

On June 30, 1993, the Supreme Court of Canada issued its long awaited decision in the appeal of Patrick Francis Ward, an applicant for refugee status from the Republic of Ireland. This is the first decision of the Supreme Court of Canada to deal in depth with the Convention refugee definition.

Mr. Justice LaForest's judgment is extraordinarily comprehensive in its treatment of nearly every key element of the refugee concept. It is easily the most far-ranging decision on refugee status issued by the senior court of any country.

In view of the significance of the judgment, and its generally pro-refugee and internationalist stance, we have extracted key quotations from the decision and re-ordered them using the analytical headings established in The Law of Refugee Status (1991). Moreover, the extent to which the holdings either confirm, support, are consistent with, diverge from, or contradict the positions taken in this study is noted after each quotation.

It is our hope that this brief Table of Concordance will assist lawyers and others involved in the protection of refugees to grapple with the key aspects of this very important legal precedent.

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Canada v. Ward

[1993] SCJ 74

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Table of Concordance to The Law of Refugee Status (1991)

Chapter 2: Alienage

- 2.5.1 "... [T]he rationale underlying international refugee protection is to serve as 'surrogate' shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option": para. 130. Confirmatory.
- 2.5.1 "The exercise of assessing the claimant's fear in each country of citizenship at the stage of determination of 'Convention refugee' status... accords with the principles underlying international refugee protection. Otherwise, the claimant would benefit from rights granted by a foreign state while home state protection had still been available": para. 133. Confirmatory.
- 2.5.1 "An underlying premise of this presumption, however, is that citizenship carries with it certain basic consequences. One of these... is the right to gain entry to the country at any time...": para. 137. Confirmatory.
- 2.5.1 Evidence that a national may be prohibited from entering his or her state of nationality "... might serve to rebut the presumption by demonstrating a lack of protection... Denial of admittance to the home territory is offered by the UNHCR in its Handbook, at paragraph 99, as a possible example of what might amount to a refusal of protection": para. 137. Consistent.

Chapter 3: Well-Founded Fear

- 3.0 "... [T]he test is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense": para. 64. Contradictory: continues the traditional view that well-

founded fear is not a strictly objective criterion.

- 3.0 "A subjective fear of persecution combined with state inability to protect the claimant creates a presumption that the fear is well-founded": para. 72. Contradictory for reason previously noted.
- 3.2 "Having established that the claimant has a fear, the Board is, in my view, entitled to presume that persecution will be likely, and the fear well-founded, if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution. But I see nothing wrong with this, if the Board is satisfied that there is a legitimate fear, and an established inability of the state to assuage those fears through effective protection": para. 62. Consistent: this evidentiary presumption is novel, but logical in the overall "failure of protection" scheme.
- 3.2 "The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced": para. 72. Consistent.
- 3.2 "... [T]he heart of the inquiry... is whether there is a likelihood of persecution": Divergent: while the Adjei test is not raised as an issue, appears to posit a more difficult test than the "reasonable chance" standard.

Chapter 4: Persecution

- 4.1 "Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination... This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention... This theme sets the boundaries for many of the elements of the definition of 'Convention refugee.' 'Persecution', for

example, undefined in the Convention, has been ascribed the meaning of 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'...": paras. 89-91. Confirmatory.

- 4.4.1 "... [T]he international community did not intended to offer a haven for all suffering individuals. The need for 'persecution' in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary": para. 85. Confirmatory.
- 4.5 "International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection was unavailable, and then only in certain situations": para. 28. Confirmatory.
- 4.5 "The international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution": para. 46. Confirmatory.
- 4.5.1 "The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as 'surrogate or substitute protection', activated only upon failure of national protection...": para. 28. Confirmatory.
- 4.5.1 "In sum, the parties, including the respondent, appear to be unanimous in concluding that the court below was wrong to suggest that the claimant's fear must emanate from the state.

As well, there is substantial agreement that a state's inability to protect is an integral component of the notion of a Convention refugee... I find that the consensus reached by the parties is substantially correct": para. 34. Confirmatory.

4.5.1 "... [I]f a state is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded. Beyond this point, I see nothing in the text that requires the state to be complicit in, or be the source of, the persecution in question. My conclusion [is] that state complicity in persecution is not a pre-requisite to a valid refugee claim...": paras. 36-37. Confirmatory.

4.5.1 "I, therefore, conclude that persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens": para. 47. Confirmatory.

4.5.1 "The distinction between these two branches of the 'Convention refugee' definition resides in the party's precluding resort to state protection: in the case of 'inability', protection is denied to the claimant, whereas when the claimant is 'unwilling', he or she opts not to approach the state by reason of his or her fear on an enumerated basis. In either case, the state's involvement in the persecution is not a necessary consideration": para. 57. Confirmatory.

4.5.1 "It is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded...": para. 61. Confirmatory.

4.5.1 "... [I]t would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness. Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection 'might reasonably have been forthcoming', will

the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of 'Convention refugee' where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state": paras. 67-68. Confirmatory.

