Case No: C4/2004/1291

Neutral Citation Number: [2005] EWCA Civ 249
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 17 March 2005

Before :

LORD JUSTICE WARD
LORD JUSTICE RIX
and
LORD JUSTICE MAURICE KAY

- -

Between :

CHUN LAN LIU	**Appellant/ Applicant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Melanie Plimmer (instructed by **Messrs Miles Hutchinson & Lithgow**) for the **Appellant/Applicant**
Kate Gallafent (instructed by **Treasury Solicitors**) for the **Respondent**

- -

Judgment

Lord Justice Maurice Kay :

1. The appellant is a citizen of the Peoples' Republic of China. She was born on 8 May 1968. She is married and has two children. She arrived in this country on 10 June 2002 and claimed asylum two days later. Her husband and children remain in China. Her application for asylum was a harrowing one. However, her account of events in China was not accepted by the Secretary of State and in a letter dated 29 July 2002 he rejected her claim. She appealed to an adjudicator. In a decision promulgated on 17 July 2003 he allowed her appeal on both asylum and human rights grounds. The Secretary of State accepted the decision of the adjudicator on human rights and, accordingly, the appellant now has leave to remain in this country. However, the Secretary of State appealed to the Immigration Appeal Tribunal on the question of asylum. In a determination notified on 25 March 2004 the Immigration Appeal Tribunal allowed the appeal of the Secretary of State on the asylum issue. This means that, whilst the appellant is free to remain in this country at least for the time being, she does not have refugee status. She is thus disadvantaged in a number of ways, one of which concerns the prospect of her husband and children being permitted to join her here. Although she was initially refused permission to appeal to this court by the Immigration Appeal Tribunal and by the Lord Justice who considered the application on paper, on 7 October 2004, following an oral application, permission to appeal was granted by Pill and Hooper LJJ.

2. So much for the procedural history. I now turn to the factual background. The facts found by the adjudicator and subsequently accepted as such by the Secretary of State are as follows. In October 2002, when her children (who are both girls) were aged fifteen and ten, the appellant was eight months pregnant with her third child. Under Chinese law couples have the right to have a single child and eligible couples may apply for permission to have a second child. The law requires regional authorities to use quotas and other measures to limit the total number of births in the region. There is a history of forced abortion and sterilisation. Although the law has been amended in recent times a report of the US Department of State referred to in the determination of the adjudicator states:

> "Central Government policy formally prohibits the use of physical coercion….however intense pressure to meet birth limitation targets set by government regulations has resulted in instances in which local birth planning officials reportedly have used physical coercion to meet government goals."

The adjudicator also referred to an expert report by Dr. Harriet Evans which includes this description of the implementation of the "one child policy" at the local level:

> "It is [in] the complex context of rural need and local official pressure that forced abortions and sterilisations have been and continue to be carried out on women into their third and subsequent term."

It is against this background, which is not disputed by the Secretary of State, that the events of October 2002 took place. The appellant was forcibly taken to a hospital and the eight month foetus was removed by caesarean section. No attempt at sterilisation occurred on that occasion but sometime later the appellant was required to attend

hospital for sterilisation. She refused to do so. Officials came into her home in order to remove her to hospital by force. There was a fight in the course of which her husband returned home. The appellant sought to defend herself by taking up a stick of the kind used for carrying heavy weights across the shoulders. She struck one of the three officials. She succeeded in escaping to the railway station where she hid in a goods train which took her to another province. She remained there illicitly for some months before managing to leave China so as to make her way to this country. Her application for asylum is based on a fear of persecution in that she fears that upon return to China she would be forcibly sterilised and would be severely punished for having assaulted an official in self defence. She would be imprisoned in inhuman and degrading conditions.

3. Once the adjudicator had accepted the account of the appellant, it was virtually inevitable that he would find that she had a well founded fear of persecution. That, however, is not enough. Article 1(A)(2) of the Refugee Convention provides that the term "refugee" should apply to any person who

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

Thus, the well founded fear of persecution has to be for a Convention reason. In this case the appellant had to establish that her well founded fear of persecution was for "membership of a particular social group". The adjudicator held that the appellant was a member of "a particular social group", that group being defined as "women of child bearing age in China". He did not consider it necessary for there to be any further refinement of the definition. He therefore concluded that the appellant had a well founded fear of persecution for a Convention reason. In view of his factual findings, it was inevitable that he would also conclude that upon return she would face a real risk of inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights and Fundamental Freedoms.

