

# The Meaning of 'Social Group': The Federal Court's Failure to Think Beyond Social Significance

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## INTRODUCTION

*Morato v Minister for Immigration Local Government and Ethnic Affairs*<sup>1</sup> is a significant case because it is the first Australian judicial decision of precedential value which interprets the term 'membership of a particular social group' as it appears in the definition of 'refugee' contained in the 1951 Convention relating to the Status of Refugees<sup>2</sup> and the 1967 Protocol relating to the Status of Refugees.<sup>3</sup>

### The facts

Morato and another man, Diaz, were charged in Australia with the offence of knowingly importing cocaine.<sup>4</sup> Morato pleaded guilty and was sentenced.<sup>5</sup> Thereafter, he gave evidence against Diaz as a prosecution witness at Diaz's trial.<sup>6</sup> As Morato was neither a citizen nor a permanent resident of Australia, the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) commenced deportation proceedings against him upon completion of his sentence. Morato did not wish to be returned to Bolivia as he feared that he would be killed by the Diaz family, a powerful drug trafficking family whose influence extended to the Bolivian police force and secret police force.<sup>7</sup> Morato claimed that he was a refugee within the meaning of the Refugee Convention and Protocol on the basis that he had a well-founded fear of being persecuted on account of his membership of a particular social group.<sup>8</sup> The putative social group of which he claimed to be a member was the group of police informants who have assisted the police to the extent of giving Crown evidence.<sup>9</sup> DILGEA conceded that Morato had a well-founded fear of being persecuted.<sup>10</sup> However, it argued that the persecution he feared could

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<sup>1</sup> (1992) 111 ALR 417. It should be noted that since this case was decided the Department of Immigration, Local Government and Ethnic Affairs changed its name to the Department of Immigration and Ethnic Affairs. The old name has been used throughout this article.

<sup>2</sup> 28 July 1951, 189 UNTS 150. Hereinafter cited as the Refugee Convention.

<sup>3</sup> 31 January 1967, 606 UNTS 267. Hereinafter cited as the Refugee Protocol.

<sup>4</sup> (1992) 111 ALR 417, 423.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id* 423-4.

<sup>7</sup> *Id* 427. It was not disputed by DILGEA that these facts were correct: *ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id* 428.

<sup>10</sup> *Id* 429.

not be described as persecution on account of his membership of a particular social group.<sup>11</sup>

#### The international law claim

Australia acceded to the Refugee Convention on 21 January 1954<sup>12</sup> and acceded to the Refugee Protocol on 13 December 1973.<sup>13</sup> Article 33(1) of the Refugee Convention provides that no State 'shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'<sup>14</sup> This prohibition on *refoulement* is the key protection for 'refugees' contained in the Refugee Convention.

Morato's claim framed in terms of Australia's international legal obligations was that he was a 'refugee' within the meaning of article 33(1) of the Refugee Convention and thus entitled to protection from *refoulement*.

#### The domestic law claim

Under Australian domestic law, the issue of the interpretation of the definition of 'refugee' contained in the international instruments above-named arose in the context of an application to the Federal Court of Australia for judicial review of decisions by a delegate of the Minister for Immigration, Local Government and Ethnic Affairs (the Minister) to reject Morato's applications for recognition of refugee status and grant of a Domestic Protection (Temporary) Entry Permit (DPTEP).<sup>15</sup> The primary judge dismissed

<sup>11</sup> *Ibid.*

<sup>12</sup> At the time of accession Australia made reservations to art 17, 18, 19, 26, 28 and 32: 189 UNTS 202. All of these reservations have now been withdrawn: P Hyndman, 'Australian Immigration Law and Procedures Pertaining to the Admission of Refugees' (1988) 33 *McGill Law Journal* 716, 720.

<sup>13</sup> P H Rohn, *World Treaty Index Main Entry Section Part 2 1960-1980* (2nd ed, United States, Clio Press Ltd, 1983) vol III, 1394.

<sup>14</sup> Article 33(2) of the Refugee Convention provides that the benefit of art 33(1) cannot be invoked by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

<sup>15</sup> (1992) 111 ALR 417, 423. Morato lodged his application for recognition of refugee status on 15 January 1991: *id* 424. Although this application pre-dated legislative provision for the grant of DPTEPs, applications for recognition of refugee status lodged before 1 July 1991 were deemed to have effect also as applications for DPTEPs by subsequent regulation: regulation 22D(1)(a) of the *Migration Regulations* (now repealed). Morato also applied for judicial review of the Minister's conduct in failing to consider whether it was in the public interest that he exercise his power under the *Migration Act* 1958 (Ch) s 115(5) to set aside the unfavourable decision of his delegate and to substitute a favourable one and for judicial review of a decision by another delegate of the Minister to deport him. (Section 115 *Migration Act* has been repealed with effect from 1 November 1993 by s 23 *Migration Reform Act* 1992 (Cth). The federal government has foreshadowed its intention to amend the *Migration Reform Act* so as to substitute 1 September 1994 commencements for 1 November 1993 commencements: Senator Bolkus, media release, 28 May 1993). These aspects of the case will not be considered.

Morato's application for review.<sup>16</sup> The decision here considered is the decision of the Full Court of the Federal Court of Australia on appeal from the lower court decision.

From 1 September 1994, DPTEPs will be replaced by protection visas.<sup>17</sup> However, a criterion for the grant of a protection visa is that 'the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the [Refugee Convention] as amended by the [Refugee Protocol].'<sup>18</sup> In other words, although the specific legislative provisions considered in the *Morato* case have been repealed with effect from 1 September 1994, the substantive issue addressed by the case, that is the interpretation of the definition of 'refugee' contained in the Refugee Convention and Protocol, is still of importance in the domestic law context.

## THE REFUGEE CONVENTION DEFINITION<sup>19</sup>

### The Refugee Convention definition

For the purposes of the Refugee Convention, the term 'refugee' applies to any person who,

[a]s a result of events occurring before 1 January 1951<sup>20</sup> and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality<sup>21</sup> and is unable or, owing to such fear, is

<sup>16</sup> *Morato v Minister for Immigration, Local Government, and Ethnic Affairs* (1992) 106 ALR 367.

<sup>17</sup> Section 26B *Migration Act* (Inserted with effect from 1 November 1993 by s 10 *Migration Reform Act* 1992 but see fn 15 above).

