



RESEARCH NOTE

Number 31, March 1997
ISSN 1323-5664

China's One Child Policy and Refugee Status in Australia

On 24 February 1997, in *Applicant A v Minister for Immigration and Ethnic Affairs*, the High Court, in a 3:2 decision, dismissed the applicants' claim for refugee status.

Following Justice's Sackville's finding in the Federal Court on 6 December 1994 that the applicants' were refugees, the use of China's One Child Policy as a grounds for refugee status in Australia has generated significant controversy.

This latest decision by the High Court should alleviate the concerns of those who considered Australia might face an overwhelming number of applications for refugee status on the basis of Sackville J's decision. On the other hand, some have moved to criticise the High Court's decision. For example, Senator Harradine has said that the decision sends 'a message to Chinese women fleeing abortion...: you're not welcome, we won't protect you.'

Background

Article 1 of the 1951 *United Nations Convention Relating the Status of Refugees*, as amended by the 1967 *Protocol*, is incorporated into Australian law by the *Migration Act 1958*. A refugee under the *Convention* is a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.'

The applicants, a husband and wife, and nationals of the Peoples Republic of China (PRC), arrived in Australia by boat in late 1993. Their application for refugee status was refused by a delegate of the Minister for Immigration and Ethnic Affairs in January 1994.

The applicants successfully appealed the Minister's decision in the Refugee Review Tribunal (RRT) on the grounds that they feared persecution owing to their membership of a particular social group. The RRT's finding was upheld by Sackville J in the Federal Court but overturned by the Full Federal Court. The applicants then appealed to the High Court.

On 24 February 1997, the High Court dismissed the applicants' appeal. The majority on the High Court found that the applicants were not refugees within the relevant definition.

The Minister did not contest that forced sterilisation amounts to persecution. Further, the Court agreed the persecution suffered had to be for one of the reasons outlined in Article 1. Where the Court disagreed was in determining whether the

applicants belonged to a 'particular social group.'

The Facts

The applicants have one child. They argued that, if returned to the PRC, they faced forcible sterilisation as a result of the way in which China's 'One Child Policy' is enforced in their province. (It was accepted by the Court that for other reasons the couple could not simply return to another province in the PRC.)

The Law

The High Court devoted considerable attention to how provisions in international treaties, incorporated into Australian law, should be interpreted. Chief Justice Brennan noted that when the Commonwealth legislature transposes the text of a treaty into an Australian Act, *prima facie*, that text should be given the meaning it has in the treaty. To ascertain that meaning, consideration must be given to the rules governing treaty interpretation. He added that, given that treaties are signed by nations, often after considerable negotiation and compromise, treaty provisions should not be interpreted in a narrow or strict manner. Rather, Brennan CJ said consideration must be given to 'both the text and the object and purpose of the treaty in order to ascertain its true meaning.'

This led Brennan CJ to consider the negotiations leading to the *Convention*, as well as its preamble, which stated its objects included, for example, ensuring refugees enjoy to the fullest extent, their fundamental rights and freedoms. However, his Honour continued, the *Convention* goes further. It offers protection to those who suffer a denial of their fundamental rights because of one of the reasons listed in Article 1, including, membership of a particular social group.

The Minority

Brennan CJ and Kirby J delivered separate dissenting judgments. Brennan CJ noted that although forced sterilisation is not practised throughout the PRC, its practise is tolerated in the applicants' province. The applicants do not fear indiscriminate persecution. It is, his Honour continued:

...forced sterilisation of those who, being the parents of one child, have not voluntarily adopted one of the birth-preventing mechanisms approved by the local officials. The characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguished the appellants as members of a social group that shares that characteristic.

Kirby J accepted that the term 'particular social group' 'does not provide a "safety-net" to cover any form of persecution.' His Honour stated that there was no requirement for the members of the group to associate with one another, or to know of other members in the group. Kirby J, therefore, accepted that the applicants were members of the social group identified by the RRT.

The Majority

Justices Dawson, McHugh and Gummow made up the majority. In separate judgments their Honours agreed that the applicants could not demonstrate that they feared persecution for reason of membership of a particular social group.

Dawson J stated that members of a 'particular social group' must be united by some common characteristic that makes them a 'cognisable group within their society.' However, the shared characteristic cannot itself be the fear of persecution. In this case, Dawson J continued, the group to which the applicants belong is 'the group comprising those who fear persecution pursuant to the one child policy.' Thus, the applicants do not belong to a group recognised by the *Convention*.

Similarly, McHugh J did not accept that the fear of persecution could itself be one of the defining elements of the social group. He, therefore, denied the applicants were members of a social group for purposes of the *Convention*.

McHugh J, did, however, leave open the possibility that, in some circumstances, persons who oppose China's One Child Policy may be members of a social group under the terms of the *Convention*. His Honour stated:

If, for example, a large number of people with one child who wished to have another had publicly demonstrated against the government's policy, they may have gained sufficient notoriety in China to be perceived as a particular social group. Any involuntarily sterilisation of a member of that group simply because he or she was a member of the group would be

persecution for reasons of membership of a particular social group as well as persecution for 'political opinion'.

Gummow J, in agreeing with McHugh J, stated 'the RRT erred in law by defining membership of the group by reference to acts giving rise to the well-founded fear of persecution.'

Conclusion

This decision is important in the context of Australian refugee law. It offers some guidance to decision makers and tribunals as to what constitutes a social group under the *Convention*. The *obiter* comments made by McHugh J (noted above), however, leave open the possibility of further claims for refugee status from Chinese nationals fleeing that country's 'One Child Policy'.

**Max Spry
Politics and Public
Administration Group
Law and Bills Digest
Information and Research
Services**

Phone: 06 2772433
Fax: 06 2772486

Views expressed in this Research Note are those of the author and do not necessarily reflect those of the Information and Research Services and are not to be attributed to the Department of the Parliamentary Library. Research Notes provide concise analytical briefings on issues of interest to Senators and Members. As such they may not canvass all of the key issues.

© Commonwealth of Australia