Attorney-General of Canada v. Ward

Discussion Paper #1

Refugee Law Research Unit
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This Discussion Paper is intended to provide a commentary on the issues raised in the Ward decision. It does not constitute a formal legal opinion.

The Refugee Law Research Unit has recently been established as an operating Unit of Osgoode Hall Law School's Centre for Research on Public Law and Public Policy, and a partner of York University's Centre for Refugee Studies. Its primary goal is to promote understanding of the Convention definition of refugee status, and more generally to promote the humane application and progressive reform of international and Canadian refugee law.

Among the projects of the Unit, one of the most important is the preparation of a series of discussion papers on issues of refugee law. I am pleased to introduce this first discussion paper, dealing with the recent decision of the Federal Court of Appeal in the case of Patrick Francis Ward, a citizen of the United Kingdom and Ireland whose claim to refugee status was ultimately denied by Canada. This decision is extraordinary in its breadth, dealing with notions of agents of persecution and availment of protection, dual nationality, and the definition of membership of a particular social group. Moreover, it has important jurisprudential value, as the majority judgment is complemented by a thorough concurring decision, which read together present most of the major concerns in relation to these three aspects of Convention refugee status.

It is our hope that this discussion paper will be of assistance to advocates involved in the process of refugee determination, to decision makers, and ultimately to those charged with the reform of policy in this field. We welcome the comments of those who read this discussion paper, and look forward to a continuing dialogue with individuals and groups concerned to ensure the continuing viability of the refugee protection system.

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Director
November, 1990
Toronto.

INTRODUCTION:

The decision of the Federal Court of Appeal in the Ward case raises numerous issues of fundamental importance in the determination of claims to refugee status. It is widely perceived that the majority decision represents a narrow and restrictive interpretation of key provisions in the Convention refugee definition as incorporated in Canadian law. The following discussion is intended to provide a commentary on Ward, and to provide a framework within which the issues raised in the case can be understood.

SUMMARY OF FACTS:

The facts in the Ward case can be briefly summarized. Ward was a citizen of the United Kingdom of Great Britain and Northern Ireland. Having been born in Northern Ireland, he was also entitled to citizenship of the Republic of Ireland. He was a member of the Irish National Liberation Army (INLA), a paramilitary organisation which uses violence to further its goal of ending British rule in Northern Ireland. Ward deserted the INLA after a crisis of conscience over a hostage-taking incident. The INLA subsequently condemned him to death. He went to the Republic of Ireland where he was arrested and imprisoned for two years because of his role in the hostage-taking incident. Prior to his release, police officers in the Republic of Ireland told him that they could not protect him from the threatened INLA revenge. They assisted him in obtaining a Republic of Ireland passport and in leaving the country. He entered Canada as a visitor and later claimed refugee status. The Immigration Appeal Board (IAB) determined that Ward was a Convention refugee, and the Minister appealed this decision to the Federal Court of Appeal.

ISSUES RAISED ON APPEAL:

Three main issues were raised on appeal.[1]

(i) Whether the IAB had erred in finding that Ward faced a genuine risk of "persecution" despite the fact that Ward did not fear state-perpetrated harm;

(ii) whether the IAB had erred in failing to consider that Ward was a national of the United Kingdom as well as of the Republic of Ireland; and

(iii) whether the IAB had erred in considering the INLA to be a "particular social group" within the meaning of that phrase in s.2(1) of the Convention refugee definition.

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[1] The issues were neither dealt with in this order nor stated in precisely these terms.

