CASE NOTES

APPLICANT A v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS*

THE HIGH COURT AND 'PARTICULAR SOCIAL GROUPS': LESSONS FOR THE FUTURE

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* (1997) 142 ALR 331. High Court of Australia, 24 February 1997, Brennan CJ, Dawson, McHugh, Gummow and Kirby JJ ('*Chinese One Child Policy Case*').

I INTRODUCTION

On 24 February 1997, the High Court handed down a decision which is an important interpretation of the international legal definition of a refugee. The Court determined, three to two, that a Chinese couple who wanted more than one child, in contravention of China's policy that couples may only have one child (the 'one child policy'), and who feared forcible sterilisation on return to China, were not refugees. This was because the majority did not accept that the appellants were members of a 'particular social group' singled out for persecutory treatment (that is violation of human rights) pursuant to the policy. Rather, the appellants had attracted sanctions pursuant to the policy because of their individual reactions to, and refusals to comply with, the policy.

This note will be developed as follows. The one child policy will be very briefly described. Then, the law relating to refugee status will be set out and the key issues raised by the one child policy will be flagged. The issue is narrowed to consideration of the question of persecution 'for reasons of membership in a particular social group'.[1] Next, jurisprudence from Canada and the United States regarding this phrase will be outlined and appraised. This is followed by an assessment of the Australian jurisprudence. Then the judicial history of the *Chinese One Child Policy Case* and the judgments of the High Court will be considered and evaluated. It is then suggested that the issue cannot be resolved without an examination of the legitimacy of the policy itself (not just the means of enforcement) in that it sets a compulsory limit on family size. The note concludes with some observations about the consequences of the decision for the next controversy likely to come before the courts, that of gender-based social groups, and the ominous signs that the executive might interfere with the decision-making process regarding this issue.

II THE ONE CHILD POLICY

The one child policy was conceived in the seventies and intensified in 1979 under the auspices of Deng Xiaoping.[2] The policy reversed the previous policy espoused by Chairman Mao to boost population growth. It also runs against the grain of many cultural understandings about the family and children in China, while strengthening aspects of these cultural mores that are harmful to women. Traditionally, Chinese peasants have relied on their children to work the farm and to support them in old age. Female children have been undervalued in China and marry into their husbands' families, thus becoming responsible for the care of their in-laws. The one child policy has exacerbated son preference and led to an increase in female infanticide.[3] Women are also more likely to be subjected to

[1] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, art 1A(2) (entered into force 22 April 1954) ('Refugee Convention' or 'the Convention').

[2] John Aird, *Slaughter of the Innocents: Coercive Birth Control in China* (1990) 28.

[3] Ibid.

measures such as abortion and sterilisation as a result of the policy than men are to be sterilised.[4]

The one child policy is presently meant to work through a series of economic incentives and disincentives. Incentives include extended maternity leave,[5] extra work permits and pensions and preferential allocation of jobs and housing.[6] Disincentives include a multi-child tax, refusal to guarantee employment to any child other than the first, and reduction of the pension.[7] There are also reports of other disincentives such as destruction of crops and family assets, heavy fines, monthly fines, denial of housing permits, disconnection of utilities, reduction in salaries and closure of businesses.[8] Disincentive is perhaps a euphemism, as the implementation of some of these measures can make bare subsistence impossible. In addition, the reproductive functions of individuals have become the subject of intense public scrutiny. In particular, women's menstrual cycles are publicly documented by their places of work. In the past, more brutal methods of enforcement, such as forcible abortions and sterilisations, were openly sanctioned by the authorities.[9] In some regions, the anxiety of officials to meet quotas on the number of children born in their region has led to the continuance of these measures. These measures are not officially condoned by the current central authorities. However, as with female infanticide, the central authorities have not been particularly effective in ensuring that these measures cease. Indeed, the authorities rely on the presence of many pressure points on couples as local officials' jobs may depend on the meeting of the quota in a particular region. As pointed out in the Canadian case of *Chan v Canada (Minister of Employment and Immigration)*,[10] enforcement of the policy relies on the creation of conditions whereby there is enormous societal pressure to abuse people's rights.[11]

III Issues Raised by the One Child Policy under the Law of Refugee Status

Refugee status is governed at the international level by the 1951 Convention Relating to the Status of Refugees,[12] as amended by the 1967 Protocol Relating

[4] The following statistics from the period 1971–85 give an idea of the pattern of birth control mechanisms and the fact that women are more directly affected by the policy: 182,691,497 intrauterine device insertions; 24,993,383 vasectomies; 59,051,848 tubal ligations; 111,960,987 abortions: Yearbook Compilation Committee, *Zhongguo Weisheng Nianjian 1986, (Public Health Yearbook)* (1986) 475, quoted in Aird, above n 2, 40.

[5] Penny Kane, *The Second Billion — Population and Family Planning in China* (1987) 136.

[6] Ibid 90–1.

[7] Ibid 133–5.

[8] Aird, above n 2, 74.

[9] Forced sterilisations were mandated under Deng Xiaoping in 1983: ibid 33.

[10] [1995] 3 SCR 593 ('*Chan*').

[11] La Forest J noted that 'the Chinese government ... creates a climate in which incentives for mistreatment are ripe': ibid 630.

[12] Refugee Convention, above n 1.

to the Status of Refugees.[13] The Convention has not been implemented by specific Australian legislation. Rather, applications for refugee status are governed by the Migration Act 1958 (Cth) and regulations. The Migration Act provides that a protection visa may be granted to 'persons to whom Australia has protection obligations under the Refugee Convention'.[14] Protection visas replaced Domestic Protection Temporary Entry Permits ('DPTEPS') in 1994. In the *Chinese One Child Policy Case*, the High Court was dealing with the legislative scheme relating to DPTEPS, however the new legislative scheme is not appreciably different for present purposes.

Applications for a protection visa are heard at first instance by an officer of the Department of Immigration and Multicultural Affairs ('DIMA'). Merits review is then available before a member of the Refugee Review Tribunal ('RRT'). Judicial review before the Federal Court is pursuant to limited bases contained in the Migration Act. Appeal to the High Court may follow.

The definition of a 'refugee' contained in article 1A(2) of the 1951 Convention, as amended by the Protocol, provides that a refugee is someone 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, 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 [as a result of such events], is unable or, owing to such fear, is unwilling to return to it.[15]

The Convention definition of a refugee may be broken into several components. A person seeking recognition as a refugee (an 'asylum-seeker') must be outside the country of origin and unable or unwilling to return. The person must fear persecution. 'Persecution' is not defined in either the Convention or the Protocol. The *Concise Oxford Dictionary* defines the verb 'to persecute' as follows:

> [P]ersecute: Pursue with enmity and ill-treatment; subject to penalties on grounds of religious or political beliefs; harass, worry, importune (person with questions etc).[16]

Given that article 33 of the Refugee Convention, which enshrines the cardinal obligation of *non-refoulement*, that is non-return to the country of origin, refers to non-return to a place where 'life or freedom' is threatened, persecution must at least involve a threat to life and liberty. It is generally accepted as meaning serious violations of human rights.[17] The High Court in *Chan v Minister for*

[13] Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267, (1967) 6 ILM 78 (entered into force 4 October 1967) ('the Protocol').
[14] Migration Act 1958 (Cth) s 36(2).
[15] Refugee Convention, above n 1, art 1A(2).
[16] *Concise Oxford Dictionary* (6th ed, 1976) 823.
[17] James Hathaway, *The Law of Refugee Status* (1991) 99.

Immigration and Ethnic Affairs[18] held that persecution involves some serious punishment, penalty, detriment or disadvantage.[19] Fear of persecution must be well-founded. Both a subjective element of fear and an objective element of reasonableness are required. The test applied in Australia is that there must be a 'real chance' of persecution.[20] The persecution must be linked to the state in the sense that the state is unwilling or unable to protect the asylum-seeker from persecution. Thus the human rights violations need not stem directly from the state. They may be the result of action by private individuals, but if the state fails to prevent or punish such action the requirement of a nexus to the state is satisfied. Where persecution is committed by a private actor, there is some ambiguity as to whether the requirement that persecution be 'for reasons of' one of the five Convention grounds refers to the motivation of the private actor or the reason for the state's failure to protect. In my view, both readings of the Convention are plausible. Finally, fear of persecution must be related to one of the five grounds, which are known as 'Convention grounds' or 'Convention reasons': race, religion, nationality, political opinion, or membership of a particular social group.[21]

The case of asylum-seekers fleeing enforcement of the one child policy raises two key issues under the definition of a refugee. The first is whether human rights are endangered. The second is whether the feared rights violations are linked to one of the five Convention reasons.

Turning to the first issue, it must be acknowledged that over-population is a pressing global problem as it may contribute to environmental degradation and impoverished living conditions for human beings.[22] China's one child policy is an attempt to be responsible about population growth. However, the international law of human rights does not suggest that every measure is justified in the name of population control. Even in times of public emergency (which appear to involve a more immediate threat to the life of the nation than population growth, such as a war) certain rights are non-derogable. Article 4 of the International Covenant on Civil and Political Rights[23] lists as non-derogable those rights most basic to survival such as the right to life and the prohibition on torture, as well as the anomalous right not to be put in debtor's prison (which is unlikely to aid a response to a public emergency).

Coercive population control may be in violation of human rights. Although China has not become party to many human rights treaties, it is bound by those human rights norms which have attained the status of customary international law. Moreover, regardless of China's decision not to become party to human

18 (1989) 169 CLR 379.

19 Ibid 388 (Mason CJ).

20 Ibid 389 (Mason CJ), 398 (Dawson J), 407 (Toohey J), 429 (McHugh J).

21 Refugee Convention, above n 1, art 1A(2).

22 See especially *Report of the International Conference on Population and Development*, ch VII Programme of Action, UN Doc A/CONF 171/13 (1994).

23 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art 4 (entered into force 23 March 1976) ('ICCPR').

rights treaties, it is accepted that decisions regarding refugee status made by parties to the Refugee Convention must take account of the canon of international human rights law when determining whether the applicant has a well-founded fear of persecution.[24]

Coercive implementation of the one child policy may violate the right to found a family, in relation to which the Human Rights Committee has stated that population limitation programs are permissible but must not be compulsory.[25] It is an interesting question as to where the line would be drawn between coercion and voluntary submission to the policy in the case of some of the economic disincentives adopted by China. Job loss which threatens survival surely involves a threat to life. In the case of extreme, physical measures of enforcement such as forced sterilisations and forced, particularly late-term, abortions, the right to privacy and security of the person, and perhaps the prohibition on torture or cruel or inhuman or degrading treatment or punishment, and the right to life may be at stake.[26] Indeed, Australian delegations to China have stated that the more extreme measures for enforcing the policy do offend human rights.[27]

Population control and its interaction with human rights has been considered by the international community at the 1994 Cairo Conference on Population and Development and the Fourth World Conference on Women held in Beijing in 1995. It was acknowledged at these conferences that coercive population control is neither appropriate nor likely to succeed. Rather, it was accepted that education in family planning and, more broadly, education and empowerment for women, is the best strategy.[28] It must be admitted that the Chinese policy has enjoyed success in terms of limitation of the number of births:[29] the phenomenon of 'little emperors' or spoilt only children is well known. However, Amartya Sen suggests that a comparison with the Indian State of Kerala demonstrates that coercion is not necessarily the best policy:

> Underlying the change in Kerala is the operation of economic and social incentives towards smaller families. As the death rate has fallen and family-planning opportunities have been combined with health care, and the desire of Keralan women — more educated as they are — to be less shackled by continuous

[24] For a discussion of the connection between the concept of persecution and international human rights norms, see generally Hathaway, *The Law of Refugee Status*, above n 17.

[25] *Human Rights Committee's General Comment on ICCPR Article 23*, UN Doc CCPR/c/21/Rev 1/Add 2 (1990); reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1 (4 September 1992) 28–9.

[26] Late-term abortions are a risk to the mother's life and many people accept that at some point the foetus requires protection as a human life. For a survey of feminist critiques of the debate concerning 'when life begins', see especially Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 211–4.

[27] Commonwealth of Australia, Department of Foreign Affairs and Trade, *Report of the Second Australian Human Rights Delegation to China*, 8–20 November 1992 (1993) [7.39].

[28] *Report of the International Conference on Population and Development*, above n 22, [7.12].

[29] Writing in 1994, Sen noted that '[t]he Chinese birth rate has certainly fallen quite sharply; the last systematic calculation put it at around 21 per thousand': Amartya Sen, 'Population and Reasoned Agency: Food, Fertility, and Economic Development' in Kerstin Lindahl-Kiessling and Hans Landberg (eds), *Population, Economic Development and the Environment: the Making of Our Common Future* (1994) 51, 71.

> child-rearing has become prominent, the birth rate has tumbled ... What also appears to have played a part is a general perception that the lowering of the birth rate is a real need of a modern family — a conceptualisation in which public education and enlightened discussion have been very effective.[30]

Thus the extremes of the one child policy cannot be justified on the basis of necessity.

Nor can it be claimed that the measures adopted in China are culturally acceptable. Measures involving the intense scrutiny of what many in Australia would regard as the most private of issues, reproductive functions, could be argued to reflect a particular cultural interpretation of the balance to be struck between community needs and individual desires. However, given the totalitarian nature of the Chinese political system and the fact that the one child policy goes against the grain of many traditional Chinese cultural understandings regarding the family and children, an easy acceptance of the coherence between political edicts and cultural values is unwarranted.[31] Indeed, the policy has to surmount culturally entrenched attitudes in order to be successful. The existence of these cultural attitudes may be quite important in assessing whether the policy may be viewed as persecution for Convention reasons.

The second, and much more problematic, issue arising under the definition of refugee status in relation to persons fleeing enforcement of the one child policy is whether there is a nexus between the human rights violations feared and one of the five Convention grounds of persecution.[32] Human rights violations must be feared for a reason which discriminates on the basis of one of the five grounds. The one child policy is a policy of general application which does not, on its face, single out any particular group of people. Of course, people who are beyond reproductive age or who are known to be physically incapable of reproduction for other reasons would not necessarily be affected by the policy. However, this would appear to be a 'benign' rather than an invidious basis of discrimination between different statistical sectors of the population. Other exceptions are made for ethnic minorities. Again such distinctions may be viewed as benign and protective of the right of minorities to continued existence.[33] Couples who disobey the policy appear to be reacting to a policy which applies to everyone, or at least to a very large section of the population other than themselves. Thus, even when subjected to measures such as forcible abortion or sterilisation, it might be argued that these measures of enforcing the

[30] Ibid 72.

[31] For an examination of the misuse of culture by authoritarian governments, see Yash Ghai, 'Human Rights and Governance: The Asia Debate' (1994) 15 *Australian Year Book of International Law* 1.

[32] Refugee Convention, above n 1, art 1A(2).

[33] This right may be gleaned from the ICCPR, above n 23, art 27, which refers to the rights of minorities and therefore presumes their continued existence. The prohibition on suppressing births within a particular ethnic or cultural group is contained in the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, art II(d) (entered into force 12 January 1951) which prohibits the prevention of births within a national, ethnical [*sic*], racial or religious group, if the measures are intended to destroy the group. See generally Patrick Thornberry, *International Law and the Rights of Minorities* (1991).

policy are not discriminatory, although they are repugnant and violate human rights. Such means of enforcement would apply to any person who disobeys the policy. The reasons driving the measures of enforcement are not Convention reasons.

