

IMMIGRATION - refugee status - construction of the words of the Convention embraced by s. 4 of the Migration Act 1958 - "persecuted" - "for reasons of ... membership of a particular social group" - whether "wealthy Sikhs" or "villagers returned to the Punjab from a foreign country with money" formed a particular social group - approach to construction of the Convention - reference to Canadian authorities.

WORDS& PHRASES - "persecuted" - "particular social group".

Migration Act 1958, s. 4

Morato v. Minister for Immigration, Local Government and

Ethnic Affairs (1992) 39 FCR 401

Chan Yee Kin v. Minister for Immigration and Ethnic Affairs

(1989) 169 CLR 379

Attorney-General of Canada v. Ward (1993) 103 DLR (4th) 1

Kwong Hung Chan v. The Minister of Employment and Immigration

(1993) 3 FC 675

Xin-Chang Zhang v. Slattery (unreported, U.S. Court of Appeals

Second Circuit, Miner and Jacobs JJ., 19 May 1995)

Immigration & Naturalization Service v. Elias-Zacarias (1992)

502 U.S. 478

**KULDIP RAM v. THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS AND
THE REFUGEE REVIEW TRIBUNAL**

SG 17 of 1995

Burchett, O'Loughlin and Nicholson JJ.

Adelaide

27 June 1995

IN THE FEDERAL COURT OF AUSTRALIA)

)

SOUTH AUSTRALIAN DISTRICT REGISTRY) SG 17 of 1995

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GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: KULDIP RAM

Appellant

AND: THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS AND
THE REFUGEE REVIEW TRIBUNAL

Respondents

CORAM: Burchett, O'Loughlin and Nicholson JJ.

PLACE: Adelaide

DATE : 27 June 1995

ORDER OF THE COURT

THE COURT ORDERS that the appeal be dismissed with costs.

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

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CORAM: Burchett, O'Loughlin and Nicholson JJ.

PLACE: Adelaide

DATE : 27 June 1995

REASONS FOR JUDGMENT

BURCHETT J.:

The sole issue in this appeal concerns whether the appellant was, at the time at which the matter must be judged, a refugee within the meaning of the international

Convention and Protocol incorporated into Australian immigration law by the definition of "refugee" in s. 4 of the Migration Act 1958. What the appellant had to satisfy the Refugee Review Tribunal (the decision of which came before the judge at first instance by way of judicial review) was that he was a refugee by virtue of being, in the words of the Convention (the Convention relating to the Status of Refugees done at Geneva on 28 July 1951), a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"

The time at which, for the appellant to succeed, facts had to exist that enabled him to meet the terms of the description of a refugee in the Convention was the time when he sought recognition as a refugee: Morato v. Minister for Immigration, Local Government and Ethnic Affairs (1992) 39 FCR 401 at 412; Chan Yee Kin v. Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379.

The appellant, who was born in 1956 in the Punjab, left India in 1977 to work as a contract labourer in Saudi Arabia. He returned home, after ten years, with savings of about 100,000 rupees. He claims that he was seen in his village as a wealthy man, and should be regarded as a member of a particular social group, broadly defined as those who have returned to their villages in the Punjab from a foreign country with money, or as rich Sikhs. When he presented his case to the Refugee Review Tribunal, he contended that extremist groups were rife in the Punjab, and that the police themselves were apt to adopt the role of extremists. It is, of course, well known that there has for long been unrest in this part of India, with much political and religious agitation, and even terrorism, aimed at the establishment of a separate Sikh state, to be known as Khalistan. According to the appellant, extortion by violence or threats of violence is a common occurrence, often perpetrated, not by terrorists or ordinary criminals, but by the police themselves. Particular targets of extortion are, he claims, villagers who have gone abroad and returned with money, as he had done, or other wealthy Sikhs. In 1988, his home was invaded at night, to the terror of his wife and children, by masked men who demanded what money he had, and threatened to kill

him if on their return he did not ransom himself by the payment of further sums. He delivered up a very substantial amount of money, but then fled with his family, and eventually made his way out to Australia.

