

RECENT DEVELOPMENTS IN REFUGEE LAW IN AUSTRALIA

*Refugee Review Tribunal**

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Introduction

The United Nations *Convention relating to the Status of Refugees* ("the Convention") was drafted between 1948 and 1951. The majority of states which drafted the Convention sought to create a regime to cope with the large numbers of people who had been displaced by the Second World War. The original definition of "refugee" only permitted a person to be declared a refugee as a result of events occurring before 1 January 1951. The Convention was supplemented by the 1967 *Protocol relating to the Status of Refugees* ("the Protocol"). The main effect of the Protocol was to remove the time line in the Convention's definition of a refugee. Hence, the Convention now extends to all persons who are refugees because of events occurring at any time. Australia ratified the Convention and acceded to the Protocol in 1973.

The Convention itself consists of 46 articles. However, administrative decision makers, lawyers and judges usually only need to consider article 1 of the

Convention, which contains the definition of a refugee, and in particular article 1A(2).

Article 1A(2) of the Convention, as amended by the Protocol, defines a refugee as a person who:

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

The definition of a refugee in article 1 of the Convention ("the Convention definition") has been effectively incorporated into Australian domestic law in the Migration Act 1958 and the Migration Regulations.

Since 1 September 1994, a person seeking recognition as a refugee in Australia must apply to the Department of Immigration and Multicultural Affairs for a protection visa. The prescribed criteria for the grant of a protection visa are set out in the Migration Act and the Migration Regulations.¹ In broad terms, the main criterion for a protection visa is that the decision-maker must be satisfied that the applicant is a refugee under the Convention.² Although problems may arise by splitting the definition of "refugee" into separate parts, for convenience it may be said that there are five basic elements which an applicant for a protection visa must satisfy, and those elements have become a source of rapidly developing area of law in Australia.

These five elements are:

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- the person must be outside his or her country of nationality or former habitual residence;
- the person must hold a 'well-founded fear';
- the treatment the person fears must amount to 'persecution';
- the persecution feared must be for a reason specified in the Convention;
- the person must be unable or unwilling because of his or her fear to take advantage of the protection of his or her country. This element is commonly referred to as a 'failure of state protection'.

This paper focuses on the recent developments in the areas of 'well-founded fear', the meaning of the term 'persecution' and the meaning of the phrase 'particular social group'.

The meaning of "well-founded fear": the "real chance" test

The first substantive element of the Convention definition is "well-founded fear". The meaning of this phrase was considered by the High Court in *Chan v MIEA*.³ The only subsequent High Court case to examine this issue was *MIEA v Wu Shan Liang & Ors*,⁴ handed down in May this year, where the Court very succinctly set out what *Chan* had decided about the meaning of 'well founded fear':

Chan established two propositions as to the steps by which refugee status was to be 'determined'... First, the definition of refugee involved a mixed subjective and objective test. Second, the definition would be satisfied if an applicant could show genuine fear founded upon a 'real chance' of persecution for a Convention stipulated reason.⁵

What has been of particular interest in recent case law is the "real chance" test. It is well-established that "real chance" means a chance that is not "remote or

insubstantial" or "a far-fetched possibility", and may be as low as 10%.⁶

The application of the "real chance" test was relatively uncomplicated until fairly recently. However, a line of authority starting with *MILGEA & Anor v Mok*,⁷ has introduced some complexity into this area. In *Mok*, the decision-maker had considered conflicting evidence about conditions in the applicant's country, and had given greater weight to some evidence than to other evidence. The Federal Court said that use of the term "I give greater weight to..." indicated that the decision maker had applied a 'balance of probabilities test' rather than a 'real chance test'. The Court found it difficult to accommodate the use of the expression 'I gave greater weight to...' to the assessment of a real chance that a person may be persecuted on return to another country.⁸ *Mok* was applied by the Full Federal Court in *Wu v MIEA* (Vic).⁹ In that case, the Court again held that the decision-maker had made an error of law by weighing the evidence. The Court said that language such as "give greater weight to" indicated that the decision-maker had approached the inquiry in terms of establishing whether a state of affairs was more probable than not - which is not the same as a "real chance".¹⁰ In the subsequent case of *Guo Wei Rong v MIEA*,¹¹ the Full Federal Court took this line further by indicating that the real chance test should be applied to the determination of past facts as well as to future possibilities.