<sup>18</sup> Section 26B(2) *Migration Act* (Not yet in force. See fn 17 above).

<sup>19</sup> Unless the context otherwise indicates, the term 'Refugee Convention definition' will be used to denote the definition of 'refugee' contained in art 1A(2) of the Refugee Convention as modified by art 1D, 1E and 1F of the Refugee Convention and by the Refugee Protocol. Article 1A(1) of the Refugee Convention provides that for the purposes of the Convention, the term 'refugee' applies also to any person who:

Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

Article 1A(1) of the Refugee Convention is of little significance in the 1990s.

<sup>20</sup> Article 1B(1) provides that for the purposes of the Refugee Convention, the words 'events occurring before 1 January 1951' shall be understood to mean either:

(a) 'events occurring in Europe before 1 January 1951'; or

(b) 'events occurring in Europe or elsewhere before 1 January 1951',

and each contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

Article 1B(2) enables parties who initially adopt alternative (a) to adopt alternative (b) at any time by notification.

<sup>21</sup> A careful reading of art 1A(2) makes it clear that it does not require a refugee status claimant to have left his or her country of origin *on account of* a well-founded fear of being persecuted: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of*

unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>22</sup>

The temporal limitation was removed by article I(2) of the Refugee Protocol which provides that for the purposes of the Protocol, the term 'refugee' means any person within the meaning of the Refugee Convention as if the words '[a]s a result of events occurring before 1 January 1951 and', and the words 'as a result of such events', in article 1A(2) were omitted.<sup>23</sup>

Articles 1D, 1E and 1F of the Refugee Convention provide for the exclusion from the application of the Convention of persons who would otherwise fall within the definition in article 1A. A person excluded from the application of the Refugee Convention cannot be described as a Refugee Convention refugee or be given any benefit under the terms of the Refugee Convention.<sup>24</sup>

## Interpreting the Refugee Convention definition — the methodology

### (a) State practice

*The Vienna Convention on the Law of Treaties*<sup>25</sup> states that for the purpose of interpretation of a treaty there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>26</sup> The *travaux préparatoires* and other such material are supplementary aids to interpretation, subordinate to the means of interpretation set out in article 31 of the *Vienna Convention on the Law of Treaties*. Thus, I will have regard to the practice of States in establishing the content of the Refugee Convention definition.

*Refugees* (1979) para 94. A person who had no claim to refugee status at the time he or she left his or her country of origin may become a refugee while outside his or her country because of changes in that country during his or her absence or even as a result of his or her own actions while outside the country of origin: id para 95–6. Such persons are called refugees *sur place*. The Federal Court of Australia considered the concept of refugee *sur place* in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339. Morato was claiming to be a refugee *sur place*.

<sup>22</sup> Article 1A(2) of the Refugee Convention.

<sup>23</sup> Article I(3) of the Refugee Protocol provides that the Protocol is to be applied by State parties without any geographic limitation, save that existing declarations made by parties to the Refugee Convention in accordance with art 1B(1)(a) of the Convention, unless extended under art 1B(2), apply also under the Protocol. Australia did not make a declaration in accordance with art 1B(1)(a) of the Refugee Convention.

<sup>24</sup> Of course, this does not prevent a State from giving such a person any benefits it likes providing that it does not purport to do it pursuant to the Refugee Convention: A Grahl-Madsen, *The Status of Refugees in International Law* (Netherlands, 1966) Vol I, 263.

<sup>25</sup> *Vienna Convention on the Law of Treaties*, (23 May 1969), 1155 UNTS 331 to which Australia acceded on 13 June 1974 and which came into force on 27 January 1980.

<sup>26</sup> Article 31(3)(b).

*(b) Status of the UNHCR Handbook*

UNHCR has published the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees*.<sup>27</sup> UNHCR's view is that the Handbook is evidence of State practice relating to the interpretation of the Refugee Convention and Protocol and thus a source to be consulted in the interpretation of those treaties.<sup>28</sup> In addition, article 35(1) of the Refugee Convention provides that:

[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising<sup>29</sup> the application of the provisions of [the Refugee] Convention.

Article II(1) of the Refugee Protocol makes similar provision in relation to the Protocol. The UNHCR Handbook was produced by UNHCR in response to a request made by the Executive Committee of the High Commissioner's Programme (EXCOM)<sup>30</sup> for a handbook 'for the guidance of Governments'.<sup>31</sup> Thus the publication of the UNHCR Handbook, can be regarded as an act of UNHCR in discharge of its duty of supervision and States are bound by the Refugee Convention and Protocol to regard the guidelines to interpretation of those treaties contained in the Handbook as, at the least, highly persuasive. The UNHCR Handbook is often used by governments as an aid to interpretation of the Refugee Convention definition of 'refugee'.<sup>32</sup> It is also treated as an interpretative guide by the domestic courts of some States.<sup>33</sup>

<sup>27</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (1979). Hereinafter cited as the UNHCR Handbook. (The UNHCR Handbook was reissued in 1988 but no significant changes were made to the text.)

<sup>28</sup> See art 31 of the *Vienna Convention on the Law of Treaties*: R Plender for UNHCR intervening in *R v Secretary of State for the Home Department; ex parte Sivakumaran* [1988] 1 AC 958, 981. The explanations of the Refugee Convention definition contained in the UNHCR Handbook are based 'on the knowledge accumulated by the High Commissioner's Office over a period of about 25 years, since the entry into force of the 1951 Convention on 21 April 1954, including the practice of States in regard to the determination of refugee status, exchange of views between the Office and the competent authorities of the Contracting States, and the literature devoted to the subject over the last quarter of a century': UNHCR Handbook, 1.

<sup>29</sup> This duty of supervision is imposed upon UNHCR by para 8(a) of the Statute of the Office of the United Nations High Commissioner for Refugees: GA Res 428(V) Annex, 14 December 1950, reproduced in G S Goodwin-Gill, *The Refugee in International Law* (London, Clarendon Press, 1983) 241.

<sup>30</sup> EXCOM is a committee composed of member States of the United Nations which was established in 1958: GA Res 1166(XII), 26 November 1957 and ESC Res 672(XXV), 30 April 1958 cited in G S Goodwin-Gill, op cit 132. EXCOM functions in relation to UNHCR as an advisory body only: National Population Council, *The National Population Council's Refugee Review* (July 1991) 149.