On the other hand, the policy must deal with culturally embedded attitudes and perhaps also other belief structures, such as religious faith or opinions concerning the right to bear children and the government's role in such matters. Do measures which violate rights occur pursuant to the policy despite these belief structures in order to meet the quota, or do these measures effectively target persons with these belief structures? Is this targeting aimed at eliminating the beliefs which drive such people to violate the policy? What is the relevance of the fact that the measures to promote the aims of the policy are coercive, and sometimes brutal, rather than consisting of education and empowerment — particularly for women — in order to promote responsible decisions by couples in a broader context of governmental provision for its citizens which would remove the economic pressures for larger families? Does it mean that the policy is effectively one which persecutes people on the basis of their beliefs? Alternatively, is childbirth so politicised in China that the authorities view violation of, or opposition to, the policy as tantamount to expression of a political opinion? When attempting to answer these questions, should we focus on the perceptions of the persecutor or the victim, and must the focus be constantly on one or the other as opposed to a shifting focus?

All five members of the High Court in the *Chinese One Child Policy Case* accepted that the measures of enforcement involved in the case — forcible sterilisation — violated human rights. It is the second issue with which the Court was concerned. In particular, the bench had to answer the question whether the ground of 'particular social group' could be relied on by the appellants. The RRT member had accepted that the applicants for refugee status were members of a social group comprising parents who had one child and who did not accept the limitations placed on them by official policy, or who were coerced or forced into being sterilised or were susceptible to being coerced or forced into being sterilised.[34] On review, a single judge of the Federal Court, Sackville J, agreed with the RRT member,[35] but the Full Court of the Federal Court did not.[36] The asylum-seekers appealed to the High Court. The crucial issues for the High Court were the test for defining a social group, the question of whether the persecution feared was for reasons related to membership of that group, and the wording used by the RRT member to define the group.

[34] RRT decision N94/3000 (20 May 1994) 11.
[35] *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383.
[36] *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 130 ALR 48.

IV 'FOR REASONS OF MEMBERSHIP OF A PARTICULAR SOCIAL GROUP': AN APPRAISAL OF CANADIAN AND UNITED STATES JURISPRUDENCE

The ground of 'social group' is a vexed aspect of the definition of a refugee. There is no definition of social group contained in either the Convention or Protocol. The only guidance to be gained from the *travaux préparatoires* to the Convention is from the Swedish delegate's declaration that people had been persecuted in the past on the basis of membership of a particular social group.[37] Various definitions, often contradictory, have been adopted by jurists and municipal courts. Here, the spotlight will be on jurisprudence from Canada and the United States, since these were the two jurisdictions to which the High Court's attention was drawn. Moreover, as pointed out by Fullerton, jurisprudence on social group in other jurisdictions may not be as well developed,[38] and the author is handicapped by reliance on English language sources.

In considering the meaning of 'particular social group', questions arise as to whether the members of the group have to know and associate with each other or whether they must have some public face or organisation. Some authority in the United States, especially the case of *Sanchez-Trujillo v Immigration and Naturalization Service*,[39] supports this approach. The approach favoured by James Hathaway, a leading jurist in the field of refugee law,[40] and by the Canadian Supreme Court in *Canada (Attorney-General) v Ward*,[41] is the *ejusdem generis* approach, by which the ground of social group is construed by looking to the elements common to the other four Convention grounds. According to this approach, elements common to all the grounds are either an immutable characteristic (such as race, perhaps nationality) or some other characteristic so fundamental to the personality of the individual concerned (political opinion, religious beliefs, nationality) that it should not be changed. A person's past history can also be considered to place a person in a social group, since the past has an immutable character. Thus a social group could be defined by looking to any of these elements. Red hair, which is (generally) an immutable characteristic, could be the defining characteristic of members of a social group if this was the characteristic which attracted persecution. It would attract persecution because of social attributes ascribed to the characteristic of red hair.

There is much to commend this approach. After all, in the case of race, it is the person's skin colour, and other physical features, and the attributes imputed to such characteristics which attract persecution. There is no requirement that there

[37] Mr Petren, United Nations General Assembly Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Third Meeting held at Geneva*, 3 July 1951, A/Conf/2/SR 3, 14.

[38] Maryellen Fullerton, 'A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group' (1993) 26 *Cornell International Law Journal* 505, 506.

[39] 801 F2nd 1571 (9th Cir, 1986) ('*Sanchez-Trujillo*').

[40] Hathaway, *The Law of Refugee Status*, above n 17, 160–1.

[41] [1993] 2 SCR 689 ('*Ward*').

be any connection between, or sense of solidarity among, the members of a race. The key is whether characteristics common to, or imputed to, members of a race motivate the persecution. As Audrey Macklin states:

> [A]s long as perpetrators of persecution treat people with a shared attribute as comprising a group by virtue of that common characteristic, whether individuals so identified would choose to see themselves as united in any meaningful sense has little impact.[42]

At bottom, racism is a means of constructing and asserting superiority on the basis of differences which may either be imagined or inconsequential, or, alternatively, important to the persecuted group or perceived as threatening to the persecutors and therefore the subject of assimilationist pressure. The point is that there is an attempt either to make consequences follow from a perceived identity or to suppress a supposedly threatening identity.

Important consequences follow from the different approaches adopted in the United States, on the one hand, and in Canada, on the other. If the Canadian *ejusdem generis* test is adopted, essentially all that is required for membership of a social group is a characteristic shared by members of the group which attracts persecution. Some element of invidious discrimination is required. On the other hand, the requirement of a voluntary association as used in some US authority narrows the application of social group considerably.

In relation to the one child policy, however, there has been controversy surrounding the interpretation of the test laid down in *Ward*. This was the focus of some attention by the High Court of Australia in the *Chinese One Child Policy Case*. In *Ward*, La Forest J laid down a three part test for membership of a 'particular social group':

> (1) groups defined by an innate or unchangeable characteristic; or
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; or
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[43]

As Macklin wrote in 1993, there was some ambiguity in the meaning to be ascribed to the term 'voluntary association' in relation to the second limb of the test:

> [O]ne possible interpretation would suggest that voluntary association requires self-conscious solidarity between the claimant and other members of the group. Another would require only that the individual assigned to the relevant social group voluntarily participate in whatever activity is used to define him or her.[44]

[42] Audrey Macklin, '*Canada (Attorney-General) v Ward*: A Review Essay' (1994) 6 *International Journal of Refugee Law* 362, 375.

[43] *Ward* [1993] 2 SCR 689, 739.

[44] Macklin, '*Canada (Attorney-General) v Ward*: A Review Essay', above n 42, 375.

Thus according to Macklin, the example given by La Forest J in *Ward* of sexual orientation as an example of a characteristic defining a group falling within the first limb could, in fact, fall within the second limb, particularly since there is debate as to whether sexuality is innate or chosen.[45] Her interpretation would correctly emphasise the fact that sexual activity is perceived to define groups of people, and that exercising a right to a different sexuality is not something which should be required to be abandoned, an approach which is returned to in the next section.

The confusion in the Canadian jurisprudence on the one child policy stems from the fact that La Forest J's ruling in *Ward* drew on the Federal Court of Appeal's decision in *Cheung v Canada*,[46] in which the Court decided that 'women in China who have more than one child and are faced with forcible sterilisation' were a particular social group. However, in *Chan*,[47] which was decided after *Ward*, the Federal Court of Appeal did not accept that a man claiming he faced forcible sterilisation was a refugee. The majority of the Federal Court of Appeal did not think that the applicant fell within the second limb of the test laid down in *Ward*. On appeal, the majority of the Supreme Court also rejected the claim by the applicant for refugee status.[48] However, the Supreme Court's decision was driven by evidentiary factors and the decision in *Cheung* was not overruled. According to the majority, the evidence supported the view that it was primarily women who were subjected to forcible population control measures.[49] La Forest J delivered the opinion for the dissentients and, drawing on Macklin's analysis, found that the applicant for refugee status was 'voluntarily associated' with the right to decide freely and responsibly, the number, timing and spacing of his children.[50] He was at pains to point out that authority supports the view that the policy is enforced against both sexes[51] and that no doubt had been shed on the ruling in *Cheung*.[52] It should be said here that there are some other factual matters in *Chan*, such as the applicant's prior support for the democracy movement and evidence as to the angry reactions by local officials regarding his actions, which added an element of political targeting to the case and this carried some weight with the minority.[53] In the High Court's decision in the *Chinese One Child Policy Case*, McHugh and Dawson JJ both effectively expressed their doubt as to whether a common attempt to exercise a right could be said to 'unify' a group in the eyes of society and whether it could be said that the appellants were persecuted *for reasons of* the attempt to exercise this right, at least without some conscious manifestation of

[45] Ibid.
[46] (1993) 102 DLR (4th) 214 ('*Cheung*').
[47] [1993] 3 FC 675.
[48] *Chan* [1995] 3 SCR 593, 658 (Major J).
[49] Ibid 666.
[50] Ibid 646.
[51] Ibid 641.
[52] Ibid 649.
[53] Ibid 647–8.

organisation around the right, such as a public demonstration.[54] It may be that the Australian jurisprudence now contains some ambiguity as to what 'unification' of a group requires.

A final point to be made about the Canadian jurisprudence is that the distinction between targeting someone for who they are (a characteristic which may define the victims as members of a particular social group) and what they do — a dichotomy that is important to the Australian jurisprudence — has played a role in both *Ward* and *Chan*. In *Ward*, La Forest J put forward the distinction as a useful method of determining whether someone is persecuted because of membership of a particular social group.[55] However, he also found that an action could be evidence of what someone is, in terms of political beliefs,[56] provided that the act is inconsistent with anything other than a political motive.[57] As Macklin notes, there is often a relationship between imputed political opinion and membership of a particular social group.[58] In *Chan*, La Forest J commented on the dichotomy and noted that in some cases, including the case of parenting, what someone does is fundamental to who they are.[59]

In the United States, consideration of the one child policy has been characterised by a morass of administrative action and conflicting case law.[60] In *Matter of Chang*,[61] the Board of Immigration Appeals took the view that the applicant's arguments were circular and that there was no nexus between the persecution feared and the Convention grounds. In the District Court (the lowest tier in the United States court system) decision *Guo v Carroll*,[62] it was accepted that disobeying the one child policy may be viewed as manifesting opposition to the policy and that expression of views concerning procreation is political.[63] Thus it was accepted that the asylum-seekers were fleeing persecution for reasons of political opinion. Decisions of the Federal Court of Appeals (the second tier of the Federal Court system), have followed *Matter of Chang*.[64] The controversy has been resolved by the legislature providing that persons fleeing enforcement of the one child policy will be deemed to be persecuted on the basis of political opinion.[65] Ironically, this result may please the right to life lobby (who are

54 See below Part VII(B)(3).

55 *Ward* [1993] 2 SCR 689, 738–9.

56 Ibid 749.

57 Ibid.

58 Macklin, '*Canada (Attorney-General) v Ward*: A Review Essay', above n 42, 376.

59 [1995] 3 SCR 593, 643–4.

60 See generally Tara Moriarty, '*Guo v Carroll*: Political Opinion, Persecution and Coercive Population Control in the People's Republic of China' (1994) 8 *Georgetown Immigration Law Journal* 469.

61 Interim Decision 3107, No A–27202715 (12 May 1989).

62 842 FSupp 858 (EDVa 1994).

63 Acts of opposition accepted by the Court included refusal to comply with sterilisation orders and fleeing from the village.

64 The latest decision is *Chen v Immigration and Naturalization Service*, 95 F3rd 801 (9th Cir, 1996).

65 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub L 104–208, 110 Stat 3009 (1996)) s 601 amended the definition of refugee in the Immigration and Nation-

undoubtedly the main force behind the legislation), anti-communists, and feminists (who are concerned about the fact that women clearly bear the brunt of the policy). Regardless of the origins of the lobbying power behind the Act, a special humanitarian category for people fleeing measures such as forcible sterilisation and abortion is appropriate if it is thought that the definition of a refugee is not broad enough to catch such people, because the nature of the enforcement is so brutal. After all, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[66] contains a provision in article 3 to the effect that persons must not be returned to a place of torture. Unless there is debate about the requirements in the Torture Convention concerning the motivation of the persecutors (article 1 of the Convention mentions torture to extract a confession, for example), forcible sterilisation may be considered to constitute torture. Alternatively, if the purposes of the sterilisation are considered a problem, it may fall within one of the related forms of maltreatment. Grant of stay on humanitarian grounds in Australia is meant to cover survivors of torture and other such maltreatment.[67]

V AUSTRALIAN PRECEDENTS: TO BE OR TO DO?

Until the *Chinese One Child Policy Case*, the Australian High Court had not grappled with the meaning of 'social group', although Dawson J had noted in *Chan v Minister for Immigration and Ethnic Affairs* that the family could constitute a social group.[68] The leading decisions were those of the Full Federal Court in *Morato v Minister for Immigration, Local Government and Ethnic Affairs*[69] and *Ram v Minister for Immigration and Ethnic Affairs*.[70]

Morato involved a former drug-dealer who had turned Queen's evidence. He feared that his former colleagues would kill him and that his country of origin (Bolivia) would be unwilling or unable to protect him from this threat to his life. The case turned on the question of membership of a social group. Morato asserted that the social group involved was those who had turned Queen's evidence. The Court held that Morato feared persecution not because of who he was as a member of a particular social group, but because of what he had done, that is turn Queen's evidence, and specific results of that action: that is, retaliation by his erstwhile colleagues. The key requirement for ascertaining whether a

ality Act of 1952 (8 USC 1101(a)(42)). Individuals who resist coercive population control are deemed to be persecuted or to possess a well-founded fear of persecution on account of political opinion. A limit of 1,000 refugees per year applies to this provision: Immigration and Nationality Act of 1952 (8 USC 1157(a)).

66 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, (1984) 23 ILM 1027 (entered into force 26 June 1987) ('Torture Convention').

67 Stay on humanitarian grounds may be granted pursuant to the Migration Act 1958 (Cth) s 417.

68 (1989) 169 CLR 379, 396.

69 (1992) 111 ALR 417 ('*Morato*').

70 (1995) 130 ALR 314 ('*Ram*').

social group exists was defined in *Morato* as being the existence of a 'cognisable' group in society.[71]

Ram confirms that the key is whether persecution is *for reasons of* membership of a particular social group. It is not sufficient for a person to belong to a social group and to fear persecution for reasons unrelated to membership of the group. In *Ram*, it was held that 'wealthy Sikhs' or 'villagers returned to the Punjab from a foreign country with money' were not members of particular social groups that attracted persecution *on the basis of* that membership. Burchett J (O'Loughlin J concurring) held that persecution involved not only the infliction of harm, but:

> an element of attitude on the part of those who persecute which leads to the infliction of the harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution. 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'. If harmful acts are done purely on an individual basis, because of what the individual has done or may do or possesses, the application of the Convention is not attracted, so far as it depends upon 'membership of a particular social group'. ... There is thus a common thread which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group'.[72]

Accordingly, it was held that extortion directed against wealthy Sikhs was inflicted not because they were members of a social group, but because wealth was an individual attribute which made them susceptible to the extortionists' activities:

> Plainly, extortionists are not implementing a policy: they are simply extracting money from a suitable victim. Their forays are disinterestedly individual.[73]

In passing, Burchett J commented that objectors to the one child policy faced similar difficulties.[74] Nicholson J wrote a separate concurring opinion in which he indicated that 'the wealthy' could be a particular social group in some cases and that the finding of the judge at first instance to the effect that such a group was 'vague, uncertain and extraordinarily wide' was not an obstacle.[75]

The distinction adopted in *Morato* between what someone has done and what someone is, may be decidedly unhelpful. Indeed, some limitations on the concept were acknowledged by Black CJ in *Morato*:

> It may well be that an act or acts attributed to members of a group that is in truth a particular social group provide the reason for the persecution that members of such a group fear, but there must be a social group sufficiently cognis-

[71] *Morato* (1992) 111 ALR 417, 422 (Black CJ), 432 (Lockhart J).
[72] *Ram* (1995) 130 ALR 314, 317.
[73] Ibid 319.
[74] Ibid 318.
[75] Ibid 319–20.

