

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 141 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT 1999 AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3(1)

BETWEEN

S.J.L.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered the 10th day of December, 2014

1. The applicant and his wife both entered Ireland in April 2000. They both sought asylum in Ireland in 2005. They will be referred to individually as "the husband" and "the wife" in this judgment.

Background

2. The applicant and his wife are Chinese nationals. The husband was born on 13th January, 1977 and the wife was born on 5th March, 1975. The wife gave birth to a son on 6th August, 1998, in secret, as the child's father, the present applicant, was not then of the minimum age to marry. The wife and her husband were married on 20th January, 1999, by which time, the husband had reached 22 years of age and was lawfully entitled to marry. On registering their marriage, it was discovered that the wife was again pregnant. The family planning commissioner charged with the task of enforcing the stringent family planning rules, informed them that the child must be aborted. The applicant and his wife "*did not have the heart to get rid of the child*" and went into hiding. Their second son was born on 1st August, 1999, following which the wife returned home.

3. On 24th August, 1999, the wife was forcibly taken to hospital and permanently sterilised by cutting her fallopian tubes. The applicant and his wife were also charged in relation to the birth of their children. They were fined 8,500 Yuan in respect of the unplanned birth before the legal permitted age and 16,600 Yuan in respect of the second birth in the absence of legal permission. Of the total fines, 11,000 Yuan was paid.

4. Some short time later, the family planning enforcers returned seeking to take the husband for a sterilisation, whereupon the couple fled to Fuzhou City. They were unable to register with the authorities in Fuzhou or anywhere else without the required documentation and were unable to return to the husband's area to procure the documentation. Their children were left in the care of the husband's parents.

5. The applicant and his wife fled China on 15th February, 2000, through the aegis of a smuggling gang. They travelled through different destinations over the course of two months, sometimes by plane and sometimes by car. When not travelling, they were kept out of sight. They became separated in the course of the journey.

6. The wife arrived in Ireland on 23rd April, 2000, while the applicant arrived on 28th April, 2000. They lived among the Chinese community and worked in various Chinese restaurants.

7. In 2003, their family put them in touch with an agent, a Chinese national, whom they met in Dublin with a view to procuring legal status for the wife in the UK, with the hope that she would in due course be joined by her husband and children. The wife accompanied the agent to the UK on 28th March, 2003, but was detained at the airport. She recalled being fingerprinted and completing a form with the assistance of an interpreter. The agent then immediately brought the wife back to Ireland by boat, his plan having been unsuccessful. In the event of the agent successfully procuring legal status for the wife in the UK he was to be paid €10,000.

8. The wife continued working in various Chinese restaurants until detected without identity documents by the gardaí in November 2005. The wife gave evidence at her interview that it was a solicitor who applied for bail and who, having heard their history, advised them to apply for protection in Ireland. The husband stated in his interview that it was friends who suggested that they apply for asylum.

9. The applicants submitted their completed questionnaires on 7th December, 2005, wherein they claimed that if returned to China they would be made an example of by reason of their early marriage and early childbirth; that they would be exposed to wide publicity and regarded as monsters; that the husband would be forcibly sterilised; and that their children would be adversely affected. In response to the query about disability or medical conditions the wife stated that conjugal relations caused her pain as a result of scarring from her sterilisation operation.

10. The applicants were interviewed on 28th August, 2006. Thereafter reports were issued in respect of each applicant pursuant to s. 13 of the Refugee Act 1996 (as amended). In each case the Commissioner recommended that neither applicant be considered a refugee within the meaning of the Refugee Act 1996 (as amended).

11. The husband and wife each lodged appeals against the finding of the RAC. Further country of origin information was submitted with the notice of appeal. As the applicants had not applied for asylum immediately upon arrival in the State, s. 13(6)(c) of the Refugee Act 1996, as amended, applied to the appeal in respect of both applicants. In addition, in respect of the wife, the RAC also recommended that the matter came within s. 13(6)(d). As a result, the appeal was determined on the basis of a papers only appeal with no oral evidence being given.

12. By decisions dated 27th January, 2009, the same member of the RAT issued a decision that the applicants should not be declared refugees within the meaning of the legislation. The applicants have brought these judicial review proceedings against the decisions of the RAT.

13. I have already delivered judgment in respect of the wife's application for judicial review in *L.R.C. v. Refugee Appeals Tribunal* (2009 No. 142 J.R.).

Membership of a particular social group

14. Section 2 of the Refugee Act 1996 (as amended) provides as follows:-

"a refugee means a 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 or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it..."