ISSUE 1 - Agents of Persecution/Availment of Protection:

Ward did not fear state-perpetrated harm. His specific fear was that upon release from prison he would be killed by the INLA and that the authorities in Ireland and the U.K. would be unable to protect him.[2] In Zahirdeen Rajudeen v. Minister of Employment and Immigration, the Federal Court of Appeal held inter alia that a claim to refugee status may be successful where there is evidence of state incapacity to protect.[3] Drawing upon this decision, the Immigration Appeal Board concluded in Ward that a state need not be complicit in the persecution complained of for a claim to refugee status to succeed. Rather, it is sufficient if the state is simply incapable of extending its protection.[4]

Before proceeding to a discussion of the majority's reasoning in Ward, it is worth reiterating why the Rajudeen principle is entirely consistent with a logical interpretation of the Convention refugee definition. The definition reads as follows:

> 'Convention refugee' means any person who, by reason of a well-founded fear of persecution for reasons of.... is unable, or, by reason of such fear, is unwilling to avail himself of the protection of that country...(emphasis added).

Thus, the definition does not apply to persons only because they have a well-founded fear of persecution for a Convention reason (race, religion etc.), but to those who, because of this fear are unable or unwilling to avail themselves of the protection of their state. The Convention does not explicitly stipulate that a refugee must fear state-perpetrated harm.[5] What is fundamental to the conception of refugeehood embodied in the Convention, however, is the requirement that state protection be absent. In other words, it is only when the link between the

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2 Reasons for Judgment, per MacGuigan J. at 10. In addition, there was some question as to whether the U.K. would be willing to offer protection given Ward's testimony that he would have been refused entrance into the U.K. This issue will be discussed in section 2.

3 "...[A]n individual cannot be considered a 'Convention refugee' only because he has suffered in his homeland from the outrageous behaviour of his fellow citizens. To my mind, in order to satisfy the definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating behaviour of private citizens, or refusing or being unable to protect the individual from such behaviour....(emphasis added)": (1985) 55 N.R. 129 at 135.

4 Reasons for Judgment, per MacGuigan J. at 11.

5 Of course, normally claims are based on a well-founded fear of state-perpetrated persecution. The question of whether an individual's inability or unwillingness to avail herself of protection arose from such fear is usually superfluous.

citizen and her state is broken by the absence of protection, that the individual is entitled to seek the protection of other states through a claim to refugee status.

Because the absence of protection, not the fear of persecution, is the fundamental prerequisite of refugeehood, the Rajudeen principle is logically compelling. It does not matter whether or not the claimant fears state persecution: what matters is whether the state is positioned to discharge its most essential duty, viz. protecting its citizens from serious harm. Therefore, in situations where it is demonstrated that the state is incapable of protecting a claimant from persecution, whether that failure is intentional or not, the claimant is no less a refugee than if the persecution were state-perpetrated.

The logic of this proposition seems to have been overlooked by the majority of the Federal Court of Appeal in Ward. Ward testified that the state was incapable of providing protection, and the IAB accepted the strongest possible evidence on this point - the express acknowledgement by state authorities of their incapacity, through promoting and actively assisting his departure from the Republic of Ireland. Nevertheless, the majority at the Federal Court of Appeal disapproved of the Board's reasoning.

Writing for the majority, Urie J. reviewed the Rajudeen decision relied on by the IAB in its finding that state incapacity to protect was sufficient to ground a claim to refugee status. He then went on to distinguish between the motivations for not availing oneself of protection:

> If a claimant is 'unwilling' to avail himself of the protection of his country of nationality, it is implicit from this fact that his unwillingness stems from his belief that the State and its authorities, cannot protect him from those he fears will persecute him. That inability [incapacity] may arise because the State and its authorities are either themselves the direct perpetrators of the feared acts of persecution, assist actively those who do them or simply turn a blind eye to the activities which the claimant fears. While there may well be other manifestations of it, these possibilities clearly demonstrate that for a claimant to be unwilling to avail himself of the protection of his country of nationality...he must establish that the State cannot protect him from the persecution he fears...On that basis the involvement of the State is a sine qua non where unwillingness to prevail [sic] himself of protection is the fact.[6]

He defined the word "unable" as meaning:

> ...[t]hat the claimant cannot, because of his physical inability to do so, even seek out the protection of his state. These imply circumstances over which he has no control and is not a concept applicable to the facts of this case.

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[6] Reasons for Judgment, per Urie J. at 13-14.