That line of authority was recently rejected by the High Court in *Wu Shan Liang*.¹² *Guo's* case also raised other issues and is currently before the High Court.

The difficulty which was raised by the *Mok* line of cases was not so much what the real chance test means, but rather how it should be applied, and also, the extent to which the language used in a decision indicates a misapplication of the correct test.

In *Wu Shan Liang*, the High Court found that weighing evidence is not necessarily indicative of an incorrect application of the *Chan* test.¹³ The Court did not accept that the term 'give greater weight to' was a renunciation of the *Chan* test and an adoption of a 'balance of probabilities' or 'more likely than not' test. For one thing, as Brennan CJ, and Toohey, McHugh and Gummow JJ pointed out in their joint judgment, *Chan's* case actually requires the attribution of weight to material going towards a determination of refugee status.¹⁴ Similarly, Kirby J said that "there is no suggestion in *Chan* that this Court intended that the evaluation of past facts (as distinct from the speculation on future possibilities) would be based otherwise than on likelihood".¹⁵

The Court found that the decision-makers in these cases had embarked upon a process whereby the different material before them was evaluated and some material was given a greater weight. The decision-makers had concluded that there was not a real chance that the applicants for protection visas would be persecuted if returned to their country. The Court stated:

The delegates should be taken to mean what they have said and a proper construction of the reasons does not disclose any surreptitious adoption of a balance of probabilities test.¹⁶

Kirby J agreed that the decision-maker's reasons disclosed no error of law. His Honour provided some guidance as to how to assess whether there is a real chance of persecution:

The process of determination involves the [decision maker] making findings as to the primary facts, identifying the inferences which may properly be drawn from the primary facts as so found, and then applying those facts and inferences to an assessment of the real chance affecting the treatment of the applicant if he or she were returned to [his or her country of origin].¹⁷

Also at issue in *Wu's* case was the use of the term "speculative" in the context of

applying the real chance test. The decision-makers in *Wu* had rejected certain claims because they were "speculative". The Full Federal Court held that they had erred in eschewing speculation: the Court said it was impossible to answer the question of whether there was a real chance of persecution without engaging in speculation; therefore the suggestion that speculation ought not to be engaged in was incorrect.¹⁸ The High Court rejected this aspect of the Full Court's decision as well. Although the Court agreed that the real chance test necessitates speculation in the sense of prediction,¹⁹ it did not agree that use of the word "speculative" in its context demonstrated that the delegates had abandoned the process of looking into the future. It noted that the word might equally have been used to refer to the probative force of the material before the delegate.²⁰

In sum, the *Mok* line of cases created such difficulties for decision-makers applying the real chance test that Lindgren J described the situation as akin to "tiptoeing through a minefield".²¹ However, the High Court in *Wu* has removed most of the mines, so that the real chance test now appears to be more-or-less as it was understood to be before *Mok*.

