Minister for Immigration & Multicultural Affairs v <<Ndege>> [1999] FCA 783 (11 June 1999)

Last Updated: 15 June 1999

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v <<Ndege>> [1999] FCA 783

IMMIGRATION - refugee status - well-founded fear of being persecuted - situation where violence feared motivated by desire for revenge by claimant's husband - persecution for Convention related reason - whether source of persecution must be identified - whether failure of State to protect claimant from non Convention related persecution renders State complicit in Convention related persecution - whether "married women in Tanzania" particular social group.

Migration Act 1958 (Cth), s 36, Pt 8

Migration Regulations 1994, Pt 866 of Schd 2

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 243, 258-9, 263-4 applied

Canada (Minister of Employment & Immigration) v Mayers (1992) 97 DLR (4th) 729 referred to

Morato v Minister for Immigration and Local Government and Ethnic Affairs (1992) 39 FCR 401 at 404-6, 416 referred to

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 568-9 applied

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 388 referred to

Hui Quin Li v Minister for Immigration and Ethnic Affairs [1999] FCA 751 referred to

Osland v The Queen (1998) 159 ALR 170 referred to

Surujpaul v The Queen [1958] 1 WLR 1050 referred to

Walsh v Sainsbury (1925) 36 CLR 464 at 477 referred to

Mallan v Lee (1949) 80 CLR 198 at 205, 210 referred to

Islam v Secretary of State for the Home Department (unreported, House of Lords, 25 March 1999) referred to

Thalary v Minister for Immigration and Ethnic Affairs (1997) 73 FCR 437 referred to

Minister for Immigration and Multicultural Affairs v Chen Shi Hai (an infant) by his next friend Chen Ren Bing [1999] FCA 381 referred to

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v DEVOTA FORTUNATA <<NDEGE>>

VG 190 of 1998

WEINBERG J

11 JUNE 1999

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY
VG 190 OF 1998

BETWEEN:
THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Applicant

AND:
DEVOTA FORTUNATA <<NDEGE>>

Respondent

JUDGE:
WEINBERG J
DATE OF ORDER:
11 JUNE 1999
WHERE MADE:
MELBOURNE

THE COURT ORDERS THAT:

1. The application be allowed.

2. The matter be remitted to the RRT, differently constituted, to be reconsidered according to law.

3. The respondent pay the applicant's costs of and incidental to this application.

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

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JUDGE:
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DATE:
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PLACE:
MELBOURNE

REASONS FOR JUDGMENT

1 There is before the Court an application by the Minister for Immigration and Multicultural Affairs ("the Minister") for judicial review of a decision made by the Refugee Review Tribunal ("the RRT"). The decision was that the respondent is a person to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees ("the Convention"), as amended by the 1967 Protocol. The application is brought pursuant to the provisions of Part 8 of the Migration Act 1958 (Cth) ("the Act").

2 The criteria which are prescribed for the grant of a protection visa are those under s 36 of the Act, and in Pt 866 of Schd 2 to the Migration Regulations 1994. To obtain such a visa an applicant must be a person to whom Australia has protection obligations under the Convention.

3 Article 1A(2) of the Convention relevantly provides that Australia has protection obligations to any person who:

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ..."

4 The general principles which govern the interpretation of Art 1A(2) of the Convention have been authoritatively stated on many occasions. It is unnecessary for present purposes to set them out again. It is sufficient to note that the RRT was fully cognisant of all of the relevant authorities. The applicant does not take issue with the manner in which those principles were expounded by the RRT in its reasons for decision.

The background to the respondent's claim to refugee status

5 The respondent, who is a citizen of Tanzania, arrived in Australia on 5 June 1996. On 13 March 1997 she lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs ("the Department"). On 31 July 1997 a delegate of the Minister refused to grant a protection visa. On 19 August 1997 the respondent sought review of that decision.

6 The respondent's claim was set out in the written submissions made to the Department, the written submissions made to the RRT and the oral evidence which she gave to the RRT on 2 December 1997.

7 The respondent claimed that she had been the victim of serious and sustained violence at the hands of her husband. Four days after their wedding her husband had commenced to beat her and had, indeed, broken the little finger on her right hand. The beatings had continued throughout their marriage. Her husband had regarded her as his personal property. He had threatened to kill her if she left him.

8 The beatings and threats of violence continued after they arrived in Australia, where her husband was to undertake studies. Her husband told her to obtain employment in order to pay some of his many debts. She claimed that she did not know how to seek assistance from the police. She did not seek medical attention for her injuries.

