Case No: 2001/1535

Neutral Citation Number: [2002] EWCA Civ 620
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 9th May 2002

Before :

LORD JUSTICE SCHIEMANN
LORD JUSTICE MAY
and
LORD JUSTICE JONATHAN PARKER

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Between :

WILSON HERNAN LOPEZ MONTOYA	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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(Transcript of the Handed Down Judgment of
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Manjit S. GILL Q.C. and Christa FIELDEN (instructed by **Selva & Co.**) for the Appellant
Michael FORDHAM (instructed by **Treasury Solicitor**) for the Respondent

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Judgment
As Approved by the Court

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Lord Justice Schiemann: This is the judgment of the Court.

The Background

1. This appeal from a starred decision of the Immigration Appeal Tribunal in a refugee case raises issues which are important both from a humanitarian and from a legal perspective. In granting permission to appeal, Simon Brown L.J. observed

> "Although the appellant lost on 2 supposedly independent grounds neither seems to me self-evidently right: this is a difficult area of the law."

We agree with every part of that observation. However, we have come to the same conclusion as the Tribunal. Every society has in it rich men. Every society has in it individuals and groups who would like to put into their pockets what is currently in the pockets of the rich and are prepared to kill for this. Many states do not have internal policing systems which provide an adequate measure of protection from such people and groups. We do not consider that the Refugee Convention imposes upon signatory states any general obligation to provide refuge for all the potential victims in those circumstances.

2. The appellant Mr Montoya is a Columbian who has sought refugee status here. The facts are not in dispute. He is accepted on all sides as being honest. He had threats in Colombia to the effect that if he did not pay 10,000,000 pesos per month to a marxist opposition group known as the EPL he would be murdered. His elder brother was murdered in Columbia in 1992 for political reasons. His uncle had received similar threats and had for a while made payments. He stopped paying and thereupon was murdered on 31.12.1995. The appellant had never been involved in politics but had refused to make any payments partly as a matter of principle and partly because they were beyond his means. He had a genuine fear of being killed and because of this had fled to this country in 1996. If he is returned to Colombia there is a reasonable likelihood that he will be murdered. The putative murderers are the persons seeking to extort the money. The state authorities are not in a position to protect him. His claim to human sympathy is clearly strong. The Secretary of State has power to allow him to remain. Whether the Secretary of State should exercise this power rather than send him to a likely death is however not a question which the Court has jurisdiction to consider in these proceedings.

3. The legal question which we have to determine is whether on those facts the IAT was entitled to come to the conclusion that the appellant did not fall within the definition of a refugee contained in the Geneva Convention relating to the status of refugees. That definition is as follows :-

> "… 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 … ."

The reasons here set out we shall refer to as Convention reasons.

4. This definition has caused many problems in the past and will no doubt continue to do so. It is a common phenomenon of reaching political agreement that it is easier to reach agreement on imprecise wording. It is sometimes thought better to reach an agreement on such wording rather than to fail to reach agreement on more precise wording. The result of leaving imprecise wording is that the courts must do what they can with the wording that they have got. Unlike the parties to the agreement the courts can not simply walk away from the problem.

5. The Adjudicator found that Mr Montoya was a refugee as there defined. The Immigration Appeal Tribunal, however, allowed an appeal by the Secretary of State. It held that Mr Montoya's case was not covered by the Refugee Convention since (i) although he had a well-founded fear of being persecuted, the persecution in question was not for a Convention reason in that he was not a member of a particular social group as that phrase is used in the Convention nor was he threatened with persecution for his political opinion and (ii) even if he were to be regarded as a member of a particular social group, he had not shown that the threat to his life and property was the result of his being a member of such a group.

6. The Tribunal enunciated various legal propositions which were not significantly in dispute before us. The submissions before us were primarily concerned with whether the Tribunal had erred in applying those principles to the undisputed facts of the present case. Because many of the submissions made reference to particular conclusions reached by the adjudicator and the Tribunal and because the Secretary of State may wish to have the main material in one document it is perhaps useful to set out rather more from their determinations than would normally be done.