<sup>31</sup> UNHCR Handbook, 1.

<sup>32</sup> For instance, the United States government: E T Shiers, 'Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers' (1990) 30 *Virginia Journal of International Law* 1007, 1032.

<sup>33</sup> For instance, the United States courts (E T Shiers, op cit 1033 fn 167 citing *MA A26851062 v INS 858 F 2d 210 214* (4th Cir. 1988) and Canadian courts (Immigration and Refugee Board, *Preferred Position Paper: Discrimination as a Basis for a Well-founded Fear of Persecution* (March 1992) 11 fn 6).

DILGEA accepts, at least in theory, the interpretative guidance of the UNHCR Handbook.<sup>34</sup> The High Court of Australia, while it refers to the UNHCR Handbook, appears to treat the statements contained in the Handbook on par with the suggestions of academic commentators rather than as particularly authoritative guides to interpretation.<sup>35</sup> It has been demonstrated above that, as a matter of international law, the UNHCR Handbook has to be given more weight than is accorded to it by the High Court.

### (c) *Intention of the drafters*

Customary international law permits the *travaux préparatoires* (the preparatory work in the drafting of a treaty, for instance previous drafts of the treaty and official records of the meetings of the drafting committees) to be used as a resource by tribunals attempting to interpret an ambiguous provision of a treaty. In addition, article 32 of the Vienna Convention on the Law of Treaties provides that:

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

The Refugee Convention definition was the product of meetings of the Ad Hoc Committee on Statelessness and Related Problems (Ad Hoc Committee).<sup>36</sup> I will make reference to the deliberations of the Ad Hoc Committee in establishing the interpretation of terms used in the Refugee Convention.

<sup>34</sup> P Thompson, 'Refugee Procedures in Australia: Current Practices and Reform' (unpublished thesis, 1989) 23 (A copy is located at UNHCR office, Canberra).

<sup>35</sup> See *Chan Yee Kin & Ors v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, 425, 430 and 451 per Dawson J, Toohey J and McHugh J respectively. Mason CJ stated that, while he did not wish 'to deny the usefulness or the admissibility of extrinsic materials [such as the UNHCR Handbook] in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties', he regarded the Handbook more as a practical guide for those involved in determining refugee status than as an interpretive guide to the Refugee Convention: (1989) 87 ALR 412, 420.

<sup>36</sup> B Sautman, 'The Meaning of "well-founded fear of persecution" in US Asylum Law and in International Law' (1986) 9 *Fordham International Law Journal* 483, 531. The Ad Hoc Committee was formed by the United Nations Economic and Social Council (ESC) and consisted of representatives of Belgium, Brazil, Canada, the Republic of China, Denmark, France, Israel, Poland, Turkey, the USSR, the UK, the US and Venezuela: T N Cox, "'Well-founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status' (1984) 10 *Brooklyn Journal of International Law* 333, 342. The Polish and Soviet representatives did not participate in the Committee's deliberations in protest over the representation of the Republic of China: id 343.

*(d) The case for a liberal construction of the Refugee Convention definition of 'refugee'*

One of the devices employed by those parties to the Refugee Convention and Protocol, which are reluctant to recognize the refugee status of claimants, is the device of restrictively interpreting the Refugee Convention definition. This is despite the fact that, given the humanitarian purpose of the Refugee Convention, the rules of treaty interpretation would suggest that its provisions should be construed liberally,<sup>37</sup> in order to give effect to its central purpose of protecting the individual. In fact, Recommendation E of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons expresses the hope that the Refugee Convention:

will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.<sup>38</sup>

The intent of this statement implies that the 'contract' itself should be construed liberally in favour of its beneficiaries.<sup>39</sup>

**Membership of a particular social group**

The definition of 'refugee' contained in article 1A(2) Refugee Convention excludes from its scope those persons who have a well-founded fear of being persecuted for a reason other than their race, religion, nationality, membership of a particular social group or political opinion. The view that this listing is exhaustive has, in fact, been challenged by some commentators.<sup>40</sup> However, State parties to the Refugee Convention and Protocol, for instance Canada<sup>41</sup> and the United States,<sup>42</sup> appear to take the view that a claimant for the status of a Convention refugee must establish that he has a well-founded fear of being persecuted on one of the five grounds listed in the definition, meaning

<sup>37</sup> R Plender for UNHCR intervening in the *Sivakumaran* case [1988] 1 AC 958, 977-8 citing in support of a purposive interpretation art 31 of the *Vienna Convention on the Law of Treaties*.

<sup>38</sup> 189 UNTS 137, 148.

<sup>39</sup> *cf* Grahl-Madsen who takes the view that, provided it acts in good faith, a State may interpret and apply the provisions of a humanitarian convention literally rather than liberally. According to Grahl-Madsen, in the case of the Refugee Convention, this is consistent with Recommendation E, which expresses the hope that the Convention will be applied outside its 'contractual scope', as what is outside the contractual scope of an undertaking clearly cannot be a contractual duty: A Grahl-Madsen, *op cit* 145.

<sup>40</sup> For example, R Mushkat, 'Balancing Western Legal Concepts, Asian Attitudes and Practical Difficulties — A Hong Kong Perspective' (unpublished conference paper, *International Law and Refugees in the Asia Pacific Region*, University of Melbourne Asian Law Centre, August 1990) 43; A T Aleinkoff, 'The Meaning of Persecution in United States Asylum Law' (1991) 3 *International Journal of Refugee Law* 5, 11.

<sup>41</sup> *Marc Georges Severe* (1974) 9 IAC 42, 47 per J P Houle cited in J C Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991) 139.

<sup>42</sup> Butcher, 'Assessing Fear of Persecution in a War Zone' (1991) 5 *Georgetown Immigration Law Journal* 435, 458.

they regard the listing as exhaustive. This was the view taken also in the *Morato* case.<sup>43</sup>

If it is accepted that the list of grounds in article 1A(2) is exhaustive, the ambit of each ground of persecution becomes important. The purpose of this section is to arrive at a preferred interpretation of the 'social group' ground, which was the subject of the decision in the *Morato* case.