9 Eventually, on 4 October 1996, the respondent left her husband taking with her their three children. She obtained shelter and assistance at a women's refuge. On 14 October 1996 she obtained a Crimes (Family Violence) intervention order against her husband.

10 The respondent stated that she had not wished to come to Australia, but would have preferred to remain in Tanzania while her husband studied here. She would have preferred to be separated from him permanently. However, he had paid a bride price for her. In accordance with Tanzanian custom, she was regarded in Tanzania as his property. She had no right, under that custom, to leave him. She could not take her children with her if she did leave him. Her family would not support her because they would be required, in those circumstances, to return the bride price which his family had paid.

11 The respondent claimed that in Tanzania marital violence inflicted by husbands upon their wives is considered normal. There would be no point in making any complaint to the authorities about such violence because they would take no action in relation to it. They would support her husband in whatever course he took. The respondent claimed that as her husband was a professional man, and a former senior bureaucrat, he would be able to pay bribes to the police and to the judiciary. If she sought to leave him she would be ostracised, unable to find employment and dishonoured by her own family for having failed to comply with Tanzanian custom.

12 The respondent also claimed that if she were required to return to Tanzania her husband would take revenge upon her for having left him. He had threatened to kill her once they were back in that country.

13 The respondent supported her claims by tendering before the RRT a number of letters of a threatening nature which she had received from her husband. She said that he had continued to demand money from her after she left him and was making enquiries of others as to her whereabouts, and the whereabouts of their children.

14 The respondent claimed that she had particular fears for the safety of her children. Her husband had, in the past, been violent towards them. Under Tanzanian law, he would have control over them. She claimed that she feared that her daughters would be forced to undergo female genital mutilation. That claim was not, however, developed or substantiated.

15 The respondent contended that if she returned to Tanzania she would be subject to circumstances which would amount to "persecution" within the meaning of Art 1A(2) of the Convention. If she returned to the marriage, she would have to endure her husband's beatings (and what she described as "marital rape"). If she maintained a separation from him, she would be put in fear of his taking revenge and would be ostracised from her family. The respondent claimed that "women in Tanzania" were a "particular social group" within the meaning of Art 1A(2). She was a "member" of that social group and, if required to return to Tanzania, would be relevantly "persecuted" by reason of her membership of that particular social group. She could not, for the reasons set out above, avail herself of the protection of Tanzania.

The RRT's findings and reasons

16 The RRT noted that in order to assess the respondent's claims, it was necessary to examine the position of women, particularly married women, in Tanzania. It referred to various reports, including one by the United States State Department on Human Rights Practices for 1997, which had concluded that discrimination and violence against women remained a serious problem in Tanzania. The report noted, in part:

"Violence against women remained widespread. Legal remedies exist, but in practice are difficulty to obtain. Traditional customs subordinating women remain strong in both urban and rural areas and local magistrates often uphold such practices. ...It is accepted for a husband to treat his wife as he wishes, and wife beating can occur at all levels of society."

17 A report prepared by the Canadian Immigration and Refugee Board commented on the difficulties for women who are the victims of domestic violence in obtaining redress:

"According to a professor of geography with expertise in African women's issues at Oxford University, women's concerns and claims are not taken seriously by Tanzanian courts or police officials. ... The source stated that women can theoretically seek redress or protection through Tanzanian courts if they have the resources to do so, but that those who do are likely to be ostracized by their families and communities."

18 The RRT noted also that although the Marriage Act of 1971 had purported to enforce a ban upon corporal punishment in Tanzania, customary law, which continued to be applied in that country, provided that only the infliction upon a wife by her husband of severe injuries, and not the infliction of less serious injuries, could be grounds for divorce. Moreover, customary law required that when a bride price had been

paid, it had to be repaid if a wife sought divorce from her husband. Any such repayment would be likely to be resisted by the wife's family who would, in effect, compel her to return to her husband against her will.

19 The RRT, having summarised its findings in relation to the position of married women in Tanzania, then turned to its findings in relation to the respondent's claim for refugee status.