15. The applicants argue that because they have had a second child in breach of China's one-child policy, they are people who could be seen as being part of a particular social group, namely people who have had two or more children in contravention of Chinese law. The applicants argue that if they are returned to China they will suffer persecution in that the husband may be forced to have a vasectomy, they will face heavy fines, and will suffer adverse effects in relation to employment as well as discrimination in respect of access to medical and educational benefits. The applicants argue that the starting point must be an examination of the relevant legal provisions. These are Regulation 10(1)(d) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006). Regulation 10 provides as follows:-

"(1) A protection decision-maker shall take the following into account when assessing the reasons for persecution—

...

(d) a group shall be considered to form a particular social group where in particular—

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."

16. Regulation 10 of the 2006 Regulations implements Article 10 of the Council Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The wording of Article 10 and Regulation 10 of the Irish Regulations is identical, save that in the Directive the word "and" is placed between sub-article 10(d)(i) and (ii) whereas in the Irish Regulations there is a disjunctive "or" between the two sub-regulations. Thus, it is arguable that the applicant only has to satisfy one of the specific grounds of relief in Regulation 10(1)(d).

17. The applicants also argue that note should be taken of the UNHCR Guidelines on the International Protection: "*Membership of a particular social group*" of 7th May, 2002. The Guidelines point out that two approaches have dominated decision making in common law jurisdictions in definition of what constitutes "*a particular social group*". The Guidelines dealt with the two approaches in the following way:-

"6. The first, the 'protected characteristics' approach (sometimes referred to as an 'immutability' approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the 'social perception' approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.

...

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The role of persecution

14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society. To use an example from a widely cited decision, '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 recognizable 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'."

18. Thus, there would appear to be two distinct approaches to the question of what can constitute a particular social group. The "protected characteristics" approach which identifies a group by reference to a uniting characteristic which is either immutable or so fundamental to human dignity that a person should not be compelled to change it, and the "social perception" approach which identifies a group by reference to a common characteristic which makes them a recognisable group and sets them apart from society as a whole.

19. The applicant has argued that the case law establishes that for a group to exist, it does not have to be cohesive. It is not necessary for the members of the group to know each other. The size of the group is not relevant. The relevant issue is whether there is a common element that the group shares amongst its members. The applicant must then establish that he fears persecution in his home country by virtue of membership of the particular social group.

20. Turning to the case law, the applicant referred to a number of Canadian, Australian and English cases. In *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314, the applicant had had a son and following his birth she had had an intrauterine device inserted. However, due to difficulty during her menstrual cycle, the applicant had to discontinue the use of the device. Over the next two years she became pregnant three times and had had three abortions.

21. In 1986, the applicant became pregnant again and decided against having a further abortion. She moved to live with her in-laws, so that the authorities in her home province would not learn of the pregnancy as she feared that she would be forced to have another abortion. She gave birth to her daughter. The applicant returned to her home province. She was not able to take her daughter with her. Shortly after returning home, the Family Planning Bureau came to her home and took her away to be sterilised. However, due to an infection, the operation had to be deferred for six months. The applicant fled from her home province to avoid sterilisation. She went back to her parent in-law's house.

22. Over the next three years, the applicant returned periodically to her home province to visit her son who remained there with his grandparents. In 1989, while visiting her home province, the applicant participated in three demonstrations supporting the pro-democracy movement. Shortly afterwards, following the crackdown in China, the public security bureau visited her parents' house on a number of occasions. It is unclear however whether these visits were in connection to the applicant or to her brother who participated in demonstrations in Beijing. In any event, it was shortly thereafter that the applicant fled to Canada.

23. In addressing the question as to whether the applicant could be seen as being a member of a particular social group, Linden J.A. made the following remarks:-

"In M.M., supra, Mahone J.A. indicated that the following criteria may be a useful basis for consideration in constructing a test for being a particular social group:

(1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness, and solidarity or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.

It is clear that women in China who have one child and are faced with forced sterilization satisfy enough of the above criteria to be considered a particular social group. These people comprise a group sharing similar social status hold a similar interest which is not held by their government. They have certain basic characteristics in common. All of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a women's reproductive liberty is a basic right 'ranking high in our scale of values' (E (Mrs.) v. Eve, [1986] 2 S.C.R. 388).

I find, therefore, that women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to come within the meaning of the definition of a Convention refugee (Re I. (RR). [1992] C.R.D.D. No. 87). This does not mean, of course, that all women in China who have more than one child may automatically claim Convention refugee status. It is only those women who also have a well-founded fear of persecution as a result of that who can claim such status."

24. In *Chan v. Canada (Minister of Employment and Immigration)* (128) DLR (4 Ed.) 213, the applicant sought Convention refugee status because of his fear of being forcibly sterilised for a violation of China's one-child birth control laws. In the course of a minority judgment, La Forest J. stated as follows in relation to the factors applicable when considering whether a particular social group was in existence:-

"Both Canada (Minister of Employment and Immigration) v. Mayers, [1993] 1 F.C. 154, and Cheung were approved in Ward for developing tests making the consideration of basic human rights the appropriate focus of a refugee inquiry. It was noted that groups defined by a characteristic that is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights, were beyond Canada's obligation and responsibility. The essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way."

