

# FEDERAL COURT OF AUSTRALIA

**IMMIGRATION** – *Migration Act 1958* (Cth) – application for protection visa – Respondent harmed in the course of her employment as a tourist guide in Ecuador – whether Respondent suffered persecution for reasons of “*membership of a particular social group*” within the meaning of the Refugees Convention and Protocol – meaning of “*particular social group*” - relationship between occupational group and social group.

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 considered and applied.

**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v**

**DEYSE PAQUITA CEDENO ZAMORA**

**NG 785 OF 1997**

black cj, BRANSON and finkelstein jJ

SYDNEY

5 August 1998

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NG 785 of 1997

BETWEEN: MINISTER FOR IMMIGRATION AND MUTICULTURAL AFFAIRS

Applicant

AND: DEYSE PAQUITA CEDENO ZAMORA  
Respondent

JUDGE(S): BLACK CJ, BRANSON AND FINKELSTEIN JJ

DATE OF ORDER: 5 August 1998

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed
2. The orders of Madgwick J of 5 September 1997 be set aside and in lieu thereof the decision of the Refugee Review Tribunal be affirmed.

AND DIRECTS THAT:

3. The applicant have liberty to file and serve written submissions on costs within seven (7) days of today's date; and
4. The respondent have liberty to file and serve submissions on costs within five (5) days of the service on her of the written submissions of the applicant.

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

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JUDGE(S): BLACK CJ, BRANSON AND FINKELSTEIN JJ

DATE: 5 August 1998

PLACE: SYDNEY

## REASONS FOR JUDGMENT

### BLACK CJ, BRANSON AND FINKELSTEIN JJ

#### INTRODUCTION

The only issue which arises on this appeal is whether the respondent (“Ms Zamora”), at the time of the determination of her claim for a protection visa, met the criterion for the grant of that visa specified in s 36(2) of the *Migration Act 1958* (Cth) (“the Act”). Such criterion is “*that the applicant for the visa is a non-citizen in Australia to*

*whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol*. Section 5 of the Act defines the “Refugees Convention” to mean the “*Convention relating to the Status of Refugees done in Geneva on 28 July 1951*” and the “Refugees Protocol” to mean the “*Protocol relating to the Status of Refugees done at New York on 31 January 1967*.” The Convention and Protocol will hereafter be referred to as “the Refugees Convention”.

At the relevant time Ms Zamora was a non-citizen in Australia within the meaning of the Act. For present purposes, Australia had protection obligations to her under the Refugees Convention if she was 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 [her] nationality and is unable or, owing to such fear, is unwilling to avail [herself] of the protection of that country.”

(Art 1A(2) of the Refugees Convention.)

## **BACKGROUND FACTS**

The Refugee Review Tribunal (“the RRT”), whose decision was the subject of the appeal to a single judge of this Court, accepted Ms Zamora’s evidence, given by statutory declaration, as to her experiences in her homeland of Ecuador. The learned judge at first instance, Madgwick J, summarised this evidence as follows:

“Before coming to Australia, the applicant had been employed as a tourist guide in Quito, the capital of Ecuador. The applicant claims that it was a common experience for criminal gangs to attempt to recruit guides to help them steal from tourists. The applicant states that the first time she was so approached, she was threatened and told that she would have no choice but to help. She reported the incident to her office manager, but was told that no one would help her. However, the applicant several times refused to become involved. She was followed and socially harassed.

In April 1994 the applicant was hired by a group of German tourists to travel with them in Ecuador. Against the applicant’s advice, and at her employers’ insistence, the tourists travelled to a lookout, which the applicant knew was a dangerous place where tourists had been attacked and robbed. The group were confronted by a gang who tried to snatch one woman’s bag. The applicant told the tourists to run into a clearing, and was left to face the men alone. She threw her handbag to one of them, and whilst he bent down to pick it up he stabbed her leg with a knife. The applicant ran towards the clearing, collapsed, and later sought medical treatment.

After this incident, the applicant and her family began receiving threatening telephone calls and pornographic letters. The applicant arranged for her son to be escorted to and from school out of fear for his safety.