> able as such to enable it to be said that persecution is feared for reasons of *membership* of that group.[76]

Similarly, in *Ram*, Burchett J commented that in some cases, 'the act may be proscribed in the country of an individual simply in order to satisfy some state ideology as irrational as Nazi anti-Semitism.'[77]

Clearly, what someone does may be integral to who he or she is, or is perceived to be, and it may also be the key identifier of what a person is, or is perceived to be. 'Homosexuality',[78] for example, describes people who are sexually attracted to members of the same sex. Activities which identify gay men and lesbians may therefore include sexual intercourse with members of the same sex. Criminalisation of 'sodomy'[79] illustrates very well the limitations of, and ambiguities inherent in, the dichotomy between activities and identity, as well as the difficulties of distinguishing between a law which is generally applicable and a law which in fact targets a particular group and is therefore inherently persecutory.

On one view, a law which criminalises 'sodomy' could be characterised as a generally applicable law which merely prohibits 'homosexual' activity. After all, in some cases, the gender neutral language of the law has resulted in the suggestion that heterosexual couples could be prosecuted. As is often the case, lesbian sex is completely invisible. Depending on whether homosexuality is perceived as an identity or lifestyle or simply a sexual activity in which an otherwise heterosexual man (or woman) might engage, laws against sodomy could be viewed as generally applicable laws. The invisibility of lesbian sex might be explained away on the same basis: it is the conduct which is viewed as immoral and lesbian sex does not involve this conduct. On this view, suppression of a homosexual identity is not the aim of the law. Like other criminal laws, the law is not aimed at a 'criminal class', but a 'criminal act' (although there may well be sociological arguments put forward about criminality as an identity). Rather, the law aims to prevent, through deterrence, and punish criminal activity.

This is an artificial construction of laws criminalising gay sex, however. As Emma Henderson has written recently, these laws are enacted to suppress what is perceived to be a homosexual identity totally defined by sexual activity, which

[76] *Morato* (1992) 111 ALR 417, 420.

[77] *Ram* (1995) 130 ALR 314, 319.

[78] I am adopting this terminology here for the reasons described in Emma Henderson, 'Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalisation Debates' (1996) 20 *Melbourne University Law Review* 1023, 1025–6, fn 8, and which are developed in the course of her article. She explains that 'homosexuality' is used to describe a perceived illness, whether physical or psychological, of persons whose sexuality is not heterosexuality. Accordingly, an entire identity is constructed about sexual activity which leads to criminalisation of it. For examination of this 'total' identity, see especially Peter Johnston, '"More than Ordinary Men Gone Wrong": Can the Law Know the Gay Subject?' (1996) 20 *Melbourne University Law Review* 1152.

[79] Like Henderson, above n 78, I employ the term 'sodomy' here because it is the word employed in legislation criminalising gay sex, and it serves to hide the conflation of sexual activity and identity which in fact drives criminalisation of gay sex.

is viewed as a threat to the apparent heterosexual fabric of society.[80] Indeed, in a liberal democracy it is necessary to posit such a 'harm' to public morality in order to argue that homosexual acts between consenting adults, occurring in private, should be prohibited.[81] The law is not aimed simply at the act itself, but perceived attributes of those engaging in the act and the effects they will have on society. Gay men are perceived as recruiters to homosexuality. Ironically, as Henderson points out, this requires heterosexuality to be constantly (re)produced through the intervention of the law.[82]

The construction of identity relevant to criminalisation of 'sodomy' echoes similar stereotypes relevant to discrimination against, and persecution of, other groups in society. Many white Americans in the United States believed in segregation: it was in the natural order of things that blacks should sit at the back of the bus. Many non-Aboriginal Australians have held, and continue to hold, similar views about Aborigines and Torres Strait Islanders. Such stereotypes are also responsible for the saying that 'women belong in the kitchen'. Historically, these stereotypes were responsible for slavery: they are still responsible for discrimination and persecution today. Any behaviour contravening such norms could be viewed merely as an act attracting sanctions. However, this interpretation ignores the reasons for the prohibition of the acts in the first place. Thus Burchett J, in *Ram*'s case, acknowledges the importance of 'Hitler's ghastly views about race'[83] in differentiating between the entitlements of those considered Jewish and those considered German, and acknowledges that some acts are prescribed for totally irrational, ideological reasons such as anti-Semitism.[84]

However, Burchett J focuses on the fact that Hitler cruelly created differences between groups based on his perceptions of difference in the face of relevant sameness:

> Hitler's ghastly views about race ... lead to persons being classified as Jewish who had appropriately regarded themselves as German; the perception of the authorities was then the important reality which determined their fate.[85]

It is the right to be *different* from the heterosexual norm that is really affected by the criminalisation of gay sex, just as the right to have a different culture and religion was at stake in Hitler's Germany. Racial and sex discrimination too, may involve not only discrimination in the face of relevant sameness, but suppression of real differences, and more importantly, suppression of the power of members of a particular race or sex to define themselves. To carp about whether the motivation for persecution is the act or what the person is in relation to civil disobedience of an inherently discriminatory law such as that criminalising gay sex, or laws prohibiting women from working, or laws stipulating that

[80] See generally Henderson, above n 78. See also Johnston, above n 78.
[81] Even then, the reliance on harm to morality as opposed to physical harm is controversial.
[82] Henderson, above n 78, 1041.
[83] *Ram* (1995) 130 ALR 314, 318.
[84] Ibid 319.
[85] Ibid 318.

blacks sit at the back of the bus, is to adopt the view that the assumptions of racism, sexism or heterosexism are valid.

The consequences for refugee law are clear. It is appropriate to view laws criminalising 'sodomy' as being aimed at the suppression of a perceived identity. The right to a 'different' sexual orientation or preference is protected by human rights, either through the problematic concept of privacy as found by the Human Rights Committee in the Toonen decision,[86] or through equality rights such as equality before the law, provided the version of equality adopted is that which refers to the equal right to be different instead of an assimilationist version of equality.[87] Thus the law violates human rights on the basis of membership of a particular social group. The law is also responsible for perpetuating societal perceptions of the attacked identity and promoting societal violence against the group of people perceived to have this identity.[88] Laws criminalising 'sodomy' could also be dealt with on the basis of political opinion, adopting the broad view that political opinion extends to any opinion concerning the probity of governmental intrusion and that any expression of an identity which goes against cultural norms is a political statement.[89]

Only the deployment of the concept of the 'margin of appreciation' indigenous to the European human rights system could defeat this claim. This troublesome concept should not be deployed to sacrifice human rights, however. Criminalisation of sodomy may therefore be viewed as persecution, rather than prosecution. In states where religious tenets do govern the state itself, where there is no separation between Church and state to direct that breaches of moral tenets that do not cause physical harm[90] are legal, the issue raises directly the question of cultural relativism. Cultural relativism refers to the insight that human dignity, and therefore the rights (or duties if the idea of rights itself is viewed as culturally inappropriate) of individuals vary across cultures. It raises the question as to whether the perceived conflict between the religious beliefs widely held within a community and freedom to have a particular sexuality is to be resolved in favour of the religious beliefs. These questions may be addressed in at least two ways

86 *Views of the Human Rights Committee under art 5(4) of the Optional Protocol to the ICCPR — Fiftieth Session*, UN Doc CCPR/C/50/D/488/1992 (31 March 1994). For an excellent analysis of the problems with the Committee's reliance on the right to privacy as opposed to the equality rights in the Covenant, see, eg, Wayne Morgan, 'Identifying Evil for what it is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740.

87 The communication in the Toonen decision argued that a violation of equality rights was involved. The Human Rights Committee failed to consider this issue, other than to offer the odd comment that sexual orientation or preference falls within the category of the prohibited ground of discrimination, 'gender', in article 2 of the ICCPR. It should be noted that equality may be quite problematic too, given that questions arise as to what the benchmark of equality is, and whether the equality sought is the right to be the same or the right to be different: Morgan, above n 86.

88 The Toonen communication drew this to the attention of the Committee in order to provoke the realisation that even laws which were not enforced stigmatised gay men and contributed to the social violence against them: ibid 743.

89 See, eg, Guy Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996) 49.

90 Space does not permit me to venture into the area of racial vilification and pornography. These issues do, of course, raise the question of harm which is either psychological or the indirect cause of physical harm.

against the answer that religious beliefs should take priority. First, the universality of international human rights instruments may be appealed to. Second, if one questions the universality of human rights or seeks a way to mediate between the truths of universality and cultural relativism, it may be questioned whether a particular culture or religion is truly incompatible with the homosexuality of some of its members, especially since the desire of members of that culture to be 'out' indicates that these norms are contested within the culture itself. The suppression of 'deviant' identities may simply reflect a dominant interpretation of the culture or religion which is not integral to the existence of the culture or religion.[91]

Of course, it is easy to see why Morato might allege that he was persecuted for his membership in a particular social group. Undoubtedly former criminals who turn Queen's evidence are generally viewed as disloyal by their colleagues, so it may be arguable that there is an element of targeting for membership of a group. However, this may be a rather artificial construction of the situation: unlike criminalisation of gay sex which has no actual ramifications for others, turning Queen's evidence attracts persecution because of the particular results for identified people. The question in relation to objectors to the one child policy is whether there is a group of people, as opposed to individuals, asserting a right to be different, or alternatively a political opinion; whether such a right to be different is legitimate; and whether persecution is motivated by people acting on their right to be different, in order to suppress an identity in the ways described above.

VI HISTORY OF THE *CHINESE ONE CHILD POLICY CASE*

The facts[92] were that the applicants for refugee status left China in late 1993 when the wife was eight months pregnant. The husband's reason for leaving was that he feared he would be subjected to forced sterilisation. He gave evidence that he had seen the Family Planning Police come to a neighbour's home and forcibly attempt to take a male neighbour away for sterilisation, and that these raids were quite usual. The couple had been required to get a permit in order to give birth to their first child in hospital (thus the authorities were aware that the woman partner was pregnant). The RRT member accepted that there was no possibility of internal relocation within China (as an alternative to seeking refugee status abroad) since the couple would lose household registration and therefore opportunities of employment. The male applicant also gave evidence that in his village the local authorities did not wait to see if people with one child

[91] The problem is similar to questions concerning mores about the behaviour required of women in Islamic states. This has been examined extensively by Abdullahi An-Na'im, who puts forward alternative interpretations of Islam that are consistent with women's autonomy. See, eg, Abdullahi An-Na'im, 'Human Rights in the Muslim World' (1990) 3 *Harvard Human Rights Journal* 13.

[92] As found by the RRT member, RRT Decision N94/3000 (20 May 1994) 2.

complied with the policy. Forcible sterilisation was *de rigueur* after the birth of the first child unless one opted for voluntary sterilisation.[93]

In an important finding of fact, the Tribunal rejected the applicant's claim of persecution on the ground of political opinion:

> While there was much evidence before the Tribunal on the penalties and conditions placed on people in terms of their reproduction, none of these were couched in political terms nor do infringements of the laws and regulations governing family planning attract political penalties or penalties under overtly political laws ... The Applicant expressed no political, religious or ideological reason for his belief in the rights of parents to decide on the number of children they will have. He acknowledged the need for China to stabilise its population numbers and stated that he would be happy with just two children. It was stated as a preference but he linked it with a claim that the method of determining the limit of one's family ought never to be forced sterilisation. ... The Tribunal does not find that the Applicant has an unqualified right to have as many children as he wishes. The question at hand is that manner in which any limitation on his reproductive capacity will be [achieved].[94]

The RRT member did find for the applicant on the ground of 'particular social group', however. The Tribunal found that although the policy itself was general, it created different groups in society liable to differential treatment.

> The Tribunal believes that parents of one child form a social group in China. There is an historical beginning to the defining of this group, with the establishment of a national policy to constrain the growth of the population, a policy which, by laws and regulations, throughout the 1970s and the 1980s produced sub-categories of people such as 'people with one child', 'people with more than one child', 'the floating population who are parents', 'rural people with children', 'minority nationality couples with children'. For the purposes of national goals, regional and local regulations define parents of one child among other categories of people with children. Therefore the group is defined by the government itself.
>
> This group may be sub-divided. For the purposes of the matter before the Tribunal two sub-groups are identifiable, those who win the approval of the government by having only one child and who voluntarily choose from the selection of birth control methods placed before them by officials and those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised by the officials of their area of local government.[95]

In relation to the woman applicant's case, the Tribunal member also stated that the 'group' was not defined primarily by persecution since there were also rewards for complying with the policy.[96]

In the Federal Court, Sackville J accepted that no error of law had been made. He commented that there was no circularity in the RRT member's finding that

[93] Ibid 11.
[94] Ibid 12.
[95] Ibid 11.
[96] RRT Decision N94/3006 (20 May 1994) 15.

government policies meant that parents with more than one child wishing to have more children became an identifiable social group:

> The very interaction which causes a group to become identifiable (or 'cognisable') may include arbitrary, repressive conduct by government or its agencies. ... Accordingly, in my opinion, there is nothing circular about a particular social group within a society being identified, in part, by conduct that might also amount to persecution.[97]

He interpreted the RRT member's finding that the relevant group consisted of those who did not accept the limitations placed on them as referring to those who want to have more than one child, in contrast to those who voluntarily decide to have only one child.[98] He found that this group should not be required to give up their wish to have more than one child. Such a 'choice' for this group would be dictated by fear of human rights violations.[99] Sackville J did not require a voluntary association among the members of the group.[100]

The Full Court, after outlining all relevant authorities, found in a brief concluding passage, that the appellants were not members of a 'particular social group' as the policy regulated the conduct of individuals.[101]

VII IN THE HIGH COURT

In the High Court, a number of concessions were made by the Minister and the issue was narrowed down to the question of whether the persecution was feared for reasons of membership of a particular social group. The facts were not disputed by the Minister. It was also conceded by the Minister that forced sterilisation could amount to persecution and that the required nexus to the state was present since the central authorities did not, or could not, do anything to prevent it from occurring. The crucial issue was whether sterilisation was inflicted for reasons of membership of a particular social group.

The Court was divided three to two in the Minister's favour: Dawson, McHugh and Gummow JJ in the majority; Brennan CJ and Kirby J dissenting. Each judge delivered a separate opinion.

The decision will be analysed under the following headings. First, the general approach to treaty interpretation is examined. Some interesting findings were made on the question of interpretation of Australian legislation which implements a treaty, and the approach adopted by each judge hints at his answer to the specific question of interpreting the terms 'particular social group'. Then the analysis will turn to the heading of 'particular social group'. A summary of my reading of the judgments is offered first. Then, the response offered to the question of 'particular social group' is examined by reference to the majority's

97 *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383, 404.
98 Ibid 405.
99 Ibid 406.
100 Ibid 394, 407.
101 *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 130 ALR 48, 61–2 (Beaumont, Hill and Heerey JJ).

approach on three major points: firstly, the need for a 'unifying' characteristic; secondly, the dichotomy between who someone is and what they do; and thirdly, the definition of a group by reference to a common attempt to exercise a human right. The minority's approach, which either focuses on the third issue or the irrelevance of the second, and either denies the need for, or pursues a different interpretation of the first, is then examined.