The Tribunal, however, found:

"Irrespective of whether or not the extortionists were policemen, the applicant has not satisfied me that the extortion was anything other than a criminal act, or that he was targeted for any reason other than he was known to have money."

Having regard to this finding, the Tribunal went on to say that the victims of extortion in the Punjab are diverse, and do not form a particular social group. Accordingly, the appellant's fears did not arise from his membership of any such group, and were not so grounded as to attract the operation of the Convention. His dread of attacks upon his family and threats to his life was reasonable, but was based on the endemic violence prevalent in the Punjab, not upon any form of persecution to which the Convention relates. It was that conclusion, with which the learned judge at first instance found no fault, which was attacked upon the appeal as involving an error of law. The question is whether, upon the facts found by the Tribunal, the appellant had brought himself within the description of a refugee contained in the Convention. He claimed to have done so on the basis that his well-founded fear was "of being persecuted for reasons of ... membership of a particular social group", defined in the way I have already stated.

The judgment of the learned trial judge is now reported: (1995) 128 ALR 705. In it, he said (at 716):

"In my opinion the range of people suggested by the applicant as constituting the particular social group of which he claims membership has no sufficiently identifying characteristic or common element to constitute them members of a cognisable or recognisable group within the Punjab. In my opinion the tribunal correctly concluded that the applicant did not have a well-founded fear of being persecuted for reason of membership of a particular social group."

In approaching the task of applying the concept of a refugee to a situation said to raise questions about the meaning of the words "persecuted for reasons of ... membership of a particular social group", the court does not have the assistance of relevant exegesis by a large number of authoritative decisions. Not all the problems raised by the language of the provision have yet been examined. The decision most closely in point, as well as of high authority for this court, is Morato (supra). But that was a rather

clear case, where no particular social group could be identified as the target of persecution. Nevertheless, the judgments contain important statements of general principle. At first instance, there is the decision in Minister for Immigration and Ethnic Affairs v. Respondent A (1994) 127 ALR 383, but this was under appeal to another full court at the very time when the present matter was argued. In Canada, there is the decision of the Supreme Court in Attorney-General of Canada v. Ward (1993) 103 DLR (4th) 1, and the decision of the Court of Appeal in Kwong Hung Chan v. The Minister of Employment and Immigration [1993] 3 FC 675. But, as appears from the judgment (at 32-33) of La Forest J., who delivered the judgment of the Supreme Court in the former case, that court's interpretation of the Canadian law reflecting the international Convention has been influenced by Canadian anti-discrimination law, including the Canadian Charter. I would hesitate to attempt to impose, upon the words that have been adopted into Australian immigration law, the categories developed in Canada. The general language must be allowed freedom of application, so far as it reasonably extends, in order not to shut out inadvertently victims of the as yet unforeseeable forms of oppression that future despotism, fanaticism, cruelty and intolerance may invent. The Convention was intended to give hope to all fugitives fairly encompassed by its language. It seems to me that those who framed the provision wisely chose broad expressions, which it is not the court's task to constrict. I think this view is in accordance with that adopted throughout the judgment of Black C.J. (with whom French J. agreed) in Morato (supra). Similarly, Lockhart J. (at 416) avoided entanglement in precise formulae. Exegesis will bring help in the application of the provision, but should not be permitted to replace it with a narrower formulation.

In my opinion, there is a unity of concept about the whole definition of a refugee contained in the Convention, so far as it relates to membership of a particular social group, which should always be kept firmly in mind. That concept flows through the separate elements of the definition. The well-founded fear of which it speaks is a fear of "being persecuted". Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution. Consistently with the use of the word "persecuted", the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is "membership of a particular social group". 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". The link between the key word "persecuted" and the phrase descriptive of the position of the refugee, "membership of a particular social group", is provided by the words "for reasons of" - the membership of the social group must provide the reason. There is thus a common thread which links the expressions "persecuted", "for reasons of", and "membership of a particular social group". That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase "for reasons of", and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.