20 It commenced by observing that it accepted the respondent as a credible witness. It accepted the truthfulness of all of her claims. The RRT accepted, therefore, the respondent's account of her mistreatment at the hands of her husband, and also her account of what conditions were like for married women in Tanzania. The RRT noted, in particular:

"The Tribunal accepts the Applicant's actions have humiliated her husband and finds that there is a real chance that he will take revenge upon her if she returns to Tanzania. The Tribunal finds that the authorities in Tanzania will not protect the Applicant if he seeks revenge." (emphasis added)

21 The RRT then turned to the issue of whether the respondent had demonstrated a well-founded fear of persecution. It commenced its analysis with the following observation:

"On the basis of this evidence the Tribunal considers that the Applicant has suffered serious harm and a significant detriment or disadvantage and faces a real chance of suffering serious harm should she return to Tanzania. Such harm and risk of harm arises not only as a result of the abuse inflicted upon her by her husband but also because she has been effectively denied access to the protection of the criminal law and the services of the law enforcement agencies, both of which are available to other Tanzanian nationals." (emphasis added)

22 It is obvious that the RRT was well aware of the fact that the "real chance" of "serious harm" to which it referred would have to exist for a Convention related reason in order to form a proper basis for a claim to refugee status. The RRT noted:

"However it is not sufficient to show that there is a real chance a person would face serious harm or a significant detriment or disadvantage. For such treatment to be considered persecution within the meaning of the Convention, there must be an element of motivation on behalf of the persecutor relating to the Convention grounds; the reason for the persecution must be found in the singling out of one or more of the Convention reasons; it must be shown fear of persecution is well founded; and the person must show they cannot avail themselves of the protection of their country."

23 The RRT continued:

"Although there may be a range of complex factors leading to his abuse of the Applicant, there is evidence to indicate the Applicant's husband's motivation to inflict harm includes his attitude towards her as a woman and the concept of ownership by the husband towards the Applicant as a chattel resulting from the payment of bride price by him. These factors relate to the Convention ground of the particular social group of being a married woman in Tanzania ... Further, on the basis of her past experiences, evidence that her husband has continued to seek her out even after she left him, his behaviour in Australia and his vow for revenge the Tribunal considers there is a real chance she could face such mistreatment or even worse should she return to Tanzania. The Tribunal also accepts, given the evidence of the Applicant and the independent country information ... that the Tanzania authorities are both unwilling and unable to provide to the Applicant effective protection against such sustained abuse. Finally, given the fact that her husband is a former senior bureaucrat with political connections, it is evident the Applicant could not safely relocate elsewhere and so is unable or unwilling to obtain the protection of her country.

However, despite these matters, the Tribunal acknowledges that, if the harm experienced and to be experienced by the Applicant arises solely from a private act, this would not necessarily constitute persecution within the meaning of the Convention (see Applicant A's case per McHugh J at [258]). There may be further difficulties with the arguments above, particularly given the comments of McHugh J in Applicant A's case at [262-3], footnote [148]. However, the Tribunal does not consider it necessary to make

findings in relation to this aspect of the claim (namely the violence inflicted upon her by her husband) as it considers the effective denial of access to the protection of the criminal law and the services of law enforcement agencies to the Applicant by the State on the basis that she is a married woman in Tanzania, is sufficient to give rise to a well founded fear of persecution within the meaning of the definition. Similarly the Tribunal does not consider it necessary to determine whether the Applicant forms part of particular social groups namely "females from the Sukuma tribe" or "Women in Tanzania" as submitted by her representative." (emphasis added)

24 The RRT's reference to footnote [148] in the judgment of McHugh J in the High Court decision of Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 is particularly important to an understanding of its reasons for decision. In that footnote McHugh J had observed that Canadian courts had held that Trinidadian women subject to "wife abuse" were a particular social group - Canada (Minister of Employment & Immigration) v Mayers (1992) 97 DLR (4th) 729. That decision by the Canadian Court of Appeal was said by McHugh J to be:

"... surely ... wrong even if the definition of 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." (original emphasis)

25 It was this same concern which led the RRT to avoid making any finding as to the motives of the respondent's husband when considering whether or not her belief that he would carry out his threats of serious harm amounted to a well founded fear of persecution. The RRT simply substituted Tanzania as the source of the respondent's fear of persecution. This enabled it to avoid having to determine whether or not the threats by her husband could be said to be the result of her membership of the particular social group, "married women in Tanzania", which the RRT had identified as the relevant social group for the purposes of Art 1A(2) of the Convention.

26 Having found that the respondent had demonstrated that she had a well-founded fear of persecution, the RRT turned to the question whether she had shown that she was a member of a "particular social group" within the meaning of that expression in Art 1A(2) of the Convention. A related question was whether her membership of that group was the reason for the claimed persecution.