The Adjudicator's determination.

7. The following paragraphs from the Adjudicator's decision indicate what the appellant said and the Adjudicator's reaction.

> **3.** .... the appellant, the eldest of 7 children, was born and brought up ... near Risaralda in the Caldas department of Colombia. From 1993 until his departure in 1996 he managed his family's 7 acre coffee plantation in that area. He had no political affiliations.
>
> **4.** In May 1996 the appellant began to receive threats from the Ejercito Popular de Liberacion (EPL). According to the Colombia Country Assessment dated April 2000 at paragraph 4, under the heading Guerrilla Groups, this

> "was established in 1967 by the Partido Comunista Colombiano (Marxist-Leninist). It was the first Colombian group with a Maoist orientation. Made up of peasants, workers and students, it advocated total nationalisation and confiscation of all important industrial and agricultural enterprises. In 1984 .... the EPL came to an agreement with the Government and initially abandoned the armed struggle .... A dissident group, the APL-D, numbering about 120, is still active in ..... Risaralda".

These threats were continual and were in the form of 4 telephone calls and 5 letters which sought to extort large sums of money from the appellant with the warning that if he refused to pay he would suffer the consequences. As a direct result of this the appellant moved to his parents' home .... where, however, the threats continued. The appellant believed that the Colombian authorities often overlooked the activities and threats carried out by the EPL .....

5. The appellant reported these threats to the police at the Municipal Police Station and also at Belacazar....... He fled to the United Kingdom as a direct result of these threats which were similar in nature to those received by his uncle who was subsequently murdered on 31 December 1995. The appellant's elder brother Ruben Montoya and his sister Claudia .... both had political connections. Ruben was murdered for political reasons in 1992 and Claudia fled the country. ......

7. The appellant was called to give evidence in chief for the purpose of which he adopted as evidence his previously mentioned interview and 2 statements. The EPL demanded that the appellant pay them 10 million pesos every month. The appellant's father thought it wrong to give in to such threats so the appellant ignored them. He then received letters threatening to kill him if he did not comply. The appellant became too terrified to leave the house at the plantation and so he moved in with his family in Belacazar. However, after a week he received threats there and went again to the police who said they would investigate but failed to do so. Each time the appellant requested a progress report on the investigation he was told to wait, until he was driven by fear to leave the country. The EPL was a very strong organisation with links to .... (FARC) and to the .....(ELN), both extremists left-wing groups. There was no point moving to yet another part of the country since there was danger everywhere in Colombia.

8. ..... [The appellant's uncle] owned and ran a coffee plantation in the same village as the appellant. He received the same threats and made the same complaints to the police who

failed to act upon them. He was killed by the same guerrillas. .....

9. The appellant's elder brother was murdered because he was a member of the Conservative party. His parents have warned him against returned (*sic*) to Colombia saying that he is in danger of being murdered or kidnapped. The Guerrillas will not have forgotten about him.

10. [in cross-examination] the appellant said his family was popular and well regarded and had numerous friends in Colombia. He himself had never been involved in politics but had received the same sort of threats as his murdered brother. .... His murdered uncle had started off by paying the extorted money to the Guerrillas. It was because he stopped paying that he was killed. ..... The appellant had no problems until he started receiving threats in May 1996. He did not believe that his problems were linked to the political beliefs of certain members of his family but it could be the same group who had killed his brother as had murdered his uncle and threatened him. He had received no threats from groups other than the EPL. The police had opined that the threats were from common criminals but the appellant was sure it was the EPL since the notes were signed and stamped with the EPL logo.

11. The appellant's father is now running the plantation with the help of a manager and pays monthly extortion money to the EPL through that manager. He fears that they will soon seek to increase the amount. He believed that his family was targeted because they were prosperous land-owners.

