# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

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CHEN SHI HAI (an infant) by his next friend
CHEN REN BING APPELLANT

AND

THE MINISTER FOR IMMIGRATION
AND MULTICULTURAL AFFAIRS RESPONDENT

*Chen Shi Hai v The Minister for Immigration and Multicultural Affairs*
[2000] HCA 19
*13 April 2000*
P41/1999

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 13 April 1999 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

**Representation:**

R E Lindsay with H N H Christie for the appellant (instructed by Director of Legal Aid, Legal Aid Western Australia)

R R S Tracey QC with P R Macliver for the respondent (instructed by Australian Government Solicitor)

## CATCHWORDS

### Chen Shi Hai v The Minister for Immigration and Multicultural Affairs

Immigration law – Refugees – Appeal from decision of Refugee Review Tribunal – Application on behalf of minor by his next friend for grant of protection visa – Application refused – Appellant "black child" under the one child policy of the People's Republic of China – Unchallenged finding by Refugee Review Tribunal that appellant would suffer serious disadvantage amounting to persecution – Whether "black children" constituted a "particular social group" for the purposes of the Convention relating to the Status of Refugees – Whether appellant faced persecution "for reasons of" membership of such a group or by reason of parents' conduct in contravening the one child policy – Whether persecution can arise in the absence of "enmity" or "malignity".

Word and phrases – "persecution" – "for reasons of" – "membership of a particular social group".

*Migration Act* 1958 (Cth), ss 36(2), 65(1), 481(1)(b).
Convention relating to the Status of Refugees (1951), Art 1A (2).
Protocol relating to the Status of Refugees (1967).

1 GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ. The appellant, Chen Shi Hai, is 3½ years old. He is a Chinese national born in Australia to Chinese parents. He was born while his parents were detained in the Port Hedland Immigration Detention Centre. An application was made on his behalf under s 36(2) of the *Migration Act* 1958 (Cth) ("the Act") for a protection visa[1]. That application was refused by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister"). The delegate's decision was later affirmed by the Refugee Review Tribunal ("the Tribunal")[2]. It is the Tribunal's decision with which this appeal is concerned.

2 Because of the way in which the case was conducted, at first instance and on appeal, in the Federal Court of Australia, the issues which arise for this Court's determination are confined. Although the Tribunal rejected the contention that the appellant was entitled to refugee status, it made a finding in his favour, which turned largely upon its view of the facts, and which was not challenged in the Federal Court. The Tribunal found that the appellant faced a real chance of persecution in China as a member of the social group known as "black children". However, it ruled against him on legal grounds relating to the interpretation of the relevant definition of a refugee. It is those legal grounds that are in issue in the present appeal. This Court has not been called upon to consider whether the Tribunal was right in its finding that certain apprehended conduct in China would amount to persecution of a particular social group. In our reasons we shall assume that the finding was correct.

Eligibility for protection visa

3 To be eligible for a protection visa, a person must be a refugee as defined in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "the Convention"). So far as is presently relevant, Art 1A(2) of the Convention defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of ...

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**1** Section 36(2) of the Act provides for "protection visas" to be granted to persons to whom Australia has protection obligations under the Convention relating to the Status of Refugees 1951 as amended by the Protocol relating to the Status of Refugees 1967. Fuller details of the applicable legislation are set out in *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 73 ALJR 746 at 765-766; 162 ALR 577 at 603-604.

**2** Section 414(1) of the Act requires the Tribunal to review "an RRT-reviewable decision" (defined in s 411(1)(c) to include a decision to refuse to grant a protection visa), provided the criteria specified in s 412 for lodging an application for review are complied with.

membership of a particular social group ... is outside the country of his nationality and ... owing to such fear, is unwilling to avail himself of the protection of that country".

4 No point has been taken that, by reason of his age and circumstances, the appellant, himself, lacks the fear necessary to bring him within the Convention definition of "refugee". Rather, it is accepted that his parents' fears on his behalf are sufficient. Nor is it in issue that those fears are well founded. In this regard, there is an unchallenged finding by the Tribunal that it is likely that, in China, the appellant will suffer serious disadvantage amounting to persecution. What is in issue is whether, in terms of the Convention, that persecution is "for reasons of ... membership of a particular social group." To understand how that question arises, it is necessary to say something of the appellant's family background.

The appellant's family background

5 The appellant is the youngest of his parents' three children. His parents, who were not then of marriageable age, were refused permission to marry in China in 1989. This notwithstanding, their first child, a son, was born in that country in 1990. He came with them to Australia in 1994 on a boat known as the "Cockatoo". Their second child, a daughter, was born in China in 1992 and is still there. The appellant was born in Australia in 1996. His parents, whose applications for protection visas had been refused, were then awaiting return to China.

The decision of the Refugee Review Tribunal

6 The Tribunal found that, "because [the appellant] was born outside the parameters of [China's] One Child Policy, [and] also, and perhaps primarily, because he was born of an unauthorized marriage", he is what is known in China as a "black child". It also found that "black children" or "hei haizi" are a social group for the purposes of the Convention. Further, the Tribunal found that, as a "black child" in China, the appellant would be "denied access to food, education and to health care beyond a very basic level [and would] probably face social discrimination and some prejudice and ostracism".

7 Based on the findings set out above, the Tribunal concluded that the appellant "faces a real chance of persecution in [China] *because of (in a strict causative sense)* his membership of a particular social group" but not "*'for reasons of'* his membership of [that] group". (emphasis added) That was because the consequences which the appellant would be likely to suffer in China would not "result from any malignity, enmity or other adverse intention towards him on the part of the [Chinese] authorities". Rather, in the Tribunal's view, it

would result from their intention "to penalize those who have children outside the approved guidelines".

8 Although it based its decision on the absence of "malignity, enmity or other adverse intention", the Tribunal also expressed the view that the adverse treatment likely to befall the appellant in China would not result "primarily from the direct action of the authorities". Instead, in the Tribunal's view:

> "it is because his parents will be in a serious financial predicament upon return to [China] that they will be unable to avoid the consequences of the penalties imposed by the authorities in a way that other families faced with similar penalties might. For example, when the benefits of subsidized education are withdrawn, Chen Shi Hai will no doubt be unable to have an education because his parents will be unable to afford to pay for that education themselves – whereas with most families, the effect would most likely be much less severe."