(a) *State practice*

(i) *United States*

In the United States, the Board of Immigration Appeals (BIA) has taken the view that a social group for the purposes of the Refugee Act of 1980 is a group of persons with an 'immutable' common characteristic.<sup>44</sup> A common characteristic is clearly immutable if the members of a group defined by that characteristic are 'unable by their own actions' to change it,<sup>45</sup> either because the characteristic is innate or because it is part of the past history of the group's members.<sup>46</sup> However, BIA also meant to cover by the term 'immutable' a characteristic which the members of a group defined by that characteristic 'as a matter of conscience should not be required' to change, even if able to do so.<sup>47</sup> In keeping with this definition of social group, BIA has, for example, recognized homosexuals as a 'particular social group'.<sup>48</sup>

In the United States case of *Sanchez-Trujillo v Immigration and Naturalization Service*, however, the Ninth Circuit Court of Appeal said that:

the phrase "*particular social group*" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>49</sup>

The 'social group' for which the claimant in that case contended, being the group of young, working class, urban males who were not in military service,

<sup>43</sup> (1992) 111 ALR 417, 420 per Black CJ (French J agreeing).

<sup>44</sup> *Matter of Acosta*, 19 I & N Dec 211 (1985) quoted in T D Parish, 'Membership in a Particular Social Group under the Refugee Act of 1980; Social Identity and the Legal Concept of the Refugee' (1992) 92 *Columbia Law Review* 923, 936-7.

<sup>45</sup> *Matter of Acosta*, 19 I & N Dec 211 (1985) quoted in T D Parish, op cit 937. This part of the definition makes the social group ground analogous to the race and nationality grounds: T D Parish, loc cit.

<sup>46</sup> Immigration and Refugee Board (Canada), *Preferred Position Paper: Membership in a Particular Social Group as a Basis for a Well-founded Fear of Persecution* (March, 1992) 4.

<sup>47</sup> *Matter of Acosta*, 19 I & N Dec 211 (1985) quoted in T D Parish, loc cit. This part of the definition makes the social group ground analogous to the religion and political opinion grounds: T D Parish, loc cit.

<sup>48</sup> *Matter of Toboso*, No. A23 220 644 slip op. at 5 (BIA 12 March 1990) cited in T D Parish, op cit 950. Homosexuality is either an innate characteristic or is a characteristic so fundamental to a person's identity that he or she should not be required to change or hide this characteristic in order to avoid persecution.

<sup>49</sup> 801 F 2d 1571, 1576 (9th Cir 1986).



was described as a 'sweeping demographic division' encompassing 'a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings'.<sup>50</sup> It was not 'that type of cohesive, homogeneous group to which [the court believed] the term "particular social group" was intended to apply'.<sup>51</sup> Inexplicably, the court in the *Sanchez-Trujillo* case suggested that the group of immediate family members would be a paradigm of a 'particular social group'.<sup>52</sup> A family may, as the court said, be 'a small, readily identifiable group'<sup>53</sup> but a family relationship is hardly a voluntary associational one — it being beyond the power of any person to choose his or her family.<sup>54</sup>

It should be noted that the view of the Ninth Circuit Court has not been adopted by other circuits<sup>55</sup> and does not bind, nor has it been followed by, BIA in other circuits.<sup>56</sup>

### (ii) Canada

In the Canadian case of *Re Attorney-General of Canada and Ward*, the Federal Court of Appeal defined a particular social group in terms of alliance<sup>57</sup> or association with a common purpose.<sup>58</sup> However in *Ward v The Attorney-General of Canada*,<sup>59</sup> the Supreme Court of Canada disapproved of this definition and instead endorsed the BIA definition discussed above.

By analogy with the race and nationality grounds, the Canadian Immigration and Refugee Board's (IRB) preferred definition of 'particular social group' includes groups defined by innate characteristics or by characteristics which are not capable of being changed in the present.<sup>60</sup> By analogy with the political opinion ground, it includes groups defined by a characteristic which is fundamental to their members' identity.<sup>61</sup> In its actual practice,

<sup>50</sup> Id 1576–7.

<sup>51</sup> Id 1577.

<sup>52</sup> Id 1576.

<sup>53</sup> Ibid quoting *Herandez-Ortiz v INS* 777 F 2d 509, 516 (9th Cir 1985).

<sup>54</sup> IRB, *Preferred Position Paper: Membership in a Particular Social Group as a Basis for a Well-founded Fear of Persecution*, op cit 14. The Ninth Circuit Court of Appeals held in a later case that the family is not a particular social group: *Estrada-Posadas v INS* 924 F 2d 916 (9th Cir 1991), 919 cited in T D Parish, op cit 943–4.

<sup>55</sup> T D Parish, op cit 944.

<sup>56</sup> For instance, BIA accepted the social group claim of a Cuban homosexual (*Matter of Toboso*) though cohesiveness, homogeneity and 'voluntary associational relationship', would not be characteristics of the group of homosexual persons in a country.

<sup>57</sup> (1990) 67 DLR (4th) 1, 8 per Urie JA.

<sup>58</sup> Id 18 per MacGuigan JA.

<sup>59</sup> Supreme Court of Canada, unreported, 30 June 1993.

<sup>60</sup> IRB, *Preferred Position Paper: Membership in a Particular Social Group as a Basis for a Well-founded Fear of Persecution*, op cit 9–10.

<sup>61</sup> Ibid. IRB would also consider to be included within the definition of 'particular social group', groups defined by 'external perceptions': id 10. It elaborates this part of the definition as follows. If a group voluntarily formed for the purpose of recreation, for example, is considered by the potential persecutor 'as having a political purpose or posing a danger of some kind', then a 'particular social group' should be found to exist: ibid. If a group of individuals who would otherwise have no common characteristic are believed by the potential persecutor to have one, for instance, to be a group of persons conspiring to overthrow the government, then a 'particular social group' should be found to exist: ibid. IRB's purported extension of the social group ground appears to cover no more ground than the political opinion ground.

CRDD<sup>62</sup> panels have found groups defined by family background to be particular social groups.<sup>63</sup> Some CRDD panels have followed the EXCOM recommendation of 1985<sup>64</sup> and found that groups defined by gender — for instance, women in Lebanon and Tamil women in Sri Lanka — have legitimate social group claims.<sup>65</sup> Such decisions implicitly reject the *Sanchez-Trujillo* definition of social group because such groups are not 'cohesive' and 'homogeneous' and, far from being in a 'voluntary associational relationship', the members of such groups are unlikely even to know each other. What they have in common is a characteristic which they cannot change by their own actions.

