

THE CASES OF *WARD* AND *CHAN*®

BY RON SHACTER *

Parkdale Community Legal Services has had an Immigration and Refugee division since 1989. The immigration division is one of the busiest divisions. The group represents refugee claimants, with an overall priority of women fleeing abuse in their country of nationality. The group also advocates for clients in family reunification and landing matters and represents clients in their applications for landing on humanitarian and compassionate grounds. Law reform work includes continued work with the Toronto Coalition Against Racism and the Canadian Council for Refugees to build responses to the Head Tax, Safe Third Country Agreement, and the new identification and delayed landing requirements. The group also continues outreach and organizing “undocumented” workers in the Parkdale community. In the following article, Staff Lawyer Ron Shacter prefaces the two occasions in which PCLS intervened in refugee cases before the Supreme Court of Canada.

Depuis 1989, *Parkdale Community Legal Services* possède une division de l’immigration et du statut de réfugié qui grouille d’activité. Le groupe représente des personnes qui réclament le statut de réfugié, en donnant la priorité aux femmes victimes d’abus de toutes sortes dans leur pays d’origine. De plus, le groupe oeuvre en matière de réunification familiale et de droit d’établissement, en plus de représenter des clients qui présentent des demandes d’établissement fondées sur des raisons humanitaires. Le travail du groupe pour une réforme du droit inclut une collaboration continue avec la *Toronto Coalition Against Racism* et le Conseil canadien pour les réfugiés afin de trouver des solutions au *Head Tax*, *Safe Third Country Agreement* ainsi qu’aux nouvelles conditions d’identification et aux délais dont est assorti le droit d’établissement. Le groupe continue également d’aider les travailleurs «non documentés» de la communauté de Parkdale à s’organiser. Dans l’article qui suit, MeRon Shacter commente, en guise de préface, les deux occasions où PCLS est intervenu en Cour suprême du Canada dans des affaires portant sur le statut de réfugié.

I. INTRODUCTION	724
II. EXCERPTS FROM THE <i>WARD</i> FACTUM	726
III. EXCERPTS FROM THE <i>CHAN</i> FACTUM	731

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I. INTRODUCTION

In two refugee cases, Parkdale Community Legal Services (PCLS) intervened before the Supreme Court of Canada on behalf of the Canadian Council for Refugees (CCR): *Canada (A.G.) v. Ward*¹ and *Chan v. Canada (Minister of Employment and Immigration)*.² The CCR is a non-profit umbrella organization committed to the rights and protection of refugees in Canada and shares many of the same goals and law reform priorities as the PCLS immigration and refugee division. The CCR had never previously sought intervenor status and in both cases, our request to intervene was granted by consent of the parties. Preparation included several weeks of research, drafting and revising the factums (portions of each factum are appended to my preface), and as I had never appeared before the Supreme Court, I chose to arrive in Ottawa one day early so that I could watch other lawyers present their oral argument.

The *Ward* case is important because it involved for the first time the interpretation of the definition of a Convention refugee by the Supreme Court of Canada. Mr. Ward, a citizen of the United Kingdom and also Ireland, was a member of a paramilitary group, the Irish National Liberation Army (INLA). The INLA sought the union of Ulster and the Irish Republic. After being assigned the duty of guarding hostages, Mr. Ward allowed the hostages to escape when he learned of their impending execution by this group. Mr. Ward subsequently escaped from the INLA. His refugee claim was based on fear for his life from the INLA and the inability of the Irish authorities to protect him from it.

PCLS and the CCR decided to intervene in this case because of the decision of the Federal Court of Appeal in *Ward*. That court required a) state complicity in persecution in certain circumstances; and b) that the activities of a particular social group (one of the five possible grounds for claiming refugee status along with race, religion, nationality, and political opinion) be perceived as a *threat* to the state. PCLS argued that these requirements were contrary to both international law and the *Canadian Charter of Rights and Freedoms*.³ If this decision had

¹ [1993] 2 S.C.R. 689 [hereinafter *Ward*].