25. In the course of the judgment, the judge dealt with the question of forced sterilisation:-

"In sum, I think that whatever technique is employed, it is utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving bodily mutilation, and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law. I fully endorse the remark of Linden J.A. in Cheung, at p. 324, that 'there are a few practices that could be more intrusive and more brutal than forced sterilization'."

26. Later in the judgment, La Forest J. stated as follows in relation to the basic right of couples to decide freely and responsibly the number, spacing, and timing of their children:-

"I accept the respondent's categorization of the right asserted as the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children. This fundamental right has been recognized in international law in the International Covenant on Civil and Political Rights, December 19, 1966, Can. T.S. 1976 No. 47, Art. 23(2), the Convention on the Elimination of All Forms of Discrimination against Women, March 1, 1980, Can. T.S. 1982 No. 31, Art. 16(1)(e) (to both of which Canada and China adhere), and by the draft Programme of Action of the United Nations International Conference on Population and Development, Principle 8, at p. 9, and Chapter VII, para. 7.2, at p. 34. In my view, this association is so fundamental to the human dignity of the appellant that he should not be forced to forsake it."

27. In the majority judgment, Major J. held that the appellant did not meet the burden of proof on the objective aspect of the test. Specifically, he had failed to adduce any evidence that his alleged fear of forced sterilisation was objectively well founded. The court found that the appellant had not produced any evidence to establish that the forced sterilisation used by some local authorities in China is inflicted upon men by the local authorities in his area. The court noted that the documentary evidence produced by the appellant strongly suggested that physically coercive penalties for breach of the one-child policy applied principally if not solely against women. The court held that the appellant failed to present any evidence with respect to a crucial element of this claim. There was, therefore, not legal basis upon which the Board could accept him as a Convention refugee and his appeal was dismissed.

28. In *Re Z.W.D. (Refugee Appeal No. 3/91, 20/10/1992)*, the court had to determine whether those who had had more than one child could be seen as a particular social group within the meaning of the Convention. The Refugee Status Appeals Authority was of the view that it was impossible to define the group. In the course of the judgment, R.P. Haines Q.C. stated as follows:-

"What is the group?"

Unless the group is capable of reasonably precise definition, it becomes difficult, if not impossible, to address the balance of the issues. The problem faced by the appellant is that identification of the group on the present facts is virtually impossible. For the group may conceivably be defined in any or all of the following terms:

(a) Persons, whether married or unmarried, whether parents or non-parents, who believe the one-child policy to be wrong, whether for political, religious or other reasons.

(b) Persons affected by the policy, irrespective of their agreement or disagreement with the policy.

(c) Married couples who do not yet have children, but who believe that they should nevertheless have an unrestricted right to procreate and to control their own fertility without interference by the State.

(d) Parents per se.

(e) Parents who already have one child and who would like to have a second child.

(f) Parents who already have one or more children and who believe that there should be no limit to the number of children they can procreate.

(g) Anyone who has been required to submit to any form of birth control measure whether by way of abortion, sterilization or otherwise.

No doubt different or further formulations are possible. Each formulation may, of course, produce possibly different answers in relation to the two further issues to be addressed.

It is our view that a coherent formulation of the group is impossible. The appellant's case must fail for this reason alone. But we will nevertheless proceed on the alternative basis that it is possible to define the group. We will, for convenience, address the broadest category in para (a) as well as the most narrow category in para (g).

Views of the community and of the agent of persecution

We have been presented with no evidence to show that the community of which the appellant is a part perceives persons in categories (a) through to (g) to be members of an identifiable social group.

The same is true in relation to the government officials who are the relevant agents of persecution.

Certainly, individuals who do not comply with official family planning policy would be identified as such, just as persons in any society who fail to obey the law will be identified as lawbreakers. It does not necessarily follow that such persons comprise, and are recognized as comprising a distinct social group within society.

The one observation of the 9th Circuit Court of Appeals in Sanchez-Trujillo approved of by Hathaway is appropriate in these circumstances:

'... the term does not encompass every broadly defined segment of the population, even if a certain demographic division does have some statistical relevance.'

We also return to the succinct observation made by Goodwin-Gill in The Refugee in International Law (1983) 30:

'The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities of the state.'

Here, there is no evidence that Chinese society, and more importantly, the authorities of the state, identify or take notice of the individuals concerned as a social group.

We believe that the appellant's case under the social group category must fail on these facts alone."