Proceedings in the Federal Court

9 Proceedings were brought in the Federal Court of Australia for review of the Tribunal's decision[3]. At first instance, French J held that, for the purposes of the Convention, there was no need for persecution to be motivated by "enmity" or "malignity". It was sufficient, in his Honour's view, that it be motivated by "possession of the relevant Convention attributes". And given the Tribunal's unchallenged findings with respect to "persecution" and "member[ship] of a particular social group", it was in error, his Honour held, "in failing to conclude that the necessary connection between the persecution and the child's membership of [the] particular social group was made out." In the result, it was ordered that the matter be remitted to the Tribunal to be dealt with on the basis that the appellant was entitled to refugee status.

10 The Minister successfully appealed from the decision of French J to the Full Court of the Federal Court. The Minister's appeal succeeded on two grounds. First, it was held by majority (O'Loughlin and Carr JJ, R D Nicholson J dissenting) that the adverse treatment likely to befall the applicant in China was not "by reason of" his being a member of a social group of "black children".

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**3** Section 476(1) of the Act permits an application to be made to the Federal Court, on any of a number of specified grounds, for review of a "judicially-reviewable decision" (defined in s 475(1)(b) to include a decision of the Tribunal).

Rather, in their Honours' view, it was because of "his parents' conduct (as Chinese nationals) in contravening the relevant laws of China."

11 The second ground on which the Minister succeeded in the Full Court concerns the question whether, for the purposes of the Convention, the appellant is a member of a particular social group, a question not raised in the proceedings before French J. In this regard, O'Loughlin and Carr JJ held that "black children" could not constitute a group of that kind, whereas R D Nicholson J would have remitted the matter to the Tribunal to reconsider whether, for the purposes of the Convention, the appellant was a member of such a group. In the result, the orders of French J were set aside and the order of the Tribunal restored.

A particular social group

12 In *Applicant A v Minister for Immigration and Ethnic Affairs*[4], Dawson J correctly pointed out, by reference to what was said in *Ram v Minister for Immigration and Ethnic Affairs*[5], that, in the Convention, there is a '"common thread' which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group"'. Even so, it is convenient to deal with the question whether "black children" can constitute "a particular social group" as a discrete question. Moreover, it is convenient to deal with that question before considering the nature of the connection which must exist between "persecuted" and the grounds specified in the Convention definition of "refugee" if a person is to come within that definition.

13 It was held in *Applicant A* that the "common thread" which links "persecuted", "for reasons of" and "membership of a particular social group" in the Convention definition of "refugee" dictates that "a shared fear of persecution [is not] sufficient to constitute a particular social group"[6]. To treat it as sufficient would be to ignore the several parts of the definition for, as McHugh J pointed out,

> "Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the 'particular social group' ground to take on

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**4** (1997) 190 CLR 225 at 242. See also at 256 per McHugh J.

**5** (1995) 57 FCR 565 at 568 per Burchett J.

**6** (1997) 190 CLR 225 at 242 per Dawson J. See also at 263 per McHugh J, 285-286 per Gummow J. But cf at 234-236 per Brennan CJ.

> 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."[7]

Based on that consideration, it was held in *Applicant A* that persons who opposed China's "one-child policy" and feared enforced sterilisation did not, on that account, constitute "a particular social group" for the purposes of the Convention.

14 China's "one-child policy", which was the basis upon which refugee status was claimed in *Applicant A*, is, it seems, a policy of general application in China. There was, thus, some discussion in that case of laws and practices of general application. In particular, Dawson J observed that "[w]here a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms."[8] His Honour gave as an example "a law or practice which persecuted persons who committed a contempt of court or broke traffic laws"[9].

15 In the observation to which reference has just been made, Dawson J was elaborating the proposition, with which he agreed, that one should not take too far the statement that, to qualify as persecution for reasons of membership of a particular social group, the conduct must be engaged in on account of "what a person is", and that conduct by reason of "what a person does" would not be sufficient[10]. As an example of a case where the proposition held good and was not taken too far, his Honour then gave the above example of a generally applicable law or practice "which persecutes persons who merely engage in certain behaviour or place themselves in a particular situation"[11]. Such persons

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**7** (1997) 190 CLR 225 at 263.

**8** (1997) 190 CLR 225 at 243.

**9** (1997) 190 CLR 225 at 243. See also at 285 per Gummow J where his Honour observed that "a disparate collection of parents, and those desiring to be parents, who do not accept and have difficulties in complying with a 'one child policy' [and who] are at risk of the application of a general law of conduct ... are not members of a particular social group".

**10** (1997) 190 CLR 225 at 242-243.

**11** (1997) 190 CLR 225 at 243.

would not be persecuted by reason of their membership of a particular social group.

16 In the present matter, the majority in the Full Court held that "the principles explained in *Applicant A* preclude the identification of a relevant social group for Convention purposes, by recourse to the very laws and policies, being laws and policies directed to the whole population, which create the category of persons concerned." Thus, in their Honours' view, "black children" could not be identified as a particular social group. R D Nicholson J saw the issue as whether the laws which were likely to result in the appellant's adverse treatment in China were "such that [he] could not [be] a member of a particular social group of 'black children'". Seemingly, in reaching those conclusions, their Honours were influenced by their understanding of what followed from the observation made by Dawson J in *Applicant A* with respect to laws and practices of general application.

17 It was by reference to laws of general application that it was argued in this Court that the majority in the Full Court was correct in holding that, for the purposes of the Convention, the appellant could not be identified as a member of a particular social group. According to the argument, the laws or policies which are likely to result in the appellant's adverse treatment in China are laws of general application and, having regard to what was said by Dawson J in *Applicant A*, cannot create a social group for the purposes of the Convention.

18 There are difficulties with the argument that, because of the nature of the laws which will impact on the appellant if returned to China, he is not a member of a social group for the purposes of the Convention. In particular and notwithstanding that China's "one-child policy" may be reflected in laws of general application which limit the number of children that a couple may have, that does not mean that the laws or practices applied to children born in contravention of that policy are laws or practices of general application. Such children are, even within the sense of the distinction drawn by Dawson J in *Applicant A*, persecuted for what they are (the circumstances of their parentage, birth and status) and not by reason of anything they themselves have done by engaging in certain behaviour or placing themselves in a particular situation. The sins of their parents, if they be such, are being visited upon the children.

19 Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group – for example, "black children", as distinct from children generally – cannot properly be described in that way. Further and notwithstanding what was said by Dawson J in *Applicant A*, the fact that laws are of general application is more

directly relevant to the question of persecution than to the question whether a person is a member of a particular social group.