4. In his grounds of appeal to the Immigration Appeal Tribunal, the Secretary of State sought to take issue with various aspects of the determination of the adjudicator. In particular, for present purposes, he took issue with the finding of a particular social group as defined by the adjudicator.

5. Before the Immigration Appeal Tribunal, Miss Plimmer sought to redefine the particular social group into which her client fell. Her submission and the conclusion of the Immigration Appeal Tribunal can be seen from this passage in the determination of the Tribunal (at paragraph 13):

> "Undoubtedly, women of child bearing age in [China] are a particular social group. However, that is not the reason that this appellant fears persecution. Counsel suggested that this

> appellant feared persecution because she was a member of a social group defined as
>
> > 'rural women accused of transgressing social mores in relation to the population control policy by choosing to have a third child'.
> >
> > The difficulty we have with that definition is that it is defining membership of a group, by reason of the persecution. What this respondent fears, is that on her return to China she will be forced to undergo sterilisation, because she has been pregnant for a third time and left [China] when efforts were made to remove her to undergo forced sterilisation. According to counsel's definition the group exists because rural women have been accused of transgressing social mores in relation to the government's population control policy by choosing to have a third child. Such a group would not exist independently of the persecution. We believe that counsel, in seeking to clarify the social group, has fallen into the trap of identifying it by means of the persecution.…..The adjudicator's definition of membership of a particular social group is far too wide, because there is no causal link between women of child bearing age in [China] and the persecution which this appellant claims to fear. Undoubtedly, if on return the appellant were forced to undergo sterilisation, that would amount to inhuman or degrading treatment or punishment, but in our view, ….the appellant is not at risk of persecution as a member of a particular social group."

6. The present appeal to this court is concerned with that passage. Miss Plimmer is critical of the reasoning and conclusion of the Immigration Appeal Tribunal that the group in question does not exist independently of the persecution. She invites this court to find that the Immigration Appeal Tribunal erred in law. Originally, she was minded to contend that this Court should both set aside the determination of the Immigration Appeal Tribunal and proceed to decide for ourselves that the appellant has a well-founded fear of persecution as a member of a particular social group, now defined as "rural women who evince an intention to have more than two children". However, it is now common ground that, if we find a material legal error in the determination of the Immigration Appeal Tribunal, we should remit the matter. Before considering whether the Tribunal fell into legal error in this case, it is appropriate to refer to the seminal case of *Shah and Islam* [1999] 2 AC 629.

Shah and Islam

7. The appellants in *Shah and Islam* were women from Pakistan who had suffered violence in that country after their husbands had falsely accused them of adultery. They eventually applied for asylum in this country on the ground that having been abandoned by their husbands, lacking any other male protection and condemned by the local community for sexual misconduct, they feared that if they were returned to Pakistan they would suffer persecution in the form of physical and emotional abuse, would be ostracised and unprotected by the authorities and might be liable to death by

stoning in accordance with Sharia law. As in the present case, the issue was whether the appellants were members of a particular social group within the meaning of Article 1A(2) of the Refugee Convention. The House of Lords (Lord Millett dissenting) allowed the appeals. Mrs Shah's case was remitted to the Immigration Appeal Tribunal for further consideration. In the case of Mrs. Islam, the House of Lords made a declaration that it would be contrary to the United Kingdom's obligations under the Refugee Convention for her to be required to return to Pakistan.

8. A majority of the House of Lords (Lord Steyn, Lord Hoffmann and Lord Hope of Craighead) held that women in Pakistan constituted a particular social group. In addition Lord Steyn and Lord Hutton considered that the appellants also belonged to a particular social group which was more narrowly defined by the unifying characteristics of gender, of being suspected of adultery and of lacking protection from the state and public authorities. Strictly speaking, therefore, the *ratio* of *Shah and Islam* relates to the particular social group defined as "women in Pakistan" and the part of the speech of Lord Steyn (with which Lord Hutton agreed) dealing with the narrower categorisation was *obiter.* It is nevertheless of the utmost importance. He said (at p 645 C-G):