23. The appellant has given throughout a consistent account of his reasons for seeking asylum. He impressed me as an intelligent and honest witness and I found his account wholly credible. I accept his assertion that he had and still has a genuine fear of persecution if returned to Colombia. ..... I accept that the appellant has received death threats and that his personal experience suggests to him that they may very likely be carried out. Given the numerous accounts of murder and atrocities in the newspaper cuttings provided ... I am convinced that there is a reasonable likelihood of this appellant being murdered if he were returned to Colombia.

24. Having established that the appellant has a well-founded fear of persecution it is then necessary to establish whether or not that fear of persecution is for a Convention reason. Having listened to the evidence, I must agree with the appellant's own assessment that, in his case, such persecution is unlikely to be on account of his actual or imputed political opinion. He neither had nor has any particular political allegiance and it is difficult to see how he could be imputed to have done so (*sic*)

four years after his brother's death. The only other category into which he might be admitted, therefore, is as a member of a "particular social group".

26. I believe that as members of a Maoist organisation, the EPL would regard private land-owners, who work their land to generate wealth for themselves and their families, as a particular social group – a group anathema to them. ..... [the Adjudicator quotes the definition adopted in the oft cited (1985) US Board of Immigration Appeals Interim Decision 2986, *Re Acosta*] : "applying the doctrine of *eiusdem generis* we interpret the phrase to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic which might be an innate one such as sex, colour or kinship ties, or in some circumstances it might be a shared experience such as former military leadership or land-ownership .... whatever the common characteristic that defines the group, it must be one that members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other 4 grounds of persecution". I am satisfied on this basis that the appellant as a land-owner is a member of a particular social group.

27. Lastly, the appellant needs to satisfy me that owing to his well-founded fear he is unable or owing to such fear is unwilling to avail himself of the protection of the country of his nationality. The appellant has proved himself willing ... to seek the protection of the Colombian authorities but appears to have lost confidence in their ability to protect him. Is this lack of confidence justified? [The Adjudicator answered that question in the affirmative]."

The Tribunal's determination

8. The Tribunal (Dr H.H. Storey, Mr J. Barnes and Mr G. Warr), after an extensive survey of domestic and foreign case law and literature to which we would like to pay tribute, and relying particularly on the passage in *Acosta*_cited by the adjudicator, identified various principles and sought to apply these to the appeal in front of them. The most significant paragraphs of their determination are the following. We have underlined the crucial parts of the Tribunal's reasoning.

11. The Tribunal is satisfied that the Adjudicator gave sound reasons for rejecting the respondent's claim that the EPL would impute to him a political opinion....

12. ... it is difficult to see how in this case the EPL (or a dissident faction of EPL) would ever have imputed or would impute to the respondent a political opinion. On the available evidence the respondent may well have been seen as a one (*sic*) member of a group anathema to them. But they appear to have been quite indifferent to what views were held by the respondent and his family. We consider that it was his family's prosperity that made them a target not their perceived political beliefs. There is no satisfactory evidence to show that the Guerrillas' motives were anything other than the purely criminal ones of desiring to extract extortion money. Indeed we note that in one of the documents relied upon by the respondent even he is recorded as saying that:

> "According to the notes left for me they come from a cell of the EPL to be exact from the Front 19, but on closer examination of the notes, they seem more likely to have come from common criminals passing themselves off as guerrillas as they occasionally demand sums of money which I have never paid as they are beyond my means...."

13. While Ms Fielden is correct in pointing out that guerrilla organisations active in the respondent's part of Colombia (the EPL included) were to a degree selective in their choice of certain groups as their targets, on the available evidence the only significant feature which caused landowners such as the respondent and his family to be a target was their perceived wealth.

14. For the above reasons <u>we agree with the Adjudicator that there are insufficient elements in this case to justify a finding that the EPL has ever imputed or would now impute a political opinion to the respondent</u>. [The Tribunal then referred to the earlier decision in *Gomez* [2000] INLR 549 where it was said]:

> "Organisations for some if not much of the time may act for purely economic reasons. Their reasons for seeking retribution against victims may for some if not much of the time be purely criminal. Indeed the background evidence suggests that most of the kidnappings undertaken by FARC and ELN are "financially motivated"... deciding whether any kidnapping is purely financial or purely political or is for mixed financial and political motives will obviously therefore depend on the particular circumstances of each case".