29. In *A. v. Minister for Immigration and Ethnic Affairs* [1997] HCA 4, Dawson J. gave the following definition of "a particular social group":-

*"As the Federal Court has recognised, the phrase 'particular social group' should be given a broad interpretation to encompass all those who fall fairly within its language and should be construed in light of the context in which it appears. A 'group' is a collection of persons. As Lockhart J pointed out in *Morato v Minister for Immigration*, the word 'social' is of wide import and may be defined to mean 'pertaining, relating, or due to ... society as a natural or ordinary condition of human life'. 'Social' may also be defined as 'capable of being associated or united to others' or 'associated, allied, combined'.*

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

*I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group. Nor is there anything which would suggest that the uniting particular must be voluntary. To the extent that *Sanchez-Trujillo v INS* suggests the contrary I do not think it is persuasive. Furthermore, the significance of the element as a uniting factor may be attributed to the group by members of the group or by those outside it or by both."*

30. In the course of his judgment, Kirby J. noted that the following categories had been upheld as particular social groups, the membership of which gave rise to a well founded fear of persecution:-

"members of the nobility of a former Eastern European kingdom; members of the landed gentry in pre-communist Romania; farmers in areas of military operations in El Salvador; a former funeral director and his wife engaged in the private sector in procommunist Poland; a woman from Trinidad subject to spousal abuse over 15 years; homosexual and bisexual men and women in countries where their sexual conduct, even with adults and in private, is illegal; dispossessed landlords who have abandoned their claim to property after revolution, but are still subject to stigma; unmarried women in a Moslem country without the protection of a male relative living in that country; members of the Tamil minority fleeing from Sri Lanka; young males who have evaded or deserted from compulsory military service in countries engaged in active military operations condemned by the international community; members of stigmatised professional groups and trade unions; soldiers of the army of the former regime in South Vietnam; Roman Catholics and ethnic Chinese fleeing from Vietnam; and Freemasons escaping from Cuba.

On the other hand, claims have been rejected where based on membership of the following groups: the 'capitalist class' in a former East European country; an Indian woman who had married out of her caste; members of a recreational club; a person accused of corruption in Ghana; a person who had been a member of an Irish terrorist group and was suspected, in Ireland, of permitting hostages to escape; a Bolivian migrant drug offender fearful of punishment as a drug informant if he were returned to Bolivia; a member of the wealthy Sikh community returning to the Punjab with money which would be subject to the risk of robbery and extortion; an Iranian seaman imprisoned in Australia for importation of illegal drugs liable to further heavy punishment if returned to Iran; and a stepson of a Colombian storekeeper whose shop was blown up by a drugs cartel when he refused to trade for them."

31. In *Liu v. Secretary of State for the Home Department* [2005] 1 WLR 2852, the applicant was a citizen of China. She came from an isolated area where she lived with her husband and two children. China's reproduction control laws restricted couples to the right to have one child, eligible couples being entitled to apply for permission to have a second. In October 2000, the applicant, when eight months pregnant with her third child, was forcibly taken to hospital and the foetus removed by caesarean section. Subsequently, the applicant refused to undergo sterilisation and escaped from the officials and left China, arriving in the United Kingdom in June 2002.

32. An adjudicator allowed the applicant's appeal against the rejection by the Secretary of State of her asylum claim, holding that she

had a well founded fear of persecution for reasons of her "*membership of a particular social group*" should she be returned to China, within the meaning of Article 1A(2) of the Convention and Protocol relating to the Status of Refugees. The Secretary of State's appeal was allowed by the Immigration Appeal Tribunal on the ground that the applicant was not at risk of persecution as a member of a particular social group since the group contended for by the applicant, namely rural women accused of transgressing the population control policy by choosing to have a third child, did not exist independently of the feared persecution.

33. On the applicant's appeal, the court held allowing the appeal, that although the general principle that a "*particular social group*" within the meaning of Article 1(2) of the Convention should exist independently of the feared persecution had an important role to play, it was qualified in that the actions of the persecutors might serve to identify or even cause the creation of, a particular social group in society; that it was not possible to be satisfied that the Appeal Tribunal had considered that qualification to the general principle, and that, accordingly, the case would be remitted to a differently constituted the Appeal Tribunal for rehearing.