27 After referring to what had been said about the expression "particular social group" by a Full Court of the Federal Court in Morato v Minister for Immigration and Local Government and Ethnic Affairs (1992) 39 FCR 401 per Black CJ at 404-406, and by Burchett J in Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 568-9, the RRT referred again to the decision of the High Court in Applicant A v Minister for Immigration and Ethnic Affairs (supra). The RRT referred to the judgment of McHugh J in which he stated (at 264):

"... while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."

28 The RRT then determined that the respondent was a member of a "particular social group" - that of "married women in Tanzania". The RRT reasoned:

"As detailed above, she shares certain characteristics and imputed attributes with other married women in Tanzania as a result of the cultural and religious mores of the Tanzanian society. Such mores dictate that the status of women is inferior to men and that a married woman should obey the male head of household (her husband). In this matter the characteristics [sic] which unite [sic] the group (of married women in

Tanzania) is not a common fear of persecution but an imputed characteristic or attribute adopted by the patriarchal Tanzanian society which designates such women as inferior with fewer rights than men."

29 The RRT then observed that there was a direct nexus between the respondent's membership of that particular social group and "the motivation of the persecutor, in this case the State authorities, to persecute her". (emphasis added)

30 The RRT continued:

"As a result of the denial by the State to the Applicant of fundamental rights or freedoms otherwise enjoyed by Tanzanians generally in that country, namely the right to access redress and protection of the criminal law and the services of the law enforcement agencies, for the reasons set out below, the Tribunal is satisfied that the Applicant has been the victim of persecution by reason of her membership of a particular social group of married women in Tanzania. Further, not only is there a failure of the State to provide such protection but, given the country information which indicates that had the Applicant sought protection she would have been pressured to return to the violent situation, the Tribunal considers that the State itself has implicitly encouraged or has been powerless to prevent the serious harm inflicted upon the Applicant by her husband (see Applicant A's case per McHugh J at [258]).

Although in this matter the Applicant, by her own admission, has not specifically sought the protection of the authorities in Tanzania, the Tribunal does not accept that this is a situation where "a government has not been given an opportunity to respond to a form of harm in the circumstances, where protection might reasonably have been forthcoming" ... Given the Applicant's evidence and the independent information relating to the prevalence of corruption and the position held by the Applicant [sic] husband, the Tribunal accepts the Applicant's claim that any approach to the police authorities would be fruitless and may have placed her at greater risk of harm from her husband."

31 The RRT stated that it viewed the infliction of such violence upon the respondent as a breach of her fundamental human rights. By failing to ensure effective observance of such rights, and by pressuring the respondent to remain in a situation where she continued to be subjected to cruel and inhuman behaviour, "the State was complicit in breach of such rights" (emphasis added). The State was also said to be in breach of Arts 7 and 8 of the Universal Declaration of Human Rights, and Arts 2, 5 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women adopted by the General Assembly of the United Nations on 18 December 1979. The RRT also drew attention to Arts 3 and 4 of the Declaration of the Elimination of Violence Against Women, adopted by the General Assembly of the United Nations in December 1993. That Declaration was said to be evidence of an emerging view that the State is obliged to protect women against violence, and possibly indicative of the emergence of a principle of customary international law to that effect.

32 Finally, the RRT stated:

"In any event, the Tribunal finds that the failure of the Tanzanian authorities to provide effective mechanisms to protect the fundamental rights of the Applicant in this regard and, given the particular cultural mores of the society which the independent information indicates prevents married women from having access to such protection, gives rise to a real chance of serious harm by reason of the Applicant's membership of a particular social group of married Tanzanian women."

33 The RRT concluded:

"In all the circumstances, the Tribunal is satisfied that there is a real chance the Applicant would face persecution upon return to Tanzania by reason of her membership of a particular social group, namely married women in Tanzania. That persecution takes the form of the denial of a fundamental right or freedom enjoyed by others in Tanzania by the State and the complicity by the State in the infliction of violence by the husband against the Applicant." (emphasis added)

The applicant's contentions

34 The applicant's contentions may be summarised as follows:

* Having found that her husband's motives for wanting to harm the respondent were personal, and not Convention related, the RRT erred in law in finding that the respondent had a "well-founded fear of being persecuted". The fact that the Tanzanian authorities were either unwilling, or unable, to protect her from such harm could not justify the RRT's conclusion that Tanzania was itself the source of any Convention related persecution.