> "The Court of Appeal held (and counsel for the Secretary of State argued) that this argument [i.e. in support of a more narrowly defined group] falls foul of the principle that the group must exist independently of the persecution. In my view this reasoning is not valid. The unifying characteristics of gender, suspicion of adultery and lack of protection, do not involve an assertion of persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands. In *Applicant A v. Minister for Immigration and Ethnic Affairs*, 71 ALJR 381, 402, McHugh J explained the limits of the principle. He 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. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.'
>
> The same view is articulated by Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (1996). P 362. I am in respectful agreement with this qualification of the general principle. I would hold that the general principle does not defeat the argument of counsel for the appellants."

9. That part of Lord Steyn's speech is central to Miss Plimmer's submissions. Although strictly *obiter*, I have no doubt that it is a correct statement of the law and that we should follow it.

The primary submission on behalf of the Appellant

10. Miss Plimmer submits that, in paragraph 13 of its determination (which I set out in paragraph 5 of this judgment), the Immigration Appeal Tribunal erroneously confined its consideration to the general principle – "the group must exist independently of the persecution" – and failed to consider the qualification referred to by Lord Steyn. On behalf of the Secretary of State Miss Gallafent invites the conclusion that paragraph 13 should be read as a properly considered rejection of the appellant's case, embracing a rejection of the particular social group for which the appellant was then contending on the basis of the qualification. She further submits that this can be inferred when one reads the whole determination, especially the part in which Miss Plimmer's submission was summarised.

11. In my judgment it is the submission of Miss Plimmer on this central issue that is correct. As I read paragraph 13 of the determination, doing so of course in the context of the determination as a whole, it is not possible to be satisfied that the Immigration Appeal Tribunal considered Lord Steyn's qualification. The reference to counsel having "fallen into the trap" of identifying the group "by means of persecution" convinces me that the Tribunal considered the general principle but not the qualification. That in itself is sufficient for this appeal to succeed and to require the matter to be remitted to the Immigration Appeal Tribunal but, because there is no previous Court of Appeal authority or a starred decision of the Tribunal dealing with China's reproductive control policy, it is appropriate to consider further aspects of the case in the hope that the Tribunal and others will be assisted.

Further considerations

(1) Defining the group: evidence

12. At each stage of these proceedings, the particular social group contended for on behalf of the appellant has been redefined. Before the adjudicator it was "women of child bearing age in China". Before the Immigration Appeal Tribunal it became "such women accused of transgressing social mores in relation to the population control policy by choosing to have a third child". In her skeleton argument in support of the present appeal, Miss Plimmer opted for "rural women who evince an intention to have more than two children". As we are no longer asked and do not propose to decide the matter with finality, it is not necessary for us to grapple with the actual definition of the postulated group. However, it is appropriate to observe that the need to establish a particular social group should not become an obstacle course in which the postulated group undergoes constant redefinition. *Shah and Islam* is itself an illustration of that. It is important to keep in mind that, however the group is defined, it is not essential that all members of it suffer persecution. As Lord Hoffmann said in *Shah and Islam* (at p 653 H):

> "It is….a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership of that class."

Indeed if it were not a fallacy, "women in Pakistan" would not begin to constitute a particular social group. It is to be hoped that cases of this sort will not degenerate into nitpicking around the margins of definition. As it will be for the Immigration Appeal Tribunal to decide on the evidence at the remitted hearing whether and, if so, what particular social group has been established, it is inappropriate to say much more on the issue at this stage. I simply record that, when the Court indicated that it might be in a position to decide the case without a remittal, Miss Gallafent submitted that the evidence before this Court on this issue does not favour the appellant. I do not feel able to accept such a submission. The evidence merits the consideration of the specialist Tribunal. That is why it is necessary for the matter to be remitted, with no further comment about the evidence.