² [1995] 3 S.C.R. 593 [hereinafter *Chan*].

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. See paragraphs 6-7, 13-14, and 28-47 of the CCR's factum, reproduced hereafter.

prevailed, women and children in most cases would have been denied protection as Convention refugees because they are generally not seen as a danger by agents of persecution.

The Supreme Court of Canada accepted the arguments made by the CCR in terms of international law. It explicitly recognized women, children and sexual orientation as constituting the basis for particular social groups. In addition, for refugee status to be granted the Court required that claimants be credible and demonstrate a lack of state protection from the persecution feared, owing to membership in such a group. There is no need for claimants to show state complicity in such persecution.

The Court found it unnecessary to deal with the section 15 *Charter* arguments. However, the decision is far-reaching with respect to the interpretation of the Convention refugee definition for all claimants in Canada as well as other countries. The Court clarified that the protection of basic human rights informed the interpretation of the elements of the definition of Convention refugee. Tribunals can no longer properly deny that women, for example, are a particular social group, or exclude “private persecution” (e.g., women fleeing domestic violence) from the scope of the definition of Convention refugee. This is of enormous significance to our work at the clinic and to both potential and actual refugee claimants.

In the case of *Chan*, the claimant’s wife gave birth to a second child in violation of the one-child policy in China. According to Mr. Chan, the authorities ordered him *or* his wife to undergo sterilization. Under pressure, he consented to this operation. Mr. Chan then left China before he was to be sterilized.

His refugee claim was based on a fear of forced sterilization in China for breaching the one-child policy.

PCLS and the CCR decided to intervene in *Chan* because, according to the Federal Court of Appeal decision, those resisting a valid state policy such as population control cannot be Convention refugees. Any means used by a state, including a violation of a basic human right such as physical integrity and reproductive capacity, would be justified; anyone fleeing such treatment would be denied refugee status.

The Supreme Court of Canada, with a strong dissent by three of the seven Justices hearing the case, denied the appeal on the sole ground that Mr. Chan would not face forced sterilization.

In dissent, Mr. Justice La Forest found that Mr. Chan’s fear was objectively well-founded. In addition, he referred favourably to the CCR’s *factum* and held that a law or policy of general application may

violate basic human rights. Thus, forced sterilization, for example, is a form of persecution, and therefore a violation. Finally, Mr. Justice La Forest adopted the CCR's argument that concern about "floodgates" or a large volume of refugee claimants coming to Canada is an inappropriate legal consideration.⁴

The importance of the Supreme Court of Canada's decision in *Chan* lies in its clarification of *Ward*, in the strong dissenting judgment. The central focus of refugee law is the protection of basic human rights: the end (*i.e.*, a valid state policy) can never justify the means (*i.e.*, a violation of such rights). Together, *Chan* and *Ward* are the most significant cases in Canada relating to the definition of a Convention refugee and courts in other Commonwealth jurisdictions have considered these two decisions.⁵

II. EXCERPTS FROM THE *WARD* FACTUM

7. It is submitted that the Court in the present case erred in its interpretation of "particular social group": a) in holding that the INLA was the appellant's social group; and b) in requiring that the activities of such a group be perceived as a possible danger to the state.

13. The Court, through applying paragraphs 77-79 of the *Handbook*, required that the activities of a particular social group be perceived as being a possible danger to the state.

United Nations High Commissioner for Refugees,
*Handbook on Procedures and Criteria for Determining
Refugee Status*(Geneva: Office of the United Nations
High Commissioner for Refugees, 1979), paras. 77-79
[hereinafter *Handbook*].

14. However, this requirement is not found anywhere in the *Handbook*: the perceived disloyalty of a group to a government is cited therein only as an example of a possible basis for a claim to Convention refugee status relating to membership in a particular social group.

⁴ See paragraphs 4-26, 38 and 42 of the CCR's factum reproduced hereafter.