* Having found that her husband's motives for wanting to harm the respondent were personal, and not Convention related, the RRT's conclusion that the State would be complicit in the infliction of any such harm upon her could not give rise to a "well-founded fear of being persecuted". A finding of complicity is accessorial and derivative. It depends for its existence upon a finding that there is a well-founded fear of persecution which has, as its source, the conduct of another. A finding of State complicity in Convention related persecution can only be made if the harm which is apprehended is itself the product of Convention related persecution.

* The finding by the RRT that the respondent had a well-founded fear of being persecuted by reason of her membership of a "particular social group", viz "married women in Tanzania", should not be permitted to stand. There had been no evidence before the RRT that "married women in Tanzania", as a class, were denied equal protection under the law. It was only a sub-group within that wider class, namely those who had been subjected to marital violence, who were said to have been denied that protection. It was implicit in the reasoning of the RRT that the respondent's membership of the designated social group required an additional qualification to define, and not merely to identify, the basis upon which the members of that group were exposed to persecution. That additional qualification was "those married women in Tanzania who have been subjected to marital violence". The addition of that qualification by the RRT involved circular reasoning. It also contravened the principles authoritatively laid down by McHugh J in Applicant A v Minister for Immigration and Multicultural Affairs (supra) at 263 where his Honour stated:

"The concept of persecution can have no place in defining the term "a particular social group". While decisions that have sought to apply the ejusdem generis principle to discern the meaning of "particular social group" are problematic because it is difficult to identify a genus common to "race, religion, nationality ... [and] political opinion" [fn: Art 1A(2) of the Convention], one factor common to these four categories is that the fact or fear of persecution plays no role in understanding their content. If the drafters did not intend persecution to be relevant in defining those four categories, it would seem likely that they did not intend persecution to play any part in defining what is a "particular social group". Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of "fear of persecution", "for reasons of" and "membership of a particular social group" in the definition of "refugee". It would also effectively make the other four grounds of persecution superfluous.

That being so, persons who seek to fall within the definition of "refugee" in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the "particular social group" of which they claim membership [fn: Secretary of State for the Home Department v Savchenkov [1996] Imm AR 28 (Court of Appeal (Civil Division))]. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution."

The respondent's contentions

35 The respondent's contentions may be summarised as follows:

* The RRT had been entitled to adopt an "unorthodox", but nonetheless appropriate, analysis of the concept of "well-founded fear of being persecuted". It could have found that the respondent's husband's motives for

threatening the respondent with violence were, at least in part, Convention related. The RRT had not, however, made that finding. It had focused instead upon the breach by Tanzania of its international obligations to protect the respondent, and its failure to provide her with equal protection under the law. A breach of those international obligations could amount to Convention related persecution if it were established that Tanzania was actuated, at least in part, in its inability, or unwillingness, to provide such protection, by the fact that the respondent was a member of the designated social group, namely "married women in Tanzania".

* The applicant's contentions regarding complicity might be correct as a matter of strict logic. However, the RRT had not based its decision to grant the respondent a protection visa solely upon any such finding of complicity. Any error in its reasoning in this regard did not, therefore, vitiate its decision.

* The RRT had not erred in either its finding that the respondent was a member of a "particular social group" viz "married women in Tanzania", or in its finding that there was a direct nexus between the inability or unwillingness of that country to provide protection, and the respondent's membership of that group.

36 I propose to deal with the various contentions of the parties in the order set out above.

The attribution of responsibility to Tanzania for Convention related persecution

37 The concept of "persecution" is not defined in the Act. Nor is it closely defined elsewhere. In Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 Mason CJ observed at 388 that it connoted "some serious punishment or penalty or some significant detriment or disadvantage".

38 In Ram v Minister for Immigration and Ethnic Affairs (supra) Burchett J stated (at 568):

"Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them 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"." (emphasis added)

39 It follows from this statement of principle that it is an essential condition of "persecution" that the source of that "persecution" must be able to be identified. If there is nothing more than a belief on the part of the claimant that he or she is being "persecuted" it will not be possible to demonstrate that the "attitude" of the persecutor is Convention related. It also follows that a finding by the RRT that there is a well-founded fear of persecution must include within it, expressly or implicitly, a finding as to the source of such persecution. Moreover, that finding must be able to be supported by the evidence and other material before the RRT.

40 Another helpful statement of principle is to be found in Applicant A v Minister for Immigration and Ethnic Affairs (supra) at 258-9 per McHugh J:

"Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory

conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution [fn: Yang v Carroll (1994) 852 F Supp 460 at 467]. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race [fn: cf Korematsu v United States (1944) 323 US 214. But the sanction must be appropriately designed to achieve some legitimate end of government policy. Thus, while detention might be justified as long as the safety of the country was in danger, lesser forms of treatment directed to members of that race during the period of hostilities might nevertheless constitute persecution. Denial of access to food, clothing and medical supplies, for example, would constitute persecution in most cases. It need hardly be said that a law or its purported enforcement will be persecutory if its real object is not the protection of the State but the oppression of the members of a race, religion, nationality or particular social group or the holders of particular political opinions.]

