, to have regard to the object and purpose of the Convention and to the factual background against which the applicant's fear has arisen. This factual background will ordinarily include the political, legal and social conditions of the applicant's country of nationality, particularly so far as these conditions impact on those of the applicant's race, religion, nationality or political opinion or on members of the particular social group, if any, to which the applicant belongs (see, for example, *Khawar v Minister for Immigration and Multicultural Affairs*). Having identified the context in which its determination is to be made, the Tribunal will then be in a position to apply common sense to its determination of whether the applicant's fear of being persecuted is in all of the circumstances a fear of being persecuted *"for reasons of race, religion, nationality, membership of a particular social group or political opinion"* - bearing in mind the common thread that links the crucial expressions in Article 1A(2) of the Convention. In reaching its determination in this regard, the Tribunal will need to bear in mind that the motives of a persecutor may be multifaceted yet meet the requirement of Article 1A(2) of the Convention (*see Minister for Immigration and Multicultural Affairs v Sarrazola* at paras 13-16). The Tribunal will also need to be alert to avoid the fallacy, convincingly identified by Lord Hoffman in *Islam's* case at 1035, of concluding that because not all members of a class are being persecuted, it follows that the members of the class who are being persecuted cannot be being persecuted for reason of their membership of the class (see also *Kanagasbai v Minister for Immigration and Multicultural Affairs*).

CONCLUSION

40 Despite my concern with aspects of the Tribunal's reasons for decision, its finding of fact that state protection would be available to David Hellman were he to return to the United States, compels the result that the decision of the Tribunal must be affirmed. The fact that the Tribunal's decision with respect to David Hellman's application for a protection visa must be affirmed does not, of course, carry the inference that there is no visa under the Act appropriate to the circumstances in which David Hellman now finds himself.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment

herein of the Honourable Justice Branson.

Associate:

Dated: 17 May 2000

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|---|---|
| Mr G. Hellman (father) represented the applicant. | |
| Counsel for the Respondent: | Mr. G.T. Johnson |
| Solicitor for the Respondent: | Australian Government Solicitor |
| Date of Hearing: | 23 March 2000 |
| Date of Judgment: | 17 May 2000 |