- 4.5.1 "Where such an admission [of inability to protect, by the state of origin] is not available, however, clear and convincing confirmation of a state's inability to protect must be provided... Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant": para. 69. Consistent.
- 4.5.1 "...Satiacum may best be explained as exemplifying such a case of presumption of a state's ability to protect and of objective unreasonability in the claimant's failure to avail himself of this protection": para. 70. Confirmatory.
- 4.5.1 "Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already": para. 71. Consistent: the reference to the inappropriateness of a claimant seeking out "better protection" must be read together with para. 67 which requires that only protection which is "effective" is relevant.
- 4.5.1 Evidence that a national may be prohibited from entering his or her state of nationality "... might [demonstrate]... a lack of protection... Denial of admittance to the home territory is offered by the UNHCR in its Handbook, at

paragraph 99, as a possible example of what might amount to a refusal of protection": para. 137. Consistent.

Chapter 5: Nexus to Civil or Political Status

- 5.0 "International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection was unavailable, and then only in certain situations": para. 28. Confirmatory.
- 5.0 "The distinction between these two branches of the 'Convention refugee' definition resides in the [circumstances] precluding resort to state protection: in the case of 'inability', protection is denied to the claimant, whereas when the claimant is 'unwilling', he or she opts not to approach the state by reason of his or her fear on an enumerated basis...": para. 57. Supportive: the nexus requirement implies a linkage between civil or political status and the absence of state protection (as opposed to a linkage to the harm itself).
- 5.0 "... [T]his persecution [must be] directed at the claimant on the basis of the enumerated grounds...": para. 72. Contradictory: seems to suggest that the nexus requirement applies to the harm (rather than the absence of state protection), and is thus inconsistent with para. 57 (noted above).
- 5.0 "The drafters' decision to list these bases was intended to function as another built-in limitation on the obligations of signatory states. The issue that arises, therefore, is the demarcation of this limit": para. 86. Confirmatory.
- 5.0 "... [I]t is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground": para. 117. Consistent.

- 5.0 "The examination of the circumstances should be approached from the perspective of the persecutor, since that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution": para. 120. Confirmatory.
- 5.4 "The more general interpretation of political opinion suggested by Goodwin-Gill... i.e. 'any opinion on any matter in which the machinery of state, government, and policy may be engaged', reflects more care in embracing situations of this kind": para. 118. Supportive.
- 5.4.2 "First, the political opinion at issue need not have been expressed outright. In many cases, the claimant is not given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant": para. 119. Confirmatory.
- 5.4.2 "Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution": para. 120. Confirmatory.
- 5.4.2 "... [I]nternational refugee protection extends to situations where the state is not an accomplice to the persecution, but is unable

to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real": para. 118. Consistent.

5.4.2 "To Ward, who believes that the killing of innocent people to achieve political change is unacceptable, setting the hostages free was the only option that accorded with his conscience. The fact that he did or did not renounce his sympathies for the more general goals of the INLA does not affect this. This act, on the other hand, made Ward a political traitor in the eyes of a militant para-military organization... Whether viewed from Ward's or the INLA's perspective, the act is politically significant. The persecution Ward fears stems from his political opinion as manifested by this act": para. 123. Supportive.

5.4.2 "In INS v. Elias-Zacarias... Scalia J. was not convinced that the claimant's motive, nor that perceived by the guerillas to be his motive, was politically based... In Ward' case, a contrario, his act was inconsistent with any other possible motive": paras. 124-125. Divergent: problematic insofar as countenances a superficial application of an otherwise valid doctrine.

5.4.2 "Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction. This approach... would preclude a former Mafia member, for example, from invoking it as precedent": para. 126. Consistent.

5.5 "In my view, the supporters of the wide definition [of particular social group] exaggerate the implications of the intention of the framers [of the Convention]. The fact that this class was added to enlarge the range of cases falling within the definition of 'refugee' therein was initially a Cold War reaction aimed at ensuring a haven for capitalists fleeing the persecution they encountered in Eastern Bloc regimes after the World War II": para. 83. Confirmatory.

- 5.5 "In distilling the contents of the head of 'particular social group'... it is appropriate to find inspiration in discrimination concepts. Hathaway... explains that the anti-discrimination influence in refugee law is justified on the basis of those sought to be protected thereby... The manner in which groups are distinguished for the purposes of discrimination law can thus appropriately be imported into this area of refugee law": paras. 93-94. Confirmatory.
- 5.5 [The Court cites at length the eiusdem generis test as set out in Matter of Acosta]. "What is excluded by this definition as 'groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights...': paras. 98-99. Confirmatory.
- 5.5 "The 'analogous grounds' approach to s.15 of the Charter parallels that of the Federal Court of Appeal in its recent judgments, as well as the United States Board of Immigration Appeals, with respect to the definition of 'particular social group' in the distillation of and extrapolation from the common thread running through the enumerated heads. These types of tests appear to be appropriate to us": paras. 100-101. Confirmatory.
- 5.5 "The meaning assigned to 'particular social group' in the Act should take account of this general underlying themes of the defence of human rights and anti-discrimination that form the basis of the international refugee protection initiative. The test proposed in Mayers... Cheung... and Matter of Acosta... provide a good working rule to achieve this result. They identify three possible categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence": para. 103. Confirmatory/Divergent: the first two groups named confirm the position advocated in LRS; quaere the extent to which the third category

may be more narrow than "groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change."