Similar consideration seems (*sic*) to us to apply when extortion is involved. There has to be concrete evidence that such a political motive would be brought to bear in the particular case. As we have just shown, such evidence is lacking here.

16. ..[the Adjudicator] failed to apply the correct criteria for determining whether there was a particular social group comprised of private landowners in Colombia. And nowhere did she apply her mind to the further essential question of whether or not the respondent had established a causal nexus between the harm feared and his membership of such a particular group.

17. We consider that her incorrect approach to the assessment of membership of a particular social group category led her to identify private landowners in Colombia as a particular social group when in fact they are not. Even if we had agreed with her about the existence of such a social group, the absence of any clear decision on the causal nexus question constitutes reason enough on its own why her determination cannot stand.

28. ....It is clear that the respondent cannot be excluded from consideration as a member of the particular social group composed of private landowners simply because he himself was not a land-owner. We are prepared to accept that in this case the EPL group concerned have always perceived the respondent as a land-owner, by virtue of the fact that it was his family through the father who owned the coffee plantation.... It is a reasonable inference that the guerrillas have always proceeded on the basis that it was the family that was the real source of the wealth that they sought – and apparently still seek – to extort.

31. The question of whether the landowners constitute a particular social group in the present appeal has to be looked at in the particular context of current-day Colombia. It was the failure of the Adjudicator to grasp this point which caused her to fall into error.

32. We have no difficulty in accepting that for a number of purposes private landowners in Colombia are differentiated from other groups or categories. They are distinguished by the fact that they own land and that many of them work the land for profit. However, the question we have to ask is whether such a group constitutes a particular social group for Refugee Convention purposes.

33. For reasons given earlier, as this appeal is primarily based on the risk of persecution feared at the hands of non-state agents, it is necessary to examine for what extent such a group is set apart from the rest of society not only by reference to the attitude of the State towards it but also to the attitude towards it of non-state actors, the EPL in particular. In current-day Colombia the position of landowners is nowhere near as distinct and demarcated as for example were landowners in pre-Revolutionary Russia. However, the Tribunal considers

that it remains that such a group does have some significant internal characteristics. The only question is whether such characteristics are enough to constitute it a particular social group for Convention purposes.

34. .... We do accept that as a result of the common designation given to them of being "Maoist" it is reasonable to infer that the EPL does view itself to some degree as involved in a class struggle and that it numbers among its class enemies those belonging to the landowners class.... It also seems to us evident enough that despite urbanisation Colombia remains a country dominated to a significant degree by the economics of its rural production. Historically the ruling classes have been the landowners ruling alongside or through major political parties representing their interests....

35. We would accept therefore that in such a society the status of being an owner of land that is worked for a profit is an ostensible and significant social identifier with historical overtones.

36. We would also accept that another characteristic which private landowners share is the fact that they are ineffectively protected.....accordingly the inability of the State to protect private landowners serves in this case to add an additional basis on which to recognise this group as a distinct entity.

37. However... <u>a further requirement must be met before the respondent can establish that he is a member of a particular social group composed of private landowners. That requirement is that such a group is one which shares an immutable characteristic.</u>

38. Mr. Harper's claim that the respondent fails on this count has two parts. First of all <u>it is argued that such a group clearly does not share an innate characteristic. We must accept that as being correct</u>, even taking that concept in the broadest possible sense. It would appear that in Colombia a person can divest himself of his status and identity of a land-owner by his voluntary action. It may not always be that easy for a person to do this in practice, but there are clearly no longer entirely rigid lines of social stratification such as would make it practically impossible for a person to change from being a land-owner to some other status or position.

39. The second part to Mr. Harper's principal objection appears to be <u>that the common non-innate characteristics of such a group is not one which falls within the requirement set out in *Re Acosta*, *Savchenkov* and other cases of being one that members of the group cannot change, or should not be required</u>

to change because it is fundamental to their individual identities or conscience. On this point we must agree with Mr. Harper.