⁵Most recently they were both considered in "*Applicant A*" and *Anor v. Minister for Immigration and Ethnic Affairs and Anor* in the High Court of Australia, February 24, 1997 (on appeal from the Federal Court of Australia), involving a claim based on a fear of forcible sterilization pursuant to China's one-child policy.

Handbook, para. 78.

28. In the human rights context, equality requires equal access to facilities, services, and employment free from arbitrary obstructions. Discrimination results from such barriers standing between the merits of an applicant (his or her ability in the case of equality in the area of employment) and that person's opportunity to demonstrate that ability. If certain groups are affected by the barrier in a disproportionately negative way, an indication exists that the cause of this adverse impact is discriminatory. For example, discrimination on the basis of gender includes practices having the effect of limiting the employment opportunities available to employees on the basis of a characteristic related to gender. A finding of discrimination does not require a) disparate treatment founded solely on one of the prohibited grounds; or b) everyone in the affected group to be treated identically. The fact that some members of such a group are not adversely affected by a discriminatory policy or action is no bar to such a finding. What is required is that the prohibited ground be for no legitimate reason a substantial factor in the discrimination. It is submitted that similarly, in the refugee determination context, it is irrelevant if some members of a social group can meet the requirements imposed by the Federal Court of Appeal and be found to be Convention refugees.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1279, 1288-91.

29. Constructive discrimination has thus been recognized in cases where a policy requirement has the effect of excluding certain groups, e.g., Sikhs and Orthodox Jews, from access to a school because of a dress code.

Sehdev v. Bayview Glen Junior Schools Ltd. (1988), 9 C.H.R.R.D/4881, paras. 37760, 37776, 37777 (Cumming, Ont. Bd. Inq.).

30. It is submitted that the requirements imposed by the majority decision of the Federal Court of Appeal ... will have an adverse impact on historically disadvantaged groups such as women and children, by making it more difficult for them to obtain asylum/international protection in Canada when they face persecution.

31. The nature of the persecution historically perpetrated against women and children is less likely to meet these new requirements than the types of persecution most often directed against men. According to the Canadian human rights jurisprudence referred to above, it is irrelevant if *some* women and children could meet these requirements and be found to be Convention refugees.

The Historical and Political Context

33. The refugee conventions have been generally interpreted in such a way as to protect persons from persecution which arises from public activities. The persecution directed at women, however, has often been persecution within the private domain. The distinction between private and public is artificial: often, what is *perceived* as the private domain in the context of women is in fact sanctioned or at least not prevented by the state.

A. Johnsson, "The International Protection of Women Refugees: A Summary of Principal Problems and Issues" (1989) 1 I.J.R.L. 221 at 222-23.

C. Bunch, "Women's Rights as Human Rights: Toward a Revision of Human Rights" (1990) 12 Hum. Rts. Q. 486 at 491-92.

The Treatment of Women

34. Women and children are often persecuted for reasons different from those of men. They have historically been vulnerable and persecuted in a context in which they have not been perceived as a possible danger to the state. For example, women are often assaulted by authorities in order to harm their spouse and not because of their own activities. They are in many cases persecuted so that the authorities may extract information about their husband's whereabouts or political activities.

Johnsson, *supra*, para. 33 at 222-223.

Bunch, *supra*, para. 33 at 491-492.

35. Another example is the situation of women caught in the crossfire of civil war or unrest: they are vulnerable to brutal treatment at

the hands of government and opposition forces. Often in these situations they are raped and forced into slavery and prostitution.

“Women in the Front Line” 18:2 Amnesty International Bulletin (February/March 1991)1 at 2-7.

“Sullied bride seen as a sacrifice” *Manchester Guardian Weekly* (3 June 1990).

“Women in Afghanistan raped and killed by Mujahideen” (1989) 15:3 WIN News 57.

“Violation of women by armed forces in Ethiopia” (1990) 16:4 WIN News 48.