34. In the course of his judgment, Maurice Kay L.J. cited the following passage from the textbook "*the Refugee in International Law*" by Goodwin-Gill:-

"The essential question, however, is whether the persecution feared is the sole distinguishing factor that results in the identification of the particular social group. Taken out of context, this question is too simple, for whenever persecution under the law is the issue, legislative provisions will be but one facet of broader policies and perspectives, all of which contribute to the identification of the group, adding to its pre-existing characteristics. For example, parents with one or more children can be considered as an identifiable social group because of (1) their factual circumstances and (2) the way in which they are treated in law and by society. Arbitrary laws might subject red-headed people, mothers of one or more children, and thieves to a variety of penalties, reflecting no more than the whims of the legislator. Where such laws have a social and political context and purpose, and touch on fundamental human rights, such as personal integrity or reproductive control, then a rational basis exists for identifying red-headed people and mothers of one or more children as a particular social group, in their particular circumstances, while excluding thieves. For the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices and laws. Treatment amounting to persecution thus remains relevant in identifying a particular social group, where it reflects State policy towards a particular class."

35. In the course of his judgment, Rix L.J. looked at the Canadian decisions. He was of opinion that *Cheung v. Canada (Minister of Employment and Immigration)* was the leading case. He noted that it concerned the same issue as the current appeal, viz the position of woman in China who have more than one child and face sterilisation. The Canadian Court of Appeal held that such women constituted a particular social group. The essence of the reasoning was that such women "*are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it*".

36. He noted that *Chan v. Canada (Minister of Employment and Immigration)* (128 DLR (4th) 213) concerned essentially the same issue, but from the point of view of the husband who faced sterilisation. On that occasions, the Canadian Court of Appeal decided by a majority that the husband's case failed, first, because he had not shown a well founded fear of sterilisation on the facts; and secondly, because, were he to be so persecuted, it would have been for what he did, not for what he was, and he could not, therefore, establish persecution by reason of membership of a particular social group.

37. On appeal to the Canadian Supreme Court, the decision in *Chan* was upheld by a majority of four to three, but only on the facts. For these purposes, the majority were prepared to assume, without deciding that on the issue regarding membership of a particular social group, that *Cheung's* case (and not the Court of Appeal in *Chan's* case) gave the correct answer. The minority, however, in a judgment delivered by La Forest J., built on *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 and *Cheung's* case in focusing again on the question whether "*the appellant is voluntarily associated in a manner so fundamental to his human dignity that he should not be required to forsake it*".

38. In concluding that issue in the appellant's favour, La Forest J. rejected the distinction between what a parent does and is. Having reviewed the Australian case law, Rix L.J. then continued:-

"In my judgment, there are at least two strands apparent in this jurisprudence. The first relates to what can amount to a defining characteristic of a particular social group. In this connection Acosta, Ward and Cheung are of particular interest and are probably saying much the same thing. In Shah Lord Hoffmann adopted the language of Acosta (at 651e/f):

'where it was said that a social group for the purposes of the Convention was one distinguished by:
'an immutable characteristic...[a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.'

This was true of the other four grounds enumerated in the Convention. It is because they are either immutable or part of an individual's fundamental right to choose for himself that discrimination on such grounds is contrary to principles of human rights.'

The second strand relates to how the characteristic and thus the particular social group in question may be identified. It may be identified by discrimination and even in part by means of discrimination amounting to persecution: but that will not matter as long as such persecution is not the sole means of definition or identification. It may be identified by the recognition or perception of the surrounding society in general that the group in question shares a particular characteristic. Or it may be that the distinguishing characteristic and thus the group in question may simply be objectively observable, irrespective of the insight of the general society in which it is placed. It may be said that these concepts have not yet been fully worked out in the jurisprudence."

39. In looking at the definition of the particular social group, the learned judge referred to the test laid down by Gleeson C.J., and Gummow and Kirby JJ., in *Applicant S. v. Minister for Immigration and Multicultural Affairs* [2004] 206 ALR 242:-

"First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."

40. Rix L.J. concluded his review of the case law in the following terms:-

"The case of parents of more than one-child families who face forced sterilisation in China has engendered controversy and some finely balanced decisions in Canada and Australia. It seems, however, that in principle the developing jurisprudence in both countries on balance favours the possibility of finding, rather than the necessity of rejecting, a case of persecution by reason of membership of a particular social group."

41. In *Fornah/K. v. Secretary of State for Home Department* [2007] 1 AC 412, Lord Hope of Craighead stated as follows in relation to the nature of persecution and the definition of the social group:-

"I do not agree with the approach that the Court of Appeal took to this issue in Quijano. It is, of course, well established that the persecution which is feared cannot be used to define a particular social group: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 264 per McHugh J. But this simply means that there must be some characteristic other than the persecution itself, or the fear of persecution, that sets the group apart from the rest of society. This may be because its members share a common characteristic other than their risk of being persecuted, or because they are perceived as a group by society. It is the latter approach that defines the family as a particular social group. Each family is set apart as a social group from the rest of society because of the ties that link its members to each other, which have nothing to do with the actions of the persecutor."