20 In *Applicant A*, McHugh J pointed out that "[w]hether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct [but] ... on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group."[12] In that context, his Honour also pointed out that "enforcement of a generally applicable criminal law does not ordinarily constitute persecution."[13] That is because enforcement of a law of that kind does not ordinarily constitute discrimination.

21 To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory[14]. And *Applicant A* held that, merely because some people disagree with a law of that kind and fear the consequences of their failure to abide by that law, they do not, on that account, constitute a social group for the purposes of the Convention.

22 The question whether "black children" can constitute a social group for the purposes of the Convention arises in a context quite different from that involved in *Applicant A*. That case was concerned with persons who feared the imposition of sanctions upon them in the event that they contravened China's "one-child policy". In this case, the question is whether children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind. To put the matter in that way indicates that the group constituted by children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear. And so much was recognised by the Tribunal in its finding that a "child is a 'black child' irrespective of what persecution may or may not befall him or her."

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**12** (1997) 190 CLR 225 at 258.

**13** (1997) 190 CLR 225 at 258 referring to *Yang v Carroll* (1994) 852 F Supp 460 at 467.

**14** See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ.

23 The circumstance that "black children" receive adverse treatment in China is descriptive of their situation and, as McHugh J pointed out in *Applicant A*, that may facilitate their recognition as a social group for the purposes of the Convention but it does not define them[15]. Accordingly there was no error in the Tribunal's finding that, for the purposes of the Convention, the appellant is a member of a particular social group. The Full Court erred in holding otherwise.

Persecution and the reasons for persecution

24 As already indicated, there is a common thread linking the expressions "persecuted", "for reasons of" and "membership of a particular social group" in the Convention definition of "refugee". In a sense, that is to oversimplify the position. The thread links "persecuted", "for reasons of" and the several grounds specified in the definition, namely, "race, religion, nationality, membership of a particular social group or political opinion"[16].

25 As was pointed out in *Applicant A*[17], not every form of discriminatory or persecutory behaviour is covered by the Convention definition of "refugee". It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct.

26 The need for different analysis depending on the reason assigned for the discriminatory conduct in question may be illustrated, in the first instance, by reference to race, religion and nationality. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.

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**15** (1997) 190 CLR 225 at 264.

**16** Article 1A(2).

**17** (1997) 190 CLR 225 at 232-233 per Brennan CJ, 257-258 per McHugh J, 284 per Gummow J. See also *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568 per Burchett J, with whom O'Loughlin and R D Nicholson JJ agreed.

27 The position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups – for example, terrorist groups – which warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views – for example, those who advocate violence or terrorism – differently from other members of society.

28 As McHugh J pointed out in *Applicant A*, the question whether the different treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]"[18]. Moreover, it is "[o]nly in exceptional cases ... that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving [some] legitimate government object and not amount to persecution."[19]

29 Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilized world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.

30 The fact that "black children" are treated differently in China in consequence of the "one-child policy", which is a policy of general application, is relevant to the question whether that treatment amounts to persecution. But if the conduct in question does amount to persecution, that consideration cannot then result in the conclusion that that persecution is not for the reason that they are "black children".

31 As earlier noted, the Tribunal found that, if returned to China, the appellant is likely to face discrimination amounting to persecution. In reaching that decision, it proceeded on the basis that, in China, "black children" are treated

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**18** (1997) 190 CLR 225 at 258.

**19** (1997) 190 CLR 225 at 259.

differently from other children. Moreover, it found that it was likely that the appellant would be "denied access to food, education and ... health care beyond a very basic level." And as already noted, it also found that, having regard to his parents' financial situation, "when the benefits of subsidized education are withdrawn, [the appellant] will ... be unable to have an education". Given those findings, it was clearly open to the Tribunal to find, as it did, that the treatment the appellant was likely to receive if returned to China amounted to persecution. And significantly for present purposes, that finding has not been challenged.

32 Once it is accepted that "black children" are a social group for the purposes of the Convention, that they are treated differently from other children and that, in the case of the appellant, the different treatment he is likely to receive amounts to persecution, there is little scope for concluding that that treatment is for a reason other than his being a "black child". As a matter of common sense, that conclusion could only be reached if the appellant had some additional attribute or characteristic and the treatment he was likely to receive was referable solely to that other characteristic or attribute. However, it has not been suggested that that is the position. Moreover, that is not the basis upon which either the Tribunal or the majority in the Full Court dealt with the matter.

33 As already indicated, the Tribunal based its conclusion that the adverse treatment the appellant is likely to receive in China is for a reason other than his being a "black child" on its view that the Chinese authorities were not motivated by "enmity" or "malignity". Where discriminatory conduct is motivated by "enmity" or "malignity" towards people of a particular race, religion, nationality, political opinion or people of a particular social group, that will usually facilitate its identification as persecution for a Convention reason. But that does not mean that, in the absence of "enmity" or "malignity", that conduct does not amount to persecution for a Convention reason. It is enough that the reason for the persecution is found in one or more of the five attributes listed in the Convention.

34 In the present case, French J dealt as follows with this point:

> " The majority judgment in *Applicant A* supports the proposition that the apprehended persecution which attracts Convention protection must be motivated by the possession of the relevant Convention attributes on the part of the person or group persecuted. But although the words 'enmity' and 'malignity' appear in the dictionary definitions of persecution and in some of the passages in the judgments, they do not mandate a narrow or constricting view of what may constitute the relevant connection between persecution and membership of the group. Motivation connecting persecution to the relevant attribute is sufficient. Persecution may be carried out coolly, efficiently and with no element of personal animus

> directed at its objects. There are too many historical examples of the inhuman indifference of which governments are sometimes capable in the pursuit of persecutory policies to so narrow the concept. The attribution of subjectively flavoured states such as 'enmity' and 'malignity' to governments and institutions risks a fictitious personification of the abstract and the impersonal."

35 Persecution can proceed from reasons other than "enmity" and "malignity". Indeed, from the perspective of those responsible for discriminatory treatment, it may result from the highest of motives, including an intention to benefit those who are its victims. And the same is true of conduct that amounts to persecution for a Convention reason. Accordingly, French J was correct to hold, as did the Full Court, that the Tribunal erred in finding that, because the different treatment which the appellant was likely to receive was not motivated by "enmity" or "malignity", that treatment was for a reason other than his being a "black child".

36 Nor can it be said, as the Tribunal suggested, that the appellant faces a real risk of persecution in China, not because he is a "black child", but because of his parents' financial situation. To say that the consequences that are likely to befall him in China will result from his parents' financial situation is simply to say that neither he nor his parents have the means to mitigate the consequences of his adverse treatment. It may be that, if they had, the treatment in question could be viewed as appropriate and adapted to the implementation of China's "one-child policy" and not as persecution. However, that question is entirely hypothetical and need not be pursued in this case.