36. In India, despite the illegality of the practices, dowry deaths or bride burning continue, with the potential husband viewing dowry and marriage as a “get-rich-quick scheme.” If the promised money or goods do not materialize, the woman is often set on fire, and her death may be reported as accidental.

Bunch, *supra*, para. 33 at 489-490.

L. Heise, “Crimes of Gender” *World Watch* (March-April 1989) 12 at 14-16.

The Treatment of Children

38. In India, ... girls as young as nine years old are sold to brothels by slave traders. They then exist for only one purpose, that being the performance of the sexual act. The vast majority of those rescued suffer from venereal disease, tuberculosis, hepatitis, and the effects of chronic malnutrition. Only a small fraction of these girls are rescued, due in part to the few resources available.

“Girls sold into India sex slave trade” *The [Toronto] Sunday Star* (7 July 1991) A1.

39. In Iraq, children of both genders have become the victims of human rights violations in the form of arbitrary arrest, detention, and execution. Some are imprisoned as hostages in place of relatives sought by the authorities and are tortured by them. Even infants are mistreated to compel members of their families to confess to alleged political offences. An example occurred in March 1986 when Kurdish forces were alleged to have made an attempt to assassinate the governor of

Arbil. In an act of retribution, fifteen students from secondary schools and university were arrested and executed in public.

16:3 *Amnesty International Bulletin* (May 1989)

41. In Sudan, Dinka women and children are enslaved through kidnapping and forced labour amounting to slavery. This is done by the Baggara of southern Kordofan and southern Darfur. The phenomenon of pawning results in the mistreatment of the pawn children, including rape and forced concubinage, beating, excessive workload, and inadequate food. Pawn children are transferred to second and third “patrons” for money in transactions tantamount to sale. In addition, women and children often work for only food and shelter and are abused and subject to complete domination by the employer.

“Sudan: A Human Rights Disaster” *Africa Watch* (March 1990)
139-151.

43. The preceding examples of the treatment of women and children all point to situations where members of these groups would not be perceived as a possible danger to the government and where the state may not be complicitous in the acts of persecution against them. The requirements for Convention refugee status which are outlined in the majority decision of the Federal Court of Appeal in the present case have an adverse or disproportionately negative impact upon these historically vulnerable groups. This impact is discriminatory and thus the interpretation of the Federal Court of Appeal is inconsistent with section 15 of the *Charter*.

44. It is further submitted that those tribunals charged with making determinations concerning refugee status in Canada including the Immigration and Refugee Board and the Immigration Appeal Board have, in the past, found persons from a variety of circumstances and social groups to be Convention refugees, even though they posed no threat to their states of origin. Should the added requirements of the majority decision of the Federal Court of Appeal be upheld, similar claims would be barred in the future, excluding some of the weakest and most vulnerable groups, presently found to be entitled to refugee protection in Canada.

C.R.D.D. No. M89-00562 (May, 1989).

Incirciyan v. M.E.I., IAB No. M87-1541X, M87-1248 (10 August 1987).
C.R.D.D. No. T89-00260 (27 July 1989).

45. It is therefore submitted that the affected groups described herein are not theoretical or potential refugee claimants, but representative of small numbers of the actual refugee population currently reaching Canada. The Canadian refugee determination system must continue to have sufficient flexibility in its interpretation of the Convention refugee definition in order to avoid discrimination against women, children and the innocent victims of war.

Nature of the Order Sought

47. The Intervenor respectfully requests that this appeal be allowed, so that the interpretation of “membership in a particular social group” and “... is unable or, ... is unwilling” as found in s. 2(1) of the *Immigration Act* as elements of the definition of Convention refugee may be consistent with international law and s. 15 of the *Charter*.

III. EXCERPTS FROM THE *CHAN* FACTUM

4. It is submitted that the majority decision of the Federal Court of Appeal in the present case relating to persecution is inconsistent with international law and the jurisprudence of this Honourable Court.