- 5.5 "The fact that Ward might no longer be a member [of the INLA] is merely a result of the persecution feared, not its foundation": para. 113. Supportive: in rejecting "former members of the INLA" as an appropriate form of "particular social group" in this way, the Court is impliedly diverging from the (unduly restrictive) formulations of the relevant particular social groups identified by the Federal Court in Mayers and Cheung. In each of these cases (as in Ward), the Federal Court (inappropriately) defined the group by "result" ("subject to wife abuse" and "faced with forced sterilization") rather than by "foundation" (e.g. "women").
- 5.5 "The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person": para. 104. Confirmatory: immutability is the reason that any form of past status must be cognizable. Quaere the logic of the restrictive interpretation suggested in para. 103.
- 5.5 "The third branch of the definition is not applicable... [where] the group is associated in the present and membership is not unchangeable owing to its status as a historical fact. (It seems that this branch of the definition will only come into play when the identity of the persecutor does not coincide with that of the social group... For this prong to be relevant, the social group should no longer be actively affiliated; if the group has disbanded, it cannot possibly persecute)": para. 115. Divergent: what of the situation of a presently constituted social group from which disengagement is not possible without severe consequences?
- 5.5 "... [T]he exclusion of... undesirable claimants [by exclusion from the definition of 'particular social group']... is a limitation of the scope of the definition of 'particular social group.' An examination of the Act as

a whole, however, reveals that the concerns... are anticipated and provided for elsewhere in the Act. In my view, therefore, such a restriction on the scope of 'particular social group' is unnecessary and render redundant the explicit exclusionary provisions": para. 106. Confirmatory.

- 5.5.1 "The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation...": para. 104. Confirmatory, though "linguistic background" arguably "nationality."
- 5.5.1 "The fact that Ward might no longer be a member [of the INLA] is merely a result of the persecution feared, not its foundation": para. 113. Supportive: in rejecting "former members of the INLA" as an appropriate form of "particular social group" in this way, the Court is impliedly diverging from the (unduly restrictive) formulations of the relevant particular social groups in both Mayers and Cheung. In each of these cases (as in Ward), the Federal Court (inappropriately) defined the group by "result" ("subject to wife abuse" and "faced with forced sterilization") rather than by "foundation" (e.g. "women").
- 5.5.2 "The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation...": para. 104. Confirmatory, though "linguistic background" arguably "nationality."
- 5.5.4 "The persecution in the 'Cold War cases' was imposed upon the capitalists not because of their contemporaneous activities but because of their past status as ascribed to them by the Communist leaders. Given this historical origin, the definition of 'particular social group' must, at the very least, embrace these types of situations": para. 84. Supportive.
- 5.5.5 "Surely there are some groups, the affiliation in which is not so important to the individual that it would be more appropriate to have the person dissociate him- or herself from it before Canada's responsibility should be engaged": para. 102. Confirmatory.

- 5.5.5 "Perhaps the most simplified way to draw the distinction is by opposing that which one is against that which one does, at a particular time. For example, one could consider the facts in Matter of Acosta, in which the claimant was targeted because he was a member of a taxi driver cooperative. Assuming no issues of political opinion or the right to earn some basic living are involved, the claimant was targeted for what he was doing and not for what he was in an immutable or fundamental way": para. 102. Divergent: appears to suggest that groups defined by occupational choice may (except where basic ability to earn livelihood is involved) be excluded from the scope of the "particular social group" category.
- 5.5.5 "... [T]he second [category] would encompass, for example, human rights activists": para. 104. Supportive.
- 5.5.5 "As for the second branch... [a] voluntary association [which is] committed to the attainment of specific political goals by any means, including violence... [cannot] be said to be so fundamental to the human dignity of its members such that it constitutes a 'particular social group'... [R]equiring them to abandon their violent means of expressing and achieving these goals does not amount to an abdication of their human dignity": para. 115. Divergent: is this not in fact importing consideration of "undesirability" in a manner inconsistent with para. 106?
- 5.6.3 "... [T]he international community did not intend to offer a haven for all suffering individuals. The need for 'persecution' in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary": para. 85. Confirmatory.

Chapter 6: Cessation and Exclusion

- 6.3 "... Parliament opted not to treat a criminal past as a reason to be estopped from obtaining refugee status...": para. 109. Confirmatory.
- 6.3.2 "Hathaway... interprets this exclusion to embrace 'persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status.' In other words, Hathaway would appear to confine paragraph (b) to accused persons who are fugitives from prosecution. The interpretation of this amendment was not argued before us. I note, however, that Professor Hathaway's interpretation seems to be consistent with the views expressed in the Travaux Préparatoires, regarding the need for congruence between the Convention and extradition law...": para. 111. Confirmatory.