(2) Lord Steyn's qualification: further observations

13. It will be recalled that Lord Steyn expressly referred to and adopted a passage from Goodwin-Gill *The Refugee in International Law*. It is appropriate to set it out here (p 362):

> "The essential question, however, is whether the persecution feared is the sole distinguishing factor that results in the identification of the particular social group. Taken out of context, this question is too simple, for whenever persecution under the law is the issue, legislative provisions will be but one facet of broader policies and perspectives, all of which contribute to the identification of the group, adding to its pre-existing characteristics.
>
> For example, parents with one or more children can be considered as an identifiable social group because of (1) their factual circumstances and (2) the way in which they are treated in law and by society. Arbitrary laws might subject red-headed people, mothers of one or more children, and thieves to a variety of penalties, reflecting no more than the whims of the legislator. Where such laws have a social and political context and purpose, and touch on fundamental human rights, such as personal integrity or reproductive control, then a rational basis exists for identifying red-headed people and mothers of one or more children as a particular social group, in their particular circumstances, while excluding thieves. For the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices and laws.
>
> Treatment amounting to persecution thus remains relevant in identifying a particular social group, where it reflects State policy towards a particular class."

I have set out this extract at length because it was incorporated by reference into Lord Steyn's speech (although not there set out) and, as I have said, I gratefully accept that

speech to represent the law. The extract is also a useful elaboration of the passage from the judgment of McHugh J in *Applicant A*.

(3) Other authorities

14. In the course of submissions we were referred to a number of other authorities from various jurisdictions which were said to advance the case of one side or the other. They emanate from the United States of America. (*Acosta* (1985) 19 I&N 211), Canada (*Cheung v. Canada (Minister of Employment and Immigration*) [1993] 2 FC 314; *Chan v. Canada (Minister of Employment and Immigration*) [1993] 3 FC 675; *Chan v. Minister of Employment and Immigration* [1995] 3 RCS 593) and Australia (*VTAO v. Minister of Immigration and Multicultural and Indigenous Affairs* [2004] FCA 927). Plainly there are significant differences between these cases and sometimes between different judgments in the same case. I do not propose to attempt a comprehensive analysis of all the cases, but have seen in draft and agree with what Rix LJ is to say about them. There are some passages which it seems to me should inform any case such as this. One of Miss Gallafent's submissions rests on the proposition that the members of a particular social group must share a common immutable characteristic. The proposition is derived from *Acosta* and it was acknowledged by the House of Lords in *Shah and Islam*. However, it is important to see the principle in full. In *Acosta* the US Board of Immigration Appeals said that a social group for the purposes of the Convention is one distinguished by

> "an immutable characteristic……that either is beyond the power of an individual to change [the Board later gave as examples 'sex, color or kinship ties'] or that is so fundamental to his identity or conscience that it ought not to be required to be changed."

In *Shah and Islam*, Lord Hoffman, having just set out that passage, added (at p 651F):

> "This was true of the other four grounds enumerated in the Convention. It is because they are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights."

Neither *Acosta* nor *Shah and Islam* concerned reproductive control policies. However, the Canadian and Australian authorities did. Although they do not all speak with one voice, I have derived considerable assistance from the dissenting judgment of La Forest J (with whom L´Heureux-Dubé and Gonthier JJ agreed) in *Chan*. Commenting on *Acosta* and his own earlier judgment in *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, he said ([1995] 3 RCS at p. 644):

> "It is still necessary under the second category to consider whether an association exists that is so fundamental to members' human dignity that they should not be required to forsake it. To apply this simplified distinction without proper consideration of the context in which it arose can lead to ludicrous results….I find it difficult to conceive that he associative qualities of having children may be considered so

> significantly analogous to the associative qualities of being a member of a taxi driver cooperative [i.e. the factual matrix of *Acosta*] to warrant any meaningful comparison. Moreover, if the distinction was treated as a hurdle claimants are obliged to pass, behaviour fundamental to one's basic humanity, such as having children, could always be classified out of context as something one merely does rather than something one actually is. To pursue this example, however, surely it is nonsensical to find other than that one fundamentally is a parent. Parenting cannot be considered an activity that one merely does, as interchangeable as a particular occupation, without distorting the primary forms of refugee law: the assurance that basic human rights are not fundamentally violated without international recourse."

Although this was a dissenting judgment, the difference between the minority and the majority related to matters of proof rather than principle. In my judgment, it is the approach of La Forest J that is the natural bedfellow of the majority of the House of Lords in *Shah and Islam*. I also observe that, whilst the approach of La Forest J did not impress Dawson J in the Australian case of *Applicant A* (above, at pp 17-18), in the recent case of *VTAO* (above), the Federal Court of Australia, having considered *Applicant A*, reached a conclusion about the identification of a particular social group arising out of the application of China's reproductive control law and policy which is consistent with the approach of La Forest J. It seems to me that if, upon a reconsideration by the Immigration Appeal Tribunal, the country evidence in the present case passes muster, this approach should inform the decision of the Tribunal on the question whether the Appellant's well-founded fear of persecution is "for reason of membership of a particular social group".