A *Principles of Treaty Interpretation*

All judges made reference to the principles of interpretation contained in the Vienna Convention on the Law of Treaties[102] as necessary or permissible in the construction of Australian legislation which implements a treaty. These principles, set out in articles 31 and 32 of the Vienna Convention, place primary emphasis on the 'ordinary meaning' of the text, in light of its context, and the object and purpose of the treaty. Extrinsic sources, namely the *travaux préparatoires*, may be relied on as a supplementary source of treaty interpretation. Articles 31 and 32 appear to draw on all three major schools of treaty interpretation: the textual approach, focussing on the normal meaning of the words; the 'founding fathers' approach which looks to the intent of the drafters; and the teleological approach, which emphasises the object and purposes of the treaty. There is vigorous debate as to what order of priority is to be placed on the elements of article 31 (text, context, object and purposes) as well as the correctness of the priority accorded to primary over secondary means of interpretation. Martii Koskenniemi has concluded that the task of treaty interpretation is hopelessly circular.[103]

Most of the judges adopted a 'holistic' approach. However, what follows from this differs from judge to judge. McHugh J, who expressly adopted the holistic approach,[104] stated that this required that primacy be given to the text, although the context, object and purpose must also be examined.[105] Gummow J recorded his agreement with McHugh J that primacy must be given to the text.[106] However, in making reference to the entire text of the Convention[107] as context for the provision to be construed (a valid approach under the Vienna Convention),[108] he appears to look to the text as confirmation of the framers' desire to restrict the entry of refugees. Brennan CJ agreed with McHugh J that a holistic approach should be adopted, but he interpreted this as including reference to extrinsic

[102] Vienna Convention on the Law of Treaties, 23 May 1969, (1969) 8 ILM 679 (entered into force 27 January 1980) ('Vienna Convention').

[103] Martii Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (1989) 291–9.

[104] *Chinese One Child Policy Case* (1997) 142 ALR 331, 347.

[105] Ibid 349–52.

[106] Ibid 370.

[107] Ibid 366–71.

[108] Article 31(2) provides that the context includes the entire text of the treaty, the preamble and the annexes: Vienna Convention, above n 102, art 31(2).

sources, such as the *travaux préparatoires*.[109] Ultimately, he is swayed by the objects and purposes of the Refugee Convention, which he saw reflected in the preamble, as protection of human rights.[110] Dawson J concluded that '[a]rticle 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear.'[111] Kirby J found that as the reference to particular social group is ambiguous it is legitimate, perhaps essential, to look to the *travaux préparatoires*.[112]

Interestingly, none of the judges expressly referred to the possibility of construing the Refugee Convention by subsequent state practice,[113] being the decisions of municipal courts and tribunals regarding social group, although all of them referred to jurisprudence from Canada and the United States. This could be because the state practice was considered too diverse to indicate 'agreement'[114] as to how the Refugee Convention is to be interpreted. Accordingly, it may be that the judges were referring to judicial decisions from other jurisdictions in much the same way as they would on any issue of domestic law.

All members of the majority took the view that the interpretation of 'particular social group' could not be stretched by reference to the humanitarian aims of the Refugee Convention.[115] The Convention has numerous restrictions built into the definition of a refugee. Had the framers wanted to protect all sufferers of human rights abuse, they would not have included the five Convention grounds at all.

The minority judges differed amongst themselves on this point. Kirby J also accepted that the human rights function of the Refugee Convention could not be permitted to make reference to the grounds of persecution redundant.[116] Brennan CJ expressly stated that the human rights function of the Convention works in favour of the ground of social group operating as a catch-all for any group whose rights are violated.[117] He did refer to the need for the human rights violation to be for a reason which distinguished those persecuted from the rest of society. However, this may in fact be circular. Those suffering the human rights violations may be distinguished from the rest of society solely by virtue of the fact of the violation, or by fear of future violations because the asylum-seekers will not comply with the one child policy.

The approaches taken by Brennan CJ and Gummow J seem to fall at opposite ends of the spectrum, while the other three judges occupy shared middle ground.

109 *Chinese One Child Policy Case* (1997) 142 ALR 331, 332–3.
110 Ibid 333.
111 Ibid 340.
112 Ibid 387.
113 This is permitted pursuant to the Vienna Convention, above n 102, art 31(3).
114 As required by the Vienna Convention, above n 102, art 31(3).
115 *Chinese One Child Policy Case* (1997) 142 ALR 331, 344–5 (Dawson J), 355–6 (McHugh J), 374 (Gummow J).
116 Ibid 383–4.
117 Ibid 337.

Brennan CJ appears to adopt an expansive teleological approach to assure the protection of human rights regardless of the express textual limitations on this aim contained in the Refugee Convention. However, there is an alternative construction of his opinion which is that he is simply appealing to the idea of non-discrimination between groups which is a legitimate, and I would argue the preferable, way of looking at the issue of social group. If the first reading of his opinion is more accurate, it has to be acknowledged that, sadly, the object and purpose of the Convention is not the protection of all those whose human rights are abused.

Gummow J came closest to adopting the 'founding fathers' approach. His approach to the question of 'particular social group', which may be somewhat narrower than that of the two other majority judges,[118] appears to be guided by the framers' concern to protect state sovereignty. This concern is manifested in the absence of a guarantee of admission for refugees outside state territory, and Gummow J stated that this tempers the references to humanitarian principles in the Convention.[119] In my opinion, this gives too much weight to the intentions of the drafters and too little weight to the ordinary words of the Convention and its humanitarian purposes. It is true that the Convention omits any reference to admission or to asylum, and that the humanitarian purposes of the Convention are not pursued in an unlimited fashion. However, most jurists accept that the better view, confirmed by state practice, is that the practical requirements of the principle of *non-refoulement*, which is expressly included in the Convention and to which no reservations are permitted, mean that the protection of the Convention extends to asylum-seekers at the border. Accordingly, the decision in *Sale v Haitian Centers Council*[120] in which the United States Supreme Court held that interdiction of Haitian asylum-seekers on the high seas was legitimate and which Gummow J referred to as supporting a restrictive reading of the Convention as regards admission to state territory, has been much criticised. It is simply not good enough for a state to declare that it has no obligation to grant asylum or admission and then actively to ensure that asylum-seekers are returned to a place of persecution in violation of the norm of *non-refoulement*, by sending its coast-guard out on the high seas. The state has exercised its jurisdiction extra-territorially to ensure that the principle of *non-refoulement* is violated. Concern for immigration control should not be permitted to render the obligation of *non-refoulement* entirely meaningless by permitting states to engage in activities such as interdiction of asylum-seekers on the high seas.[121] Equally, while it may be impermissible to read the Convention definition so as to protect all sufferers of human rights abuse, concern for immigration control should not encourage an overly restrictive reading of the term 'particular social group'.

[118] See below Part VII(B)(1).

[119] *Chinese One Child Policy Case* (1997) 142 ALR 331, 366–7.

[120] 125 LEd 2nd 128 (1993).

[121] See generally Penelope Mathew, 'Sovereignty and the Right to Seek Asylum: the Case of Cambodian Asylum-Seekers in Australia' (1994) 15 *Australian Year Book of International Law* 35.

B *'Particular Social Group'*

Each of the majority judges found that the definition of 'particular social group' relied on by the RRT member is impermissibly circular. The majority also required a social group to be 'united' by some common element or characteristic so that there is a 'cognisable' group within, and perceived by, society. *Societal* perception that the group is distinct appears essential. While there was acknowledgment that external perceptions of the group are important, rather than internal perceptions, it was found that the perceptions of the persecutors in this case were related to activities of the appellants in violation of a generally applicable policy, rather than any belief structure on the part of the appellants which distinguished them, and others like them, as members of a particular social group. The persecution occurred *despite* rather than *for reason of* any such beliefs. The purpose of the policy, which the majority viewed as legitimate, was only to limit population growth, not to oppress a particular social group.

By contrast, the minority accepted the RRT member's view that the one child policy had created a particular social group liable to forcible sterilisation. They arrived at this conclusion by different routes. Kirby J emphasised that there need not be an associational membership of the putative group, that knowledge of the identity of other group members is not required, and that self-identification or consciousness as a member of the group is unnecessary. He also made reference to the link between imputed political opinion and membership of a particular social group. Brennan CJ focused on the reasons for persecution, distinguishing the appellants, and others like them, from the rest of society, the reasons being their refusal to adopt contraceptive measures. The attitude to the legitimacy of the policy *per se*, as opposed to the sometimes brutal methods of its enforcement, was somewhat ambiguous. Brennan CJ did not explicitly address this point. Kirby J, on the other hand, offered a disclaimer at the beginning of his judgment to the effect that it was not the role of the High Court to comment on the legitimacy of the policy itself in light of the pressing problem presented by population growth.[122] However, towards the end of his judgment, he indicated that the means of enforcement affect the legitimacy of the policy so that the policy goes beyond the bounds of what is acceptable.[123]

In my view, both approaches have their merits, in technical legal terms. The one child policy is one of the most controversial issues in refugee law because it presents some old chestnuts, in a new context, that are not easily resolved even in more familiar contexts. Problems specific to refugee law include the impact of a law of general application, the question of what is political in any given context, and the question of whether decision-makers' assessments should focus on the perspective of the persecutor, the victim, or adopt a shifting interplay between both perspectives. Another issue familiar to human rights lawyers and feminists is the question of what counts as equality and what constitutes invidi-

[122] *Chinese One Child Policy Case* (1997) 142 ALR 331, 385.
[123] Ibid 395.

ous discrimination. In the course of analysing and critiquing the judgments, I will suggest that while the majority approach is logical, the minority approach is also plausible. This analysis is further elaborated in Part VIII, following the analysis of the judgments.

In policy terms, I think that the arguments favour the minority view. The majority focused on the Convention's purpose as being to protect only select groups of victims of human rights abuse. This limited purpose was the result of the framers' desire to protect the general right of states to restrict immigration and control entry to their territory. However, it may be possible to distinguish people fleeing the extreme measures of enforcement under the one child policy from persons fleeing prosecution under reasonable criminal laws and other general policies. It is also important to give shelter to people fleeing forcible sterilisation. Moreover, there is no evidence that granting refugee status to those fleeing enforcement of the one child policy is going to open the floodgates to millions of Chinese. These policy issues were admirably addressed by Kirby J. Refugee status requires proof of a well-founded fear of human rights violation; brutal measures of enforcement of the policy are limited to specific regions of China; it is difficult for persons fearing human rights violations to leave their countries in the first place; and countries which have recognised Chinese asylum-seekers fleeing enforcement of the one child policy as refugees have not experienced a break-down in immigration control.[124] Furthermore, the framers encouraged application of the Refugee Convention to those who did not necessarily meet the strict terms of the definition in recommendation E of the final conference of plenipotentiaries.

1 *'Unifying Characteristics'*

All three majority judges required that a particular social group be 'unified' by some common characteristic which makes the group cognisable in society. Dawson J referred to the need for a 'characteristic or element' which unites the members of the group and 'enables them to be set apart from society at large'.[125] McHugh J referred to the requirement of a common 'characteristic, attribute, activity, belief, interest or goal' which unites the group.[126] Gummow J spoke of a 'common unifying element'.[127]

The way in which a common characteristic is transformed from a simple 'demographic statistic' into a characteristic which 'unifies' the group in the eyes of society, appears to attract slightly different treatment by different members of the majority. Both Dawson and McHugh JJ made it clear that the reasoning in *Sanchez-Trujillo* requiring a 'voluntary association' among members of the group was not to be followed in Australia.[128] Gummow J, on the other hand, said

[124] Ibid 385–6 (Kirby J).
[125] Ibid 341.
[126] Ibid 359.
[127] Ibid 375–6, citing *Ram* (1995) 130 ALR 314.
[128] *Chinese One Child Policy Case* (1997) 142 ALR 331, 341 (Dawson J), 356 (McHugh J).

that he approved of the United States authorities, including *Sanchez-Trujillo,* indicating that not every segment of the population defined by broad characteristics, such as youth or gender, without more, was a particular social group.[129] This could be taken by implication to indicate that he requires a voluntary association among members of the group. On the other hand, he referred to the assessment in *Ram* that it is by virtue of being condemned along with others sharing the common characteristic that a person is persecuted for reasons of membership of a particular social group.[130] Thus his reasoning seems simply to refer to his belief that the persecution in this case is not suffered as a result of who the appellants are, as opposed to what they may do in contravention of a generally applicable policy.[131] His reference to the fact that members of a race, religion or nationality could be said to be members of a particular social group could be taken as confirming this interpretation.[132]

McHugh and Dawson JJ also made it clear that the group may be identified by external, rather than internal, perceptions of the group, or by characteristics attributed to the group.[133] McHugh J gave the example of witches, who 'were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft.'[134]

McHugh and Dawson JJ also acknowledged that the large size of the group is irrelevant. Dawson J found that there is no need for particular social groups to be confined to large or small groups.[135] McHugh J found that the term 'particular social group' was probably intended to cover only a relatively large group of people, owing to its inclusion with other large groups such as race, religion, and nationality.[136]

McHugh J was clear that the fact that the group is otherwise disparate, apart from at least one unifying common characteristic, is not fatal to the conclusion that a particular social group exists. He noted in this regard that the groups contemplated by the framers of the Convention, *kulaks* or landowners in communist countries, were disparate in character, but that this did not matter providing that there was 'a common attribute and a societal perception that they [stood] apart'.[137]

He did not require the group to have a public face. All that is necessary is that the public was aware of the characteristics that unite the group. He gave the example of early Christians who were forced to practice their religion in the catacombs. He also gave the example of homosexual members of a particular

[129] Ibid 372.
[130] Ibid.
[131] Ibid.
[132] Ibid 375.
[133] Ibid 341 (Dawson J), 359–60 (McHugh J).
[134] Ibid 360.
[135] Ibid 341.
[136] Ibid 360–1.
[137] Ibid 360.

society if 'perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole'.[138]

McHugh J also acknowledged that it was possible for persecution to assist in the creation of a cognisable group in society. Here, he stated that left-handedness could become the defining characteristic of a group if left-handers were persecuted, as they would soon become cognisable as a particular social group. But he noted that it is the characteristic of being left-handed, not the persecutory acts, which would be the identifying characteristic of the group.[139]

This statement by McHugh J recognises the basic fact acknowledged by both the RRT member and Sackville J in the lower decisions, that the policies or ideologies of the *persecutors can and usually do* define particular social groups. It is odd, therefore, that he still seemed to persist with the idea that the group must become cognisable by society as a whole before persecution of group members will entitle them to refugee status. If the persecutors see left-handedness as the mark of the devil (as Christians once did) and this perception drives their acts, it is difficult to see why the perceptions of the rest of the society are at all relevant. The person is attacked for what they are perceived to be. Thus Savitri Taylor has criticised the reasoning in *Morato* because its emphasis on societal perception leads to unreasonable results whereby groups persecuted for some characteristic are unprotected until they attain some social significance.[140] She gives the example of the Khmer Rouge who divided the population into old people (those who had lived in areas controlled by the Khmer Rouge during the revolution) and new people (those who had moved to the areas controlled by Lon Nol), groups which had *no* social significance before the Khmer Rouge adopted their policies.[141]

This flaw in otherwise good reasoning may be driven by the fear that it may be difficult, once it is accepted that the persecutors' perceptions are what counts, to distinguish between the persecuted left-handers and those who suffer forcible sterilisation under the one child policy. Frankly, it is also difficult to see why, in the context of the intense government and general public scrutiny of childbirth in China, people in the appellants' position could not be viewed as having a unifying characteristic, being the desire to have more than one child, pursuant to the broad test offered by the majority. However, the answers in relation to the one child policy rest on an assessment of whether there is a characteristic, apart from the persecutory conduct of forcible sterilisation itself, which attracts the attention of the persecutors; whether persecution is *for reason of* this characteristic or some other motivation; and whether the spotlight should be on the motivation of the persecutors or the belief of, or effect on, the victim. The RRT member and Sackville J found that the relevant characteristic was defined by the

[138] Ibid.

[139] Ibid 359.