41. .....There was or is nothing to stop the respondent changing his perceived identity as a private land-owner.

43. We agree ... that there was some degree of interference in the respondent's and his family's civil and political rights. Their attempts at relocating to their family house in Balcazar did not solve their problems. The evidence was that the threats made to him as a result of his failure to pay extortion money on the coffee plantation in Risaralda continued there. Thus action on his part to continue as manager of the coffee plantation on behalf of his family had only been possible at the expense of a considerable interference with his basic right to enjoy private and family life without threat or anxiety. That such interference would continue to be a real threat is strongly suggested by the evidence as to the current situation of the respondent's father.

44. We also accept that the respondent did not and does not have opportunities available to him to preserve his personal freedom by reliance upon state protection....

45. However, these interferences in the respondent's and his family's civil and political rights have all occurred because of their status as private landowners. The latter is a status the respondent can change. He could change from being a land-owner without that having a fundamental impact on his identity or conscience.

47. ..... Despite the very real respects in which the respondent and his family face interference in their civil and political rights, their membership of this group is not one which they are unable to change. The nature of present-day Colombian society would not prevent them from earning their livelihood in another way.

48. It might be objected that whilst the respondent and his family might be able to change their status of land-owner to something else, the most likely result would be that they would remain a target for persecution by groups such as the EPL because of their continuing wealth. That may well be true, but it seems to us to demonstrate that in reality the only group of which they have membership is that of persons with wealth. But if it is wealth alone that makes them a target then such a group does not exist independently of their persecution.

55. Summary of Conclusions

A. The Adjudicator was correct to conclude that the respondent could not show a Convention ground of political

opinion but incorrect to conclude that he had made out the ground of membership of a particular social group (PSG). In deciding that private landowners were a PSG in current-day Colombia the Adjudicator overlooked the judgment of the House of Lords in *Shah* and *Islam* [1999] 2 A.C. 629 and in consequence applied the wrong criteria for evaluating the PSG category. She also erred in failing to consider whether there was a causal nexus between the respondent's well-founded fear of persecution and this alleged PSG.

B. Taking stock of post-*Shah* and *Islam* cases both here and abroad, the Tribunal considers that the basic principles that should govern assessment of a claim based on the PSG category are as follows:

(i) in order to succeed under the Refugee Convention a claimant who has a well-founded fear of persecution must show not only the existence of a PSG (the "PSG question"), but also a causal nexus between his membership of the PSG and that fear (the "causal nexus question");

The PSG Question

(ii) the PSG ground should be viewed as a category of last resort;
(iii) persecution may be on account of more than one ground. If the principal ground is membership of a PSG, then focus should be on that;
(iv) the PSG ground must be interpreted in the light of the basic principles and purposes of the Refugee Convention;
(v) if the PSG ground had been intended as an all-embracing category, the five enumerated grounds would have been superfluous;
(vi) the PSG ground is further limited by the Convention's integral reliance on anti-discrimination notions inherent in the basic norms of International Human Rights Law;
applying the *eiusdem generis* principle to the other 4 grounds, the PSG category must be concerned with discrimination directed against members of the group because of a common immutable characteristic;
a broad range of groups can *potentially* qualify as a PSG, including private landowners;
(ix) but whether any particular group is a PSG *in fact* must always be evaluated in the context of historical time and place;
(x) in order to avoid tautology, to qualify as a PSG it must be possible to identify the group independently of the persecution;
(xi) however the discrimination which lies at the heart of every persecutory act can assist in defining the PSG. Previous arguments excluding any identification by reference to such discrimination were misconceived;
(xii) a PSG cannot normally consist in a disparate collection of individuals;
(xiii) for a PSG to exist it is a necessary condition that its members share a common immutable characteristic. Such a characteristic may be innate or non-innate. However, if it is the latter, then the non-innate characteristic will