The applicant needed to obtain new working papers from the National Tourist Corporation. She informed the Corporation that she had been attacked and her papers had been stolen, but was told that there was nothing the Corporation could do to help her avoid the attention of these gangs. Corrupt and criminal activity against tourists extends into the higher echelons of the Corporation.

The applicant was subsequently abducted from the street by three men and sexually assaulted, apparently as a punishment for not assisting in their schemes to rob tourists. The applicant was told that she had “good contacts” and that she had to “give them a share”, otherwise she would be killed. The applicant did not inform the police because she feared their corruption and links to gangs such as those which had harassed her, but tried to borrow money from the bank and her brother to leave the country. Arrangements were made for the sale of the applicant’s house, and on 28 June 1994 the applicant and her son travelled to Australia.

The applicant claims that she has since been informed that her boyfriend has been kidnapped, and although she is not certain that there is a connection between what happened to her and this event, she had some letters in the bag stolen from her which may have led the criminals to him.

The applicant says that she is afraid to return to Ecuador because of the assaults upon her, and her fears that the police are unable to protect her, and secondly, because she fears a resumption of great pressure, including serious harassment and possible violence, to force her to become involved in criminal activities.”

## **REASONS OF REFUGEE REVIEW TRIBUNAL**

The RRT noted that Ms Zamora claimed to have been persecuted in Ecuador by reason of her membership of a particular social group, identified by her adviser as “*professional accredited tourist industry workers in Ecuador*” or “*certified tourist guides with the Ecuadorian Tourist Commission*”. The RRT expressed some doubt that either social group is recognised in Ecuador. It went on, however, to consider whether Ms Zamora had been persecuted for reason of membership of any such group. The RRT concluded that Ms Zamora had not been the target of persecution because she was a member of a particular social group but simply because she was guiding tourists around. The RRT was not satisfied that Ms Zamora suffered persecution for a Convention reason. By inference, it was not satisfied that she had a well-founded fear of being persecuted for reason of her membership of a particular social group if she were required to return to Ecuador.

The RRT further found that Ms Zamora could avoid any real chance of further persecution by not returning to her employment as a tourist guide, and that she could relocate to an area of Ecuador away from the capital Quito where her persecutors would not follow.

## **REASONS OF THE SINGLE JUDGE**

Madgwick J proceeded on the basis that there was no real challenge to the assumption upon which the RRT based its reasons, namely that Ms Zamora might have been a member of a particular social group within the meaning of the Refugees Convention. His Honour found that, on that basis, there was an “*inseparable connection between the applicant’s membership of the relevant social group and her activities as such a member which attracted the persecution.*” His Honour expressed the view that “*the applicant’s activities which attracted the persecution of her could be said to be the core activities of her social group*” and that any contrary conclusion flowed from “*artificially and over technically defining the relevant social group*”.

His Honour also held that in considering the issue of possible “*internal flight*” by Ms Zamora, the RRT failed to give proper consideration to “*the realities as they subjectively affect the applicant*”. He drew attention to a number of factors, including Ms Zamora’s position as “*a recovering victim of a serious sexual assault*” committed by reason of her occupation; to that occupation being the one for which she was best equipped and which she had followed for some years to ensure the support of her son; and that official corruption widespread in Quito, is unlikely to be less so elsewhere in that country.

Madgwick J concluded that:

- “(1) The Tribunal misapplied the applicable law by failing to consider whether the close inter-relationship of the defining qualities of the social group, of which it was accepted the applicant was a member, with the activities in relation to which she was persecuted, was such that it might be said that she was ‘persecuted for reasons of ... membership of [that] particular social group.’
- (2) The Tribunal failed to consider there was another relevant and more limited ‘particular’ social group to which the applicant could be said to belong.
- (3) The Tribunal failed to consider the subjective effect on the applicant of the ‘range of realities’ which affected her and her country of nationality.
- (4) The Tribunal wrongly relied on the supposed circumstance that the applicant might escape her persecution by relinquishing her membership of the social group, which membership gave rise to the persecution.”

His Honour set aside the decision of the RRT and remitted the matter to the RRT for determination according to law.

## **CONSIDERATION**

## Particular Social Group

It is crucial to Ms Zamora's claim to be entitled to a protection visa that she is in Ecuador "a member of a particular social group" within the meaning of Art 1A(2) of the Refugees Convention.