The role of motivation in defining persecution

The "real chance" that a refugee faces is a real chance that he or she will be persecuted for one of the reasons set out in the Convention definition. Examples of harm which have been said to be persecutory in the particular circumstances are denial of access to employment, liability to arrest and detention, and restriction on a right to practise a religion.²² There are a number of factors involved in the concept of persecution. Persecution is "serious" harm,²³ it is also "selective",²⁴ and part of a course of systematic conduct" directed for a Convention reason against a person or a group.²⁵

The focus in recent cases has been the element of intention, attitude, or motivation of the persecutor, which is said to be implicit in the very idea of "persecution". This aspect, already implicit in *Chan*,²⁶ was clearly articulated by the Full Federal Court in *Ram v MIEA & Anor*.²⁷ In that case the Court emphasised that the motive of the persecutor is a critical element in a finding that an applicant is being persecuted for a Convention reason. That case concerned a Sikh man who was born in the Punjab and left in India in 1977 to work as a contract labourer in Saudi Arabia. He returned home after ten years with savings and was seen in his village as a wealthy man. Mr Ram claimed that extremist groups were rife in the Punjab and that the police themselves were apt to adopt the role of extremists. Mr Ram said that extortion by violence or threats of violence was a common occurrence in the Punjab and that particular targets were villagers who had gone abroad and returned with money, as he had done, or "wealthy Sikhs". He argued that his fear of persecution arose because he was a member of a 'particular social group'. He argued that his particular social group was broadly defined as those who have returned to their villages in the Punjab from a foreign country with money or as rich Sikhs.

In considering Mr Ram's claims about membership of a particular social group, Burchett J had regard to the whole of the definition of a refugee, and in particular, the link between the concept of persecution and the Convention ground. His Honour said:

In my opinion there is a unity of concept about the whole definition of a refugee contained in the Convention, so far as it relates to membership of a particular social group...That concept flows through the separate elements of the definition. The well-founded fear of which it speaks is a fear of being persecuted. "Persecution" involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm.

People are persecuted for something perceived about them by their persecutors. ... Consistently with the use of the word "persecuted", the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is "membership of a particular social group".

...

The link between the key word "persecuted" and the phrase descriptive of the position of the refugee, "membership of a particular social group" is provided by the words "for reasons of" - the membership of the social group must provide the reason. There is thus this common thread which links the expressions "persecuted", "for reasons of" and "membership of a particular social group". That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase "for reasons of", and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.²⁸

It is the whole of the Convention conception of a refugee which must be applied in an individual case. A lawyer naturally analyses the language into its constituent parts. But the whole is not merely the sum of those parts.²⁹

The motivational aspect of persecution was again picked up by the Federal Court in *Amanyar & Anor v MIEA*.³⁰ The Court concluded that the adverse treatment must be directed at a person due to some perceived characteristic or conduct of the person being subject to the treatment - the persecutor must act out of ill-will towards the person.

This theme - the link between the persecution feared and the Convention reason - has been picked up in other recent cases - particularly in cases dealing with membership of a particular social group.

Membership of a particular social group

The notion of "membership of a particular social group" has been the most problematic of the Convention reasons, and there has been considerable recent

judicial deliberation about it. The courts have made it clear that there are two issues to be considered. The first one is whether a relevant 'particular social group' exists and the second is whether the persecution feared is for the reason of membership of that group.

*Morato v MILGEA*³¹ established the basic principle that a particular social group must be sufficiently recognisable in a society to have something that may be sensibly identified as membership.³² In *Ram's* case, it was held that membership of a particular social group may be defined through the eye of the persecutor. That is, a person could come within the Convention if he or she is perceived by the persecutor to be a member of a particular social group even if in truth this is not the case. Burchett J gave the example of Hitler's views about race leading to the classification as Jewish of people who had regarded themselves as German. In that instance it was the perception of the authorities which identified the particular social group and in reality determined the fate of the members of the group.³³

Over the last two years the Federal Court has considered, and in most cases rejected, a number of different groups put forward as particular social groups.