The point can be illustrated from history. In the infamous Reign of Terror during the French Revolution, men, women and children were guillotined because they belonged to a class seen as dangerous to the emerging democratic State. Similarly, in Cambodia under Pol Pot, teachers, lawyers, doctors and others who were seen as having, by their education and status, a capacity to influence public opinion, were regarded as potentially dangerous to the new order, and were therefore eliminated. These were textbook examples of persecution for membership of a social group. In neither case was the motivation what a particular individual possessed or had done. Of course, many of the people murdered did have greater wealth than the average, but others did not. Some probably had greater capacity, if they chose, to act against the State than the average citizen, but many were quite helpless. The fact is that it was the whole class which, in each instance, was attacked. Individuals were not persecuted for what they had done as individuals, nor for what they possessed as individuals.

When the linked ideas expressed by the definition of a refugee come to be applied to less clear examples, it remains important to keep steadily in mind the essential unity of the conception. A crowd is not a social group, and numerous individuals with similar characteristics do not make up a social group - certainly not one of a kind that is properly described as having a *membership*. There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes

of their persecutors, so that it is a fitting use of language to say that it is "for reasons of" his membership of that group.

I have referred to the way in which a group is seen by others. In this area, perception is important. A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words "persecuted for reasons of" look to *their* motives and attitudes, and a victim may be persecuted for reasons of race or social group, to which *they* think he belongs, even if in truth they are mistaken. Hitler's ghastly views about race, for instance, led to persons being classified as Jewish who had appropriately regarded themselves as German; the perception of the authorities was then the important reality which determined their fate.

It is the whole of the Convention conception of a refugee which must be applied in an individual case. A lawyer naturally analyses the language into its constituent parts. But the whole is not merely a sum of those parts. When they are put together to express the total concept, each of them is coloured by its association with the others, and a composite meaning emerges. Of course, in a particular case a clear failure to match one part of the conception may be decisive. In the forced sterilization cases (as in Chan v. Canada (supra)), it is likely to be the impossibility of regarding a disparate collection of parents, with difficulties in complying with the accepted population policy of their government, as members of a particular social group. If they could be regarded as such a group, there would be less difficulty in seeing their treatment as for reasons of their membership of it. A policy is being implemented, the perceived importance of which engulfs the individual. But since the policy is general, there being no particular social group to which it is limited, its application does not involve persons being

persecuted for reasons of membership of a particular social group. Indeed, such a general policy, even if harsh, is not easily seen as persecution, and the United States Court of Appeals for the Second Circuit has recently held that China's coercive family planning policy is not persecution: Xin-Chang Zhang v. Slattery (Miner and Jacobs JJ., as yet unreported, 19 May 1995), a decision grounded on the ruling, in the context of a brutally enforced policy of a different kind, of the Supreme Court of the United States in Immigration and Naturalization Service v. Elias-Zacarias (1992) 502 U.S. 478. In the present case, quite apart from the difficulty of seeing wealthy Punjabis living in circumstances which make them vulnerable to extortion as a sufficient group, it is the greater difficulty of saying that the attacks feared by the appellant would be *for reasons of* his membership of that group which, it seems to me, he cannot overcome. Plainly, extortionists are not implementing a policy; they are simply extracting money from a suitable victim. Their forays are disinterestedly individual.

It has been suggested that a social group cannot generally be identified solely by the criterion of its members having done a particular thing: Morato (supra, at 404-405) - people who had turned Queen's evidence and feared reprisals; Chan v. Canada (supra, at 690) - objectors against the Chinese one-child policy. However, Black C.J. qualified this proposition in Morato at 405. With respect, I think his Honour was right to qualify it. The difficulty is that the formulation is too wide to permit of precise application. At one extreme, it would cover a case where an individual is one of a substantial number dealt with in a particular way because they have all committed the same criminal act, or are otherwise persons who could not be said to be persecuted for reasons of membership of the group constituted simply by virtue of all having done the same act. In the case of criminals, plainly they are dealt with for their personal

guilt. At the other end of the scale, the act done may be proscribed in the country of an individual simply in order to satisfy some State ideology as irrational as Nazi anti-Semitism. The impossibility of laying down a rule on this point to which there would be no exceptions (see Morato at 405-406) emphasizes the need to have regard to the whole of the definition of a refugee, rather than to make narrow exclusions based on a rigid application of one particular part of it.