only qualify if it is one which is beyond the power of the individual to change except at the cost of renunciation of core human rights entitlements;
(xiv) it is not necessary, on the other hand, for such a group to possess the attributes of cohesiveness, interdependence, organisation or homogeneity;
(xv) there is nothing in principle to prevent the size of the PSG being large (e.g. women), but if the claim relies on some refinement or sub-category of a larger group, care must be taken over whether the resultant group is still definable independently of their persecution;
(xvi) a PSG can be established by reference to discrimination from state agents or non-state agents (actors) of persecution;
(xvii) it is not necessary in order to qualify as a PSG that a person actually has the characteristics of the group in question. It is enough that he will be perceived to be a member of the group.

The Causal Nexus Question

C. The words "for reasons of" require a causal nexus between actual or perceived membership of the PSG and well-founded fear of persecution. Caution should be exercised against applying a set theory of causation. In *Shah* and *Islam* and the Australian High Court case of *Chen* no final choice was made between the "but for" and "effective cause" tests, but the "but for" test was said to require a taking into account of the context in which the causal question was raised and of the broad policy of the Convention.

D. Applying the above principles to the present appeal, whilst private landowners could be said to be a group with identifiable and significant unifying characteristics, it could not qualify as a PSG for Refugee Convention purposes because private land ownership could not be said to be an immutable characteristic, i.e. either an innate characteristic or one which a person cannot change or should not be required to change, because it is fundamental to the individual identities or conscience of its members.

E. Even if it were accepted that private landowners did form a PSG in current-day Colombia, the respondent could not establish on the evidence a causal nexus. The ill-treatment private landowners were likely to receive was referable to the fact that they had wealth. The motivation behind the actions of guerrilla groups such as EPL in targeting persons in the respondent's area of Colombia appears to be purely financial.

60. The Secretary of State's Appeal is allowed.

[Although there appears to be a gap between paragraphs 55 and 60 of the determination it seems clear that nothing has been omitted.]

Discussion

9. There are three points which are not controversial but which are important.

10. First, Mr Montoya is outside Columbia owing to a well-founded fear of being persecuted. There is no definition of persecution in the Convention. The victim is a member of a family which owns land and thus has wealth. Mr Manjit Gill Q.C. submitted that to threaten death to someone unless he gives up his property is to infringe a fundamental human right. A person has a right to life and a right to retain his property. That much is recognised in the United Nations Charter. It is true that both those rights are qualified. However in the circumstances of the present case none of the possible circumstances which might be regarded as justifying depriving someone of his life or his property has any possible application. To make that threat to Mr Montoya amounts to persecution and the contrary has not been argued.

11. Second, he is unable to avail himself of the protection of Columbia. The present case is not one where the persecution feared comes from an organ of the state of the country of the applicant's nationality. Mr Montoya's problems arise from the fact that the organs of the state do not offer him the proper level of protection from unlawful elements in that state. The applicable law is to be found in *Horvath v Home Secretary* [2001] 1 A.C.489 H.L.. This establishes that the general purpose of the Convention is the provision by the international community of surrogate protection by way of the recognition of the refugee status of persons who fear being denied protection from persecution for a Convention reason in their home state. The fact that the persecution does not emanate from an organ of the state does not in itself prevent the obligation of surrogate protection from arising. On the other hand, the mere fact that the home state can not guarantee protection does not cause the obligation of surrogate protection to arise. It only arises when the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals. In many cases the issue is whether the level of protection offered by the home state is adequate to discharge that duty. In the present case that issue does not arise : both the adjudicator in paragraph 23 and 27 and the Tribunal in paragraphs 36 and 44 found that the level of protection afforded by the home state was not adequate.