5. Domestic legislation such as the *Immigration Act* and in particular the definition of Convention refugee found therein is presumed to conform to international law and Canada's treaty obligations arising from it:

6. Thus,

the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

R. Sullivan, ed., *Driedger on the Construction of Statutes* 3d ed. (Toronto: Butterworths, 1994) at 330.

7. All three justices in *Cheung* and two of the three in *Chan* (Mr. Justice Mahoney in dissent) found forced sterilization of parents who violated the Chinese population control policy to be persecution. However, the majority in *Chan* held that forced sterilization was a justifiable sanction for the breach of the valid state objective of population control.

Cheung v. Canada (Minister of Employment and Immigration)
[1993] 2 F.C. 314 at 323, 324, 325 (C.A.).

Chan v. Canada (Minister of Employment and Immigration)
[1993] 3 F.C. 675 at 697, 705, 709, 724, 728 (C.A.).

8. This Honourable Court cited with approval the *Cheung* case in interpreting the notion of persecution, defining it as a breach of basic human rights which is “sustained or systemic.” The Court arrived at this interpretation by identifying the intention of the drafters of the Convention Relating to the Status of Refugees as being the promotion of fundamental human rights without discrimination. The preamble of the Convention was examined in this process.

Canada (A.G.) v. Ward, [1993] 2 S.C.R. 689 at 733, 735, 736.

11. It was held in *Cheung* that punishment such as forced sterilization even under a law of general application that is a) completely disproportionate to the objective of the law; or b) a violation of *internationally recognized standards of human right* may constitute persecution. Forced sterilization of women was found to be persecution, being a serious violation of the basic right to security of the person and an example of “cruel, inhuman and degrading treatment.” The Court also held that the *intent* of the punishment need not be persecution. Thus legal authority promoting a valid state policy such as population control cannot validate such treatment.

Cheung, supra, para. 7

Alfred v. Canada (Minister of Employment and Immigration)
(1994), 76 F.T.R. 231 at 234 (F.C.T.D.).

12. This Honourable Court considered the holding in *Cheung* that forced sterilization was a violation of the fundamental right of reproductive control. The *Cheung* decision referred to the *Eve* case, which found such treatment—if non-therapeutic and imposed on a

mentally retarded adult—to be a serious intrusion on an individual's basic rights.

Ward, supra, para. 8 at 736

E (Mrs.) v. Eve, [1986] 2 S.C.R. 388 at 431, 434.

13. It has also been held that in the case of powerful mind-altering drugs a competent adult's right to refuse medical treatment is protected by section 7 of the *Charter* and is not saved by section 1. The forcible injection of such drugs was seen to be one of the most intrusive medical procedures existing and a violation of the right to security of the person.

Fleming v. Reid (1991), 4 O.R. (3d) 74 at 85, 87, 88, 91, 95, 96 (C.A.).

14. Besides finding various medical procedures to be a violation of basic human rights, in the refugee context as persecution and in other situations as a violation of the *Charter*, the courts have begun to point to Canadian international legal obligations. Thus in the case of a refugee claimant from Sri Lanka who had been physically mistreated by the police the *International Covenant on Civil and Political Rights* (ICCPR) was considered. This instrument, ratified by Canada, prohibits cruel, inhuman, or degrading punishment even in times of an officially proclaimed public emergency: the mistreatment in question was seen to be persecution.

Alfred, supra, para. 11 at 234.

ICCPR, arts. 4 and 7, as found in *Collection of International Instruments Concerning Refugees* 2d ed. (Geneva: Office of the United Nations High Commissioner for Refugees, 1979) at 104-13.

W. Schabas, *International Human Rights Law and the Canadian Charter* (Toronto: Carswell, 1991) at 166.

15. The Federal Court of Appeal in *Cheung* found that forced sterilization of women who violated the Chinese population control policy was "cruel, inhuman and degrading treatment." Because the ICCPR contains this same wording as the *Universal Declaration of Human Rights* referred to in *Cheung*, it is submitted that it is logical to conclude that involuntary sterilization in China may also properly be categorized as "cruel, inhuman and degrading treatment," and thus persecution, being in violation of Canada's international legal obligations pursuant to this *Covenant*.