### (iii) Europe

After conducting a survey of European refugee status decisions, Fullerton has concluded that there has been very little mention of, let alone analytical development of, the social group concept by European refugee status determination authorities.<sup>66</sup> Canada's IRB makes much the same observation, but adds that the decisions which have been made in relation to the social group ground suggest that most European countries apply 'a broad and flexible interpretation of particular social group'.<sup>67</sup> In fact, the following examples suggest that the European definitions of 'particular social group' would have to be at least inclusive of the BIA definition of that term.

The European Parliament has called upon States to consider women who have been the targets of sex-based persecution as belonging to a 'particular social group'<sup>68</sup> and, in fact, a Netherlands district court has held in a first instance decision that women can in appropriate cases constitute a social group.<sup>69</sup> In the UK, a Tamil applicant's claim to be persecuted by reason of his membership of the group of young Tamil males was accepted by an immi-

<sup>62</sup> Convention Refugee Determination Division of the Immigration and Refugee Board.

<sup>63</sup> IRB, *Preferred Position Paper: Membership in a Particular Social Group as a Basis for a Well-founded Fear of Persecution*, op cit 7.

<sup>64</sup> See fn 78 below.

<sup>65</sup> IRB Decision T89-00260, July 1989, RLRU Cat Sig 10143; IRB Decision M89-0213, June 1989, RLRU Cat Sig 10240; IRB Decision M89-00407, July 1989, RLRU Cat Sig 10147; IRB Decision M89-01225, July 1989, RLRU Cat Sig 10017: all cited in J C Hathaway, op cit 162-3.

<sup>66</sup> M Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' (1990) 4 *Georgetown Immigration Law Journal* 381, 383-4.

<sup>67</sup> IRB, *Preferred Position Paper: Membership in a Particular Social Group as a Basis for a Well-founded Fear of Persecution*, op cit 5. Cf the approach of the French refugee status determination authority, OFPRA, which is to deny that the particular social group ground has a scope independent of the race and nationality grounds contained in the Refugee Convention definition: M Fullerton, op cit 384 fn 8.

<sup>68</sup> Call made on 13 April 1984. Cited in G Camus-Jacques, 'Refugee Women: The Forgotten Majority' in G Loescher and L Monahan (eds), *Refugees and International Relations* (NY, OUP, 1989) 141, 147.

<sup>69</sup> Judgment of 19 November 1985, Raad van State, President Rechtbank, Haarlem (court of first instance) cited in M Fullerton, op cit 383 fn 5.

gration adjudicator.<sup>70</sup> The highest administrative court in the Netherlands has held that homosexuals can also constitute a particular social group.<sup>71</sup> A German administrative court has come to the same conclusion in a case involving a refugee status claim by an Iranian homosexual.<sup>72</sup> The German courts have also held, inter alia, that 'families of former capitalists, independent businessmen, and former members of a particular country's Royal Foreign Service' constitute particular social groups.<sup>73</sup>

*(b) The UNHCR approach*

The UNHCR Handbook states that 'a "particular social group" normally comprises persons of similar background, habits or social status.'<sup>74</sup> It points out that often the 'particular social group' ground will overlap with the 'race', 'religion' and 'nationality' grounds.<sup>75</sup> I have been informed that, at present, UNHCR's official line is to ask whether there is actual interaction and relationship between the members of any group put forward as a possible social group.<sup>76</sup> This approach appears to be much narrower than the UNHCR Handbook approach as persons of similar background, habits or social status do not necessarily interact with each other. Nevertheless, UNHCR will often make suggestions to governments as to a social group analysis which could be made in a particular case, without adopting that analysis itself.<sup>77</sup> In other words, it is deliberately conservative in its approach and leaves it to governments to stretch the boundaries of the concept.<sup>78</sup>

*(c) The intention of the drafters*

It is argued that the 'social group' ground was intended by the drafters of the Refugee Convention to have a wide ambit. It is possible to establish that this is

<sup>70</sup> R Marx, 'The Criteria for Determining Refugee Status in the Federal Republic of Germany' (1992) 4 *International Journal of Refugee Law* 151, 160 citing *Sivakumaran et al v Immigration Officer, Heathrow*, Decision of the Adjudicator, TH/64840/88-TH/6844/88, abstracted in (1990) 2 *International Journal of Refugee Law* 449.

<sup>71</sup> Judgment of 13 August 1981, Afdeling Rechtspraak van de Raad van State (Supreme Administrative Court), cited in M Fullerton, op cit 383 fn 5.

<sup>72</sup> Judgment of 26 April 1983, Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden), No IV/I E 06244/81, cited in M Fullerton, op cit 409.

<sup>73</sup> T D Parish, op cit 928-9.

<sup>74</sup> UNHCR Handbook, para 77.

<sup>75</sup> *Ibid.*

<sup>76</sup> Interview with H Domzalski, UNHCR Deputy Regional Representative for Australia, New Zealand and the South Pacific, 14 January 1992.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* For instance, EXCOM in 1985

recognized that States, in the exercise of their sovereignty, were free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they lived may be considered as a 'particular social group'.

Addendum to the Report of UNHCR, UN GAOR; 40th session, Supp No 12A (1985) 33, para 115(4)(k).

so by contrasting the provisions in the IRO Constitution<sup>79</sup> with the Refugee Convention definition and inquiring into the reasons for the difference between them. Like the Refugee Convention, the IRO Constitution explicitly restricted the definition of 'refugee' by reference to the reasons for loss of national protection.<sup>80</sup> However, the Refugee Convention definition differs from the IRO definition in this vital respect: it includes as refugees those persons who have a well-founded fear of being persecuted for reason of membership of a particular social group. The departure is significant in light of the *travaux préparatoires* of the Refugee Convention. It is clear from the *travaux préparatoires* that the category of 'membership of a particular social group' was included in the definition as a catch-all ground which would plug any gaps in the coverage of the other, more specific, grounds of persecution.<sup>81</sup>

(d) *The preferred definition of 'social group'*

If a refugee status claimant can establish membership of a group defined by the existence of a voluntary associational relationship, his or her claim to membership of a particular social group within the meaning of the Refugee Convention definition should be recognized. This proposition receives support from the US case of *Sanchez-Trujillo v Immigration and Naturalization Service*. However, the existence of such a relationship cannot be regarded as a *sine qua non* of the social group ground. It would appear that the real reason that such a relationship is insisted upon in some cases is that in those cases decision makers have allowed themselves to be swayed by a disinclination to make a decision which might extend refugee status to very large numbers of people. In the *Sanchez-Trujillo* case, for instance, it was thought necessary to characterize as indispensable the existence of a voluntary associational relationship in order to avoid opening the door to 'every alien displaced by general conditions of unrest or violence in his or her home country'.<sup>82</sup> Such sentiments are not in keeping with the humanitarian purpose of the Refugee

<sup>79</sup> The Refugee Convention was intended to take the place of the International Refugee Organization (IRO); B Sautman, op cit 535. The IRO Constitution set out defined categories of persons who were to be protected by its provisions and stated that no such person with a valid objection should be compelled to return to his or her country of origin.