12. Third, the mere fact that the applicant has established that he is reasonably likely to be murdered if he is returned home is not in itself enough to cause the obligation of surrogate protection to arise. The international community has agreed to provide that surrogate protection only to those who have a well- founded fear of being persecuted for a Convention reason – see *Islam v Secretary of State for the Home Department* and *R v I.A.T, ex parte Shah* [1999] 2 A.C. 629, at 651A, 656D, 659F. When the Convention was drafted amongst the possible options were (1) to accept no liability in respect of what another state did or did not do within its own borders, (2) to provide for surrogate protection in all cases where someone was at risk of being persecuted within his home state, and (3) to provide for surrogate protection only for those cases

where someone was at risk of being persecuted for a Convention reason. The signatories opted for the third of these.

13. The crucial question in the present case is whether the Tribunal were entitled to come to the conclusion that Mr Montoya had no well-founded fear of being persecuted for reasons of membership of a particular social group ("PSG") or political opinion.

14. It is convenient to deal first with the question of political opinion. Mr Gill, submitted that the class to which the appellant belonged was seen as a political enemy by the persecutors. In making that submission he could point to the acceptance by the Tribunal in paragraph 12 that the appellant may well have been seen as one member of a group anathema to the persecutors. However, in our judgment the Tribunal were right to focus not on the political beliefs of the persecutors but on their perception of Mr Montoya's political beliefs and their motivation. The Tribunal had before them a wealth of material as to why persons in the position of the appellant were persecuted. In our judgment they were entitled to conclude in paragraphs 12 and 13 that it was the family's prosperity which made them a target not their perceived political beliefs. So we now turn to the questions which were at the centre of the debate before us.

15. We were addressed by both sides on the basis that the Tribunal's summary of the basic principles as set out in their paragraph 55B was a broadly correct summary of the existing law binding on this Court. This we are content to do.

16. The leading English authority is to be found in the consolidated appeals *Shah* and *Islam*. Lord Steyn, at page 639C, Lord Hope at 656E and Lord Millett at 660E indicated that they regarded the preamble to the Convention as important as showing that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms.

17. Lord Steyn held at page 643G that cohesiveness may prove the existence of a PSG, but the meaning of PSG should not be so limited: the phrase extends to what is fairly and contextually inherent in that phrase. In coming to that view at page 640H he expressed his support of the reasoning in *Acosta* in the passage quoted by the adjudicator in his paragraph 26 which we have cited in paragraph 7 above.

18. The last sentence of this passage in *Acosta* was the foundation of the Tribunal's reasoning in the present case.

19. It was common ground before their Lordships in *Shah* and *Islam* that a PSG cannot be defined merely by the existence of persecutory acts – see 639G,H, 656F, 657C. Lord Steyn expressed at page 645 his agreement with the following passage from the judgment of McHugh J. in *Applicant A v Minister for Immigration and Ethnic Affairs* 71 A.L.J.R. 381, 402

> … while persecutory acts 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 PSG. Their persecution for being left-handed would create a public perception that they were a PSG. But it would be the attribute of being left handed and not the persecutory acts that would identify them as a PSG.

20. The same approach can be found in the speech of Lord Hope at page 657G – 658A.

21. By analogy, the appellant in the present case argues that it is the attribute of being wealthy not the persecutory acts which identifies the wealthy in Columbia as a PSG.

22. Lord Hoffmann at page 651A held that the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention and emphasised that the Convention was concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the rights of every human being to equal treatment and respect. The obvious examples were race, religion, nationality and political opinion. But the inclusion of PSG recognised that there might be different criteria for discrimination, *in pari materia* with discrimination on the other grounds, which would be equally offensive to principles of human rights.

23. Lord Hoffmann also at page 651E indicated his approval of the passage from *Acosta* cited by Lord Steyn.

24. We would not think it right, in the light of the approval given to *Acosta* both in their Lordships' House and elsewhere for this court to depart from what was there said. Mr Gill accepted that it would not be right for us to do so although he submitted that one should not apply the immutability part of *Acosta* too rigidly.

25. The applicant here is, and is perceived as to be, a member of the rich land-owning class. The persecutors seek out members of that class and hunt them down in order to obtain their land or money. The essence of the Tribunal's decision is (1) that this class can not qualify as a PSG for the purposes of the Convention because each member of it can dispose of his land or wealth and (2) that in any event any persecution would not be because the immigrant is a member of the group but rather because the persecutors wished to have his money.