Thus, Urie J. appears to have created a rather semantic distinction between the words "unwilling" and "unable" in the Convention definition. According to his judgment, if a refugee claims to be unwilling to avail herself of the protection of her state, she must prove state "involvement" or "complicity" in the persecution feared. If she claims to be "unable" to avail herself of protection, she must show that she was physically unable to seek out this protection.

What might initially appear to be a useful distinction,[7] is, in fact, highly problematic. The delineation of the term "unwilling" as encompassing only situations where the state is complicit in the acts of persecution constitutes an unhelpful and indeed, unprecedented confinement of the kinds of situations in which a claimant might view herself as unwilling to seek out the protection of her state. Take, for example, the situation in which a state is not complicit in the acts of persecution, is willing to offer protection, but that protection exists in some reduced form. Would the claimant in these circumstances not be (justifiably) "unwilling" to avail herself of the protection of her state? Under Urie J.'s apparent distinction, her claim to refugee status would necessarily fail. Indeed, this is precisely the concern raised by Mr. Justice MacGuigan in the minority, in his holding that there was no textual basis for positing a technocratic analysis of the word "unwilling" in the Convention definition:

> ...[I] can find no warrant for limiting the sense of is unwilling to a single meaning. There may be several reasons why a claimant is unwilling to avail himself of his country's protection. The fact that there are two clauses in the subparagraph is insufficient reason for holding that there are only two possible meanings, one for each clause. In my view the logical conclusion is that there are at least two meanings, but not necessarily only two. There can be a single meaning for the first clause, and a multiple meaning for the second.[8]

Furthermore, Mr. Justice Urie's defintion of the term "unable" as applying only to situations where a person is physically incapable of seeking out the protection of her state is inconsistent with the meaning which was attributed to that phrase by the drafters of the 1951 Convention. An analysis of the travaux préparatoires relating to this phrase clearly show that "unable" referred originally to persons without a nationality, or in other words, to persons who did not have any government that could protect them. This possibility was later dealt with

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[7] Indeed, it could be argued that such a distinction is supported by the UNHCR Handbook in paragraphs 98 and 100. Handbook on Procedures and Criteria for Determining Refugee Status Office of the UNHCR, (1988) at 23 [hereinafter UNHCR Handbook].

[8] Reasons for Judgment, per MacGuigan J. at 13.

in a second paragraph to Article 1 of the draft Convention which is now part of the current definition and Canadian law.[9] However, rather than delete the word "unable", it was pointed out that it might still apply to those with a nationality whose countries refused to protect them - by denying them permission to return, for example, or refusing to issue them a passport.

While the debates support the notion that "unable" is applicable in cases where the state refuses protection, they do not directly contemplate cases of state incapacity. However, as jurisprudence under the Convention has developed, "unable" has also come to cover cases of state incapacity - a position which is clearly reflected in the UNHCR Handbook.[10] This development is entirely consistent with the original sense of the the term "unable", in that, from a protection point of view, where persecution is feared but there is no state complicity, it matters little whether the state refused protection or was simply incapable of providing it.

The decision in Ward appears to run counter to this trend. However, if this decision stands it is still possible to successfully argue a claim in the absence of state complicity:

(1) The first approach would be simply to read the Ward case narrowly as not stating explicitly that an element of state complicity is required to prove persecution. Urie J.'s discussion on this matter was clear as regards "unwilling", but somewhat ambiguous regarding "unable". Although he did say that "unable" (meaning physical inability) did not apply to the facts of the case, he also approved of the Board's holding that "...the individual's inability to avail himself of his country's protection and the state's inability to offer protection are inextricably intertwined".[11] The crucial point on this issue for the majority was to refute the Board's holding that

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9 S.2(1) of the Immigration Act as enacted by R.S.C. 1985 (4th Supp.) c. 28, incorporating the Convention refugee definition, defines the term "refugee" as applying to any person who: "not having a country of nationality, is outside the country of his former habitual residence and is unable, or by reason of that fear, is unwilling to return to that country...(emphasis added)".