<sup>80</sup> The IRO Constitution provided that the term 'refugee' applied to a person outside the country of his or her nationality or former habitual residence who belonged to one of the following categories:

- (a) Victims of the Nazi or fascist regimes or of regimes which took part on their side in the Second World War, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
- (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;
- (c) Persons who were considered refugees before the outbreak of the Second World War, for reasons of race, religion, nationality or political opinion: IRO Constitution, Annex 1, Part I, Section A(1). See GA Res 62(1), Annex I, 15 December 1946, reproduced in D J Djonovich (ed), *United Nations Resolutions Series I Resolutions Adopted by the General Assembly* (1973) vol I, 100.

<sup>81</sup> A T Aleinkoff, op cit 11 citing A R Zolberg et al, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (1989) 25.

<sup>82</sup> 801 F 2d 1571, 1577 (9th Circuit, 1986).

Convention. Moreover, they are the very antithesis of the sentiments which prompted the drafters of the Refugee Convention to include a social group ground in the definition of 'refugee'. It follows that State practice influenced by such considerations cannot be regarded as good faith State practice able to shape the interpretation of the Refugee Convention definition at international law.

Social group claims based on gender, sexual orientation, family background and former social status or former employment are not based on the present existence of a voluntary associational relationship but on the fact that, in each case, a group of persons sharing a particular immutable characteristic has been made the target of persecution. The fact that this type of claim has succeeded in North America and Europe is State practice which makes unviable the proposition that the existence of a voluntary associational relationship is a necessary condition precedent to establishing a social group claim under the Refugee Convention definition. Likewise, the UNHCR Handbook, which should be regarded as authoritative evidence of State practice, makes it clear that a social group claim is available to a much broader range of persons than just those who fear being persecuted on the basis of a voluntary associational relationship. The fact that UNHCR presently chooses to safeguard its long-term relationship with governments by avoiding a leadership role in relation to a politically sensitive issue does not detract from the authority of the UNHCR Handbook.

In my view, State practice supports the proposition that a complete definition of 'particular social group' embraces both groups defined by reference to a voluntary associational relationship and groups defined by reference to a common immutable characteristic. One writer has suggested that a collection of individuals with a common immutable characteristic should not be regarded as a social group unless they have an 'awareness of a collective identity' and their society attaches 'social significance' to their common characteristic.<sup>83</sup> I disagree. Given the generous intent of the drafters of the Refugee Convention, any group of persons with a common immutable<sup>84</sup> characteristic that causes them to be a target of persecution should be considered a social group, regardless of whether persons other than the persecutors would consider such persons to be anything more than a statistical group.<sup>85</sup> Whether or not the members of such a persecuted group have an awareness of collective identity should be similarly irrelevant to their characterization as a social group for the purposes of the Refugee Convention definition.

My justification for asserting that it is the persecutors' perception which should be decisive in these cases<sup>86</sup> is that any other approach would lead to manifestly unreasonable results. For instance, any other approach would

<sup>83</sup> T D Parish, *op cit* 923 and 945.

<sup>84</sup> In the BIA sense.

<sup>85</sup> An example of a statistical group is the group of redheaded persons in a country: A C Helton, 'Persecution on Account of Membership in a Social Group as a Basis for Refugee Status' (1983) 15 *Columbia Human Rights Law Review* 39, 51-2.

<sup>86</sup> D Matas, 'Innocent Victims of Civil War as Refugees' in Centre for Refugee Studies, York University, *Obligations and Their Limits: Refugees at Home and Abroad* (collection of unpublished conference papers, 25-28 May 1991), vol I, 127, 141.

have meant that a person who fled persecution by the Khmer Rouge, at least in the early days of that regime, may not have been able to establish a claim to refugee status.<sup>87</sup>

Once it had seized power, the Khmer Rouge divided the population of Cambodia into two groups: the 'old people' and the 'new people'.<sup>88</sup> This division was not a division on the basis of class,<sup>89</sup> family<sup>90</sup> or any other basis which, *at that time*, had social significance. Nor did the members of each group have a pre-existing 'awareness of collective identity'. The 'old people' were those who had, during the revolution, lived continuously in areas controlled by the Khmer Rouge.<sup>91</sup> The 'new people' were those who had, during the revolution, remained in or moved to areas controlled by the Lon Nol government.<sup>92</sup> The Khmer Rouge perceived the 'new people' as a social group — a group tainted 'by imperialist and capitalist culture'.<sup>93</sup> The regime enforced the social segregation of 'old people' and 'new people'<sup>94</sup> and worked towards the elimination of the 'new people'.<sup>95</sup> Of course, Cambodian society as a whole soon attached social significance to membership of the group of 'new people' and presumably 'new people' soon developed an awareness of collective identity. However, it would offend the humanitarian spirit of the Refugee Convention to assert that the 'new people' had only a tenuous claim to protection under the Convention until the perception of the persecutors had pervaded society as a whole.

Finally, it is my contention that the German courts have gone too far by accepting such groups as 'independent businessmen' as 'particular social group[s]'. The members of such a group are not in a voluntary associational relationship and do not share an immutable characteristic (in the BIA sense). The acceptance of such groups points to a definition of 'particular social group' which is so wide as to render illusory the apparent exhaustiveness of the list of cognizable grounds of persecution in the Refugee Convention definition.