[140] See generally Savitri Taylor, 'The Meaning of "Social Group": The Federal Court's Failure to Think Beyond Social Significance' (1993) 19 *Monash University Law Review* 307.

[141] Ibid 319–20.

one child policy itself: the characteristic was being a parent with one child who wanted more than one. There was also a reference in the definition of the group itself to the forcible sterilisation. The majority of the High Court found that the issue of whether the appellants and people like them were members of a particular social group is governed by the fact that they bring themselves within the terms of a generally applicable policy: what they do, rather than who they are, is targeted.

2 *To Be or To Do? Insertion of Persecution Occurring Under a Policy of General Application into the Relevant Social Group*

Each of the majority judges found that the persecution feared in this case was not by virtue of a unifying characteristic, but by virtue of individual conduct which is prohibited by a general law or policy. The persecutors were not *motivated* by perceptions of the appellants as belonging to a group of like-minded people, but by the individual *conduct* of the appellants and others.

Gummow J found that couples wanting to have children without governmental constraint were simply a demographic statistical group at risk of the application of a general law of conduct.[142] He also noted a 'further' fundamental objection to the definition of 'particular social group' relied upon by the RRT member, being the insertion of the form of persecution into the definition.[143]

Dawson J stated that an 'important limitation' is that 'the characteristic or element which unite[s] the group cannot be a common fear of persecution'.[144] McHugh J made the same finding and for very similar reasons.[145] He also offered, in *obiter*, his opinion that because it is impermissible to insert a reference to the persecution feared into the group, the finding by a Canadian Court that 'Trinidadian women subject to wife abuse'[146] were a social group, proceeded on an incorrect interpretation of the Convention. This comment is returned to in Part IX, where it is argued that nevertheless, women fleeing domestic violence may be refugees, even under the test adopted by the majority.

According to Dawson J, without the prohibition on persecution defining the group, the definition of a social group was 'circular'[147] and amounted to a reversal of the requirement that persecution be for reasons of membership of a social group.[148] To ignore this limitation was to ignore the 'common thread' between the elements of the definition identified by Burchett J in *Ram*.[149] It would also render the enumeration of at least three of the Convention grounds (race, religion and nationality) superfluous,[150] and would render the ground of

142 *Chinese One Child Policy Case* (1997) 142 ALR 331, 375–6.
143 Ibid 376.
144 Ibid 341.
145 Ibid 358–9.
146 Ibid 358.
147 Ibid 341.
148 Ibid.
149 Ibid, citing *Ram* (1995) 130 ALR 314.
150 *Chinese One Child Policy Case* (1997) 142 ALR 331, 341.

social group an all-encompassing safety net.[151] Dawson J noted the limitations of the dichotomy between who someone is and what someone does, but stated that it was a useful dichotomy in cases of a generally applicable law which applied to all persons, *regardless of who they were*: '[w]here 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.'[152] Thus, referring back to the need for a 'unifying element' among the putative group, he assessed a number of common characteristics put forward by the appellants and concluded that these characteristics did not unite the group: fear of persecution was the *sole* uniting factor.[153] These characteristics included the fact that the appellants were members of the Han majority; the fact that they were a couple of reproductive age; the fact that the policy applied economic and other sanctions short of persecution; and the fact that measures such as forcible sterilisation applied only in particular regions.[154] Thus Dawson J concluded that:

> [i]n this case, the reason the appellants fear persecution is not that they belong to any group, since there is no evidence that being the parents of one child and not accepting the limitations imposed by government policy is a characteristic which, because it is shared with others, unites a collection of persons and sets them apart from society at large. It is not an accurate response to say that the government itself perceives such persons to be a group and persecutes individuals because they belong to it. Rather the persecution is carried out in the enforcement of a policy which applies generally. The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms. The only recognisable group to which they can sensibly be said to belong is the group comprising those who fear persecution pursuant to the one child policy. For the reasons I have given, that cannot be regarded as a particular social group for the purposes of the Convention.[155]

McHugh J also pointed out that if the group in this case was defined broadly, as parents with one child, the persecution was not feared for reasons of membership of that group. Alternatively, if the group was defined narrowly by 'hedging' the group with qualifications to relate it to the persecution feared, then the definition of the group was circular.[156] In addition, he took the view that not all people obey the policy because they believe that they should only have one child since they simply accept the rewards the government gives people who obey the policy.[157] Nor, despite the ambiguities in the evidence presented about the situation in the appellant's region, did he accept that people with one child are sterilised as a matter of course.[158]

151 Ibid 341–2.
152 Ibid 342.
153 Ibid 347.
154 Ibid.
155 Ibid 342.
156 Ibid 353.
157 Ibid.
158 Ibid.

While the reasoning of Dawson and McHugh JJ appears logical, it has been demonstrated earlier that even in relation to generally applicable laws, the distinction between who people are and what they do is not always helpful. What the appellants and others like them do clearly is driven by who they are and what they believe in. The fact that some people with these beliefs nevertheless abandon them should not prevent those who do stand by their beliefs from constituting a social group. Moreover, the ambiguities in the evidence could indicate that in the appellant's region, whatever happened elsewhere, he was a member of a social group — people having one child — which was something he could not change and which led inevitably to forcible sterilisation. The fact that people in his position would not be viewed as a social group in other regions in China does not seem terribly relevant, if the focus is on the persecutor, which I think it should be, rather than society, or even society in that region.

It has already been pointed out that there are examples like criminalisation of gay sex which muddy the waters. While the criminalisation of gay sex is a relatively easy case to bring within the terms of the Refugee Convention as an inherently persecutory law, there is another example which is not so easy and yet may provide the basis for successful claims to refugee status, at least in theory. This is the case of *Republikflucht*. As with criminalisation of gay sex, characterisation of the ultimate objective of the law is more important than the act which the law targets, as is the context in which the law operates, and the effect on the victim. It may be possible to draw analogies between *Republikflucht* and the one child policy. Goodwin-Gill's analysis of *Republikflucht* is helpful:

> Totalitarian states severely restrict travel abroad by their nationals. Passports are difficult to obtain, while illegal border-crossing and absence abroad beyond the validity of an exit permit can attract heavy penalties. The question is, whether fear of prosecution and punishment under such laws can be equated with a well-founded fear of persecution on grounds of political opinion, especially where the claim to refugee status is based on nothing more than the anticipation of such prosecution and punishment. It may be argued that the individual in question, if returned, would be subject merely to prosecution for breach of a law of general application; he or she would not be 'singled out' for treatment amounting to persecution. Alternatively, more weight might be accorded to the object and purpose of such laws, and a context in which the fact of leaving or staying abroad is seen as a *political act*. It may reflect an actual and sufficient political opinion on the part of the individual, or dissident political opinion may be attributed to the individual by the authorities of the state of origin; in practice, however, many states are wary of recognising refugee status in such cases, for fear of attracting asylum seekers motivated by purely economic considerations.[159]

[159] Goodwin-Gill, above n 89, 53. See also Hathaway, *The Law of Refugee Status*, above n 17, 172–3 where he describes the case of *Republikflucht*, along with the criminalisation of freedom of political expression, as an example of an 'absolute political offence', where it is 'unreasonable to accept at face value the state of origin's characterization of the exercise of a core human right not only as illegitimate, but as just cause for punishment'.

In the case of the one child policy, it may be appropriate, as some authority in the United States indicates,[160] to view enforcement of the policy as involving the suppression of political dissent on the basis that to disobey the policy is to manifest opposition to it. It is arguable that in the context of an authoritarian state any disagreement with government policy is viewed as a threat to government itself, or as involving disloyalty to government, and that *this* is what drives the harsh enforcement measures pursuant to the policy. This may be so even where the central authorities do not actively condone what is done by local officials: it is the general climate towards dissent which matters. The fact that the one child policy involves childbirth, rather than some more usual political activity such as political speech, should not necessarily matter if the context in which it occurs indicates that the activity is politicised.[161] While the ultimate objective of the policy is to limit population growth, the means by which this goal is pursued, both through the express limitation of individual choice in size of family — rather than encouragement to make a responsible choice — and the brutal nature of some of the enforcement measures which seek to remove the person's very capacity to make her own choice, may mean that the policy persecutes people for what they are.[162] These factors may transform the policy from one which simply seeks to control population growth to one which attacks those disobeying the policy because of the fact that they dare to dissent: a policy which targets people for who they are rather than what they do.

McHugh J's comments that persecution is not defined by the 'nature of the conduct'[163] but by whether it discriminates against a person for one of the Convention grounds[164] are similar to the comments made by Dawson J concerning people who, by their actions, bring themselves within the terms of a generally applicable policy. McHugh J stated that conduct would not constitute persecution if 'appropriate and adapted to achieving some legitimate object of the country of the refugee' such as the general welfare of the state and its citizens.[165] He added that 'enforcement of laws designed to protect the general welfare of the state [or its people] are not ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group'.[166] He commented, however, that where a law implements sanctions against a particular group which are not applicable to the

160 *Guo v Carroll*, 842 FSupp 858 (EDVa 1994).

161 For a particularly useful examination of the dichotomy between political and private, see Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public–Private Distinction*, Study Commissioned by the Hague Emancipation Council (1994) 45–6, 57–8.

162 Cf Sharon Hom who writes that the patriarchs of China have adopted the one child policy to address the latest threat to the state: women's bodies: Sharon Hom, 'Female Infanticide in China: the Human Rights Specter and Thoughts Towards (An)other Vision' (1991) 23 *Columbia Human Rights Law Review* 249.

163 *Chinese One Child Policy Case* (1997) 142 ALR 331, 354.

164 Ibid.

165 Ibid.

166 Ibid.

rest of society, such laws attract 'close' or strict scrutiny.[167] While he gave an odd illustration of this point, being a law to detain members of a particular race engaged in a civil war,[168] the basic point seems sound. Even if, for example, a law creates problems for someone who has particular religious beliefs, it may be that as the aim is not purposefully to inflict harm on members of that religion and applies to all members of the community, there is no issue of discrimination. A law which required all people not to have a religion would be inherently persecutory, but there are other laws which conflict only indirectly with the right to freedom of conscience.

Once again, however, while the basic point appears sound, it needs to be pushed further, and there are complications. First, it should be possible to catch cases of indirect discrimination through the concept of strict scrutiny. For example, safety regulations which require workers to be of a certain weight may exclude most women from particular occupations. If the weight requirement is really irrelevant to performing the task, then it is discriminatory.[169] Second, it is increasingly accepted that where a generally applicable law impacts more heavily, perhaps only, on those with strong religious or cultural beliefs or political opinions there may be scope for granting refugee status on the basis of a conscientious objector exception, particularly in the case of compulsory military service. The focus shifts from consideration of the motivation of the persecutor, which is not necessarily what the phrase 'for reasons of' connotes,[170] to the perspective of the victims and the effect on them.

The question with conscientious objection to military service is whether there is a sincere belief for reasons of religion or conscience, perhaps relating to the particular war being waged such as whether it suppresses the right to self-determination, that it is wrong to fight. The conscientious objection may also stem from a citizen's belief that the state should not have the right to call up or draft its citizens in the first place. As both Goodwin-Gill and Hathaway argue, there is growing acceptance of the concept of conscientious objection in such cases. This is despite the fact that it could be said that military service is only persecutory from the viewpoint of the conscientious objector, and that the state is not motivated by Convention reasons (unless military service clearly discriminates between particular races or other groups) but by the purpose of waging the war.[171]

If a conscientious objection paradigm is adopted in relation to the one child policy, a question may arise as to what should count as a good reason to disobey the policy. It might require a distinction between those acting on a sincere belief as to the illegitimacy of government setting an absolute limit, and who will make

[167] Ibid 355.
[168] Ibid.
[169] For an examination of these issues, see Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992).
[170] Goodwin-Gill, above n 89, 51.
[171] Ibid 54–9; Hathaway, *The Law of Refugee Status*, above n 17, 179–85.

responsible decisions (to have two children, for example), as opposed to those who simply desire to have more than one child. (Forcible sterilisation of members of either group would be objectionable, though.) And what is to be made of those who choose to have large families on religious grounds or on the basis of traditional cultural beliefs regarding family size: as stated previously, it is not necessarily inappropriate to *encourage* change of such beliefs since they are often not integral to the particular culture or religion at all.[172] (Though it is thoroughly objectionable to change them by force, especially by forcible sterilisation.) In relation to the cultural reasons for the belief, while as a feminist I am concerned by the disproportionate impact of the one child policy on women, what of the fact that more than one child may be desired because of son preference?

Goodwin-Gill addresses the problem of conscientious objection as follows:

> It is increasingly accepted in a variety of different contexts that it may be unconscionable to require the individual to change, or to exercise their freedom of choice differently. The question is, how to distinguish between those opponents of state authority who do, and those who do not, require international protection. For sincerely held reasons of conscience may motivate the individual who refuses to pay such proportion of income tax as is destined for military expenditures; or the shop-keeper who wishes to trade on Sundays; or the parents who, on grounds of religious conviction, refuse to send their children to public schools.[173]

He distinguishes the reluctant taxpayer from the conscientious objector to military service on the basis that the taxpayer is not asked to engage in active complicity with the aims of the war.[174] In the case of the one child policy, it might be argued that limits on the size of family are not as unreasonable as forcing people to fight against their consciences and to risk their own lives. However, the right to found a family constitutes a particularly strong prohibition on governmental interference with the right to procreation.[175] While article 23(2) of the ICCPR (which protects the right) is not listed as a non-derogable right, there are no limitations expressly included in the article. Thus while there is no mention of unlimited family size, this is because the matter is left to the choice of the couple involved. Given that the right is one which may be exercised differently by different people (some might want no children, others many) the one child policy could be regarded as a policy which discriminates against those who want to exercise the right in such a way as to have more than one child. Furthermore, Goodwin-Gill also suggests that proportionality is a balancing factor in cases of conscientious objection to military service (suggesting a need for alternative service, for example).[176] It could be argued that the disproportionate measures of enforcement utilised in some areas of China mean that refugee

[172] See generally above n 91 and accompanying text.
[173] Goodwin-Gill, above n 89, 56.
[174] Ibid 57.
[175] Manfred Nowak, *UN Covenant on Civil and Political Rights* (1993) 413–4.
[176] Goodwin-Gill, above n 89, 58.

status should be granted to those likely to be subjected to them, who of course are precisely those with beliefs that they should be able to determine the size of their family or who have cultural or religious beliefs about family size.

Ultimately, answers to these questions require not only an assessment of the legitimacy of the measures inflicted pursuant to the policy itself, because it might be reasonable to *ask* people to have only one child, but the legitimacy of the policy itself in that it sets an absolute limit, one which will be coercively enforced if the incentives to meet the limit do not work, rather than stopping at the point where people are merely encouraged to adhere to the quota. No member of the High Court was prepared to assess the legitimacy of the policy itself, a question which is returned to in Part VIII.

It may also be necessary to provide some basis for distinguishing between those who refuse to comply with the one child policy and those who do not believe that they should be subject to legitimate constraints of the criminal law, such as the law against murder, or policies such as progressive taxation which seek to redistribute wealth. This is necessary because of the circularity problem (anyone disobeying a policy is persecuted because of membership of a particular social group); and because disobedience of such laws may involve philosophical issues, or questions about the scope of governmental authority, rather than merely factual points of distinction or problems of proof. By factual points of distinction, I am referring to the fact that it is unusual for murderers to have a philosophical commitment to killing: they usually have a motive for murder which is very specific to their victim. In the case of tax avoiders, the motivation may be greed, pure and simple, rather than a philosophical disagreement with the law which is disobeyed. However, sometimes objection to paying tax does raise philosophical questions about the extent of government involvement in individuals' lives. In Part VIII, some answers to these questions are provided which demonstrate that the law against murder and taxation policy do not involve violations of human rights and are philosophically justified, at least within liberal political theory.