37 Further, it is not correct to say, as was held by the majority in the Full Court, that the adverse treatment that is likely to befall the appellant is not because he is a "black child" but because of his parents' conduct in contravening China's "one-child policy". To say that his parents contravened China's "one-child policy" is simply another way of saying that he is a "black child".

Conclusion and orders

38 The Full Court erred in holding that "black children" could not constitute a social group for the purposes of the Convention and, also, in holding that the adverse treatment which the appellant was likely to experience in China was not by reason of his being a "black child" but because his parents had contravened China's "one-child policy". It follows that the appeal must be allowed.

39 It was submitted on behalf of the Minister that, even if the appeal is allowed, the order of French J remitting the matter to the Tribunal to be dealt with on the basis that the appellant is entitled to refugee status should not stand.

In that regard, counsel for the Minister relied on what was said in *Minister for Immigration and Ethnic Affairs v Guo*[20]. Before turning to that case, it is convenient to note that by s 481(1)(b) of the Act, the Federal Court has power, when reviewing a decision of the Tribunal, to make "an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit".

40 In *Guo*, the Federal Court declared that the applicants for judicial review "[were] refugees and [were] entitled to the appropriate entry visas"[21]. It was held that that course was not open for it was for the Minister to determine whether the persons concerned were refugees, by reference to his satisfaction that they had that status, and their right "to the issue of visas, which the Full Court purported to declare with present effect, would only arise upon satisfaction of statutory conditions including the determination by the Minister"[22].

41 The statutory regime which presently governs entitlement to the issue of a protection visa is somewhat different from that which applied when *Guo* was determined[23]. As the Act now stands, s 36(2) provides:

> "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

That sub-section directs an objective enquiry. However, s 65(1) provides that, if the Minister is satisfied that the criteria prescribed by the Act and regulations for a particular class of visa are satisfied, that the grant of a visa is not prevented by the Act or other Commonwealth law, and that the application fee has been paid, the Minister "is to grant the visa" and, if not so satisfied, "is to refuse to grant the visa". Thus, although the Minister's satisfaction (or, in the case of the Tribunal, its satisfaction) is still required, s 65(1) imposes an obligation to grant a visa, as distinct from conferring a power involving the exercise of a discretion. The

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**20** (1997) 191 CLR 559.

**21** (1997) 191 CLR 559 at 579.

**22** (1997) 191 CLR 559 at 579 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. See also at 599-600 per Kirby J.

**23** Section 22AA of the Act, which was in force when *Guo* was decided, relevantly provided that: "[i]f the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

satisfaction that is required is a component of the condition precedent to the discharge of that obligation[24].

42 In the present case, the Tribunal concluded that but for the lack of "enmity" or "malignity" on the part of Chinese authorities, the treatment that the appellant was likely to receive in China was persecution for the reason that he was a member of the social group known as "black children". As already indicated, the lack of "enmity" or "malignity" cannot alter the fact that the persecution the appellant is likely to receive in China is for the reason that he is a "black child". Nor can any of the other matters which have been raised in opposition to that conclusion. Accordingly, French J was correct to hold that the Tribunal erred in failing to reach it or, in terms of s 65 of the Act, in failing to be satisfied that the appellant fell within the Convention definition of "refugee". That being so, s 481(1)(b) authorised the remitter of the matter to the Tribunal with a direction that it be dealt with on the basis that the appellant is entitled to refugee status.

43 The appeal should be allowed with costs, the orders of the Full Court set aside and, in lieu thereof, the appeal to that court should be dismissed with costs.

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**24** *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 73 ALJR 746; 162 ALR 577.

44 KIRBY J. This appeal concerns the law of refugees. It comes from orders of the Full Court of the Federal Court of Australia[25].

The broad humanitarian purpose of the Refugees Convention

45 The appeal raises the operation of the *Migration Act* 1958 (Cth) ("the Act") in so far as it incorporates into Australian law the definition of a "refugee" contained in the Convention relating to the Status of Refugees[26] as amended by the Protocol relating to the Status of Refugees[27] ("the Convention"). The special feature of this case is that it relates to the application of that law to an infant who makes a claim for refugee status (and the domestic protection that, if granted, it would afford) separately from his parents who have already been denied such status and are thus liable to be deported from Australia.

46 As this Court has earlier demonstrated[28], and as many decisions in Australia and in courts of other countries of refuge show, the language of the Convention is opaque. Perhaps it is deliberately so given that it must apply to the great variety of acts of oppression, despotism, fanaticism, cruelty and intolerance of which humanity is capable[29]. In these circumstances only a broad approach to the text, and to the legal rights which the Convention affords, will fulfil its objectives. As Sedley J remarked, in terms endorsed in the House of Lords by Lords Steyn[30] and Hoffmann[31], adjudication upon this branch of the law[32]:

> "is not a conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal

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**25** *Minister for Immigration and Multicultural Affairs v Chen Shi Hai* (hereafter "Full Court judgment") [1999] FCA 381.

**26** Signed at Geneva, 28 July 1951. Australian Treaty Series (1954) No 5.

**27** Signed at New York, 31 January 1967. Australian Treaty Series (1973) No 37.

**28** *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (hereafter "*Applicant A*").

**29** *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 567-568 per Burchett J.

**30** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 646.

**31** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 649.

**32** *R v Immigration Appeal Tribunal; Ex parte Shah* [1997] Imm AR 145 at 153.

milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."

47 Whilst courts of law, tribunals and officials must uphold the law, they must approach the meaning of the law relating to refugees with its humanitarian purpose in mind. The Convention was adopted by the international community, and passed into Australian domestic law, to prevent the repetition of the affronts to humanity that occurred in the middle of the twentieth century and earlier. At that time Australia, like most other like countries, substantially closed its doors against refugees. The Convention and the municipal law giving it effect, are designed to ensure that this mistake is not repeated.

The facts and findings of the Refugee Review Tribunal

48 The background facts are stated in the reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ ("the joint reasons"). The appeal is brought by Chen Shi Hai ("the appellant"). He was born in Australia in July 1996. He is a national of the People's Republic of China (PRC)[33]. His parents were in immigration detention at Port Hedland, Western Australia, at the time of his conception and birth. He did not acquire Australian citizenship by reason of being born in this country[34].