42. The learned judge continued at para. 51 of his judgment:-

"For these reasons I would answer the questions which I posed earlier (see para 40) in this way. It is not necessary to prove that the primary member of the family of which the asylum seeker is also a member is being persecuted for a Convention reason. Nor need it be proved that all other members of the family are at risk of being persecuted for reasons of their membership of the family, or that they are susceptible of being persecuted for that reason. This approach has the advantage that it is unnecessary to identify all those who are, and those who are not, to be treated as members of the family for the purposes of article 1A(2). Questions as to whether it includes not only the asylum seeker's sisters but his cousins and his aunts too are avoided. It avoids the circularity that arises where what is said to unite persons into a particular social group is their common fear of persecution: see Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 per Dawson J at p 242, McHugh J at p 263."

43. Baroness Hale of Richmond had the following to say in relation to persecution and its connection to the Convention:-

"97. Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention. Asylum can only be claimed by people who have a well-founded fear of persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Of these, 'membership of a particular social group' has proved the most difficult to define, but is increasingly being used to push the boundaries of refugee law into gender-related areas such as domestic violence, enforced family planning policies, and FGM..."

44. In *Regina v. Immigration Appeal Tribunal & Anor, ex parte Shah* [1999] 2 AC 629, two applicants who were both citizens of Pakistan but were otherwise unconnected with each other, suffered violence in their country of origin after their husbands had falsely accused them of adultery. Both applicants arrived in the United Kingdom and were granted leave to enter as visitors for six months. Both subsequently applied for asylum on the ground that having been abandoned by their husbands, lacking any other male protection and condemned by the local community for sexual misconduct, they feared that if they were returned to Pakistan they would suffer persecution in the form of physical and emotional abuse, would be ostracized and unprotected by the authorities, and might be liable to death by stoning in accordance with Pakistani Sharia law. The Secretary of State for the Home Department refused the applications on the grounds that the applicants were not members of a "particular social group" within the meaning of Article 1A(2) of the Convention and Protocol relating to the Status of Refugees, so as to entitle them to refugee status under the Convention. Special adjudicators dismissed the applicant's appeals. The Immigration Appeals Tribunal dismissed the appeal in I's case and refused leave to appeal. Sedley J. granted S's application for judicial review of the Tribunal's decision refusing her leave to appeal against the adjudicator's decision, holding that she was capable of bringing herself within the definition of membership of "a particular social group" within the meaning of Article 1A of the Convention. The Court of Appeal dismissed an appeal by I and allowed an appeal by the Secretary of State against the decision in S's case on the ground that I and S were not members of a particular social group since they had no common uniting attribute which existed independently of the feared persecution.

45. On appeal by the applicants, it was held, in allowing the appeals, that a "particular social group" within the meaning of Article 1A(2) of the Convention had to exist independently of the persecution so that persecution alone could not be relied on to prove the group's existence but that cohesiveness was not an essential requirement (per Lord Steyn, Lord Hoffman and Lord Hope of Craighead). It was held that in Pakistan women were discriminated against as a group in matters of fundamental human rights and the State gave them no protection because they were perceived as not being entitled to the same human rights as men. The court thus concluded that women in Pakistan constituted a particular social group for the purposes of Article 1A(2) that (per Lord Steyn and Lord Hutton). It was also held that the applicants belonged to a "particular social group" which was more narrowly defined by the unifying characteristics of gender, of being suspected of adultery, and lacking protection from the State and public authorities: that although not all members of the group were persecuted, the applicant's well founded fear of persecution, which was sanctioned or tolerated by the State, was for reasons of membership of a particular social group and that accordingly, they were entitled to asylum under the Convention.

46. Lord Steyn had the following to say in relation to the words "membership of particular social group":-

"Putting to one side the separate question whether the appellant in the Islam case can rely on the Convention ground of political opinion, the principal issue before the House is the meaning and application of the words 'membership of a particular social group'. It is accepted that each appellant has a well founded fear of persecution in Pakistan if she is returned to that country. The appellants are outside the country of their nationality. And they

are unable to avail themselves of the protection of Pakistan. On the contrary, it is an unchallenged fact that the authorities in Pakistan are unwilling to afford protection for women circumstanced as the appellants are. Except for the requirements inherent in the words 'persecution for reasons of ... membership of a particular social group' in article 1A(2) all

the conditions of that provision are satisfied. Two issues remain: (1) Do the women satisfy the requirement of

'membership of a particular social group?' (2) If so, a question of causation arises, namely whether their fear of persecution is 'for reasons of' membership of a particular social group. I will now concentrate on the first question. It is common ground that there is a general principle that there can only be a 'particular social group' if the group exists independently of the persecution. In *A. v. Minister for Immigration and Ethnic Affairs and Another* (1997) 142 A.L.R. 331, 358 McHugh J. neatly explained the point as follows:-

"... If it were otherwise, Art. 1(A)(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..."