Cheung, supra, para. 7.

18. Reference has been made to the United Nations Human Rights Committee's interpretation of the ICCPR (Article 23 (2)), which prohibits compulsion to achieve family planning policies:

[T]he right to found a family implies, in principle, the possibility to procreate and live together. When State parties adopt *family planning policies*, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.

United Nations, *Human Rights Committee* General Comments, CCPR/C/21/Rev. 1/Add. 2 (1990) [emphasis added]; as found in *The Center for Reproductive Law and Policy* (submission dated 13 September 1993 to the U.S. Department of Justice) at 7.

19. The following has also been noted:

The right to reproductive self-determination has also been recognized in the Convention on the Elimination of All Forms of Discrimination Against Women (the "Women's Convention"). G.A. Res. 34 U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979). This Convention, ratified in whole or in part by 118 nations, guarantees to men and women the right and ability to control reproduction and creates a strong legal basis for the obligation of state parties to address issues of reproductive health. Article 16 codifies the specific right to reproductive choice in terms of the right to conceive a child and the right to control if and when to conceive a child. Finally it has been argued that the principles enshrined in the *Proclamation of Teheran* (U.N. Doc. A/Conf. 32/41 (1968)) which recognizes at Article 16 that "parents have a basic human right to determine freely and responsibly the number and spacing of their children" constitute customary international legal norms.

The Center for Reproductive Law and Policy *supra*, para. 18 at 4, 5, 6, 7, 8, 9 and 10.

20. The recent caselaw of the Federal Court reflects both trends of analysis: that which allows the "end to justify the means" despite any resulting violation of basic human rights and that which examines the nature of the methods used by the state and finds them to be persecutory if they breach such rights.

22. For example, the Court of Appeal has adopted the holding in *Cheung* that a law of general application may be persecutory and that one must examine both the intent and principal *effect* of such legislation.

Zolfagharkhani v. Canada (Minister of Employment and Immigration), [1993] 3 F.C. 540 at 549-50 (C.A.).

23. That court in another case examined the means used by the state to enforce a valid state policy and considered them to be persecutory. While no reference was made to the ICCPR, the court's finding was consistent with the view that there exist certain inalienable basic human rights (Articles 4 and 7). According to Mr. Justice Linden:

While the appellant had twice been arrested in Colombo in 1989 by the police and subjected to beating and detention, the panel held that these arrests were part of the Sri Lankan government's 'perfectly legitimate investigations into criminal and/or terrorist authorities' by Tamil organizations. In my view, beatings of suspects can never be considered 'perfectly legitimate investigations,' however dangerous the suspects are thought to be ... the state of emergency in Sri Lanka cannot justify the arbitrary arrest and detention as well as beating and torture of an innocent civilian at the hands of the very government from whom the claimant is supposed to be seeking safety ...

Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589 at 600 (C.A.).

24. In contrast are three decisions of the Trial Division where physical mistreatment by the authorities against the claimants was justified in terms of the state's right to take law enforcement measures aimed at the protection of the public.

Jebanayagam v. Canada (Minister of Employment and Immigration) (1994), 85 F.T.R. 277 at 284 (F.C.T.D.).

Murugiah v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 230 at 231 (F.C.T.D.).

Brar v. Canada (Minister of Employment and Immigration) (1993), 68 F.T.R. 57 at 58 (F.C.T.D.).

26. To summarize, it is submitted that the finding of the majority of the Court of Appeal in *Chan* regarding the overriding nature of valid state policy with respect to acts of persecution or violations of basic human rights is anomalous when considered in relation to the previous and subsequent jurisprudence of that Court as well as the *Ward* decision of this Honourable Court. The latter referred to the centrality of the protection of fundamental human rights in the interpretation of Convention refugee. In addition Canada's international legal obligations require this focus.