49 It is useful[35] to collect at the outset, in summary form, certain crucial findings of the Refugee Review Tribunal ("the Tribunal") whose decision has been under scrutiny in these proceedings for error of law. Only an error of law permits the intervention of the courts[36]. By restating the findings it will become clearer what the proceedings are about and what they are not about.

50 First, the application for refugee status initially to the delegate of the Minister, to the Tribunal upon review, and thereafter to the courts, is by the child Chen Shi Hai. Because of the child's age, the father is the guardian and next friend for legal purposes to permit the child to bring the proceedings. But it is not the father's application under the Act. It is solely that of the child. This fact was correctly recognised by the Tribunal[37].

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**33** *Nationality Law* 1980 (PRC), Art 5.

**34** *Australian Citizenship Act* 1948 (Cth), s 10(2).

**35** cf *Applicant A* (1997) 190 CLR 225 at 288, 296-298.

**36** *Migration Act* 1958 (Cth), s 476.

**37** *Application of Chen Shi Hai* unreported, Refugee Review Tribunal (Dr R Hudson), 3 September 1997 (hereafter "the Tribunal decision") at 2, 18.

51 Secondly, an earlier application by the appellant's parents for refugee status was dismissed and all rights in respect of their entitlement to refugee status have been exhausted. Their claims are not before this Court. In resistance to their deportation, the parents had raised an argument that the PRC would not accept their return. This point was decided against them. The proceedings involving the child have continued on the footing that there is no impediment to the parents' return and hence to the return to the PRC with them of the infant appellant[38].

52 Thirdly, the decision of the Tribunal is determinative of the question of the appellant's refugee status. It is not simply a recommendation to the Minister who may disagree with it. The courts can intervene for error of law in the Tribunal's decision. The Minister has power thereafter to substitute a more favourable decision on the question. But the law has changed since *Minister for Immigration and Ethnic Affairs v Guo*[39] was decided. I agree with the joint reasons on this issue and will not repeat what is said there[40].

53 Fourthly, the Tribunal correctly found that the applicable category to be considered in the appellant's case was Art 1A(2) of the Convention. There are particular components in the relevant definition. However, they must not mislead the decision-maker into atomising the concept in the Convention. It must be considered as a whole[41]. To secure the application of the definition, the person must show, relevantly, that he or she "owing to well-founded fear of being persecuted for reasons of … membership of a particular social group … is outside the country of his nationality and … owing to such fear, is unwilling to avail himself of the protection of that country". The appellant was certainly at all times outside the PRC. In order to make the Convention operate in the case of an infant, "fear", twice referred to in the definition, had to be attributed from its parents to the child. This finding was affirmed by the primary judge[42]. If there was persecution, there could be no dispute on the findings made in this case that such "fear" was "well-founded".

54 Fifthly, the Tribunal, after a review of authority and of the evidence before it, concluded that the multitude of legal, social and economic disadvantages that would be suffered by the appellant if he were returned to the PRC would amount

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**38** *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs* unreported, Federal Court of Australia, 5 June 1998 (hereafter "the judgment of French J") at 3.

**39** (1997) 191 CLR 559.

**40** Joint reasons at [40]-[41].

**41** *Applicant A* (1997) 190 CLR 225 at 257 per McHugh J.

**42** Judgment of French J at 14.

to "persecution". According to the evidence, the appellant was subject to serious discrimination and disadvantages suffered in the PRC by children classified by the popular appellation "hei haizi" ( 黑孩子 −"black children"). The only comparable concept of illegality which this expression imputes to its subject in the English language is the notion of "black market". The only partly analogous discrimination against a child is that formerly meted out by our law, and by society, to an "illegitimate child".

55 The severe disadvantages in terms of deprivation of primary education, basic medical and other civil rights are described at length in the earlier decisions of the Tribunal and of the Federal Court. I will not repeat them. They are extremely burdensome. They would deny the appellant basic entitlements enjoyed by other children in the PRC and fundamental rights internationally enshrined in standards accepted as universal and basic, including in Australia. The Tribunal, in consequence of its findings went so far as to conclude that the appellant "faces a real chance of persecution in the PRC in the foreseeable future" upon the assumption that he would be returned there[43].

56 Sixthly, the Tribunal also concluded that the appellant was to be classified as a member of a "particular social group"[44]. The "social group" in question was that of "black children". In the case of the appellant, he "offended" in a treble respect. He was born out of wedlock, in the sense that his parents had begun cohabiting before the legal age for marriage in the PRC and had never married. He was the third child of their unlawful union. And his status would be the more obvious if he were to be returned to the PRC in company of his parents and his brother (thereby clearly in breach of the "one child" policy imposed by PRC law and applicable to his parents). In the PRC, the family would, inferentially, be reunited with a sister who had been left behind when the parents had illegally left the PRC to travel to Australia. He was thus not even a second but a third child. The breach of PRC law in his case was therefore a flagrant one[45].

57 In the Full Court, the Minister as appellant, sought leave for the first time to contest the finding of the Tribunal that "black children" were a "particular social group". He sought to add a ground of appeal that the primary judge had erred in failing to find that the Tribunal, on the evidence before it, had been mistaken in law in so deciding. This application arose out of questions apparently addressed to the parties by or for the Full Court during and after the hearing in that Court. Unsurprisingly perhaps, the Full Court eventually declined to allow the

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**43** Tribunal decision at 24.

**44** Tribunal decision at 24.

**45** Tribunal decision at 6, 11, 18.

amendment to be made[46]. However an amendment was permitted to raise the issue whether, if "black children" were a "particular social group", they were so defined solely by reference to persecutory conduct and thus outside the Convention definition[47].

58 In light of these developments, it is not in issue in this Court that the appellant was one of the "hei haizi" or "black children" as that expression is used in the PRC. Nor is it in issue that "black children", as such, constituted a "particular social group", for the purposes of the Convention definition and of Australian law incorporating it[48]. In these proceedings therefore, this Court need not consider the issue of what is meant by a "particular social group" or whether the appellant was a member of one such group. Those questions have been found in the appellant's favour. They cannot now be reopened.

The issues

59 The foregoing findings and conclusions bring this Court, as they did the Tribunal and the Court below, to the issues which will eventually decide the case. These issues, stripped of immaterial questions, are:

(1) Whether the Tribunal erred in law in deciding that the phrase "for reasons of" (membership of a particular social group) imported the consideration of the subjective motivations of enmity or malignity[49] on the part of the authorities in the PRC towards a person such as the appellant? Whether, in such circumstances, such motivation being absent or unproved, its absence would deprive the appellant of an ingredient necessary to attract the Convention definition to his case? Or whether, as the primary judge concluded[50], this ingredient was inessential so that requiring its existence amounted to an error of law? (The subjective motivation point).