- "Russian seamen" on a particular vessel, carrying out a particular trade with the Russian mafia did not constitute a particular social group (*Kashayev v MIEA & RRT*).³⁴ However, the Court acknowledged that in appropriate circumstances, people engaged in a particular trade, profession or calling could be members of a particular social group within the meaning of the Convention;³⁵
- "Rich Sikhs" or "victims of extortion" did not constitute a particular social group (*Ram's*);³⁶
- "Hepatitis B carriers" did not constitute a particular social group (*Lo v MIEA*);³⁷

- "evil organisers" [of illegal departure from the People's Republic of China] did not constitute a particular social group (*Su Qun De v MIEA & RRT*)³⁸ and *Fu Hai Yuan v MIEA & RRT*.³⁹

In *MIEA v Respondent A & Ors*,⁴⁰ the Refugee Review Tribunal and the Federal Court accepted that "people with one child who wish to have another child ... [and] are susceptible to forcible sterilisation" constituted a particular social group in China. The Full Federal Court disagreed, and the matter is currently before the High Court. That case involved a claim by a Chinese woman who feared forcible sterilisation as a result of the implementation of China's family planning policies which in general terms limit families to one child. Rejecting the claim that a particular social group existed through the operation of the family planning law, the Full Federal Court said:

... To apply the reasoning of *Morato*, such a law would be dealing with what people did, not with what they are. The only difference is that such a law would be one operating on individuals to prevent future acts (conception and birth) rather than to punish past acts. Such a law would not create or define a particular social group constituted by those who are affected by it, any more than would laws imposing tax or prescribing punishment for tax evaders...the respondents are not facing persecution by reason of membership of any social group having a recognisable existence separate from the persecutory acts complained of.⁴¹

Perhaps the most interesting of the recent Federal Court cases dealing with membership of a particular social group is *Jahazi v MIEA*⁴² because in that case the crucial question was not the existence of a relevant group, but the link between the group and the harm feared. The applicant feared excessive punishment in Iran for drug offences committed while serving on an Iranian shipping line. It was accepted that his fear was well-founded. French J accepted that the employees of that shipping line constituted a particular social group attracting Convention protection.

However, he identified the real question as one of connection between membership of that group and the feared persecution. Following *Morato*, he noted that the membership of the group must provide the reason for the persecution. His Honour accepted that there was a causal connection between the apprehended harm in Iran and Mr Jahazi's former employment by the Iranian shipping line; however, a bare causal connection was not enough.⁴³

The Court found that the feared harm was not in any relevant sense attributable to membership of the group of "employees of the Iranian Shipping Line". If Mr Jahazi was persecuted upon his return to Iran it would be because he had been convicted of an offence which had a connection with an Iranian government organisation which in this case happened to be the Iranian Shipping Line. There was no suggestion that the Iranian government had any policy or practice of persecuting the employees of its own shipping line. *Jahazi's* case is a clear application of the principle enunciated in *Ram's* case - that the Convention link involves an element of motivation.

In summary, the recent developments in refugee law in Australia have been most marked in the application of the "real chance" test, the importance of motivation in the concept of persecution, and the correct interpretation and application of the Convention ground of "particular social group". Further guidance in each of these areas is anticipated when the High Court delivers its judgments in the matters of *Guo*, and *Respondent A & Ors*.