The High Court has recently given consideration to the meaning of the phrase "a particular social group" in Art 1A(2) of the Refugees Convention in "*Applicant A*" v *Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331, hereafter referred to as "*Applicant A's case*." *Applicant A's case* concerned a married couple who were citizens of the People's Republic of China. They were the parents of one child and did not accept the limitations imposed by their government's one child policy. They feared forced sterilisation if they returned to their home village. Dawson, McHugh and Gummow JJ concluded that neither of the applicants was a member of a particular social group within the meaning of Art 1A(2) of the Refugees Convention. Brennan CJ and Kirby J concluded that the applicants were members of a particular social group within the meaning of Art 1A(2).

The members of the High Court who constituted the majority in *Applicant A's case* did not adopt an entirely common approach to the issue of what constitutes a particular social group for the purposes of the Refugees Convention. Dawson J observed at 341:

"The adjoining of 'social' to 'group' suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.

I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group. Nor is there anything which would suggest that the uniting particular must be voluntary...

However, one important limitation which is, I think, obvious is that the characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is

said to unite those persons into a particular social group is their common fear of persecution.”

McHugh J at 358 agreed that “[t]he concept of persecution can have no place in defining the term ‘a particular social group’”. His Honour, however, went on to observe at 359:

“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...

The fact that the actions of the persecutors can serve to identify or even create ‘a particular social group’ emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the ‘particular social group’ category is the notion of ‘membership’ expressly mentioned. The use of that term in conjunction with ‘particular social group’ connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.”

McHugh J observed at 360:

“...the association of the term ‘membership of a particular social group’ with race, religion and nationality indicates that ‘a particular social group’ was probably intended to cover only a relatively large group of people. The concepts of race, religion and nationality imply groups of hundreds of thousands, in some cases millions, of people”.

His Honour concluded at 361:

“It follows that, once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as ‘a particular social group’ for Convention purposes.”

Gummow J said at 375:



“I respectfully agree with the emphasis placed in the United States authorities to which I have referred upon the qualification of the term ‘group’ by the words ‘particular’ and ‘social’, as indicating that para (2) of s A is not apt to encompass every broadly defined segment of those sharing a particular country of nationality ... numerous individuals with similar characteristics or aspirations in my view do not comprise a particular social group of which they are members. I agree with the statement in Ram:

‘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.’ [Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 569]”

Brennan CJ, who with Kirby J, was in the minority in *Applicant A’s case*, said this of the expression “*a particular social group*” at 335:

“There is nothing in the term ‘a particular social group’ which limits the criteria for selecting such a group nor anything in the travaux préparatoires which suggests that any limitation was intended. There is no reason to treat ‘a particular social group’ as necessarily exhibiting an inherent characteristic such as an ethnic or national identity or an ideological characteristic such as adherence to a particular religion or the holding of a particular political opinion. By the ordinary meaning of the words used, a ‘particular group’ is a group identifiable by any characteristic common to the members of the group and a ‘social group’ is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the members of the group from society at large. The persons possessing any such characteristic form a particular social group.”

Kirby J at 393 urged the recognition of “*particular social groups*” on a case by case basis, accepting that an element of intuition on the part of decision makers is inescapable. His Honour, at 394, did not support “*an attempt by courts unduly to narrow the operation of the Convention or to impose upon its deliberately broad and ambulatory language categories which are by no means exhaustive of the actual words used.*” He expressed the view that “[t]he development and expression of such categories, at least in the first instance, is the province of administrators and review tribunals with experience of refugee claims.”

In our view *Applicant A’s case* is authority for the following propositions. To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or

the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.

It follows that one should be cautious in characterising an occupational group as a particular social group. Quite apart from the risk of using persecution or the fear of persecution as a defining feature, in many cases an occupational group will not satisfy the requirement that it be recognised within the society as a group, even though it may fairly be said that the members of an occupational group have common characteristics not shared by their society. Indeed, members of an occupational group will have characteristics in common simply by reason of the fact that they all follow the same occupation, but this does not of itself make those who follow the same occupation members of a particular social group.