In other words relying on persecution to prove the existence of the group would involve circular reasoning. It is therefore unsurprising that counsel for the appellants and counsel for the United Nations High Commissioner for Refugees (UNHCR) accept the general principle that there can only be a 'particular social group' if it exists independently of the persecution."

47. Steyn L.J. looked at the concept of women in Pakistan as a group in the following manner:-

"The idea so incisively put forward by Lord Hoffmann is neither novel nor heterodox. It is simply a logical application of the seminal reasoning in *Acosta's case* 19 I. & N. 211. Relying on an *ejusdem generis* interpretation the Board interpreted the words 'persecution on account of membership in a particular social group' to mean persecution 'that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic'. The Board went on to say that the shared characteristic might be an innate one 'such as sex, colour, or kinship ties'. This reasoning covers Pakistani women because they are discriminated against and as a group they are unprotected by the state. Indeed the state tolerates and sanctions the discrimination. The analogy of discrimination against homosexuals who may in some countries be a 'particular social group' supports this reasoning. What is the answer to this reasoning? It avoids any objection based on the principle that the group must exist deors the persecution. The objection based on a requirement of cohesiveness foists an impermissible restrictive requirement on the words of article 1A(2). What then is left by way of counter-argument? Counsel for the Secretary of State said that there is a clear answer to this line of reasoning. That turned out to be the fact that some Pakistani women are able to avoid the impact of persecution, e.g. because their circumstances enable them to receive protection. In such cases there will be no well founded fear of persecution and the claim to refugee status must fail. But this is no answer to treating women in Pakistan as a relevant social group. After all, following the New Zealand judgment in *Re G.J.* [1998] 1 N.L.R. 387 I regard it as established that depending on the evidence homosexuals may in some countries qualify as members of a particular social group. Yet some homosexuals may be able to escape persecution because of their relatively privileged circumstances. By itself that circumstance does not mean that the social group of homosexuals cannot exist. Historically, under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution. Nazi Germany, Stalinist Russia and other examples spring to mind. To treat this factor as negating a Convention ground under article 1A(2) would drive a juggernaut through the Convention. My Lords, on careful reflection there is no satisfactory answer to the argument that the social group is women in Pakistan.

The narrower group

If I had not accepted that women in Pakistan are a 'particular social group', I would have held that the appellants are members of a more narrowly circumscribed group as defined by counsel for the appellants. I will explain the basis of this reasoning briefly. It depends on the coincidence of three factors: the gender of the appellants, the suspicion of adultery, and their unprotected position in Pakistan. The Court of Appeal held (and counsel for the Secretary of State argued) that this argument falls foul of the principle that the group must exist independently of the persecution. In my view this reasoning is not valid. The unifying characteristics of gender, suspicion of adultery, and lack of protection, do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state. Conceptually such a group does not in a relevant sense depend for its existence on persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands. In *A. v. Minister for Immigration and Ethnic Affairs* 142 A.L.R. 331, 359 McHugh J. explained the limits of the principle. He said:

"Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. 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."

The same view is articulated by Goodwin-Gill, *The Refugee in International Law*, 2nd ed., (1996) at p. 362. I am in respectful agreement with this qualification of the general principle. I would hold that the general principle does not defeat the argument of counsel for the appellants."

48. In the course of argument, the respondents relied on the decision in *Msengi v. Minister for Justice, Equality and Law Reform & Anor* [2006] IEHC 241, where the applicant was a woman who had been raped in South Africa. The issue was whether she was part of "a particular social group" defined as women who had been raped or were at risk of being raped. This was not possible, as to do so would be to define the group by reference to the persecution alleged to exist. The group did not exist independently of the persecution. In the course of his judgment, MacMenamin J. stated as follows:-

"The applicant submits that the applicant belonged, arguably, to a potential social group of relevance. This social group was

(a) women in general and/or vulnerable women in respect of rape;

(b) a woman who has been the subject of sexual violence in the past in respect of a subsequent gun attack, and

(c) women with HIV.

It is submitted that HIV positive women in South Africa constitute a particular social group and that the Tribunal neither considered this nor whether this was a particular social group.

The applicant relies on a number of authorities including Shah and Islam regarding the proper approach to a particular social group wherein discrimination is isolated as the key factor.

In the case of Skenderai v. Home Secretary [2002] 4 All ER 555 Auld L.J. summarised the authorities as concluding that membership of a particular social group included:

- 1. some common characteristic either innate or which by reason of conviction or relief cannot readily be changed*
- 2. shared or internal defining characteristics giving particularity though not necessarily cohesion to the group*
- 3. (subject to possible qualification) a characteristic other than a shared fear of persecution, and*
- 4. (subject to possible qualification) in non-state persecution cases, a perception by society of the particularity of the social group.*

...