10 "...[W]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection...(emphasis added)": Paragraph 65, UNHCR Handbook, supra, note 7 at 17.

11 Reasons for Judgment, per Urie J., at 14.

a lack of protection gave rise to a presumption of persecution.[12] In other words, a narrow reading of the case suggests that the ratio on this issue was that a lack of protection does not lead to a presumption of persecution. This, in itself, is an innocuous holding as persecution must always be shown.

(2) A second way to take hold of a rather slippery issue is to return to the fundamental issue of state protection. The core problem in Ward did not relate to the reasons underlying his motivation for not benefitting from state protection. Ward may have been both unwilling and unable, or neither, depending on how those words are interpreted. The real issue was the substantive nature of the "protection" which was available. The problem was not Ward's motivation, but the fact that, regardless of whether he was able and willing, the state was incapable of protecting him.

This suggests a different framework for approaching cases like Ward. Where the state's incapacity to protect a claimant is in question, the issue to be determined is not the motivation underlying her decision not to avail herself of the protection of her state, but rather a consideration of the substantive nature of the protection. If there is clear evidence, as there was in Ward, that the protection is insufficient or non-existent, then it follows that the claimant cannot possibly benefit (i.e "avail") from state protection.

Issue 2 - Dual Nationality:

The United Kingdom (hereinafter "the U.K.") is composed of Great Britain and Northern Ireland, and thus all residents of Northern Ireland are citizens of the U.K. (provided of course that they meet the conditions normally applicable to obtaining U.K. citizenship, e.g. birth in the U.K., or naturalization). However, all citizens of the U.K. who are residents of Northern Ireland are also entitled to citizenship of the Republic of Ireland (hereinafter "Ireland"). As Ward was born in Northern Ireland he was a U.K. citizen, but also, if he chose, eligible for Irish citizenship. This option was in fact exercised by him when he applied for and was granted a passport from the Republic of Ireland which he used to travel to Canada. The acceptance of the latter did not dissolve his status as a U.K. citizen as dual citizenship is permitted as between the two countries.

The IAB held that Ward:

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[12] "No such presumption arises. The determination can only be made after an assessment and weighing of the evidence to ascertain whether or not the claimant...has, on a subjective and on an objective basis a well-founded fear of persecution for one of the reasons set out in the definition. Thereafter the other elements of inability or unwillingness must be addressed": Ibid. at 15.

> "...[i]s a citizen of Ireland, both Northern Ireland and the Republic of Ireland. However, no evidence was presented to the Board to establish that the claimant is also a citizen of the United Kingdom."[13]

Given the clarification above, it is obvious that the Board made a significant error - Ward could no more be a "citizen of Northern Ireland" than he could be a citizen of Oxfordshire. This error merely compounded matters with regard to its subsequent holding that it was incumbent upon the Minister to prove Ward's U.K. citizenship if she sought to claim that Ward could be returned to the U.K. The Board itself had de facto proved this citizenship by finding as a fact that he was born in Northern Ireland.

The fact that Ward was considered to be a national of both the U.K. and Ireland raises the issue of dual nationality. In this respect, there are two points of relevance to be considered, both of which were reflected in the Court's holding that:

> ...[a] refugee claimant must establish that he is unable or unwilling to avail himself of all of his countries of nationality. It is the nationality of the claimant which is of prime importance. The right to live in his country of nationality becomes relevant only in the discharge of the onus on himself of proving that he is unable to avail himself of the country of which he has established he is a national.[14]

The first issue raised here is whether a claimant who has more than one "country of nationality" must prove a well-founded fear of persecution in each one. The Federal Court was unanimous in its conclusion that the claim must be proved against each country of nationality. This is no doubt a correct holding, especially given the comments above on protection. If a claimant has two countries of nationality - A and B, but only has a well-founded fear of persecution in country A, it does not necessarily follow that she is in need of protection. If she does not have a well-founded fear of persecution in country B, she cannot claim an inability or unwillingness to benefit from country B's protection, unless she can show that her citizenship in country B is only **putative or ineffective.**

Putative citizenship refers to cases where a person is not an actual citizen of that country, though she may be entitled to citizenship by virtue of that country's domestic law.[15] This scenario did not arise in Ward.