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny [fn: cf Shapiro v Thompson (1969) 394 US 618 at 634; City of Cleburne v Cleburne Living Centre Inc. (1985) 473 US 432 at 440]. In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution."

41 It is generally, but not invariably, the case that the source of any Convention related persecution will be the State. In Applicant A (supra) Brennan CJ stated at 233:

"The feared "persecution" of which Art 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to "the country of his nationality" for protection of his fundamental rights and freedoms but, if "a well-founded fear of being persecuted" makes the person "unwilling to avail himself of the protection of [the country of his nationality]", that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent." (emphasis added)

42 In Hui Quin Li v Minister for Immigration and Multicultural Affairs [1999] FCA 751, Dowsett J reiterated the requirement that, in order for a claimant to establish refugee status where the immediate source of the persecution is a private individual, the government of the claimant's country must at least be tolerating, or unable to control, the persecution of the claimant by that private individual.

43 In Applicant A McHugh J stated at 258:

"Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the de jure or de facto protection of their governments, are unwilling to return to the countries of their nationality." (emphasis added)

44 It seems from this last observation by McHugh J that had the respondent's husband's intended violence against her been motivated by one or more of the indicia of race, religion, nationality or political opinion, or the respondent's "membership of a particular social group" it would have been open to the RRT to find

that she had a "well-founded fear of being persecuted" for a Convention related reason. Such a finding, which the applicant conceded might have been open to the RRT on the material before it, would have entitled the RRT to conclude that Tanzania either encouraged, or was powerless to prevent, that private, but Convention related, persecution. A finding that the respondent was eligible for a protection visa could then properly have been made.

45 That was not, however, the approach adopted by the RRT. It was concerned that her husband's intended violence towards the respondent may have been motivated solely by his desire to gain revenge for having been humiliated by her having left him. The RRT was plainly in doubt as to whether it could treat this desire for revenge as falling somehow within the ambit of any of the Convention related reasons. It presumably thought, in the end, that it could not. It turned, therefore, to the inaction of the State in the face of the threats to the respondent. It treated Tanzania as though it were, by that inaction, the source of Convention related persecution. It found that by denying the respondent equal protection under the law, the State itself had become the "persecutor".

46 I am unable to accept the respondent's submission that the conclusion reached by the RRT that the State was the source of the Convention related persecution was properly open to it. The respondent's case before the RRT was that her husband, and not the State, was the source of her "well-founded fear of being persecuted". The RRT did not make that finding.

47 There is no authority of which I am aware which suggests that a State may be found to have engaged in persecution for a Convention related reason merely because it is unwilling, or unable, to protect its citizens from acts of violence which are not themselves, in any way, Convention related. Certainly McHugh J did not go so far as to suggest this in the passage cited (at 258) above where his Honour spoke of inaction by the State in the face of "persecution by private individuals or groups". In context, his Honour there meant persecution for a Convention related reason.

48 The very concept of "persecution", viz "the action of persecuting or pursuing with enmity or malignity" - The Oxford English Dictionary; "to pursue with enmity and injury" "to harass, worry, importune" - Concise Oxford Dictionary, suggests something actively done by a persecutor, and not mere inaction on the part of another who is in a position to prevent it.

49 Notwithstanding the suggestion in these and other definitions of the term "persecution" that only positive acts are embraced within that term, inaction in the face of Convention related violence may amount to Convention related persecution if that inaction is motivated by factors which are Convention related - Applicant A (supra) at 258 per McHugh J. Failure by the State to prevent Convention related violence, albeit violence which emanates from a non-State source, such as a private individual or group, will be sufficient, in such circumstances, to give rise to a successful claim to refugee status. The State may properly be viewed as complicit in that Convention related violence.

50 That is not, however, the situation in the present case. Tanzania itself was found by the RRT to be the source of the respondent's "well-founded fear of being persecuted". Absent a finding that the respondent's husband was motivated in his violence towards her by one or more of the matters set out in Art 1A(2) of the Convention, there was no evidence or other material before the RRT capable of giving rise to that conclusion.