Adopting a conscientious objection paradigm could mean that the appellants are viewed as members of a social group involved in a common attempt to assert a right. However, the attempts of counsel to bring the appellants into such a group were rejected by both McHugh and Dawson JJ.

3 *A Common Attempt to Assert a Human Right: McHugh and Dawson JJ*

Dawson J cast doubt on the idea that there is a right to a family of unlimited size.[177] However, the question is not whether there is a right to a family of unlimited size, but whether government has the right to set a compulsory limit on the number of children or whether the final choice is left to the individuals involved. He also commented on the belief-structure of the male appellant, as noted by the RRT member in her finding that persecution was not for reasons of

[177] *Chinese One Child Policy Case* (1997) 142 ALR 331, 343.

political opinion:[178] '[w]hat the appellants in truth object to is not the one child policy *per se*, but its enforcement by officials in their area by forcible sterilisation.'[179] Although Dawson J accepted that forcible sterilisation was a violation of personal security, he found that this merely established that the couple had a well-founded fear of persecution, not that the persecution was because of membership in a particular social group.[180] This was because it is in the nature of human rights that *all* people hold them. Thus something more is required in order for common assertion of a right to be the unifying characteristic of a group of people. This 'something more' would be either a voluntary association among people attempting to exercise the right or a societal perception that such people were members of a group because of their wish to exercise the right.[181] Referring to the interpretation of voluntary association by the minority in the Canadian decision of *Chan*,[182] his Honour could not see that parents from 'disparate' walks of life could be viewed as having 'associational qualities' if the *only* thing uniting them is the fact that they do not want to be prevented from having more children.[183]

McHugh J analysed the two limbs of the definition of 'particular social group' relied upon by the RRT member, 'those who ... do not accept the limitations placed on them [or] who are coerced or forced into being sterilised'.[184] He held that the second attribute, being forced into sterilisation, refers to the fear of persecution and is impermissibly circular.[185] In relation to the first attribute, not accepting the limitations placed on them, he held that there was no evidence before the Tribunal indicating that it was this attribute which attracted persecution.[186] Such evidence could include a public demonstration by persons opposing the one child policy, which, if this fact led to persecution, would mean that these persons could be said to be persecuted on the basis of both membership of a particular social group and political opinion.[187] Otherwise, the putative group were simply a 'disparate' collection of people who want to have more than one child.[188] Similarly, although this point was not made contemporaneously with his examination of this issue, McHugh J found that the Tribunal had acknowledged that 'those who complied with the government's policy — *whatever their own wishes about having more than one child* — were rewarded, not punished'.[189]

178 RRT Decision N94/3000 (20 May 1994) 11.
179 *Chinese One Child Policy Case* (1997) 142 ALR 331, 343.
180 Ibid.
181 Ibid 345.
182 [1995] 3 SCR 593, 644–6 (La Forest J).
183 *Chinese One Child Policy Case* (1997) 142 ALR 331, 344.
184 Ibid 363.
185 Ibid.
186 Ibid 363–4.
187 Ibid 363.
188 Ibid.
189 Ibid 353 (emphasis added).

Both judges appeared to treat the issue of a social group comprised of people making a common attempt to assert a right to have more than one child as a problem of proof or lack of evidence as to the motivation of the persecutors. Both may also have perceived a problem of proof relating to the belief structure of the appellants, that is whether they genuinely believed that they should be entitled to have more children and that the state should be excluded from this decision, or whether they simply 'wanted' more children. In these matters, they appeared constrained by the findings of fact by the RRT member regarding persecution for reasons of political opinion.[190]

In relation to the question of proof regarding the appellants' beliefs, by my reading of the male appellant's comment, he was indicating that he disagreed with the particular limit set by the government,[191] which may also indicate a view that it should be left to the individual to decide the limit responsibly. Again, what the appellant was likely to do was clearly an indication of what he thought about the policy. It seems unfair, and perhaps contradictory to the idea that human rights inhere in all persons, to require the appellant to articulate his views in the precise terms of the relevant international instruments, that is, in terms of his 'right to found a family'.[192] Moreover, it is not immediately apparent why an examination of the appellants' belief structure is at all necessary unless one adopts a conscientious objection paradigm in relation to the one child policy, as examined above. Then, as argued above, the nature of the right affected may mean that the policy is inherently political and discriminatory against those who want to exercise their rights in a particular way. If the question in fact revolves around a consideration of what the persecutors' motivation is, rather than the victim's, then the inquiry is completely misplaced.

In relation to the question of proof regarding the persecutors' motivation, it is also well accepted that there is no need for overt political activity such as a public demonstration or a voluntary association in order to make a finding of persecution on the basis of political opinion. It is now accepted that a political opinion may be attributed to, or implied from, conduct.[193] The question is whether, similar to the case of *Republikflucht*,[194] disobedience of the one child policy would be viewed by the authorities as a political act. In the context of an authoritarian state which puts an absolute limit on the number of children a person may have, as opposed to merely encouraging people to make responsible decisions, this is not an unreasonable proposition.

Moreover, on the earlier reasoning of both Dawson and McHugh JJ in relation to the dichotomy between what someone does and is, it would still be difficult to prove that the persecution feared, forcible sterilisation, was inflicted as a result of the group's expression of their desire to exercise a right to have more chil-

190 RRT Decision N94/3000 (20 May 1994) 11.
191 He seemed to indicate that two children would be an appropriate limit.
192 See, eg, ICCPR, above n 23, art 23(2).
193 Hathaway, *The Law of Refugee Status*, above n 17, 152.
194 See above n 159 and accompanying text.

dren, through a public demonstration, as opposed to the fear by the authorities that particular individuals would engage in conduct violating the one child policy (which applies to all). Perhaps additional findings of fact, such as those commented on by the minority in the Canadian decision in *Chan*, to the effect that the appellant in that case had been labelled 'an enemy of the class' and that he had made life difficult for those responsible for administering the childbirth quota,[195] would have sufficed as proof. In these instances, the persecution would be directed against the person for reasons of political opinion, and the dissident identity constructed in relation to objectors to the one child policy, rather than mere disobedience of the policy itself. Certainly, Dawson J's comment on the need for *either* a voluntary association or proof regarding societal perceptions indicates that he wants more sociological evidence about the way in which objectors to the one child policy are perceived, and that he is constrained by findings of fact by the RRT member. On the other hand, perhaps there is a failure to work with, and theorise about, such evidence as is available in light of the overall political context in China. Certainly, the evidence adduced in *Chan* may demonstrate how fine, perhaps non-existent, the line is between what someone does and what someone is perceived to be as a result of what he or she may wish to do.

Dawson J's point that human rights are held by all is an important one. However, where a right may be exercised in different ways, it seems a legitimate approach to view persons who want to exercise their rights in a particular way as 'voluntarily associated' with that right or status as held by the minority in the Canadian decision of *Chan*[196] and by Sackville J.[197] Accordingly, the appellants, and others like them, fear persecution for reasons of membership of a particular social group.

C *'Particular Social Group': The Minority*

1 *Brennan CJ*

According to Brennan CJ, forced sterilisation violated the right to security of the person and destroyed a person's reproductive capacity.[198] The nexus with the five Convention grounds necessitated an element of discrimination.[199] Non-discriminatory punishment for contravention of a criminal law of general application was excluded from the reach of the Convention definition of a refugee.[200] Brennan CJ held that according to the ordinary words used, a particular social group is identified by any characteristic distinguishing the

[195] *Chan* [1995] 3 SCR 593, 647–8.
[196] [1995] 3 SCR 593.
[197] *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383.
[198] *Chinese One Child Policy Case* (1997) 142 ALR 331, 334.
[199] Ibid.
[200] Ibid 334–5.

members from society at large.[201] Thus the key to refugee status must be that the well-founded fear of human rights violation is for a 'reason that distinguishes the victims as a group from society at large'.[202] He rejected the reasoning in *Ward* that the term 'particular social group' was not a safety net for anyone persecuted but who did not fall within the other four grounds.[203] Brennan CJ approved of the RRT member's construction of a 'particular social group' and stated that:

> [t]he 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. It is their membership of that group that makes them liable to sterilisation if they return to Bang Hu.[204]

It is difficult initially to see why Brennan CJ took the view that he was construing 'particular social group' in a manner which created a 'safety net' for any group subjected to a human rights violation, given his stated requirement that there be some discrimination in the reasons for persecution. The point of difference between his opinion and that of the majority seems to be that the majority took the view that the characteristic of not voluntarily accepting birth control mechanisms was not what attracts measures such as forcible sterilisation. According to the majority, this was not a feature which 'united' or defined the group in the eyes of society and therefore attracted persecution. It was simply an indication that members of the putative group would act in violation of the policy, and this is what attracted persecution. Brennan CJ did not require that the common characteristic for the purposes of a social group 'unite' individuals as a group in the eyes of society, as the majority did. All that he required was that people be persecuted for a reason which distinguished them from other people in society. However, as perceived by the majority, the *reason* for the persecution, in one sense, is to ensure that population growth is limited, and the appellants have brought themselves within the terms of a generally applicable policy by virtue of their conduct. Accordingly, Brennan CJ's construction of the persecuted group could be viewed as circular. There may not be anything to distinguish the persecuted group from the rest of society at all, apart from the fact that these individuals are prepared to violate the policy. The reason for their preparedness to do so is irrelevant.

This may explain why he did not require a characteristic to unite members of the group in the eyes of society and why he viewed his own approach as a safety net. He may implicitly be admitting that the reason for the persecution was the appellants' reaction to a generally applicable policy. This is circular, but it certainly involves a reason for persecution which distinguishes the appellants from the rest of society: the appellants were not prepared to obey the policy, while the rest of society was. This could also explain why he felt it necessary to

201 Ibid 335.
202 Ibid 336.
203 Ibid.
204 Ibid 338.

make an appeal to the humanitarian aims of the Convention[205] and why he seemed to ignore the often stated, but doctrinally controversial, order of treaty interpretation which proceeds by intrinsic means first and then extrinsic means, as a backup.[206] Brennan CJ may believe that the framers of the Convention had no idea what they meant when they added the words 'particular social group', and accordingly all that the Convention grounds were meant to add to the concept of persecution was a notion of distinguishing among members of society on some basis. This is not a totally unreasonable interpretation.

An alternative construction of Brennan CJ's opinion is that he is simply appealing to the idea of non-discrimination which should indeed be the focus for interpretation of the Refugee Convention. What Brennan CJ may be articulating is that for those who do hold strong beliefs, whether religious beliefs connected to procreation (such as those connected with the Catholic faith), or more general political beliefs related to the proper extent of government interference in individual decision-making regarding procreation, or traditional Chinese cultural beliefs that larger families are a good thing, the policy itself will be *felt* as persecutory. It is also more likely that such persons will be the ones resisting and violating the policy. Others in society may well believe that the policy is a good thing and comply with it *voluntarily*, particularly given the incentives to do so. Of course, the disincentives may mean that some people's beliefs change or that they comply with the policy regardless of their beliefs. However, that should not exclude those who do act on their beliefs from being viewed as a particular social group. Thus, although the policy is seemingly neutral, it actually discriminates against those who cannot agree that they should only have one child, or that the state should make decisions about family size for them. Carping about the difference between what one wants to do as opposed to who one is seems beside the point. Again, the situation may be somewhat akin to that of conscientious objection to military service. However, as explained previously, there are issues of proof concerning the sincere beliefs of the conscientious objector, before conscientious objection may lead to refugee status. In relation to the one child policy, there is the rather large preliminary question of whether it is legitimate to resist the policy, which cannot be answered unless the legitimacy of the policy itself, as well as the manner in which it is pursued, is addressed.

2 *Kirby J*

In the course of outlining his general approach to the appeal and a number of matters which he did not regard as being in issue, Kirby J tackled the argument that the appellants and others like them did not fall within a particular social group until the introduction of the one child policy by acknowledging that membership of a group may be imputed. He said that self-identity as a member of the group was not necessary. The persecutors' imputation of membership of the group was the key issue. To illustrate this point, his Honour used the

[205] Ibid 333.
[206] Ibid 332.

example of German citizens of Jewish ethnicity who did not self-identify as Jewish, but rather as German, who were nevertheless persecuted as Jews by the Nazi regime.[207] He noted that there was no association, society or club to represent the interests of the social group asserted to exist by the appellants but said that this was 'hardly surprising given the nature of the society described in the evidence'.[208]

He then moved to a detailed consideration of the category of particular social group. Referring to the word 'particular', Kirby J said that this distinguished social groups from 'a crowd or section of the population lacking sufficient common identifiers or experience'.[209] In relation to the word 'group', he said that while this did not require a voluntary association, which he expressly rejected as a prerequisite,[210] it did require that the members of the group are recognisable: '[t]hey must be definable by reference to common pre-existing features'.[211] However, it was not required that members be known to be members of the group, even by each other, 'because the very persecution which helps to define or reinforce the 'group' may, in some cases, make such identification dangerous.'[212]

Kirby J then referred to the relationship between imputed political opinion and membership of a particular social group.[213] He related this passage to the situation at hand:

> As revealed in the evidence, the policies of the government of the PRC concerning the 'one child' family limitation are promoted both by inducements and rewards and by more drastic means such as compulsory sterilisation and abortion. Clearly enough, such policies would be seriously impeded if a sufficient number of persons in the suggested 'group' resisted the imposition of that policy. The very existence of a 'group' of persons, inclined to oppose, evade and flee the imposition of such a policy, would suggest a strain upon the loyalty of group members to the Government of the PRC. It would postulate the potential willingness of such group members to resist the imposition of that country's law and policies. The actual loyalty of such a 'group' to the government might be different from the government's perception of that loyalty. A potential danger of the group lies in the perceived risk of alienation from the government which, in turn, could give rise to a governmental response and to a well-founded fear of persecution.[214]

Kirby J rejected the tests adopted in Canada and the United States.[215] He also commented on the artificiality of the distinction between what a person does and who he or she is, stating that oppressors target what people do as this is evidence

[207] Ibid 384.
[208] Ibid 386.
[209] Ibid 389.
[210] Ibid 388.
[211] Ibid 389.
[212] Ibid. See also Kirby J's summary of conclusions: 394–6.
[213] Ibid, citing *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, UN Doc HCR/IP/4/Eng/REV 1 (1979).
[214] *Chinese One Child Policy Case* (1997) 142 ALR 331, 389–90.
[215] Ibid 393.

of what they believe.[216] An element of intuition on the part of decision-makers was accepted as being necessary in recognising a particular social group.[217] Kirby J distinguished between the situation of the appellants and the situation of persons like Morato who face criminal prosecution or 'retaliation from erstwhile compatriots',[218] stating that the law and policy relating to the one child policy goes beyond the acceptable limits of the criminal law as it is incompatible with human rights.[219]

For the reasons given earlier, Kirby J's approach, which focuses on the inferences which may be drawn from the conduct of the appellants and others like them, is a more reasonable one than that adopted by McHugh and Dawson JJ who require proof of persecution for organisation around a particular right, or refusal to accept the limitations on the appellants, by evidence such as a public demonstration or a voluntary association.[220] However, the majority judges think that the persecutors are not motivated to suppress a particular identity or belief-structure but simply to control population growth. This, it is agreed by Kirby J, is a legitimate aim, indeed it is agreed by the entire bench that the problem with the policy is that it is enforced through measures like forcible sterilisation. Essentially, Kirby J addressed the question of whether the policy seeks to suppress identity or is merely aimed at acts which threaten population quotas, by pointing out that in an authoritarian state like China, there may be a pronounced sense of loyalty required from citizens in the sense of conforming to particular political views and the programs adopted by the government. This is demonstrated by the evidence presented in *Chan* that the applicant was called a class enemy.[221] It is in the nature of authoritarian regimes that any dissidence is seen as a threat to the regime itself.