(2) Whether the Tribunal and the majority in the Full Court erred in law in classifying the "reason of" the fear of persecution on the part of the

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**46** Full Court judgment [1999] FCA 381 at [8], [24] per O'Loughlin and Carr JJ; [51]-[53] per R D Nicholson J.

**47** In accordance with what was taken to be a holding of this Court in *Applicant A* (1997) 190 CLR 225. See Full Court judgment [1999] FCA 381 at [24].

**48** cf *Cheung v Canada (Minister of Employment and Immigration)* [1993] 2 FC 314.

**49** Tribunal decision at 22-24.

**50** Judgment of French J at 11. See also Full Court judgment [1999] FCA 381 at [38] per R D Nicholson J.

appellant as no more than a consequence of the application to his parents of certain laws of general application adopted by the PRC rather than the appellant's membership of the particular social group of "black children"? (The causation point); and

(3) Whether the majority of the Full Court erred in concluding that in the particular case, because both parents sought but were refused refugee status, "it must follow as a matter of logic, that if the parents cannot claim refugee status, then their child (who … is dependent upon their fears for his status) cannot succeed in a claim for refugee status"[51]. (The status of the child point).

The subjective motivation point

60 In my opinion the primary judge and R D Nicholson J, the dissentient in the Full Court, were correct to conclude that, so far as the Tribunal decision was "founded on a search for malignity, enmity or adverse intention as a *necessary* part of motivation towards the [appellant]," it was based on a misunderstanding of the requirements of the applicable law[52]. The primary judge was correct to detect an error of law in this respect. He was right to correct it as he did.

61 It is true that passages exist in a number of judicial decisions, including in this Court, which might suggest that such motivations are a feature of persecutory conduct as such. Thus in *Applicant A v Minister for Immigration and Ethnic Affairs*[53], Brennan CJ observed that the obligation to show that the persecution was "for reasons of" one of the Convention categories excluded "indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim or victims of persecution". Upon a quick reading of this passage the obverse might suggest the necessity to enquire into the motives of the alleged persecutors in order to establish persecution of the requisite kind. Furthermore, some dictionary definitions incorporate amongst the primary meanings of "persecution", notions of "pursuing with enmity and malignity"[54]. No doubt such concepts may be present in persecution in particular cases. But they are not necessary or essential.

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**51** Full Court judgment [1999] FCA 381 at [28] per O'Loughlin and Carr JJ.

**52** Full Court judgment [1999] FCA 381 at [42] per R D Nicholson J (emphasis in original).

**53** (1997) 190 CLR 225 at 233.

**54** *Oxford English Dictionary*, 2nd ed (1989), vol 11 at 592. See also definition of "persecute".

62 First, the standard Australian dictionary, the *Macquarie Dictionary*[55], defines the verb to "persecute" as "to pursue with harassing or oppressive treatment; harass persistently" and relevantly, "to oppress with injury or punishment for adherence to principles". The *Australian Concise Oxford Dictionary* defines "persecute" as to "subject (a person etc) to hostility or ill-treatment, esp on the grounds of political or religious belief" and, secondarily, to "harass; worry"[56]. Other recently published dictionaries are to the same effect[57]. Thus, the more modern definitions suggest that, in contemporary understanding of persecution, there has been a softening of the original meaning. Perhaps this has come about because of the greater awareness of people today of the wrongs of persecution and a heightened vigilance to those wrongs, whether manifested in gross or even in more limited forms. Care must be observed in subjecting the words of the Convention to earlier more extreme meanings of persecution expressed in older dictionary meanings. Like the language itself, the Convention moves with the times.

63 Secondly, as the primary judge noted, "[p]ersecution may be carried out coolly, efficiently and with no element of personal animus directed at its objects. There are too many historical examples of the inhuman indifference of which governments are sometimes capable in the pursuit of persecutory policies to so narrow the concept" in this way[58]. I also agree with the primary judge that the attribution of subjective emotions such as "enmity" and "malignity" to governments and institutions accused of persecution "risks a fictitious personification of the abstract and the impersonal"[59]. Some of the most fearsome persecutions of people on the grounds of race, sex, religion, sexuality and otherwise have been performed by people who considered that they were doing their victims a favour. Persecution is often banal.

64 Thirdly, as R D Nicholson J pointed out in the Full Court[60], there is a special reason in the context of the Convention to refrain from importing

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**55** 3rd ed (1997) at 1601.

**56** 3rd ed (1997) at 1000; cf *Applicant A* (1997) 190 CLR 225 at 258-259 per McHugh J.

**57** eg *Encarta World English Dictionary*, (1999) at 1407 gives as the primary definition, "oppress people, to systematically subject a race or group of people to cruel or unfair treatment, eg because of their ethnic origin or religious beliefs".

**58** Judgment of French J at 11.

**59** Judgment of French J at 11.

**60** Full Court judgment [1999] FCA 381 at [40].

concepts of personal motivation as essential to the context. By definition, the Convention will ordinarily be invoked in a foreign country where an enquiry into the motives and feelings of the alleged "persecutors" will be extremely difficult or impossible to perform. Not least is this so in relation to an infant refugee from outside the country of its nationality and as yet unknown to that country's authorities who are accused of likely future persecution if the child were to be returned to that country.

65 Fourthly, in these proceedings, the Tribunal found that the conduct which was objectively proved and accepted as likely to be targeted at the appellant if he were returned to China, would amount to "persecution". As R D Nicholson J remarked, that explicit finding was not challenged before the primary judge nor on the appeal to the Full Court[61]. Such a finding rendered the considerations of enmity and malignity redundant to the decision that had to be made. Whether as an element of the definition of "persecution" or as an element of the issue of causation required by the Convention phrase "for reasons of", the subjective motivation of the impugned persecutors was not a necessary element in proof of the applicability of the Convention definition. Such motivation may sometimes be present. It may sometimes be inferred. But it is not essential[62]. In so far as the primary judge concluded that this error required correction and the carrying into effect of the consequences of the Tribunal's holding that "persecution" had been established, he was clearly correct. In this respect, his decision and order should be restored.

The causation point

66 This brings me to the principal basis on which the Tribunal, supported by the majority in the Full Court[63], concluded that the appellant was not entitled to refugee status. In the words of the Tribunal this was succinctly stated as[64]:

> "To sum up, then, I consider that on the present state of Australian jurisprudence I am bound to hold that although Chen Shi Hai faces a real chance of persecution in the PRC because of (in a strict causative sense) his membership of a particular social group, he does not face a real chance of persecution there 'for reasons of' his membership of a particular social group as that phrase has received exposition in the Australian courts."