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[13] Reasons for Judgment, per Urie J., at 15.

[14] Reasons for Judgment, per Urie J., at 19.

[15] Putative nationality would apply in situations of, for example, Jewish persons outside of Israel who are entitled, by virtue of Israel's Law of Return, to Israeli citizenship. Though every Jewish person may claim Israeli citizenship, a Jewish asylum-seeker should not be required to make this claim. Until such a person is actually a citizen of Israel, Israel has no greater duty to offer protection (as a matter of

Ineffective citizenship refers to cases where a person is an actual citizen of country B, but that country has refused to extend its protection to her. For example, country B may have issued the claimant with a passport of convenience only, on the clear understanding that it did not entitle her to the normal rights flowing from citizenship, especially the right to enter that country.

Applying this framework to the facts in Ward, an interesting aspect of the notion of ineffective citizenship emerges. It appears that in addition to his fear of persecution in Ireland, Ward asserted a well-founded fear of persecution in the U.K. on the basis that the authorities in the U.K. would probably refuse to protect him.[16] This gives rise to the second important issue concerning dual nationality in Ward - must the second country of nationality explicitly refuse to protect (by denying entrance or a passport), or can there be an implied refusal?

In the Ward case, Urie J. held that the onus was on the claimant to prove that he could not benefit from the protection of the U.K. Evidence was presented to the Board which suggested that the Prevention of Terrorism Act[17] (PTA) prevented Ward from entering Great Britain, (i.e. the U.K. minus Northern Ireland). Ward testified that as a former member of the INLA and because of two 'terrorist' related convictions he would most certainly not be admitted to Great Britain. However, Urie J. held that Ward should have sought the U.K.'s protection and thus implicitly found that the possibility of exclusion under the PTA was insufficient proof of a refusal by the U.K. to offer protection. The essence of the majority decision, therefore, is that Ward was obliged to test whether or not he would be excluded under the PTA.[18] Is this a reasonable requirement?

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international law), than any other state.

[16] However, it appears that Ward was alleging a refusal to protect only with respect to Great Britain (the U.K. minus Northern Ireland). It is implicit in the case at both the IAB and FCA levels, that Ward feared that protection in Northern Ireland, even if offered, would be insufficient. If there was no protection in the Republic, then it must follow that Northern Ireland was also unsafe given that the INLA is based there. Since Northern Ireland is part of the U.K., and because both Urie J. and MacGuigan J. only speak of a return to Great Britain they are thus indirectly upholding the 'local flight' principle.

[17] Prevention of Terrorism Act (Temporary Provisions) Act, 1984 c. 8.

[18] It is unclear whether the full effect of the PTA was entered into evidence. If it was not, this is regrettable given that the broad language for exclusion under the PTA seems certain to have captured Ward within its embrace as any person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism" may be exluded: PTA Section 4(1)(a). Ward had been convicted in 1982 of, inter alia, "contributing to acts of terrorism" (Reasons for Judgment, Urie J., at 3) and in 1983

To answer this question we must return to the notion of inability to benefit from protection. In the Ward case, the U.K. had not conclusively refused protection, but the PTA was strong evidence of the likelihood of such a refusal. The rationale for requiring Ward to seek protection in the U.K. is that the U.K. has the obligation to protect him before any potential country of asylum. But where there is evidence that the U.K. may refuse to protect, and that such refusal will lead to a return to persecution, there are good grounds for holding that the citizenship is not effective.[19] In Ward, the likelihood of a refusal was apparently not sufficient for the Federal Court, though the record may have been incomplete with regard to the operation of the PTA.