Conclusion

15. For the simple reason given in paragraph 11 of this judgment, I would allow the appeal and remit the matter to a differently constituted Immigration Appeal Tribunal. I have endeavoured to identify the correct principles and approach to adopt if the evidence of conditions in China justifies it.

Lord Justice Rix:

16. I agree, and would only like to add a few observations about the US and Commonwealth authorities to which Lord Justice Maurice Kay has referred above.

17. Several in this line of cases were cited to the House of Lords in *Shah and Islam* of which *Acosta*, *Chan* (1995) and *Applicant A* were referred to in their Lordships' speeches.

18. In Canada, *Cheung* is in many ways the leading case. It was cited to their Lordships, but not referred to by them. In effect, it concerns the same issue as the current appeal, viz. the position of women in China who have more than one child and face sterilisation. The Canadian Court of Appeal held that such women constituted a particular social group. The essence of the reasoning was that such women –

> "are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it" (at 322).

19. *Chan* concerned essentially the same issue, but from the point of view of the husband who faced forced sterilisation. On this occasion, the Canadian Court of Appeal decided by a majority that the husband failed, first, because he had not shown a well-founded fear of sterilisation on the facts, and secondly, because, were he to be so persecuted, it would have been for what he *did*, not for what he *was*, and therefore could not establish persecution by reason of membership in a particular social group.

20. On appeal to the Canadian Supreme Court, the decision in *Chan* was upheld by a majority of 4 to 3, but only on the facts. For these purposes the majority were prepared to assume without deciding (see para 119) that on the issue regarding membership of a particular social group *Cheung* (and not the court of appeal in *Chan*) gave the correct answer. The minority, however, in a judgment delivered by La Forest J, built on *Ward* and *Cheung* in focusing again on the question whether

> "the appellant is voluntarily associated in a manner so fundamental to his human dignity that he should not be required to forsake it" (at para 84).

21. In concluding that issue in the appellant's favour (see at paras 86/88), La Forest J rejected the distinction between what a parent does and is, and also drew attention to the analysis of Professor Audrey Macklin in "*Canada (Attorney-General) v. Ward:* A Review Essay" (1994) *6 Int'n J of Refugee L 362*. That analysis was itself cited by *Goodwin-Gill*, *The Refugee in International Law*, 2nd ed, 1996, at 362, in a passage drawn on by Lord Steyn in *Shah and Islam* at 645 (set out by Lord Justice Maurice Kay at para 13 above).

22. In Australia, on the other hand, in *Applicant A* the majority of the High Court of Australia differed from the conclusion in *Cheung* on the ground that there was no evidence in their case that Chinese parents of more than one child were set apart and perceived by society at large as a particular social group (at 15C/D, 17E/F *per*

Dawson J, at 30G/31D, 34F/35D *per* McHugh J). In *Shah and Islam* at 645 Lord Steyn cited the following extract from McHugh J's judgment as properly stating the limitations of the principle that a particular social group must exist independently of persecution and cannot be defined in terms of it:

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

23. The minority in *Applicant A* however, considered that such principles sufficed for a decision in the applicants' favour. Thus Brennan CJ referred to the findings of the Refugee Review Tribunal as pointing out that Chinese law in any event distinguished parents of one child and parents of more than one child in terms of rewards. He specifically relied on *Cheung* in defining the characteristic of the particular social group as being the parent of a child and not voluntarily adopting an approved birth-preventing mechanism (at 11A). Kirby J saw that there were arguments for both viewpoints but concluded that the applicants were targeted "because of the characteristics which they have as members of their community…they would be quite visible in their village" (at 63F/H).

24. The High Court of Australia revisited the issue in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* [2000] 201 CLR 293 from the point of view of the child rather than the parent of such Chinese families. On this occasion it held that children born in contravention of China's one child policy, so-called "black children", could constitute a particular social group. It disapproved the court's resort below to *Applicant A* for a concept that there could be no persecution for membership of a particular social group where laws of general application are concerned. Thus –

> "19. Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - for example, "black children", as distinct from children generally – cannot properly be described in that way."