On behalf of the respondent it is submitted that the proposition advanced by the applicant herein is misconceived and contrary to the accepted view as expressed in Shah that it is a general principle that there can only be a 'particular social group' if the group exists independently of the persecution. Ms. Stack B.L. puts the position succinctly where she states that while persecution cannot define the social group it may serve to identify it. However the social group must exist independently of the persecution.

In this case because the group is defined by reference to rape it is submitted that the applicant is engaged in circular reasoning which was rejected by the House of Lords in Shah. The necessary element or litmus test is that there must be discrimination. Counsel adds that while it is true that women are more likely to be the victims of sexual violence, that does not mean that women in South Africa are more likely to be the victims of sexual violence because they are women."

49. The learned judge concluded his judgment with the following comments:-

"It seems to me that there is one issue only which is arguable and substantial, and that is whether HIV positive women in South Africa constitute a particular social group and receive State protection. It would be inappropriate in a leave application to go further or to trespass on the issues which arise for full hearing.

I consider that the grounds upon which leave should be granted should be considerably narrowed to read:

'The first named respondent failed to take into account adequately or at all the fact or significance of the applicant's status as an HIV positive person in the consideration of persecution in the future and as to her membership of a particular social group in the consideration of whether State protection was available to her.'"

Conclusions

50. Applying the various dicta in the case law already cited herein, it seems to me that it is arguable that the applicant could be seen as being part of a particular social group. The applicant and his wife can be seen as part of a social group defined as people who, contrary to the one child policy in China, have had more than one child without permission. The shared characteristic is that they are parents of more than one child born in China without official permission. This characteristic cannot be changed by the applicants. In that capacity, it is arguable that they face persecution in the form of forced sterilisation (already carried out on the wife and threatened against the husband); large fines; loss of employment; and discriminatory treatment such as discrimination in relation to medical and educational benefits.

51. In the present case there was a large amount of country of origin information submitted on behalf of the applicant, both to the RAC and on appeal to the RAT. The RAT appears only to have had regard to one piece of COI on the basis that it dealt with Fujian province. This was the UK Home Office Report of April 2002 which was attached to the s. 13 report. Where COI documentation is submitted, it must be looked at and incorporated into the decision of the Tribunal, even if only reject the documents, but the reasons for so rejecting the documentation should be clearly stated. In this case, the remainder of the COI documentation was ignored by the RAT. It is necessary to refer the matter back to the RAT for further consideration of the applicant's claim in light of all the documentation submitted. The RAT will have to reconsider in the light of all the COI submitted whether the applicant and his wife husband are refugees owing to the fact that they fear persecution by reason of their membership of a particular social group.

Credibility Findings

52. Adverse credibility findings were made against the husband on account of the fact that he did not know how much of the fines remained to be paid to the Chinese Government. As payment of 11,000 Yuan had been completed, the balance of the 25,000 Yuan remained to be paid. The husband's solicitor suggested that this lack of knowledge could be due to the fact that the husband had departed from China before the wife. However, this does not appear to be correct, as they both left China together and only became separated in the course of the journey to Ireland.

53. The RAT was also critical of the fact that the applicants could not provide more information of their journey to Ireland and found that as they had left China by plane, they should be been aware at least of their initial destination.

54. The RAT was also critical of the fact that the wife had said that she had not applied for asylum in any other country. She stated

that she did not know that she had filled in an asylum application form in the UK in 2003. The RAT was of opinion that she should have known this, as she had been provided with an interpreter to help her fill out the form.

55. The Tribunal was also entitled to seek a good explanation as to why the applicants had waited over five years before applying for asylum in Ireland. Indeed, this step was only taken after they had come to the attention of the gardaí in 2005. In her questionnaire, the wife stated that when the couple were caught in Killarney in 2005, it was the solicitor who helped them get bail who advised them to apply for protection in this country because of their background.

56. I am satisfied that there was evidence on which the RAT was entitled to reach adverse credibility findings against the applicants. However, the applicants have argued that these findings were in relation to peripheral aspects of their claim. They pointed out that in relation to the core of their story, being the birth of their two sons and the forced sterilisation of the wife, their account had stood up to scrutiny and had been supported by case specific documentation including the marriage certificate, birth certificate, children's birth certificates, maternity hospital receipt, receipt for paying fine for second child, notification of fine for the second child, and a working certificate. In the circumstances, I am satisfied that the applicants' lack of credibility related not to their core story, but to peripheral aspects of their account.

57. In the circumstances, I will quash the decision of the RAT dated 27th January, 2009, and direct that the matter be referred back to the Tribunal for a fresh determination in light of the COI submitted on behalf of the applicant.