Issue 3 - Membership of a Particular Social Group:

Of the five Convention reasons upon which a claim to refugee status can be based, "membership of a particular social group" is undoubtedly the most ambiguous. While there is some debate as to the correct interpretation of "race" and even "nationality", the social group category is perhaps the most malleable of the Convention grounds for persecution. The nebulous nature of the term is both its strength and its weakness, in that it allows for a wide-ranging and flexible approach to locating accepted reasons for persecution, but in so doing opens itself to the charge of creating indeterminate classes of persons who can bring a successful claim to refugee status.[20]

It is worth emphasizing that it is the uncertain parameters of the social group category which conditioned the majority decision in Ward. Urie. J. was reluctant to include within this category "...organizations whose sole

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of "forcible confinement" for the hostage incident (Reasons for Judgment, Urie J., at 4). Furthermore, there is evidence that in a 1979 case, the British police excluded from Great Britain a man who had once been a member of the IRA, had served a brief prison sentence and, as he was suspected of being an informer, was being sought by the IRA. The police in Belfast had assisted him in departing for Great Britain. Moreover, the operation of the PTA makes it clear that had Ward gone to Great Britain and been excluded, the U.K. authorities would have sent him back to Northern Ireland: See C. Scorer, S. Spencer and P. Hewitt, The New Prevention of Terrorism Act: The Case for Repeal (National Council for Civil Liberties: London, 1985).

[19] Given the "reasonable chance" standard established in Joseph Adjei v. Minister of Employment and Immigration (1989) 7 Imm. L.R. (2d) 169), it is submitted that a similar standard be applied in cases of assessing whether citizenship is effective on the basis that a refusal of admission to the country of citizenship may result in a return to persecution.

[20] It is beyond the scope of this paper to set out a comprehensive framework for determining the proper interpretation of the phrase "membership of a particular social group".

raison d'être is by force to overthrow the duly and democratically constituted authority in countries...where unquestionably the rule of law continues to prevail".[21] That such considerations may no longer carry the same weight given the incorporation of the exclusion clauses into Canadian law is no doubt useful to remember in assessing the impact of Ward on Canadian case law.[22]

The majority decision in Ward centred on the question of whether the INLA, a "terrorist" organization, could constitute a "particular social group" - a question the Board, apparently without analysis, answered affirmatively. Urie J. seemed reluctant to accept an open-ended approach to defining social groups covered by the Convention,[23] and clearly felt that some groups were excluded.[24] According to Urie J., the line is drawn between Convention social groups and other social groups on the basis of state-perpetrated persecution against the group: "...[t]he persecution arising from membership in the group must arise from its activities perceived to be a possible danger of some kind to the government".[25] This interpretation was supported by reference to the UNHCR Handbook which defines a social group as comprising "persons of similar background, habits or social status" and suggests that such groups may be persecuted:

> ...because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as

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21 Reasons for Judgment, per Urie J., at 20-21.

22 Section 2(1) of the Immigration Act R.S.C. 1985, c. 28 (4th Supp.), provides that: 'Convention refugee' means any person who (a) by reason of a well-founded fear of persecution....but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof...(emphasis added). The exclusion clauses apply inter alia to persons with respect to whom there are serious reasons for considering have committed crimes against peace or humanity, or serious non-political crimes. The exclusion clauses were incorporated into Canadian law as part of the amendments introduced in Bill C-55 (2nd Session, 33rd Parliament, 35-36 Elizabeth II, 1986-87, The House of Commons of Canada), which entered into force on January 1, 1989.

23 "It was the contention of counsel for the Respondent that any reasonably definable organization engaged in political activity may be included in the definition. If that were so I find it difficult to understand why it was necessary to include in the definition the term 'a particular social group' when the term 'political opinion' is part of the definition": Reasons for Judgment, per Urie J., at 9.

24 This is implicit in his resort to the Oxford Dictionary definition of "social", which led him to the conclusion that although the INLA is a "social" group (because its members are "associated, allied or combined") it was nevertheless necessary to ask whether "...it [is] the kind of social group, membership in which provides a basis for a finding of a well-founded fear of persecution?": Reasons for Judgment, per Urie J., at 10.