In the present matter, an application of the words of the Convention, taken together, does not assist the appellant. He does not fear persecution for reasons of membership of a particular social group, but extortion based on a perception of his personal wealth and aimed at him individually. The appeal must be dismissed with costs.

I should add that I have not overlooked the question whether upheavals confined to one region of a fugitive's country of nationality, to the extent that that is true of the disturbances in the Punjab, could ever justify a finding that the fugitive is a refugee. It may be that the appellant could have avoided all persecution, and all fear of persecution, simply by moving with his family to another part of India. But I have not explored this question, both because it appears that the point may not have been raised against the appellant at the appropriate time, and because he must in any event fail for the reasons I have given.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Judgment herein of his Honour Justice Burchett.

Associate:

Date: 27 June 1995

IN THE FEDERAL COURT OF AUSTRALIA)

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SOUTH AUSTRALIAN DISTRICT REGISTRY)

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GENERAL DIVISION)

No. SG17 of 1995

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF
AUSTRALIA

B E T W E E N: KULDIP RAM

Appellant

AND: THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS
AND THE REFUGEE REVIEW TRIBUNAL

Respondents

CORAM: Burchett, O'Loughlin and Nicholson JJ.

PLACE : Adelaide

DATE : 27 June 1995

REASONS FOR JUDGMENT

O'LOUGHLIN J.:

I have read the Reasons for Judgment of Burchett J; I agree with those reasons and have nothing further to add.

I certify that this is a true copy of the Reasons for Judgment of Justice O'Loughlin.

Associate

Dated:

IN THE FEDERAL COURT OF AUSTRALIA)

SOUTH AUSTRALIAN DISTRICT REGISTRY)

GENERAL DIVISION) NO SG 17 OF 1995

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

B E T W E E N **KULDIP RAM**

Appellant

and

**THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS AND
THE REFUGEE REVIEW TRIBUNAL**

Respondents

CORAM: BURCHETT, O'LOUGHLIN and R D NICHOLSON J

DATE: 27 JUNE 1995

PLACE: ADELAIDE

REASONS FOR JUDGMENT

R D NICHOLSON J:

I agree with the reasons for judgment of Burchett J.

I wish only to add that it is clear that the possession of wealth is capable, in the appropriate circumstances, of constituting those who possess it as members of a particular social group. Wealth is no different in this respect to land ownership: cf *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 416 and *Minister for Immigration and Ethnic Affairs v Respondent A and Ors* (1994) 127 ALR 383 at 402. The learned judge at first instance recognized this. He also found, correctly in my view, that there was no evidentiary support that the society to which the appellant belonged recognised the characteristic of wealth as alone creating an identifiable group. His Honour also found that the group posited ("the rich") was too vague, uncertain and extraordinarily wide. Such difficulties are not necessarily obstacles to "the rich" constituting a particular social group where the evidence establishes that wealth is definitive of such a group, although evidence of width may inhibit findings of particularity. It is apparent, however, that this is not a case where the findings contended for by the appellant were open and that the learned judge was correct in concluding that the Tribunal correctly concluded that the appellant did not have a well-founded fear of being persecuted for reason of membership of a particular social group.

I agree that the appeal must be dismissed with costs.

I certify that this and the preceding page is a true copy of the
Reasons for Judgment of his Honour Justice R D
Nicholson.

Associate:

Date:

Counsel for the Appellant: Mr G. Patel

Solicitors for the Appellant: Patel & Co

Counsel for the Respondents: Ms S. Maharaj

Solicitor for the Respondents: Australian Government Solicitor

Date of hearing: 12 May 1995