Whether this argument suffices to demonstrate that people disobeying the one child policy are punished for what they are perceived to be (class enemies, for example) may depend on whether the measures which follow, forcible sterilisation, job loss and so on, are characterised as enforcement of the policy or punishment for having this identity. Like Kirby J, I think that this may be a very difficult line to draw. While the majority clearly views the measures as enforcement of the policy, it is difficult to accept that these measures are proportionate to their aims. While it is possible to accept that forcible sterilisation aims in a very practical manner to prevent any future violation of the one child policy, it is a brutal operation and must be viewed in the context of job loss and the denial of benefits to any children apart from the first child. How is denial of employment really relevant to preventing *future* births, unless it is thought to deter potential future parents since they may feel unable to fill extra mouths? These measures

216 Ibid.
217 Ibid 394.
218 Ibid 395.
219 Ibid.
220 See above Part VII(B)(3).
221 *Chan* [1995] 3 SCR 593, 647–8.

may have been adopted as deterrents to future likely offenders, but their extreme nature may mean that they can conceivably be construed as punishments not merely for the act of disobedience[222] but the very attempt to be disobedient: to be a 'dissenter'. Thus there may well be an element of political targeting, of suppressing an aspect of identity here. There are other contexts in which punishments are disproportionate to the crime (the death penalty, for example) that are not accepted as providing the basis for a claim to refugee status. However, in these cases, the criminal laws themselves do not necessarily discriminate between particular groups of people, nor are they necessarily aimed at activities protected by international human rights law, such as the right to found a family.[223]

Implicitly, Kirby J may accept that many people in China do choose to have one child, as he notes the economic inducements used to pursue the policy. This is a feature of the policy which is not emphasised by the majority and could be crucial to a decision that there is in fact invidious discrimination among different groups within society. This is turned to in the next section, where the legitimacy of the policy itself is addressed.

VIII LEGITIMACY OF THE ONE CHILD POLICY

The question at stake in the case of the one child policy is whether there is an element of *invidious* discrimination among different sectors of the population, or whether the appellants in this case feared sanctions that would apply to any person who violated the one child policy.

The focus on discrimination or lack of equality is appropriate because the other four grounds of the Refugee Convention all centre on a notion of discrimination against groups for being different when they are not, or for not assimilating when they are entitled to be different. Racial discrimination, for example, may result in the denial of rights on the basis of equality with others, such as the right to work, on the false premise that people of a particular race are inferior

222 In *Chan*, Desjardins JA of the penultimate court of appeal found that sterilisation in some instances was not a preventative, but a punitive measure. See the analysis of this opinion by La Forest J in the decision of the final court of appeal, the Canadian Supreme Court: ibid 610.

223 There are some other situations in which criminal laws of general application pose interesting questions concerning the scope of the Convention. There may be situations where punishments have a disproportionate impact on groups of people because they, of necessity, are driven to commit certain crimes — for example, crimes of poverty. Hathaway argues that the poor may be viewed as a particular social group: Hathaway, *The Law of Refugee Status*, above n 17, 167. While stealing is not an activity protected by international human rights law, it may be justified if the state is failing in its obligations to fulfil economic, social and cultural rights. An examination of the British criminal justice system at the time of British colonisation of Australia suggests that the criminal law was used as a tool to punish people for being poor: a case of persecution for reasons of membership of a particular social group. In other situations the criminal law may be applied in a discriminatory fashion, in which case Hathaway argues that what is otherwise prosecution may be considered persecution: Hathaway, *The Law of Refugee Status*, above n 17, 167–9. In Australia, for example, the criminal law is sometimes used as a tool for harassment of Aborigines, whereby trivial offences are punished in a context where non-Aboriginal Australians would be unlikely to be punished, because Aborigines are viewed as posing a threat to police authority. See, eg, Greta Bird, 'The "Civilising Mission": Race and the Construction of Crime' (1987) 4 *Contemporary Legal Issues* 29.

workers. Alternatively, it may deny members of a particular race the exercise of rights to their own culture, pursuant to the prejudicial belief that this culture is inferior to others. Even political opinion, which at first may seem to be the 'odd one out', fits this analysis. The point about persecution for political opinion, is that it should be open for people to hold unpopular opinions or opinions which differ from those of the government. Naturally, however, only those who disagree with totalitarian governments will be persecuted. People holding opinions that are the same as governmental opinions or supportive of governmental policies or views will be encouraged to speak their mind and to act on their opinions.

The answer as to whether there is discrimination among groups within society on the basis of the one child policy depends on the way in which the policy is pursued and on how people's reactions to the methods of enforcing the policy are characterised. This context affects the way in which the notion of equality or discrimination is construed. Is it the case that no couple in China chooses whether to have one child or more: everyone is limited in their choices (unless, perhaps, they decide to have no children)? If so, there is no element of discrimination among sectors of the population. Alternatively, do some couples actively choose to have only one child as a result of the economic incentives offered pursuant to the policy, or because they agree that population limitation is important, meaning that only those couples who choose to have more than one child are subjected to measures such as forcible sterilisation? If so, it is possible to view the policy as discriminating between different sectors of the population. The policy discriminates between those who are able to agree that decisions regarding size of family should be left to government or that the limit of one child chosen by the government is appropriate, on the one hand, and, on the other hand, those who persist in the belief that they should be able to decide how many children they should have, or that they should be able to choose to have more than one child, or to adhere to the traditional Chinese cultural belief that a family of large size is best. Only the latter group is in danger of being subjected to measures like forcible sterilisation.

Is it true that in an authoritarian state like China, people never make choices about their behaviour? This question is avoided by the majority of the High Court, because of the fact that the policy baldly requires that all couples may have only one child. There is no discrimination, the policy applies to everyone. However, the policy is only going to create problems for people who cannot agree with it, and it is possible that those complying with the policy do agree with it. Indeed, the RRT member put the evidence demonstrating popular support for the policy to the male applicant for refugee status.[224] A negative answer to the question as to whether people ever make choices about their behaviour in China overestimates the competence of the Chinese authorities to successfully bend their citizens to governmental edicts. There is evidence that

[224] RRT Decision N94/3000 (20 May 1994) 12, referring to a cable from the Department of Foreign Affairs and Trade, Commonwealth of Australia, Cable 0.SH8898, 18 October 1993.

Chinese citizens do make choices about their behaviour even when the government requires conformity: political dissent does occur.

In my view, the majority of the High Court has not given convincing reasons why those who do act on their beliefs are not perceived by society or the persecutors as a social group organising around the right to have more than one child or to freely and responsibly decide the number, timing and spacing of their children. As stated previously, this may be partly due to lack of evidence, but it also seems to stem from a failure to push some of the issues as far as they can be pushed in the abstract. The fact that some persons may agree with the dissenters but choose not to express, or act on, dissenting views does not mean that those who do are persecuted for their individual activity rather than what they believe or are as people. Would superficial conversions from Christianity by some early Christians to avoid persecution have meant that other early Christians were not an easily cognisable group because of their beliefs and persecuted for their membership in that group? The idea that these people are not perceived as united by their belief does not ring true in all respects. The point that the persecution may not be motivated by the fact of membership of that particular social group sharing that belief is accurate in some respects. The real issue is whether persecution is *for reasons of* membership of that particular social group or despite membership of a particular social group. If the terms *for reasons of* are not read as 'because' (which Goodwin-Gill suggests gives a different emphasis to the words),[225] the fact that the policy, and its sometimes brutal enforcement measures, only impacts on those who disagree with it means that grant of refugee status in these circumstances could be a plausible reading of the Refugee Convention.

It may also be that an adaptation of the conscientious objection exception to the one child policy or recourse to the idea of attributed political opinion is able to transform the persecution suffered into persecution for a Convention reason. Imputed political opinion is not unreasonable given the nature of the Chinese government, but more evidence about the manner in which the policy is applied might be necessary to convince a tribunal or Court of this. It may be, on a closer scrutiny of the way in which the one child policy is pursued, that although it is for a legitimate aim (control of population growth), the propaganda for the policy focuses on delegitimising the practice of having larger families by naming those who persist with this cultural practice as class enemies or something similar. Accordingly, the distinction between what someone does and is has been rendered non-existent by the persecutors. It must be acknowledged, however, that there appeared to be no evidence of this before the RRT member.[226] Conscientious objection involves some difficulty in that it may require an examination of the legitimacy of the state setting a limit on childbirth, not simply examination of the measures for enforcing the policy. Both approaches raise

[225] Goodwin-Gill, above n 89, 51.
[226] RRT Decision N94/3000 (20 May 1994).

questions as to whether the enforcement of any generally applicable government policy at all could be challenged under these rubrics.

As to whether it matters if society did not recognise the persecuted group before the policy itself was implemented, the answer is clearly that it does not. Moreover, if what is at stake is a traditional cultural understanding of families which says that many children are best, it is difficult to argue that the policy does not attack a pre-existing feature. Indeed, the policy is trying to surmount these attitudes. As the RRT member perceived, there are those who win the approval of the government by changing their belief structure, and those who persist in the old ways. This demonstrates that it may be possible that there is an element of suppressing a particular identity, even if the ultimate aim of the policy is the legitimate one of controlling population growth. The question is whether the persecution is therefore *for reasons of* membership in this group, or simply based on the fact that the couples concerned will violate the policy, and whether these two things are really different. It is certainly arguable that what someone does may be perceived as an indication of who someone is in this context. The question then becomes whether it is legitimate to attempt coercively to change *who* the person is.

Ultimately then, the answer to the riddle of the one child policy depends on an assessment of the validity of the one child policy itself. Accepting for the purposes of argument that the policy does encourage people to agree to have one child and that generally Chinese citizens agree with the policy, as opposed to having it forced upon them, is the discrimination between those who agree to have one child and those who want to have more children invidious because it infringes the right to choose the size of one's family in equality with those who voluntarily choose to have one child, or because it infringes a right to adhere to traditional cultural ways? Is there a right to have a family of the size you choose, or the size which culture has traditionally dictated is good, just as there is a right to have a different sexual orientation or preference to that of heterosexuality? Or may limitations be placed on this right? Does it matter that the reason you may desire to have more than one child is because of son preference, or is it more egregious that in forcing people to obey the policy women suffer most?

If it is true that limitations may be placed on the right to found a family through restrictions on the permissible size of the family, then the fact that the policy is in some instances enforced by measures such as forced sterilisation means that only one element of the definition of a refugee is met, the element of human rights violation. There is no element of invidious discrimination among groups within society that results in the selection of these rights-violative measures for particular people.

Is it legitimate to limit a couple's choice about family size in order to control population growth? The answer given so far by the international community to this question is negative. It is acknowledged that control of population growth is essential. However, it is also acknowledged that coercive control may not be successful, because repression of a practice, as opposed to reasoned discussion

of why it is harmful, does not really change people. This might be particularly true in China, where ideas about size of family may still be culturally embedded (and indeed, there is evidence that in rural areas, the policy is not so strictly enforced). The terms of article 16(1) of the Universal Declaration of Human Rights[227] and article 23(2) of the ICCPR[228] constitute a strict prohibition on governmental interference. The Human Rights Committee has stated that family planning is permissible, *but must not be coercive.*[229] Setting a compulsory limit is surely coercive in and of itself. At the Cairo Conference on Population and Development, the importance of gaining free and informed participation, particularly of women, in family planning programs was acknowledged. The right to found a family was expressed in terms of the right of individuals 'freely and responsibly' to take decisions regarding childbirth, the same language as that used in article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women.[230] While there is a tension between 'freely' and 'responsibly', this suggests that government may encourage citizens to aspire to small families, but that a compulsory limit cannot be set and pursued with coercive measures, whether they be imprisonment or measures such as sterilisation. The conference platform specifically stated that quotas should not be set.[231] The final decision as to family size must be left with the individuals involved. Responsible decisions are best encouraged by empowering education (as opposed to classic 're-education') as to the benefits of having smaller families, in a context where government ensures that it provides properly for the economic welfare of its citizens, removing the economic need for many children.

Finally, it is necessary to deal with the issue of opposition to other policies. Is regulation of family size less like criminalisation of gay sex, and more like criminalisation of murder or laws for progressive taxation? The law against murder is a law which applies to conduct of individuals. It could be construed as a law which divides society into two groups of people: killers and non-killers, a criminal class as opposed to a criminal act. However, even if that analysis is accepted, it is an unrealistic characterisation of the aims of the law. The law legitimately aims to protect the equal right to life of all citizens, by constraining the liberty of all citizens to kill others. In liberal philosophical terms, there is no invidious discrimination because a reasonable balance is struck between the liberty of some and equality for all. In terms of positive law, the right to life is a non-derogable right that one may only be deprived of through due process of law.[232] Progressive taxation laws may also be characterised as discriminating

[227] Universal Declaration of Human Rights, 10 December 1948, GA Res 217A, 3 UN GAOR (1948), UN Doc A/180, 71, art 16(1).

[228] ICCPR, above n 23, art 23(2).

[229] *Human Rights Committee's General Comment on ICCPR Article 23*, above n 25.

[230] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, (1980) 19 ILM 33 (entered into force 3 September 1981); see also *Report of the International Conference on Population and Development*, above n 22, [7.3].

[231] *Report of the International Conference on Population and Development*, above n 22, [7.12].

[232] ICCPR, above n 23, art 6.

between different groups in society, rich and poor, in this case against the rich and for the poor. However, unless one takes the libertarian view that the rich have earned their wealth and progressive taxation is an undue restriction on the liberty of individuals,[233] one accepts progressive taxation as a reasonable limitation on liberty and the right to property in favour of real equality. As Dworkin argues, there are some liberties which amount to no more than 'the right to eat vanilla icecream', or 'to drive up town on Lexington Avenue'[234] because of the need to ensure real equality for others. Again, in terms of positive law, there is no absolute right to property, and indeed a right to property is not even mentioned in the ICCPR.

What are the consequences of this analysis for refugee law? If brutal enforcement measures such as forcible sterilisation occur, it could be considered appropriate to grant refugee status. However, this may be perceived as difficult by domestic tribunals in potential countries of asylum if it involves an assessment of whether other population limitation measures should be adopted, even though decisions regarding refugee status always involve some condemnation of the country of origin for human rights violation. Moreover, there will be a fear of floodgates. However, not only is it clear that the floodgates will not be opened (as Kirby J acknowledged) but this merely heightens the need for governments to work to reduce the root causes of asylum-seekers' flight by offering views on alternative methods of controlling population growth, and technical and financial assistance towards this aim. Unfortunately, however, not only do countries like Australia dislike criticising foreign governments over their human rights records, but the populations of Western developed countries may be happy to permit the brunt of population limitation to be borne by the Chinese. We do not demonstrate much commitment to limiting other factors which may make life on this planet unsustainable, such as restraining our conspicuous consumption which is not prohibited in any human rights instrument. (The International Covenant on Economic, Social and Cultural Rights[235] refers to an 'adequate standard of living' and 'continuously improving living conditions', neither of which are incompatible with the idea of *sustainable* development.) Indeed, Australia has recently threatened to withdraw from the Framework Convention on Climate Change because of 'special circumstances' related to its economy.[236]

This leads to the final point which should be made about assessing the legitimacy of the policy. There are many aspects of the problem which privilege the state's perspective regarding particular issues. The Chinese authorities' assessment of how to go about family planning is paid undue deference, while the problem of refugee status raises the question of an exception to Australia's

[233] See, eg, Robert Nozick, *Anarchy, State and Utopia* (1974).