25 Reasons for Judgment, per Urie J., at 9.

such, is held to be an obstacle to the Government's policies.[26]

In other words, where the state does not have an adverse view of the group, persecution based on membership within it cannot support a claim to refugee status.

In Ward, it was suggested that Ward's social group was either the INLA or, more properly, defectors from the INLA, but, in either case, state complicity in the persecution feared was not alleged. Thus, according to Urie J:

> ...if the fear arises from within the group itself and does not emanate from the State, whether in the persona of the police or some other branch of government, it cannot provide the basis for a claim of persecution.[27]

Since the state was not complicit in the persecution Ward feared, his was not a group that came within the definition.

The reasoning of the majority can be summarized as follows:

(i) Not all "social" groups fall within the Convention definition;

(ii) it is the adverse view which the state holds of a group that crystallizes any social group into a Convention social group;

(iii) where there is no state complicity in the persecution feared, a claim grounded only in social group cannot succeed; and

(iv) "terrorist" groups are not necessarily excluded from the category of Convention social groups, subject to public policy considerations as to the propriety of protecting members or former members of such groups.

There are two significant problems with holding that a claim grounded in social group can only succeed when the state holds an adverse view of the group and is thus complicit in the persecution feared. First, as the discussion above on Issue 1 indicates, there is no valid basis for holding that the Convention requires state complicity for a claim to refugee status to succeed. If the state need not be complicit in religious, racial, political or nationality-based persecution, but only incapable of protecting persons from this persecution, why is state complicity a prerequisite to a successful claim on social group grounds?

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[26] Paragraph 78, UNCHR Handbook, supra note 7 at 19.

[27] Reasons for Judgment, per Urie J., at 10.

Second, numerous groups that have traditionally been recognized in Canadian and international law as Convention social groups would now be excluded. For example, young men of military age in countries like Lebanon have often successfully advanced social group claims, fearing not the government, but the various militias threatening them with forcible recruitment. The state in countries like Lebanon holds no adverse view of this group, but it is incapable of protecting them. Lebanon might be distinguished as a country without a government where the substituted authorities - the various militias in control of particular zones - hold the adverse view of the group. However, in El Salvador young men fleeing forcible recruitment by the armed opposition might be equally unable to secure state protection despite the absence of government hostility towards the group.

The essential difficulty with making a distinction between Convention social groups and other social groups on the basis of the government's view of that group is that it puts the cart before the horse. Do social groups come into being only when the government views a group with hostility? Is it not the existence or formation of the group itself which causes (and predates) the hostile government reaction? What is needed is a concept of social group, like a concept of political opinion or religion, which will exist independently of the nature of the persecution directed against it. To make the line of distinction betwen Convention and other social groups dependent on the nature of the persecution is to join together what should be separate assessments. The confusion which results from such an endeavour is apparent in Ward.

Before leaving this issue, it should be pointed out that the debate in Ward over social group was entirely unnecessary as the claim should have been anchored in political, not social group grounds. The INLA had sentenced Ward to death because of his desertion from the group based on his opposition to their methods of advancing political goals. "Political opinion" is interpreted broadly[28] and could easily have embraced the reason for Ward's fear. It is suggested, therefore, that where a claim has a political basis, it is advisable not to argue the claim on the ground of membership of a particular social group, at least until there is broader consensus on

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[28] See, for example, the decisions of the Federal Court of Appeal in Akrimul Hugue Chowdury v. Deputy Attorney General of Canada, Federal Court of Appeal Decision A-468-87, May 12, 1988; Re Ricardo Andres Inzunza Orellana and Minister of Employment and Immigration (1979) 103 D.L.R. (3d) 105; Leonardo Arturo Espinosa Astudillo v. Minister of Employment and Immigration (1979) 31 N.R. 121; and Angel Eduardo Jerez Spring v. Minister of Employment and Immigration, Federal Court of Appeal Decision A-361-80, December 4, 1980.

the proper means of distinguishing between Convention social groups and other social groups.