Likewise, caution should be exercised in making assumptions, for the purposes of argument, that a particular social group exists especially when the group is an occupational group whose work is closely linked with the persecutory conduct relied upon.

It should not be concluded that tourist guides, or indeed members of any broader group, who are approached by criminal gangs to facilitate the robbing of tourists but refuse to do so, thus leaving themselves open to retribution, are a particular social group in Ecuadorian society. Even if such a group were recognisable as a social group within Ecuador, a group so defined would be a group defined in part by its fear of persecution.

So far as the particular social group sought to be identified by Ms Zamora is concerned, the allegedly persecutory conduct experienced by them by reason of their membership of such group is that of being placed under pressure to co-operate in the robbing, or other exploitation, of tourists by the implicit or explicit threat of harm if they refuse.

The particular social group identified by Ms Zamora is 'professionally accredited tourist industry workers' or 'certified tourist guides with the Ecuadorian Tourist Commission', that is a group constituted by her and her professional colleagues in Ecuador. A group so identified would be one the members of which share a distinguishing attribute in the sense described by the Chief Justice in *Applicant A's case*. However, it is doubtful that such a group would be one recognisable in Ecuadorian society as one whose members share something which unites them. There will no doubt be cases in which persons who have in common no more than a shared occupation do form a cognisable group in their society. This may well come about, as McHugh J recognised in *Applicant A's case*, when persons who

follow a particular occupation are persecuted by reason of the occupation that they follow. The persecution for following a particular occupation may well create a public perception that those who follow the occupation are a particular social group. Human rights workers in certain nations subject to totalitarian rule come to mind as a possible example. Ordinarily however, persons who have in common no more than a shared occupation are not recognisable as a particular social group in their society. That is, they are not defined as individuals in any meaningful way by reason of their occupation. In the words of Gummow J in *Applicant A's case*, they are simply a "*broadly defined segment of those sharing a particular country of nationality.*"

The doubt entertained by the RRT that there was in Ecuador a particular social group as defined by Ms Zamora was, in our view, well founded.

### **Reasons for Persecution**

However, even if it be assumed, contrary to our view, that Ms Zamora does answer the description of being a member of a particular social group for the purposes of the Refugees Convention, she will only meet the criterion specified in s 36(2) of the Act for the grant of a protection visa if she has a well-founded fear of being persecuted **for reason of** her membership of that particular social group.

The RRT did not give express consideration to the question whether Ms Zamora had experienced persecution in Ecuador such that her fear as to what might happen if she were to return to her country of nationality was a fear of being persecuted, as opposed to simply harmed. The RRT acted on the apparent assumption that Ms Zamora had a well-founded fear of persecution.

In *Applicant A's case*, McHugh J stated at 354:

"Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of the opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group."

Dawson J expressed the matter in this way at 340:

"The words 'for reasons of' require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared

because of the person's membership or perceived membership of the particular social group.”

His Honour further explained the nature of the necessary causal nexus in the following passage at 342:

“The requirement that the feared persecution be by reason of ‘membership’ of a particular social group was taken by Black CJ (with whom French J agreed) in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* [(1992) 89 FCR 401 at 404-5] to require that the persecution be on account of ‘what a person is - a member of a particular social group - rather than upon what a person has done or does.’ But as Black CJ himself recognised, that statement should not be taken too far...

...I think that Black CJ's remarks were addressed more to the situation of a generally applicable law or practice which persecutes persons who merely engage in certain behaviour or place themselves in a particular situation. ...Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms. Viewed in that way, Black CJ's distinction between what a person is and what a person does is merely another way of expressing the proposition which I have already stated.”

