

## REFUGEES

### 'Membership of a particular social group'

The High Court has decided that people facing forcible sterilisation under China's one child policy cannot claim refugee status in Australia. SONJA MARSIC reports.

The appellants in *A & B v Minister for Immigration and Ethnic Affairs & Anor* (1997) 142 ALR 331 were Chinese nationals who arrived in Australia by boat on 5 December 1993. They claimed recognition as refugees on the basis that they feared forcible sterilisation under China's one child policy. By a majority of 3 to 2, (Dawson, McHugh and Gummow JJ; Brennan CJ and Kirby J dissenting), the High Court concluded that the appellants were not refugees within the meaning of the *Migration Act 1958* (the *Migration Act*).

#### Facts

The appellants were husband and wife, and they lived in the village of Bang Hu in the province of Guangdong. They left China by sea in late 1993 when the wife was eight months pregnant. Soon after arrival in Australia, their child was born. The appellants left China because the husband feared that he would be forcibly sterilised after the birth of their child. It was accepted before the Court that in the village of Bang Hu unconsensual abortion and sterilisation were the primary sanctions to enforce the one child policy. The local authorities sought to reduce infringements of this policy by an organised program of sterilisation after a couple achieved one surviving birth. Forcible sterilisation does not appear to be the standard practice throughout China, but seems limited to particular rural areas. However, the Central Government of China appears to give its tacit acceptance to the measures adopted in these areas.

#### Definition of refugee

Not every individual who faces persecution in her or his country of nationality is entitled to protection as a refugee under Australian or international law. The term 'refugee' is defined under the *Migration Act* as having the same meaning as it has in Article 1 of the Convention Relating to the Status of Refugees (Geneva, 28 July 1951) (the Convention) as amended by the Protocol Relating to the Status of Refugees (New York, 31 January 1967) (the Protocol). Article 1A(2) of the Convention in its amended form relevantly defined the term refugee as:

any person who ... 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 unwilling to avail himself of the protection of that country. [emphasis added]

The issue before the High Court was whether the appellants feared persecution for reasons of 'membership of a particular social group'. The particular social group was defined by counsel for the appellants as Han people<sup>1</sup> who are parents, who have one child, who are in the reproductive age, who wish to have another child, and who are subject to forcible sterilisation carried out by particular family planning police.

Records of the Convention's preparation show that the category of 'particular social group' was the last of the enumerated grounds in Article 1A to be added and that it was added with the intention of broadening the reach of the definition. It seems likely that the category was at least intended to cover those groups persecuted because of the 'restructuring' of society being undertaken in socialist states and the resulting predicament of landowners, capitalist class, independent business people, the middle class and their families.<sup>2</sup>

#### The meaning of 'membership of a particular social group'

##### The majority view

The majority held that members of a particular social group are people who share a certain characteristic, activity, belief, interest or element which unites them and enables them to be set apart from society at large. Justice McHugh said that the particular social group need not have a 'public face' nor need it actually possess the attributes that it is perceived to have.

However, in the opinion of the majority, the characteristic or element which unites the group cannot be a common fear of persecution, such as the fear of forcible sterilisation.

The claim that a number of people may be held to fear persecution by reason of membership of a particular social group where what is said to unite those people into a particular social group is their common fear of persecution was criticised by the majority as circular. Also, if a shared fear of persecution were sufficient to constitute a particular social group, it was thought that the other Convention grounds of race, religion, nationality and political opinion would become superfluous. While the majority agreed that the phrase 'particular social group' should be construed broadly, they did not consider that the category should be viewed as an all-encompassing safety net applying to any individual who is subject to persecutory conduct.

Justice McHugh, however, considered that 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. His Honour pointed to the significance of societal perception in defining a 'particular social group'. On this basis, McHugh J said that if, for example, a large number of people with one child who wished to have another had publicly demonstrated against the government's policy, they may have gained sufficient notoriety in China to be perceived as a social group.

The appellants conceded that the persecutory conduct of forcible sterilisation was a necessary element of the definition of the 'particular social group' on which they relied. That is, the appellants accepted that 'Han people who are parents, who have one child, who are in the reproductive age, and who wish to have another child' cannot, with nothing more, claim to be refugees.