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**61** Full Court judgment [1999] FCA 381 at [48] per R D Nicholson J.

**62** Leeming, "When is Persecution for a Convention Reason?", (2000) 7 *Australian Journal of Administrative Law* 100 at 101.

**63** O'Loughlin and Carr JJ.

**64** Tribunal decision at 24.

67 Causation bedevils the law in many of its aspects[65]. The phrase in the Convention "for reasons of" obviously imports certain notions of causation. There must be some relevant causal link between the postulated ground (membership of a "particular social group") and the entitling condition ("well-founded fear of being persecuted"). The one must provide the reason for the other[66]. Coincidence in time and circumstance will not alone be sufficient. The membership of a particular social group must precede the persecution and not solely be the result of it[67]. Such membership is not a general "catch-all" which obviates the necessity for all of the other specified Convention grounds. Obviously, however, persecution may later give an element of common identity and even cohesiveness to a "particular social group", especially if they decide to resist the persecution, to seek solace in mutual support or to seek redress. But the "group" is not a club or necessarily cohesive and identified to the public or to all persons affected by the same persecution. In some circumstances, self-identification with a "group" could be extremely dangerous or even fatal for the persecuted.

68 The meaning of any statutory notion of causation depends upon the precise context in which the issue is presented[68]. Providing that meaning will usually involve the decision-maker in introducing considerations of policy which cannot be reduced to a strictly logical deduction from words[69]. Thus, in the field of torts law, the matter cannot be expressed as a simple formula. The "but for" test, which was formerly much favoured by the common law, needs to be tempered by "the infusion of policy considerations"[70]. In the context of the expression "for reasons of" in the Convention, it is neither practicable nor desirable to attempt to formulate "rules" or "principles" which can be substituted for the Convention language.

69 In the end it is necessary for the decision-maker to return to the broad expression of the Convention, avoiding the siren song of those who would offer suggested verbal equivalents. The decision-maker must evaluate the postulated

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**65** For a recent instance see *Chappel v Hart* (1998) 195 CLR 232.

**66** *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568.

**67** *Applicant A* (1997) 190 CLR 225.

**68** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 654 per Lord Hoffmann.

**69** cf *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410 at 418 per Gummow J.

**70** *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515-517.

connexion between the asserted fear of persecution and the ground suggested to give rise to that fear. The decision-maker must keep in mind the broad policy of the Convention[71] and the inescapable fact that he or she is obliged to perform a task of classification. Quite simply, many acts lend themselves to ready assignment to different "reasons". Human conduct is rarely, if ever, uni-dimensional. In the present context this point was made neatly by Lord Hoffmann in his speech in *R v Immigration Appeal Tribunal; Ex parte Shah*[72] by reference to some vivid contemporary illustrations:

> "Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. Those who conform to the discriminatory laws, wear yellow stars out of doors and so forth can go about their ordinary business. But those who contravene the racial laws are persecuted. Are they being persecuted on grounds of race? In my opinion, they plainly are. It is therefore a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership of that class. Or to come nearer to the facts of the present case, suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question 'Why was he attacked?' would be 'because a competitor wanted to drive him out of business.' But another answer, and in my view the right answer in the context of the Convention, would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew'."

70 In the instant proceedings, the Tribunal found all the necessary ingredients for the Convention definition in favour of the appellant except the causative element. This was the consideration which classified the persecution awaiting him on his return to the PRC as being "for reasons of" membership of a "particular social group", which it accepted, namely "black children". Instead,

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**71** *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 61 FCR 293 at 299.

**72** [1999] 2 AC 629 at 653-654.

the Tribunal concluded that the judicial authorities in this Court in *Applicant A*, and in the Federal Court, necessitated a different conclusion. In part, this result followed because the Tribunal diverted itself into the notions of "enmity and malignity" just mentioned[73]. But, in part, it also ensued because the Tribunal thought itself obliged to classify the "reasons" for the persecution which it found by ascribing them solely to the breach by the parents of laws and programmes of general application in the PRC designed to uphold that country's population control policy. This approach found favour with the majority of the Full Court which reversed the primary judge's order. In my opinion the Tribunal and the majority of the Full Court erred in law. The primary judge was correct on this point. His order should not have been disturbed.

71 Once discrimination and persecution against the appellant, a child, were found (as the evidence accepted by the Tribunal amply justified) the classification of the persecution in this case as being "for reasons of" membership of a "particular social group" followed quite readily. It is true that the object of the population control policy of the PRC was addressed solely to the parents. But it was equally true that, one way of reinforcing that policy, as found by the Tribunal, was by actions and deprivations addressed to the children of such parents. This was not a case where the "group" in question existed only by reason of the legal provisions of general application and as a reaction to the sanctions which followed their breach. The "group" pre-existed the PRC's one child policy. One element in its definition was that of children born out of wedlock – a feature which has taken on heightened significance in contemporary circumstances in the PRC but which existed long before those circumstances.

72 Care must, in any case, be taken against blindly assuming that because a law is one of general application it can play no part in identifying, consolidating and motivating a particular social group as one falling within the protection of the Convention. This is why McHugh J in *Applicant A* used the adverb "ordinarily" in his exposition of the point that *ordinarily* enforcement of the criminal law will not constitute persecution or classify those affected as a particular social group subject to persecution[74]. Discrimination may in particular circumstances fall most heavily on racial minorities[75], on women subjected to sexual abuse[76], on religious minorities accused of apostacy or on homosexuals. It

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**73** Tribunal decision at 22-24.

**74** *Applicant A* (1997) 190 CLR 225 at 258. The passage is cited in the joint reasons at [20].

**75** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 645, 653-654, 663-664 by reference to homosexuals, Nazi Germany and apartheid South Africa.

**76** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 635-637, 648.

may be reinforced by laws or practices of apparently general application[77]. The mere fact that the law is a criminal law or one of general application in a particular society does not withdraw from those who have a well-founded fear of being persecuted, the protection of the Convention definition. The Nazi State in Germany was generally a *Rechtsstaat*. Laws of general application in such a State can sometimes be the instruments which reinforce and give effect to the antecedent persecution and help to define the persecuted and to occasion their urgent search for foreign refuge.

