



# RESEARCH NOTE

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## China's One Child Policy is not a Ground for Refugee Status: The Latest Federal Court Decision

On 16 June 1995, a Full Court of the Federal Court in *Minister for Immigration v Respondent 'A' and Respondent 'B'*, set aside Justice Sackville's decision granting refugee status to a married couple, nationals of the People's Republic of China (PRC).

According to the *1951 Convention relating to the Status of Refugees*, as amended by the *1967 Protocol*, a refugee is a person who has:

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.

### Justice Sackville's Decision

Justice Sackville of the Federal Court upheld a decision of the Refugee Review Tribunal (RRT) granting refugee status to a married couple, nationals of the People's Republic of China (PRC). The RRT found that the couple was at 'risk of forcible sterilisation by reason of population control policies and practices followed in some parts of China.' The couple was granted refugee status because:

- they feared persecution (eg, risk of forced sterilisation); **and**
- they were members of a 'particular social group'.

Justice Sackville said:

parents with one child wishing to have more children are unlikely ... to constitute a particular social group. But if government policies and practices identify such people as having special characteristics and impose a system of rewards and sanctions by reference to those characteristics, the people concerned are likely to constitute a particular social group.

### The Full Federal Court

In the Full Federal Court, Justices Beaumont, Hill and Heerey overturned Justice Sackville's decision.

The Full Federal Court accepted that 'forcible sterilisation could constitute persecution.' However, that persecution was not for reason of membership of a particular social group. The Court said:

There was no evidence that forced sterilisation formed part of the law or formal government policy in China. It was carried out at the instigation of over-zealous local officials.

The Court also said that even if it could be shown that there was a 'law of general application in China that parents of one child must be sterilised, and forcibly if necessary, persons facing that fate would not be members of a particular social group.' The reason why this is so, their Honours said, was because:

such a law would be dealing with what people **did**, not with what they **are**.

### Morato

In reaching its decision the Court relied heavily on *Morato v Minister for Immigration, Local Government and Ethnic Affairs*, decided by the Full Federal Court in 1992. Following his conviction for drug trafficking, Morato gave evidence against an accomplice in a trial in Australia. Morato feared that if he returned to Bolivia, his native country, associates of his accomplice would kill him.

Morato, therefore, sought refugee status on the basis that he feared persecution for reason of membership of a particular social group. The social group being people who have 'turned Queen's evidence.'

In rejecting his claim for refugee status, the Court held that Morato was not a member of a particular social group. Chief Justice Black said that in determining membership of a social group the primary focus is on 'what a person **is** - a member of a particular social group - rather than upon what a person has done.' Should Morato suffer persecution it would be as a consequence of acts he had done, rather than his membership of a particular social group. Here, Morato was attempting to rely on his act of giving evidence against his accomplice as a basis for defining the social group.

Black CJ did not, however, assert that the activities of a purported social group are necessarily irrelevant in defining the existence of such a group. In some instances such activities may be important:

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. 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.

Persecution may be part of that interaction and may contribute to the development of the social group.

Justice Lockhart considered that the term, 'particular social group' was a 'flexible one'. His Honour said that such groups may have a variety of interests in common including 'education, morality and sexual preference':

Examples include the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies.

### Conclusion

Respondents 'A' and 'B' have 21 days in which to lodge an appeal to the High Court against the Federal Court's decision.

The *Weekend Australian* (17-18 June 1995) reported the Minister for Immigration and Ethnic Affairs, Senator Bolkus as saying that:

The legal issues involved are complex, and the decision and any implications it may have for the No 4 Bill (Migration Legislation Amendment Bill No 4) will be carefully considered.

### Further Information

- Other Parliamentary Research Service publications on this issue include:
- Millbank, A. *Boat People from China and China's One Child Policy*;
- Millbank, A. *China's One Child Policy*;
- Spry, M. *China's One Child Policy and Refugee Law: Recent trends in Canada and the United States*; and
- Spry, M. *The definition of 'refugee' and China's One Child Policy*.

**Max Spry**  
**Law and Public**  
**Administration Group**  
**Parliamentary Research**  
**Service**

Phone: 06 277 2477  
Fax: 06 277 2407

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