The conduct relied on by Ms Zamora before the RRT as being persecutory in nature was described by her in her statutory declaration in the following passages:

- “4. I worked in the tourist industry for four years. It was quite a common experience for everyone working in the industry to be approached at some time by people asking for contact with the tourists in order to sell them drugs and sometimes to be involved in criminal activities in stealing money from them. ... The people who are higher up in the hierarchy of the Tourist Corporation are also involved in scams where tourists are often the victims. There is not much support for a person who is trying to do an honest job. Ecuador is a very poor country and people will, like anywhere do things for money that are not morally correct. It is a no win situation, to report any of these incidents or to talk about them is likely to see you without employment. It is not something you would report to the police because often the police are involved with the government employees in the scams. You just go to work and do your job and don't complain...
5. There is a central area in Quito, the capital of Ecuador where all the tourists tend to congregate, this is where the hotels and cheap restaurants are located. ... The first time I was approached by these ‘criminals’ to be involved in their scams I was working for the Corporation and had a corporation badge on my lapel. ... I told him to speak clearly to me and tell me what he wanted. He replied, you are

very brave, what I want is for you to give me the opportunity to take all the money from the tourists. I said no, and he said lets make a deal, you are being very silly, whether you like it or not we are going to do it.

...

8. I was learning that if you did not get involved with these people they would persist until you did, my work colleagues took the attitude of going along with them saying, what do you care the tourists have money. I knew I did not want to become involved with these people, they were bad people and I did not want them to have any control over me or my life. It was like they would be your pimp and you were their worker.
9. There are many of these gangs operating in Ecuador, sometimes you think that they are all the same group but they are not.”

Ms Zamora’s statutory declaration goes on to describe the April 1994 incident referred to above and its terrible aftermath.

Without expressly addressing the issue of the precise conduct said to be persecutory, the RRT did examine why Ms Zamora was targeted by a criminal element in Ecuador. It made the following findings:

“...the Applicant was targeted by a criminal element in Ecuador because they saw that she, as an individual, could be of assistance in helping them to steal from tourists. ...They weren’t motivated by a drive to persecute her because she was a member of a group of professional tourist workers. They were not motivated because the Applicant was a certified tourist guide with the Ecuadorian Tourist Commission. They were motivated because she could assist in their goals to obtain money by theft. ...The targeting had nothing to do with either her professionalism or accreditation. It had nothing to do with any group membership. ...Her membership of the group was of no interest to those doing the persecution in the absence of tourists.”

The above findings are incompatible with a conclusion that Ms Zamora was singled out by criminal elements in Ecuador for reason of her membership of any particular social group within the meaning of the Refugees Convention. Such findings suggest that the criminal element behaved in no special way towards tourist workers or certified tourist guides; the criminal element would equally have sought under threat the co-operation of individuals outside those groups who enjoyed some measure of control over tourists. Such findings, it may be noted, are supported by Ms Zamora’s evidence that “[i]t was quite a common experience for everyone working in the [tourist] industry to be approached at some time by people asking for contact with the tourists in order to sell them drugs and sometimes to be involved in criminal activities in stealing money from them.” It was understandably not suggested by Ms Zamora

that all those working in the tourist industry in Ecuador constitute a 'particular social group' within the meaning of the Refugees Convention.

No legal basis has been identified upon which the above findings of the RRT may be disturbed. Those findings are incompatible with a finding that Ms Zamora has a well-founded fear of being persecuted for reason of membership of a particular social group within the meaning of the Refugee Convention.

In particular, it has not been shown that the RRT made the errors concerning the identification of the relevant social group to which Ms Zamora allegedly belonged, or concerning the identification of the reason for her persecution, identified by the learned judge at first instance. Our conclusions on these issues make it unnecessary for us to give consideration to the questions of whether the adverse conduct experienced by Ms Zamora amounted to persecution within the meaning of the Refugees Convention, and whether "*internal flight*" was an option reasonably open to Ms Zamora.

## CONCLUSION

Like the RRT we have considerable sympathy for Ms Zamora. Her experiences in Ecuador are rightly described by the RRT as traumatic. Nonetheless, the decision of the RRT that neither she nor her son is a person to whom Australia has protection obligations under the Refugees Convention did not, in our view, involve any error of law.

In our view, the appeal should be allowed, the order of Madgwick J set aside, and in lieu thereof it should be ordered that the decision of the RRT be affirmed.

I certify that this and the preceding thirteen (13) pages are a true copy of the reasons for judgment herein of the Court.

Associate:

Dated: 5 August 1998

Counsel for the Appellant:	C Gunst QC, T Reilly
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the Respondent:	G P Craddock
Solicitor for the Respondent:	Kessels and Associates
Date of Hearing:	12 March 1998
Date of Judgment:	5 August 1998