<sup>87</sup> There is a basis for arguing that persons fleeing from the Khmer Rouge would have had a well-founded fear of being persecuted for reasons of political opinion. Many of those persecuted by the Khmer Rouge held no political opinions at all: M Stuart-Fox, *The Murderous Revolution: Life and Death in Pol Pot's Kampuchea* (Chippendale NSW, APCOL, 1985) 159. However, it might be argued that they were persecuted on the basis of imputed political opinion. According to UNHCR, there is no relevant difference between a situation where a person has a well-founded fear of being persecuted for opinions he or she in fact holds and situations in which a person is persecuted for opinions which he or she does not hold but are attributed to him or her: UNHCR Handbook, para 80. Though my own view is that using the imputed political opinion argument in relation to Khmer Rouge persecution would be a case of tailoring the facts to fit the law, I concede that the success of such an argument would render the availability of a social group claim a matter of merely academic interest.

<sup>88</sup> M Stuart-Fox, *op cit* 42.

<sup>89</sup> *Id* 43.

<sup>90</sup> *Id* 43-4.

<sup>91</sup> *Id* 42.

<sup>92</sup> *Id* 42-3.

<sup>93</sup> *Id* 159.

<sup>94</sup> *Id* 43.

<sup>95</sup> *Id* 159.

## THE MORATO CASE — THE DOMESTIC PROCEEDINGS

## The administrative decision

When faced with Morato's application for review of the primary stage rejection of his claim to refugee status, three members of the Refugee Status Review Committee (RSRC)<sup>96</sup> recommended that he not be recognized as a refugee but the Attorney-General's representative dissented on the basis that the fact of having been a police informant was an 'immutable characteristic which has consequences which are similar for all members of that group'.<sup>97</sup> A clue as to the interpretation of the 'social group' ground favoured by the other three members of the RSRC and by DILGEA is found in the fact that the review officer, who on 8 October 1991 affirmed the primary decision that Morato's refugee status application be refused, made reference to the *Sanchez-Trujillo* case.<sup>98</sup>

## Decision of Olney J

In the lower court, Olney J accepted the view expressed in the *Sanchez-Trujillo* case that 'the concept of "membership of a particular social group" involves the idea of a group of people who can demonstrate "cohesiveness and homogeneity"'.<sup>99</sup> He held that the group of police informants was not 'a particular social group' within the meaning of the Refugee Convention definition and dismissed the application for review.<sup>100</sup>

## The Full Court of the Federal Court of Australia

In the Full Court of the Federal Court of Australia, Lockhart J rejected the definition of 'particular social group' contained in the *Sanchez-Trujillo* case as being 'too narrow' and expressly stated that 'although a voluntary association of persons may fall within the definition, it is not a requirement that there be such an association to constitute a social group within the definition

<sup>96</sup> An applicant rejected at the primary stage of the refugee status determination process could request review by the RSRC: Department of Foreign Affairs and Trade, 'Changes to Refugee and Humanitarian Policies' (1991) 2(3) *Backgrounder* 7, 7. A community representative nominated by the Refugee Council of Australia was a member of the RSRC, together with representatives of the Department of Foreign Affairs and Trade (DFAT), the Attorney-General's Department and DILGEA (chairperson). A representative of the United Nations High Commissioner for Refugees (UNHCR) attended meetings in an advisory capacity. The RSRC was a creature of government policy. There was no mandate for its existence in the Migration Act. In terms of the *Migration Act*, therefore, what happened at the administrative review stage was that a delegate of the Minister (to whom the RSRC made a recommendation) conducted an internal review of the decision to refuse a DPTEP under Part 2A of the *Migration (Review) Regulations* (now repealed) and made a decision to grant or refuse that permit. It should be noted that the RSRC ceased to function on 30 June 1993.

<sup>97</sup> This was the review officer's version of the view of the Attorney-General's representative as quoted in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 106 ALR 367, 378.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Id* 377.

<sup>100</sup> *Id* 379.

of "refugee".<sup>101</sup> Black CJ<sup>102</sup> made no specific reference to the *Sanchez-Trujillo* case. However, his Honour made the following obiter comment:

It may be, for example, that over a period of time and in particular circumstances, individuals who engage in similar actions can become a cognisable social group. The actions may, for example, bear upon an individual's identity to such an extent that they define the place in society of that individual and other individuals who engage in similar actions.<sup>103</sup>

It is submitted that this comment is consistent only with the rejection of voluntary associational relationship as a necessary requirement for the existence of a 'particular social group'. Persons who engage in a common activity may become recognizable within society without associating with each other voluntarily or otherwise.

According to Lockhart J, 'for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognisable or cognisable group within a society that shares some interest or experience in common.'<sup>104</sup> His Honour did not think it was 'wise, necessary or desirable to further define the expression.'<sup>105</sup> Lockhart J found that the putative social group for which Morato contended did not meet this definition and dismissed Morato's appeal. Black CJ, too, expressed the view that 'at the very least, a particular social group connotes a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of *membership* of such a group.'<sup>106</sup> He, too, found that the putative social group for which Morato contended did not meet this definition and dismissed Morato's appeal. The judgments of Lockhart J and Black CJ (French J agreeing) appear to be an endorsement of Parish's suggested requirement that the refugee status claimant's society must attach 'social significance' to the characteristic he or she has in common with other members of the putative social group. Since this view had unanimous support in the *Morato* case, it can be taken as an authoritative pronouncement on the outer limits of the 'social group' concept for Australian domestic law purposes.<sup>107</sup>

I have already expressed my view that all that should be required is that the *persecutors* (rather than the victims' society as a whole) view the putative social group as a social group and persecute its members by reason of their membership of that group. It is my submission that the Federal Court could have achieved the result it desired (ie the rejection of Morato's social group claim) even by applying this more generous requirement. The 'social group' for which Morato argued was the group of police informants who had turned Crown witness. However, it is argued that the feared agent of persecution, the

<sup>101</sup> (1992) 111 ALR 417, 431-2.

<sup>102</sup> French J delivered a brief judgment stating that he agreed with the reasons of Black CJ as well as with the orders he proposed.

<sup>103</sup> (1992) 111 ALR 417, 422.

<sup>104</sup> *Id* 432.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Id* 422.

<sup>107</sup> Unless and until the High Court of Australia decides otherwise.



Diaz family, would not have attached significance to such a grouping. The Diaz family was not interested in persecuting any person in Bolivia who could be described as a police informant who had turned Crown witness. It was interested in persecuting Morato because he had caused harm to them. It so happened that he had caused harm to them by turning Crown witness, but the simple fact of his membership of a group defined as the group of police informants who have turned Crown witness was not the reason for his persecution.