26. A possible approach to the present case is to assume two matters in Mr Montoya's favour : 1. that he is a member of a PSG , and 2. that he has a well- founded fear of being persecuted.

27. It is common ground that, even if those matters are assumed in his favour, he must still show that he has a well founded fear of being persecuted <u>for reasons of membership of a particular social group or political opinion</u>. This brings us to the question whether the Tribunal was entitled on the evidence before it to conclude, as they did in paragraphs 12,13 and 50, that he was being persecuted not because he was a private landowner or because of his political beliefs, but because the persecutors wished to extract extortion money for their own use.

28. We are thus brought to the potentially difficult issue of causation. Lords Steyn, Hope and Hutton in *Shah* and *Islam* did not find it necessary to add to the vast amount of doctrine on causation. Lord Hoffmann at 653G points out that answers to questions about causation will often differ according to the context in which they are asked. At 654H-655A he indicates that in the present context such cases have to be considered by the factfinders on a case by case basis as they arise. We agree.

29. Mr Gill submitted that there can be mixed motivations and that the establishment of motivation is difficult. We do not take issue with either proposition in the abstract. [He pointed to the fact that in paragraph 45 of their decision the Tribunal go so far as to say that the interferences in Mr Montoya's and his family's civil and political rights have occurred because of their status as landowners. That however was said in a different context.]

30. The Tribunal had a wealth of material before them, including some emanating from Mr Montoya, from the U.S State Department Country Report for 1999 at page 11 and from the Home Office Country Report April 2000 paragraph 4.29, from which they were entitled to conclude that the motivation of his persecutors was financial. There is nothing before this court which would entitle it to upset the Tribunal's conclusion as to the motivation of the persecutors.

31. Mr Gill then submitted that the mere fact that the persecutor's motive for persecution was not a Convention motive does not have as its inevitable consequence that the victim was not being persecuted for Convention reasons. Again, we would not quarrel with that proposition in the abstract. We are prepared to accept that there can be circumstances in which a person can be persecuted for Convention reasons notwithstanding that the persecutor's personal motivation was independent of those reasons. An example might be where a person's religion forbad the carrying of weapons and that person therefore refused to do military service, which in turn exposed him to imprisonment even though his persecutor was unaware of his religious imperative and was only concerned to enforce what he saw as the victim's civic duty – see *Sepet and Bulbul v Secretary of State for the Home Department* [2001] INLR 378 C.A..

32. However, the task before the Tribunal in the present case was to decide whether Mr Montoya had a well-founded fear of being persecuted for the reason that he was a member of a land-owning family. Mr Gill submitted that, judging by the material in front of us, had Mr Montoya's family not been possessed of land they would not have been wealthy and thus would not have been the targets of persecution. Had the family

not inherited or purchased the land they would not have been persecuted; had the family given all their land away they would not have been persecuted. There are a number of factors which have combined to produce the situation in which the family had at the relevant moment and apparently still has enough wealth to be a fruitful target for extortion. All this we would accept.

33. The jurisdiction of this court is designed to enable it to set aside conclusions reached by the Tribunal which are erroneous in law – Immigration and Asylum Act 1999, Schedule 4, Paragraph 23. We see no legal error in the Tribunal's conclusion in the present case that Mr Montoya had a well-founded fear that he would be persecuted by reason of the fact that the persecutors wanted his money and that accordingly he would not be persecuted for a Convention reason.

34. By way of cross-check we have stood back from the detailed analysis carried out by the Tribunal relying as it did on separating out of two questions – one relating to the concept of particular social group and one relating to causation. we have asked ourselves whether the proper interpretation of the definition of refugee in the Convention requires that someone in Mr. Montoya's position falls within that definition construed as a whole. We are of the view that it does not and that Mr. Montoya is not a refugee as there defined.

Conclusion

35. We would dismiss this appeal

Order: Appeal dismissed; no order for costs; Application for permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)