51 Having found that the applicant has made good this first ground of review it is not strictly necessary that I deal with the remaining grounds in support of the application. As this matter is to be remitted to the RRT for reconsideration, however, I have thought it appropriate to touch briefly upon these remaining grounds as well.

The complicity finding

52 I accept the applicant's contention that it was not open to the RRT to find that the complicity of the State in the non-Convention related violence of the respondent's husband was a basis upon which it could be satisfied that she would face Convention related persecution if required to return to Tanzania.

53 "Complicity" by the State in the acts of another cannot, in my opinion, amount to Convention related persecution unless those acts of that other have the character of persecution which is Convention related.

54 Complicity is a form of accessorial liability. In the complicity situation there is only one offence, though there will be two or more offenders. If the principal offender has not committed the relevant offence, the accessory cannot, in ordinary circumstances, be convicted of complicity in that offence - Osland v The Queen (1998) 159 ALR 170; Surujpaul v The Queen [1958] 1 WLR 1050; Walsh v Sainsbury (1925) 36 CLR 464 at 477; Mallan v Lee (1949) 80 CLR 198 at 205, 210; see generally P Gillies, The Law of Criminal Complicity (1980), LBC at 138-148.

Married women in Tanzania as a particular social group

55 I am not persuaded by the applicant's contention that the RRT fell into the error identified by McHugh J in Applicant A (supra) at 263 of having defined the particular social group by the fact of their having been persecuted for a Convention related reason.

56 The RRT was, in my opinion, careful to avoid that error. The applicant's contention in this regard depends upon my drawing an inference that "by implication" the RRT must have included in the particular social group which it defined and identified the qualification that its members be "married women in Tanzania who have been subjected to marital violence".

57 That implicit qualification is said by the applicant to be the very persecutory factor which must be shown to be linked to the particular social group in order to establish Convention related persecution. It cannot, therefore, be part of the definition of that social group.

58 That is not, however, the way in which the RRT identified the characteristics of that social group. It did so by selecting criteria which were separate from, and independent of, that persecutory factor. It referred to the status of women generally in Tanzania. It concluded that the characteristic which united the members of that group was not a common fear of persecution, but an attitude towards them held by a patriarchal society.

59 I see nothing in this reasoning which is inconsistent with the judgment of McHugh J in Applicant A.

60 The finding that the particular social group was "married women in Tanzania", and that its members could be a target for Convention related persecution, is in no way inconsistent with recent authority.

61 In Islam v Secretary of State for the Home Department (unreported, House of Lords, 25 March 1999) their Lordships held, by majority, that "women in Pakistan" constituted a "particular social group" for the purposes of Art 1A(2) of the Convention.

62 In Islam both appeals involved married women who had been victims of domestic violence. They had been forced by their husbands to leave their homes. There was evidence of structural inferiority and of domestic and societal violence towards women which was sanctioned, or at least tolerated, by the State. Importantly, there was also evidence of disadvantage generally among women in Pakistan in the lack of protection afforded by the criminal justice system.

63 The majority of the House of Lords concluded that not only were "women in Pakistan" a "particular social group" within the meaning of that expression in Art 1A(2) of the Convention, but that the posited group did not infringe the limiting factor that persecution not be a defining element of that group.

64 Lord Steyn referred specifically to the decision of the High Court in Applicant A (supra) as authority for the proposition that there can only be a particular social group if the group exists independently of the persecution.

65 Lord Hope, however, observed:

"[t]he rule that the group must exist independently of the persecution is useful, because persecution alone cannot be used to define the group. But it must not be applied outside its proper context ... the notion of social group is an open-ended one, which can be expounded in favour of a variety of different classes susceptible to persecution."

66 It is clear that the majority of the House of Lords accepted that the social group category could include individuals fearing persecution on the basis of their gender.

67 If "women in Pakistan" can constitute a particular social group, a fortiori so can "married women in Tanzania".

68 In Thalary v Minister for Immigration and Ethnic Affairs (1997) 73 FCR 437 Mansfield J assumed, without deciding, that "single women in India" could, conformably with Applicant A, constitute "a particular social group". His Honour distinguished Applicant A from the case before him.

69 In Applicant A the appellant's fear of being persecuted was said to stem from her membership of a particular social group, namely those in China who, having only one child, do not accept the limitations placed upon them or who are coerced or forced into being sterilised. There the social group, as defined, only existed because it was the object of a particular government policy which was said to constitute the Convention related persecution. By majority (Dawson, McHugh and Gummow JJ, Brennan CJ and Kirby J dissenting) it was held that a group so defined could not constitute a "particular social group" for the purposes of Art 1A(2) of the Convention.