Endnotes

- 1 The prescribed criteria for the grant of a protection visa are set out in s.36(2) of the Migration Act and Part 866 of Schedule 2 to the Migration Regulations. If an applicant satisfies the prescribed criteria, the Minister is to grant the visa; if not, the Minister is to refuse to grant the visa: see s.65(1) of the Migration Act.
- 2 Migration Act, s.36(2), Migration Regulations, Schedule 2, cl 866.221. There are other criteria such as taking a health test and public interest criteria.
- 3 (1989) 169 CLR 379.
- 4 (1996) 185 CLR 259.
- 5 *Ibid* 263 per Brennan CJ, Toohey, McHugh & Gummow JJ.
- 6 *Chan v MIEA* (1989) 169 CLR 379 at 389 per Mason CJ, 407 per Toohey J, 429 per McHugh J.
- 7 (1995) 127 ALR 223.
- 8 *Ibid* 252 per Sheppard J.
- 9 (1995) 130 ALR 367.
- 10 *Ibid* 378, 383.
- 11 (1996) 185 CLR 259.
- 12 *Ibid* 280 per Brennan CJ, Toohey, McHugh and Gummow JJ.
- 13 *Id.*
- 14 *Ibid* 280 per Brennan CJ, Toohey, McHugh and Gummow JJ, referring to *Chan v MIEA* (1989) 169 CLR 379 at 413 per Gaudron J.
- 15 *Ibid* 294 per Kirby J.
- 16 *Ibid* 281 per Brennan CJ, Toohey, McHugh and Gummow JJ.
- 17 *Ibid* 294 per Kirby J.
- 18 (1995) 130 ALR 367, 378, 383.
- 19 (1996) 185 CLR 259, 277 per Brennan CJ, Toohey, McHugh and Gummow JJ.
- 20 *Id.*
- 21 *Mataka v MIEA & Anor* (Federal Court of Australia, 24 May 1996, unreported decision of Lindgren J).
- 22 *Chen Ru Mei v MIEA & Anor* (1995) 130 ALR 405; *Jesus v MIEA* (Federal Court of Australia, 9 July 1996, unreported decision of Madgwick J); *MILGEA & Anor v Mok* (1995) 127 ALR 223.
- 23 *Chan v MIEA* (1989) 169 CLR 389, 388 per Mason J. See also 130, McHugh J.
- 24 *Id.* See also 430, per McHugh J.
- 25 *Ibid* 430 per McHugh J, referring to *Periannan Murugasu v MIEA* (Federal Court of Australia, 28 July 1987, unreported judgment of Wilcox J).
- 26 *Ibid* 388 per Mason CJ. See also 430 per McHugh J.
- 27 (1995) 130 ALR 314.
- 28 *Ibid* 317 per Burchett J.
- 29 *Ibid* 318 per Burchett J.
- 30 Federal Court of Australia, 22 December 1995, unreported judgment of Jenkinson J.
- 31 (1992) 39 FCR 401.
- 32 *Ibid* 405 per Black CJ.
- 33 (1995) 130 ALR 314, 318 per Burchett J (O'Loughlin and Nicholson JJ agreeing):
I have referred to the way in which a group is seen by others. In this area, perception is important. A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words "persecuted for reasons of" look to

their motives and attitudes, and a victim may be persecuted for reasons of race or social group, to which they think he belongs, even if in truth they are mistaken.

34 (1994) 50 FCR 226.

35 *Ibid* 234.

36 *Ram v MIEA & Anor* (1995) 130 ALR 314, 319 per Burchett J:

The applicant does not fear persecution for reasons of membership of a Particular Social Group, but extortion based on a perception of his personal wealth and aimed at him individually.

37 (1996) 134 ALR 73.

38 Federal Court of Australia, 24 April 1996, unreported judgment of Carr J. Carr J stated at 6-7:

I propose, for the purposes of these reasons, to assume that if Mr Su were returned to China that he would be treated as an "evil organiser" and that any punishment meted out to him would be serious enough to amount to "persecution". That leaves the question whether an "evil organiser" is a "member of a particular social group" for the purposes of the definition of "refugee" in the Convention. In my view the applicant's submission is not made out. These Chinese laws regulate the conduct of individuals. They are laws which deal with what people do, not with what they are ...

39 Federal Court of Australia, 24 April 1996, unreported judgment of Carr J.

40 (1995) 130 ALR 48.

41 *Ibid* 61-2.

42 (1995) 133 ALR 435.

43 *Ibid* 443:

The question whether a particular causal connection between persecution and membership of a group attracts Convention protection will be resolved not merely by the logic of causality but as a matter of evaluation which has regard to the policy of the Convention. While it is not necessary that the fear of persecution be solely attributable to membership of a relevant social group, a decision-maker can have regard to the extent to which membership of the relevant group is a factor in the risk of persecution.