Black CJ appears at first to be expressing a view similar to the one espoused in this article when he says:

A critical element in the present case is that the fear of persecution relied upon must be a fear for reasons of *membership* of a particular social group. It is not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. The primary focus of this part of the definition is upon an aspect of what a person *is* — a member of a particular social group — rather than upon what a person has done or does.<sup>108</sup>

However, there is significant divergence between the views of Black CJ and my own. I would contend that persons who have in common a past activity have a common immutable characteristic (it not being in their power to change their past). If the feared agents of persecution persecute every person with this immutable characteristic because they possess this characteristic, I would say that such persons are being persecuted by reason of their membership of a particular social group, because the persecutors regard such persons as a significant grouping within their society and have resolved to persecute persons who belong to that group. In my view, it would not matter whether the rest of society regarded the group of victims as a group having 'social significance'. Black CJ is only prepared to go so far as saying that 'there may be such an interaction in a particular society that a group of people becomes a cognisable element within the society by virtue of their common activity.'<sup>109</sup> In other words, he regards it as a minimum requirement that the grouping to which the victims belong should have 'social significance' to their society as a whole.

Black CJ is clearly disconcerted by the fact that the group of police informants who have turned Crown witness would be a group of persons who acted in that way 'for a wide variety of reasons, in a wide variety of circumstances and with a wide variety of consequences for themselves and for others',<sup>110</sup> and would 'exhibit an almost limitless diversity in their personal characteristics and in their interaction with society.'<sup>111</sup> According to his Honour:

To say that all such people are members of a particular social group would be to make the definition of refugee so wide in this respect as to be almost meaningless and as to have no necessary connection with the humanitarian

<sup>108</sup> (1992) 111 ALR 417, 420.

<sup>109</sup> *Id* 422.

<sup>110</sup> *Id* 421.

<sup>111</sup> *Ibid*.

objectives that select a particular category of persons, refugees, as deserving of special consideration by the international community.<sup>112</sup>

In this respect he echoes the *Sanchez-Trujillo* case. In my view lack of homogeneity is not a valid reason for rejecting a proposed social group. For example, social group claims based on homosexuality have succeeded in the US<sup>113</sup> and Europe<sup>114</sup> and were approved by Lockhart J in an obiter remark,<sup>115</sup> even though a group of persons defined by reference to their common homosexuality is likely to display as much diversity of background, lifestyle, personal characteristics and so on as a group of persons defined by reference to their common heterosexuality. Few claims based on membership of a group of persons defined by reference either to a voluntary associational relationship or to a common immutable characteristic are likely to meet a requirement of homogeneity. It is a truism that every human being is unique. No matter how fundamental a characteristic is, it is unlikely to condition every aspect of lifestyle, personality and so on so as to cause every person who has that characteristic to be similar to every other person who has that characteristic. The same applies to voluntary associational relationships. It is not acceptance of a proposed 'social group' which lacks homogeneity which has the potential to render the definition of 'refugee' so wide as to make it meaningless. It is the acceptance of a definition of social group which is all-inclusive which has this potential. The definition of social group which I have proposed allows for the acceptance of heterogeneous groups but it is not an all-inclusive definition.

In contrast to the approach of Black CJ which is too narrow all round, that of Lockhart J is at once too narrow and too wide. The following is the aspect of his Honour's judgment which is too wide. Lockhart J would accept 'land owners, lawyers, novelists, farmers',<sup>116</sup> among others, as 'particular social groups'. Such persons are not in a voluntary associational relationship but they do have a common characteristic. However, it is easy enough to cease to be a landowner, lawyer, novelist or farmer. If persons are persecuted because they *have been* landowners, lawyers, novelists or farmers (regardless of whether they are landowners, lawyers, novelists or farmers at present), they could be described as persons being persecuted because of a common immutable characteristic. However, if they are being persecuted because they are landowners, lawyers and so on, they could only be characterized as persons being persecuted by reason of a common immutable characteristic, if the characteristic is one which is so fundamental to their identity that they ought not to be required to change. I would not describe a person's possession of property or choice of occupation as immutable in this sense.

<sup>112</sup> Ibid.

<sup>113</sup> Above, fn 48.

<sup>114</sup> Above, fns 71 and 72.

<sup>115</sup> (1992) 111 ALR 417, 432.

<sup>116</sup> Ibid.

## The High Court of Australia

In the *Chan* case, Dawson J said:

There is no room for doubt that if the appellant did fear persecution, it was for a Convention reason being because of either membership of a particular social group or political opinion. Perhaps both reasons were present because, upon the findings of the delegate, such treatment as was suffered by the appellant was because his family was perceived to be anti-revolutionary and because the appellant was perceived to be of the same persuasion. But it would have been sufficient to constitute a Convention reason that the appellant was a member of a particular social group, namely, his family, irrespective of his personal political opinions.<sup>117</sup>

Given that family membership is an involuntary characteristic, it is clear that Dawson J would reject the proposition that it is necessary to show the existence of a voluntary associational relationship between the members of the proposed group in order to make out the social group ground. Unfortunately, the other judges in the same case were content to limit themselves to the finding that the refugee status claimant concerned had a well-founded fear of being persecuted for reasons of political opinion and did not consider the social group ground. Thus the High Court's preferred interpretation of the social group ground is at present unknown.<sup>118</sup>

## CONCLUSION

As long as Australian decision makers apply the definition of 'social group' contained in the *Morato* case instead of the definition which I have suggested is to be preferred as a matter of international law, Australia runs the risk of breaching its obligation under article 33(1) of the Refugee Convention by failing to identify and consequently returning Refugee Convention refugees to the frontiers of territories where their lives or freedom would be threatened on account of their membership of a particular social group. It is, therefore, submitted that, when the definition of 'particular social group' next becomes a matter for decision by the Full Federal Court of Australia or the High Court of Australia, the *Morato* case should be overruled and it should be decided that the definition includes groups whose members are persecuted because they possess a common immutable characteristic, whether or not persons other than the persecutors would consider that the grouping in question was of 'social significance'.

<sup>117</sup> *Chan Yee Kin & Ors v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, 423.

<sup>118</sup> *Morato* has discontinued an application for leave to appeal to High Court of Australia.