70 The decision of the High Court in Applicant A was followed by a Full Court of the Federal Court in Minister for Immigration and Multicultural Affairs v Chen Shi Hai (an infant) by his next friend Chen Ren Bing [1999] FCA 381. There the respondent claimed entitlement to refugee status by reason of his membership of a particular social group identified as being "black children" (children born outside the parameters of China's "One Child Policy"). The Full Court allowed the appeal brought by the Minister, principally because there had not been demonstrated before the RRT a causal link between the respondent's membership of the designated social group, and the fear of persecution. That causal link would exist if it could be shown that the prospective persecutor was motivated to act against the alleged refugee because he or she was a member of the particular social group. However, the causal link would not exist if the motivation were simply to enforce laws of general application - Applicant A (supra) at 243 per Dawson J. The respondent in Chen Shi Hai did not face persecution by reason of being a member of the designated social group. He faced such persecution by reason of his parents' conduct (as Chinese nationals) in contravening the relevant laws of China.

71 In my opinion, both Applicant A and Chen Shi Hai are distinguishable from the present case. There is nothing to indicate that the RRT included in the definition of the particular social group which it identified for the purposes of its finding that there was Convention related persecution, any of the persecutory factors set out in Art 1A(2). Nor can it be said that the claimed inaction on the part of Tanzania in the face of the threats of violence to the respondent would relevantly be the product of the enforcement of laws of general application, in the sense in which that expression was used in Chen Shi Hai.

72 In Islam (supra) a majority of the House of Lords was prepared to hold that the appellants not only fell within the scope of the words "particular social group", but also that they had a "well-founded fear of being persecuted" by reason of their membership of that group. Lord Steyn observed:

"Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic."

73 It should be noted, however, that Lord Hoffmann, who was also in the majority in Islam, commented:

"Domestic violence such as was suffered by Mrs Islam and Mrs Shah in Pakistan is regrettably by no means unknown in the United Kingdom. It would not however be regarded as persecution within the meaning of the Convention.

...

In the case of Mrs Shah ... the special adjudicator found that she was simply a battered wife. Although as a matter of ordinary language her husband might be said to have persecuted her, it was not persecution within the meaning of the Convention."

74 In the present proceedings the RRT identified the "particular social group" involved as "married women in Tanzania". Unlike the arguments advanced in Islam, it is not suggested by the Minister in the present case that "married women in Tanzania", or indeed "women in Tanzania", cannot, as a matter of law, constitute a "particular social group" for Convention purposes. The Minister submits rather that, in reality, the "particular social group" to which the respondent belongs implicitly has as part of its definition a persecutory factor, namely the marital violence perpetrated upon the members of that group.

75 Ultimately, whether a "particular social group" exists is to be determined as a question of fact, in accordance with the limiting principles authoritatively laid down by the High Court in Applicant A. It is those limiting principles which are said by the Minister to have been infringed in this case. For the reasons set out above I reject that contention.

Conclusion and Orders of the Court

76 As noted earlier, the principal submission advanced by the applicant in the present proceeding is that, on the evidence, it was not open to find that Tanzania itself was the source of any Convention related persecution. That submission, which I have found to be correct, is in some respects, strengthened by the decision of the House of Lords in Islam. In each appeal before their Lordships the husband of the particular appellant was identified as the persecutor. What made their conduct Convention related persecution was the motivation underlying that conduct. That motivation was found to be Convention related, and not private in nature.

77 Contrast the approach taken by the RRT in the present case. The violence feared by the respondent was not characterised as a continuation of past mistreatment, but rather as violence motivated by a desire on the part of her husband for revenge. Had the RRT been prepared to find that the violence which the respondent feared was Convention related, the result may have been that the respondent would have been entitled, lawfully, to refugee status.

78 The Minister has succeeded in making good two of the three grounds relied upon in support of this application, including the ground principally relied upon. It follows that the application must be allowed. The matter should be remitted to the RRT, differently constituted, to be reconsidered according to law. The respondent must pay the applicant's costs of and incidental to this application.

I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Weinberg.

Associate:

Dated:

Counsel for the Applicant:
Mr RRS Tracey QC

Solicitor for the Applicant:
Australian Government Solicitor

Counsel for the Respondent:
Mr JA Gibson

Solicitor for the Respondent:
Victoria Legal Aid

Date of Hearing:
16 March 1999

Date of Judgment:
11 June 1999