73 Applying to these proceedings the analysis of Lord Hoffmann in *Shah's Case*, the "reasons of" the well-founded fear on the part of a person such as the appellant is, it is true, in one sense, the laws and policies of the PRC targeted at people such as the appellant's parents. The laws and policies were designed to coerce the parents into conforming to the population control policies of the State. Such laws were avowedly adopted by the PRC to restrain the explosive growth of population of that country with its serious consequences for China and the world[78]. Combined with the poor economic circumstances of the appellant's parents, such laws, and the practices adopted to enforce them, clearly deprive the parents of the ability to afford to pay for education, health care and other privileges that would otherwise be provided by the State to a lawful child. The way the PRC's laws and policies are enforced, according to the findings of the Tribunal, includes the targeting of children such as the appellant, categorised as "hei haizi", as well as the parents. In a discriminatory way, such children are denied many of the basic needs of children. This is done although they personally are innocent of any wrongdoing. They suffer. Their suffering is the other side of the coin of the laws and programmes addressed to their parents. It was much the same in former times under our legal system in respect of laws on illegitimate children or "bastards"[79]. They suffered, and were shamed, in order to promote a policy of marriage of their parents over which, at their birth and in their childhood, the children concerned had no control whatsoever. In today's world, depending on the evidence, this could amount to persecution.

74 Given the objects of the Convention and of Australian law providing it local effect, the persecution of the child is "for reasons of" its membership of the

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**77** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 645, 663.

**78** *Applicant A* (1997) 190 CLR 225 at 297 referring to Brown, *Who Will Feed China? Wake up Call for a Small Planet*, (1995) at Ch 2.

**79** See eg the *Statute of Merton* 1235 (20 Hen III c 9); see also18 Eliz I c 3 providing for recognisances (popularly known as "bastardy bonds") for the support of a woman with a child born out of wedlock. The discrimination lasted into the twentieth century. See eg *Humphrys v Polak* [1901] 2 KB 385.

particular social group of "black children". The persecution is designed to punish the parents for their infractions of the law and to discourage potential parents from breaking that law. But it is done by discriminating against innocent children who are popularly described as "black children". This is done for what may be conceived of as the higher State purpose of population control. But it is persecution nevertheless, as the Tribunal found. In the context, it is for reasons of the fact that the children are members of the particular social group, defined not by anything such children have done but by their parents' "wrongdoing".

The status of the child point

75 The Full Court made an additional error of law in suggesting that because the parents of the appellant had been denied refugee status (a question not now in contest[80]), it necessarily followed that the child who was dependent upon them, including for the imputed "fear" necessary to attract the Convention to his case, would fail in his claim.

76 Neither as a matter of logic nor as a matter of law is this necessarily so. The Convention applies, in terms, to a "person"[81]. In those terms it is incorporated into Australian domestic law. By Australian law, as well as by international law, a child is a person. It could hardly be otherwise. Indeed for the purposes of international refugee law, children are often amongst the most vulnerable groups of refugees in special need of the protection of the Convention. They sometimes arrive in a country of refuge without parents or guardians. They are entitled to the determination of their legal rights, that fact notwithstanding[82]. It would be astonishing if the Convention did not apply to them according to its plain language.

77 The Tribunal correctly recognised the separate entitlement of the appellant, although an infant, under the Convention and Australian law[83]. So did the primary judge[84] and the dissenting judge in the Full Court[85]. Although the

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**80** *Application of Chen Ren Bing and Tang De Ting* (Decision Nos N95/07015 and N95/07009) referred to in the Tribunal's decision at 2.

**81** Convention, Art 1 definition of "refugee": "shall apply to any person".

**82** Russell, "Unaccompanied Refugee Children in the United Kingdom", (1999) 11 *International Journal of Refugee Law* 126.

**83** Tribunal decision at 18.

**84** Judgment of French J at 14.

**85** Full Court judgment [1999] FCA 381 at [66] per R D Nicholson J with reference to Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 356-358 citing

(Footnote continues on next page)

majority in the Full Court appear to have accepted that it was appropriate and necessary to attribute the fears of the parents to those of the child for refugee law purposes[86], somewhat inconsistently, their Honours proceeded from this "very obvious attitude to adopt" to remark that because the parents had failed, so must the child.

78 With respect, I disagree. True, a finding favourable to the appellant might, or might not, have practical consequences for the other members of the family. True also, the Minister might have to consider the action to be taken having regard to the implications of a decision on the child's application for the family unit of which the child is a member. But under Australian law, the child was entitled to have his own rights determined as that law provides. He is not for all purposes subsumed to the identity and legal rights of his parents. Their case was affected by the decision of this Court in *Applicant A*. But that decision did not, as such, necessarily determine the rights of a child such as the appellant. Separate and different considerations might arise in a child's case as the evidence below and the reasons in the Federal Court and this Court show. This case is not governed by the holding in *Applicant A*. The Tribunal and the courts below correctly recognised this.

79 At least theoretically, the parents being adults could alter their behaviour. They could practise contraception. They could conform to the law of the PRC. But the child, as such, could do nothing to prevent or terminate its existence. What may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child. Persecution occasioning such a fear attracts the Convention definition and rights under Australian law.

80 The Minister did not seek to defend the observations of the Full Court majority on this last point. At most, he submitted that it amounted to immaterial error not affecting the Court's ultimate orders. In my view, however, it amounted to legal error. It affords a further reason for the intervention of this Court, the setting aside of the Full Court's orders and the restoration of the orders of the primary judge.

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*UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (1978) at par 185.

**86** Full Court judgment [1999] FCA 381 at [27] per O'Loughlin and Carr JJ with reference to Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 357 citing *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (1978) pars 181.8, 184.

81 It may be suggested that by the simple expedient of procuring a pregnancy, the parents have circumvented Australian migration laws, delayed their own deportation, perhaps secured a right for themselves to stay in Australia with the appellant and their other child and thereby put at nought the holding of this Court in *Applicant A*. That does not follow. It would remain for the Minister to make decisions concerning the parents and their other child or children. Painful decisions may have to be made further down the track. But such possibilities cannot deprive the appellant of his rights under Australian and international law. The prospects of circumvention of that law by wilful procurement of a pregnancy whilst in immigration detention ought not to be exaggerated. Many events must coincide to produce the circumstances of this case. By analogy with Lord Hoffmann's reminder in the context of *Shah's Case*, it by no means follows that every child of PRC nationality born in immigration detention necessarily secures a right to refugee status in this country. "Each case must depend upon the evidence."[87]

Orders

82 I agree with the orders proposed in the joint reasons.

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**87** *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 655 per Lord Hoffmann.