Accordingly, the majority concluded that there was simply a disparate collection of couples throughout China who want to have more than one child, contrary to the one child policy. They said that there is no social attribute or characteristic linking the couples, and nothing external that would allow them to be perceived as a particular social group for Convention purposes.

### *The minority view*

Chief Justice Brennan interpreted the Convention definition of refugee by focusing on the object and purpose appearing in the preamble and the operative text, and by reference to the history of the negotiation of the Convention.

The Chief Justice considered that the preamble to the Convention placed it among the international instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental human rights and freedoms.

His Honour considered that the leading concept in the definition of 'refugee' is the 'fear of being persecuted' for a 'discriminatory reason'. If a person's enjoyment of fundamental rights and freedoms is denied by a well-founded fear of persecution for a reason that distinguishes the victims as a group from society at large, it would be contrary to 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination' as expressed in the preamble. It would therefore be contrary to the object and purpose of the Convention to exclude that person from protection. The Chief Justice saw 'no warrant for reading down the categories of discrimination by postulating some *a priori* factor that restricts the denotation of the phrase 'a particular social group', ignoring the actual reason for the feared persecution'.

Chief Justice Brennan interpreted the term 'particular social group' as connoting a group constituted by those who share a common distinguishing characteristic which is the 'reason' for persecution that is feared. His Honour viewed forcible sterilisation as a denial of a person's fundamental rights and freedoms. The Chief Justice held that the characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic. In his Honour's view, it is their membership of that group that makes the appellants liable to sterilisation if they return to Bang Hu.

Justice Dawson (in the majority), however, noted that it is the very nature of a fundamental human right that it is common to all humanity and exercisable by all, and as such is not capable of uniting a finite number of people into a particular social group. His Honour said that a fundamental human right could only constitute a unifying characteristic if people associated with one another on the basis of that right or if society regarded those people as a group because of their common wish to exercise that right. Justice Dawson said that by including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humani-

tarian scope and does not afford universal protection to asylum seekers.

Justice Kirby, in contrast to the Chief Justice, asserted that the appeal was not about fundamental human rights as such, although on one view they are indeed affected.

In Kirby J's view, courts and agencies should not attempt to formulate abstract definitions of a 'particular social group'. Instead they should recognise particular social groups on a case by case basis. Justice Kirby said that this approach accepts that an element of intuition on the part of decision makers is inescapable. While his Honour recognised that this is not an entirely satisfactory conclusion, he considered it preferable to an attempt by courts to unduly narrow the operation of the Convention or to impose on its deliberately broad and ambulatory language categories which are by no means exclusive of the actual words used.

Justice Kirby considered that the error in the Minister's contention was in the emphasis on the word 'membership', as if it required people in the group to associate with one another. His Honour also considered that self-identity as a member of a particular social group was not a prerequisite.

His Honour noted that because the Convention is universal, it is not only concerned with the grounds of persecution that have been familiar to Western countries. For such countries, in the past, race, religion, minority nationality and political opinions have been the main grounds for persecution. But, said Kirby J, in other societies, and in modern times, different cultural norms and social imperatives may give rise to different sources of persecution. Justice Kirby said that the Convention is intended to operate in the context of the problems of refugee displacement in modern times. His Honour considered it an error to construe the definition of refugee so as to ignore the changing circumstances of the world in which the Convention now operates.

The very existence of a 'group' of people inclined to oppose, evade, and flee the imposition of a government policy such as the one child policy would suggest, in Kirby J's view, a strain on the loyalty of group members to the government of China. A potential danger of the group was said to lie in the perceived risk of alienation from the government which could give rise to a governmental response and to a well founded fear of persecution. In Kirby J's view, such people could constitute a particular social group.

### **The implications**

This decision of the High Court is the first Australian authority to provide comprehensive guidance on the meaning of the phrase 'a particular social group' as it appears in the Convention. Time will tell whether the narrow approach taken by the majority as to the scope of a 'particular social group' will limit the ability of the Convention, as imported into Australian law, to respond effectively to the contemporary political contexts in which peoples are displaced. In particular, it will be interesting to see whether the High Court's decision will limit the ability of women who are subjected to domestic violence and who are without sufficient protection in their home country to claim membership of a particular social group.