[234] Ronald Dworkin, 'Liberalism' in Stuart Hampshire (ed), *Public and Private Morality* (1978) 113, 124.

[235] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[236] See, eg, Craig Skehan, 'Threat to Quit UN Greenhouse Pact', *The Sydney Morning Herald* (Sydney) 30 April 1997, 3.

otherwise plenary power to control immigration. Limitation of population growth is raised in two ways: birth control by an authoritarian state; and immigration restriction by a rich, developed state. It appears that the West is content to exclude people fleeing enforcement of a policy which seeks to address a problem to which we all contribute in many ways.

IX FUTURE DIRECTIONS: GENDER-BASED PERSECUTION AND A POSSIBLE EXECUTIVE RESPONSE

The majority judges said much about their view that the appellants on the facts of this case were not persecuted for reasons of membership of a particular social group, however both the majority and the minority refrained from laying down anything other than very broad guidelines for the ascertainment of a social group. In the case of the majority this guidance consisted of the finding that the group must be cognisable by the rest of society because of some common characteristic which 'unites' them. There are many indications in the majority judgments that the questions relating to particular social group depend heavily on the factual context. Thus the onus is on decision-makers to engage with the broad pronouncements of general principle by the Court and apply them: no magic formulae will be forthcoming.

The High Court did not adopt the requirement of a voluntary association as suggested by United States authority.[237] This approach would have seriously restricted the application of the Refugee Convention to gender-based social groups. Not all women associate, whether voluntarily or not. By contrast, if the *ejusdem generis* approach is adopted, sex or gender could be the characteristic that defines the group, without more. The High Court did not expressly adopt the *ejusdem generis* approach, but many of the judges showed an appreciation of the insights gained from that approach. For example, the acknowledgment by McHugh J that a group may be disparate apart from one characteristic common to the group, and the understanding that perceptions of those outside the group are more important than the perceptions of the members of the group, are both insights that may be gained from the *ejusdem generis* approach.

The test adopted by the majority was the requirement of a 'unifying characteristic'. The question is what this means. Goodwin-Gill points out that the term 'linking' characteristic may be a preferable term.[238] The term 'unites' suggests something more than a common characteristic, as Dawson J notes.[239] However, in my opinion, there is scope, and good reason, to interpret the High Court's ruling on particular social groups to encompass gender-based groups. There is no general problem with circularity in relation to women or other gender-based groups, as there is with the one child policy. There is clearly a pre-existing

237 *Sanchez-Trujillo*, 801 F2nd 1571, 1576 (9th Cir, 1986).
238 Goodwin-Gill, above n 89, 47.
239 *Chinese One Child Policy Case* (1997) 142 ALR 331, 341.

characteristic that identifies the group and attracts persecution. The group is not defined solely by the persecution feared. In many ways, it is an externally perceived or imputed characteristic, but both Dawson and McHugh JJ acknowledge that external, rather than internal, perceptions may be important.[240] That characteristic is sex or gender.

That sex or gender may 'unify' women (and indeed men) in the eyes of society, as required by the majority, is clear. Certain characteristics may be ascribed to members of each sex and roles allotted accordingly, without regard to who these people are as individuals. Gender discrimination is group-based discrimination. It is invidious because it denies equality. It may deny women benefits of society such as education, work, and political participation. Thus gender operates as a characteristic that unites people in the eyes of society, enabling them to be set apart from society for certain purposes. If gender is not such a 'uniting' characteristic, then I have to confess that I do not understand what such a characteristic would be, unless what is required is actually a voluntary association.

The fact of gender discrimination has resulted in many efforts to combat sex stereotypes, including the Convention on the Elimination of All Forms of Discrimination Against Women.[241] Of course, gender is simply one characteristic of any woman, and there may be intersections with other characteristics that define the experiences of particular women, such as race, or living in a developing country. However, this does not deny the role that gender may play the in persecution of women. McHugh J acknowledges that such disparities in experience are not fatal to the perception that a particular social group is constructed around one characteristic.[242] There is a worrying reference by Dawson J to the 'disparate' nature of people who simply want more than one child,[243] particularly given the context of China where such characteristics are highly relevant and closely monitored. A similar comment is made by McHugh J.[244] However, these comments may be better read in light of the majority's primary concern, being the insertion of the reference to persecution pursuant to a generally applicable policy into the putative group. Furthermore, as Audrey Macklin writes in her sensitive article on the problematic nature of categorising women's experiences for the purposes of refugee law, there is no need to choose one particular ground or to define a group solely by one characteristic if the societal context indicates that several combined characteristics attract persecution.[245] Nor is there any need to prove that all women face exactly the same risks, any more

[240] Ibid 359–60 (McHugh J).

[241] Convention on the Elimination of All Forms of Discrimination Against Women, above n 230.

[242] *Chinese One Child Policy Case* (1997) 142 ALR 331, 360 (McHugh J).

[243] Ibid 344.

[244] Ibid 363.

[245] Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *Human Rights Quarterly* 213, 255. She gives the example of Nada who fled Saudi Arabia and notes that characterising Nada's experiences as persecution for reasons of gender or for religion may mischaracterise the refugee's own experiences of persecution: if it is the state, rather than the religion, with which Nada disagees, then the ground of political opinion is preferable.

than it is necessary to show that all members of a race face the same risk of persecution. Clearly, some members of persecuted groups may be safe from persecution because of factors personal to them, such as political connections, or wealth. However, such factors are not always a guarantee of protection, and may even work against some people, particularly women who often fear rights violations occurring in the private sphere of the home. In any event, the ability of some members of persecuted groups to access protection merely indicates that those people would not be able to prove a well-founded fear of persecution. In my view, the acknowledgment in the Department of Immigration's Gender Guidelines[246] that women may suffer persecution because they are women and that gender may define particular social groups is confirmed by the High Court's decision in the *Chinese One Child Policy Case*. The lesson for practitioners is to keep doing what they already do in relation to presentation of asylum-seekers' claims — that is, to produce plenty of evidence as to the treatment of women, or specific groups of women, in the particular society from which they come.

Reading Dawson and McHugh JJ together as giving support to the idea of gender-based social groups and combining them with Brennan CJ and Kirby J, whose approaches would also suggest that they might accept gender-based groups (Brennan CJ simply requires some form of discrimination, Kirby J's broad approach to political opinion would lend support to the arguments that women who violate social mores fall within the category of political opinion),[247] there is a fair indication that the High Court may be sympathetic to gender-based social groups. Gummow J's comment that members of a race may also constitute a particular social group, indicates that he might consider gender-based groups as particular social groups in a specific context.

One further point needs to be made about the *obiter* from McHugh J concerning Trinidadian women fleeing domestic violence. In a footnote, he stated:

> The Canadian Court of Appeal upheld a finding that a Trinidadian woman who had been abused by her husband for many years was a refugee because she was a member of a particular social group. The decision must surely be wrong even if the definition of a refugee is given a very liberal interpretation. It is difficult to see how the designated group was a particular social group for Convention purposes. However, it seems to have been common ground between the parties that the relevant group was 'Trinidadian women subject to wife abuse'. Nevertheless, it does not follow that the applicant was abused because of her *membership* of that group.[248]

While the insertion of the persecution feared into the particular social group may be inappropriate, and indeed the judgment has been criticized by Macklin on this basis,[249] this does not mean that women fleeing domestic violence may

[246] Commonwealth of Australia, Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996).

[247] See, eg, Spijkerboer, above n 161.

[248] *Chinese One Child Policy Case* (1997) 142 ALR 331, 358.

[249] Macklin, '*Canada (Attorney-General) v Ward*: A Review Essay', above n 42, 376–7.

not be refugees. Nor is a particularly liberal construction of the Convention required unless it is thought that domestic violence is an individualised problem specific to a couple, rather than a gendered problem (where the partners are heterosexual) or a problem of patriarchal attitudes to families (where the victims of abuse include children of both sexes). The key to analysis of domestic violence may be whether the attitude of the state to these problems is driven by such concerns, to the point that it fails to offer adequate protection. Domestic violence is often thought of as an isolated, individuated incident of violence. However, much research has shown that it is gendered. This is not simply because women are predominantly the victims, but in terms of the *attitudes* about the way in which wives or women partners are supposed to behave, both on the part of the abusive male partner, and on the part of many states who reinforce these attitudes by express laws and policies, or by failure to act. Gender plays the role of a uniting characteristic again, driving the experiences of these women. If the state fails to act and prevent or punish such violence — for example, by providing shelters for battered women — on the basis that domestic violence is a private matter and that it is women's lot in life to endure such violence, then women fleeing domestic violence may well be refugees. The Minister's concession in the *Chinese One Child Policy Case* regarding the nexus with the state illustrates the fact that direct involvement of the state in the original persecution is not required. What is relevant is the state's failure to offer protection from it. There is some doubt as to whether the Refugee Convention requires the traditional elements of state responsibility to be met. The rules of state responsibility may require some element of adoption or approval of the individual's activities.[250] In any event, however, the state *may* be proved complicit in the individual's activities[251] or to have violated its own duty to respect and *ensure*[252] rights *for reasons of* the gender of the victim (and therefore membership of a particular social group).

Of course, domestic violence cases are uncomfortable because they inevitably raise comparisons with the potential country of refuge. Thus Macklin writes:

> Finding a principled basis for admitting women who flee gender persecution requires a reevaluation of what refuge means. It also requires Western feminists to ask themselves searching questions about the shifting significance of the categories 'woman' and 'refugee' in local versus transnational contexts. What distinguishes the refugee claimant who flees Trinidad for Canada to escape an abusive husband from the Canadian citizen who flees Toronto for Swift Current for the same reason?[253]

[250] See the analysis of the International Court of Justice: *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) (Merits)* [1980] ICJ Rep 3 [58]–[59], [69]–[71]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 [114]–[115].

[251] For an analysis of the concepts of state responsibility in relation to violations of women's rights, see Celina Romany, 'State Responsibility goes Private' in Rebecca Cook (ed), *The Human Rights of Women: National and International Perspectives* (1994) 85.

[252] ICCPR, above n 23, art 2.

[253] Macklin, 'Refugee Women and the Imperative of Categories', above n 245, 277.

However, these broader questions should not mean that refugee status decision-makers should deny refugee status when faced with an individual asylum-seeker who made the assessment that she had to leave the home country, and *now*, even if the future elsewhere may be uncertain. The decision-maker's brief is solely to decide whether the asylum-seeker has a well-founded fear of persecution, regardless of whether the decision-maker's own country has a better, worse or similar record in relation to human rights. If the answer is positive, the asylum-seeker is not to be returned. Moreover, given governments' notorious reluctance to redress their own human rights violations or to question the records of other governments, refugee status offers at least a temporary refuge for those who have decided that staying in the country of origin is intolerable for now. As Hathaway writes, the very nature of refugee status is that a person has made an autonomous decision to disconnect him or herself from the state of origin, because he or she has no faith in that state's ability to offer protection.[254] It is both supremely arrogant and callous to deny what protection *is* available in these circumstances.

These questions are complex and there is insufficient space for a complete examination of them here. In order for administrative decision-makers properly to address these questions, it is vital that they be permitted to do so unfettered by threats from the executive concerning decisions that do not meet with its approval. DIMA officials, being placed within the general immigration scheme with its focus on immigration control, and directly within the administrative branch of government, may, depending on the culture of the Department, find this a tall order. The second level of decision-makers, the RRT members, are theoretically free of interference. Unfortunately, however, the Minister for Immigration and Multicultural Affairs has made statements that have been interpreted as ominous warnings to the effect that decision-makers who 'stretch' the Convention should be concerned about job security.[255]

Two points need to be made here. First, if the Minister believes that refugee status decision-makers are stretching the Convention, he should seriously consider the possibility that this is because there are situations where the definition does not apply but there is a need to respond to the plight of the asylum-seeker. If this is the case, the onus is on the executive to provide for humanitarian categories for immigration. Australia does not provide well for humanitarian status in relation to 'onshore applicants' for asylum (that is, those arriving on Australian soil and claiming asylum, rather than those applying from refugee camps offshore). Humanitarian status is a discretionary afterthought to the refugee status determination system, whereby the Minister may grant a stay

254 James Hathaway, 'Labelling the "Boat People": The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees' (1993) 15 *Human Rights Quarterly* 686, 687.

255 Editorial, 'Ruddock's Threats to Refugee Body', *The Canberra Times* (Canberra), 27 December 1996, 14. The Minister subsequently stated that law-makers are entitled to have a view on the legal issues: Mike Steketee, 'Tribunal Defends Violence Refugees' Status', *The Australian* (Sydney), 6 February 1997, 2.

on humanitarian grounds after the applicant has unsuccessfully applied for refugee status.[256] Moreover, the Minister has announced that a 'post application' fee of $1,000 will apply to applicants for refugee status who are unsuccessful at the RRT level.[257] This is inappropriate given that access to humanitarian status is only open after failure at the RRT, and appears to be a penalty adopted as a deterrence mechanism. The alternative is to do as many countries in Europe have done, that is to create a standing category of humanitarian or 'B' status for onshore asylum-seekers who do not meet the Convention definition of a refugee. Access to this category should not necessarily require prior application for refugee status, as the current system now does. Second, given the difficulties inherent in the concept of particular social group, as evidenced by the near even division of opinion in the High Court, the Minister cannot reasonably believe that decisions which do not match the government's views are the result of incompetence. Rather, his statements concerning the decision-makers who 'stretch' the Convention, together with his announced move to ensure that the Federal Court is not able to review refugee status decisions,[258] indicate a worrying disregard for the *raison d'être* of independent decision-making, which is that the executive branch of government has to listen to opinions other than its own. This may prove a greater obstacle to women asylum-seekers than the wording of the Refugee Convention and the High Court's interpretation of it in the *Chinese One Child Policy Case.*

PENELOPE MATHEW*

POSTSCRIPT

On 13 June 1997, the High Court handed down another decision concerning asylum-seekers fleeing, among other things, enforcement of the one child policy. In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong*, the full bench of the High Court found that the Full Federal Court had erred in its finding of

256 Migration Act 1958 (Cth) s 417. In some instances, there are also mechanisms such as extensions of visas for persons caught up in conflicts, like the war in the territory of the former Yugoslavia.

257 Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Sweeping Changes to Refugee and Immigration Decision Making*, Press Release, MPS 28/97 (20 March 1997).

258 Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Government to Limit Refugee and Immigration Litigation* Press Release, MPS 32/97 (25 March 1997).

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legal error on the part of the RRT.† Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ handed down a joint opinion and Kirby J gave a separate opinion. On the issue of the one child policy and membership of a particular social group, the RRT had found that Mr Guo's evidence regarding his claim that he would be forcibly sterilised was not credible. The RRT also determined that fines for breach of the policy did not amount to persecution, being disciplinary measures applicable to the entire population.‡ In consideration of the Tribunal's findings on this point, the joint opinion reads as follows:

> [T]his claim was rejected by the Tribunal. But in any event, the claim, based, as it is, on membership of a social group consisting of 'parents of one child in the PRC' is answered by the Court's recent decision in *Applicant A v Minister for Immigration and Ethnic Affairs*, which held by majority that, for the purposes of the Convention, such persons were not a particular social group and that persecutory conduct cannot define 'a particular social group'.**

Kirby J commented on similar claims made by Mr Guo's wife, Ms Pan Run Juan, that '[n]othing said by this Court in the decision (given since the hearing of these appeals) about cases concerning the Chinese "one child policy" affords any ground for re-opening the ... determinations affecting Ms Pan'.††

It appears that the issue is settled.

† *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (High Court of Australia, Full Bench, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, 13 June 1997).

‡ This description of the Tribunal's findings is drawn from the summary made in the joint judgment by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ: ibid 5–7.

** Ibid 8.

†† Ibid 14.