25. In *Applicant S v. Minister for Immigration and Multicultural Affairs* [2004] 206 ALR 242 the High Court of Australia considered the case of a young Afghan. He claimed that able-bodied young men in Afghanistan were a particular social group who were persecuted in being recruited by the Taliban regime. The High Court, drawing on both *Applicant A* and *Chen*, held that the fact finding tribunal had failed to consider the correct issue, which was –

> "whether because of legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society" (at 50).

26. For these purposes, the test was whether a separate social group was *cognisable*, not whether it was perceived or *re*cognisable by the rest of society (at paras 27, 36, 63). The latter test may be evidence of the former situation, but was not the ultimate arbiter. The matter was summarised by Gleeson CJ, Gummow and Kirby JJ as follows (at para 36):

> "First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."

27. Most recently, in *VTAO v. Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 927 (19 July 2004), the Federal Court of Australia, after considering the earlier jurisprudence, has held that Chinese parents of more than one-child families (as well as their children) are capable of being a particular social group. Of *Applicant A* it was pointed out (at para 22) that it –

> "merely decided that the fear of harm resulting from a failure to abide by such a law cannot be relied upon *alone* as the defining or uniting characteristic of a particular social group" (emphasis added).

28. The more recent Australian cases (*Chen*, *Applicant S* and *VTAO*) all post-date *Shah and Islam.*

29. In my judgment, there are at least two strands apparent in this jurisprudence. The first relates to what can amount to a defining characteristic of a particular social group. In this connection *Acosta*, *Ward* and *Cheung* are of particular interest and are probably saying much the same thing. In *Islam and Shah* Lord Hoffmann adopted the language of *Acosta* (at 651e/f):

> "where it was said that a social group for the purposes of the Convention was one distinguished by:
>
> > "an immutable characteristic…[a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed."
>
> This was true of the other four grounds enumerated in the Convention. It is because they are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights."

30. The second strand relates to how the characteristic and thus the particular social group in question may be identified. It may be identified by discrimination and even in part by means of discrimination amounting to persecution: but that will not matter as long as such persecution is not the sole means of definition or identification. It may be identified by the recognition or perception of the surrounding society in general that the group in question shares a particular characteristic. Or it may be that the distinguishing characteristic and thus the group in question may simply be objectively observable, irrespective of the insight of the general society in which it is placed. It may be said that these concepts have not yet been fully worked out in the jurisprudence.

31. Finally, I note that in *Islam and Shah* Lord Steyn said of *Applicant A* that it showed that –

> "a significant difficulty in the way of claimants to refugee status is the fact that the one child policy is apparently applied uniformly in China. There is no obvious element of discrimination. That may be the true basis of the decision of the Australian High Court." (at 642a).

32. However, in the light of subsequent Australian authority, I would respectfully suggest there may be some doubt whether Lord Steyn's comment represents either the true factual analysis of the situation in China or the logic of that jurisprudence.

33. The case of parents of more than one-child families who face forced sterilisation in China has engendered controversy and some finely balanced decisions in Canada and Australia. It seems, however, that in principle the developing jurisprudence in both countries on balance favours the possibility of finding, rather than the necessity of rejecting, a case of persecution by reason of membership of a particular social group. The facts, however, will have to be found by the Immigration Appeal Tribunal upon the remission, which I agree is necessary, to which Lord Justice Maurice Kay has referred at para 11 above.

Lord Justice Ward :

34. For the reasons given by Maurice Kay L.J., I agree that this appeal should be allowed and the matter remitted to a differently constituted Immigration Appeal Tribunal. When considering the main question which will arise, namely, whether the appellant can establish that she is a member of a particular social group, the Tribunal will be greatly assisted by the succinct analysis of the Commonwealth authorities expounded by Rix L.J. with whose judgment I also agree.

ORDER**:** Appeal allowed; draft order as agreed between the parties; case remitted to the Immigration Appeal Tribunal; application of the Secretary of State for permission to appeal to the House of Lords to be considered on the papers.

(Order does not form part of approved Judgment)