Had the High Court decided in favour of the appellants, there seems little doubt that the Government would have sought to reintroduce legislation which was put before Parliament in March 1995 by the former Labor Government, the *Migration Legislation Amendment Bill (No. 4) 1995*. This Bill was introduced after Sackville J held that 'A' and 'B'

were refugees by reason of being members of a particular social group ((1994) 127 ALR 383) but was withdrawn after the Full Federal Court reversed the decision ((1995) 57 FCR 309). The Bill sought to ensure that the fertility control policies of the government of a foreign country would be disregarded in determining whether a person was a member of a particular social group within the meaning of the Convention.

*Sonja Marsic is a lawyer with the Commonwealth Attorney-General's Department.*

## References

1. The Han people are the majority ethnic group in China. The one child policy appears to be applied less strictly by the Chinese Government to members of certain ethnic minorities.
2. Goodwin-Gill, *The Refugee in International Law*, 2nd edn, 1996, p.46.

## DOMESTIC VIOLENCE

### *Bush women confront male violence*

**NANETTE ROGERS** discusses the experiences of Aboriginal women with domestic violence in remote communities with an introduction by **SHIRLEY BRAUN**.

My name is Shirley Braun. I am a 47-year-old Aboriginal woman born and raised in Alice Springs. While my parents were at work my older brother, myself, my younger sister and brother were cared for by my grandparents, Sid and Alice Ross. Sid Ross was a traditional owner for Alice Springs. He died when I was 29 years old. In all those years he never once beat my grandmother; it was not part of his culture, and I believe because of this my parents themselves did not abuse each other. We grew up in a happy, caring and sharing house.

I have worked at the Central Australian Aboriginal Legal Aid Service (CAALAS) since 1981 in various positions but nearly always in the field. During this time there has only been one legal education workshop series specifically for Aboriginal women in remote communities, and that was in 1995. As there was only a limited amount of money not all of the communities in the CAALAS area were revisited (CAALAS covers approximately two-thirds of the NT). Nanette Rogers and I decided to visit ten of the larger communities. We wrote to the person in charge of the Women's Centres and asked that they discuss any legal

aspect with the women that they wanted workshopped. All of the Women's Centres that were functioning wrote back stating that they wanted to workshop domestic violence.

When we arrived at the Communities we found the women crying out for information and resources to deal with domestic violence. The women were concerned about the lack of respect shown in Aboriginal law towards them from their men and decided to turn to white man's law for protection. They were concerned about the treatment grandmothers, mothers and young girls were getting, and because the men control the Councils, the lack of help they were receiving from officials. Even at some of the Women's Centres the white woman in charge would turn a blind eye. The Women's Centres play a very important role on remote communities. The women are taught how to look after their homes, how to cook nutritious meals, to sew and how to fine tune their natural talents in painting and craft-making. There are also washing machines and showers at the Centres for women to resource. As there are no 'safe houses' on the communities, with ATSIC cutting the funding to the Women's Centres the women will no longer be able to escape there, even for the day.

**Shirley Braun**

*Shirley Braun has worked at CAALAS since 1981 in a variety of positions, including Deputy Director.*

Audrey Bolger<sup>1</sup> reported that Aboriginal women were grossly over-represented in the number of murders, attempted murders and sexual assaults committed against them in the years 1987 and 1988. Bolger noted that studies such as those conducted by Jocelyn Scutt in Australia and Jill Radford in the UK have shown that women are often reluctant to report violent incidents to the police.<sup>2</sup> There is no reason to assume this under-reporting by women of violence inflicted on them differs between Aboriginal and non-Aboriginal women. Bolger estimated that the equivalent to one-third of the NT Aboriginal female population is assaulted in one year.<sup>3</sup> The massive prevalence of violence perpetrated on Aboriginal women by their partners is well known locally. Over the last two years Aboriginal women, despite constituting only 24% of the total female population of the Northern Territory,<sup>4</sup> have comprised 70% of the clients of the Alice Springs Domestic Violence Service.<sup>5</sup> A significant proportion of these women were from bush communities.

### What women talked about

At the workshops, older women tended to be articulate in the company of other women about the problems of male violence they were experiencing in their own communities. Younger women tended to be quiet in such a group but nevertheless were unreserved when they were given the opportunity to speak privately about their problems. Some of the older women spoke publicly about the violence within their own marriages, a number of which had lasted for decades.