Casetellanos *v.* Canada

IMM-6067-93

Amador Franciso Pena Casetellanos, Natalia Monsievich, Irina Alvarez Monsievich and **Natalia Pena Monsievich** (*Applicants*)

v.

The Solicitor General of Canada (*Respondent*)

Indexed as: Casetellanos v. Canada ***(*Solicitor General*) (*T.D.*)***

Trial Division, Nadon J."Toronto, September 27; Ottawa, December 15, 1994.

Citizenship and Immigration " Status in Canada " Convention refugees " Judicial review of denial of Convention refugee status to wife, daughters of Convention refugee " Wife born in part of U.S.S.R. now Ukraine " Moved to Cuba, retaining U.S.S.R. passport " Neither Cuban nor Ukrainian citizen " Board erred in holding Ukrainian citizen " Uncertain applicant could become Ukrainian citizen " Daughters Cuban citizens " Family unity, family as social group, indirect persecution considered " Convention refugee definition not to be extended to incorporate concept of family unity " Although family social group, must be nexus between persecution of one and that against other family members " No evidence daughters persecuted " Indirect persecution extended to economic considerations not part of Canadian refugee law.

This was an application for judicial review of a CRDD decision denying Convention refugee status to the wife and daughters of Mr. Casetellanos, a Cuban citizen who had been granted refugee status on the ground of fear of persecution based on political opinion. Natalia Monsievich was born in that part of the U.S.S.R. which is now the Ukraine. She moved to Cuba in 1974, but retained her U.S.S.R. passport, and has never been a citizen of Cuba or the Ukraine. Their two daughters have Cuban citizenship. The Board determined that Mrs. Monsievich, on balance of probabilities, was a citizen of the Ukraine, and that she should seek the protection of that state before she could gain admission to Canada as a refugee.

The issues were: (1) whether the Board erred in finding that Natalia Monsievich was a citizen of the Ukraine; (2) whether the concept of family unity exists in Canadian refugee law; (3) what is the current acceptance of the family as a social group for the purposes of the definition of Convention refugee; (4) what is the scope of the concept of indirect persecution, and is it applicable herein?

Held, the application of Mrs. Monsievich should be allowed; that of the daughters should be dismissed.

(1) The Board erred in fact and law in determining that Mrs. Monsievich was a Ukrainian citizen. She is not a Ukrainian citizen and it is uncertain that she will be able to obtain Ukrainian citizenship under the present Ukrainian law governing citizenship.

(2) The principle of family unity could not be applied with respect to the female applicants. That principle requires that persons granted refugee status should not be separated from their closest family members, particularly when a situation of dependency exists; it is a principle of togetherness. The principle of family unity is not explicitly stated in the Act, nor has any case taken a definite position on the issue. The definition of Convention refugee in the *Immigration Act* does not incorporate the concept of family unity. There is no justification for extending that definition. The statements in paragraph 3(*c*) of the Act that one of the objectives of the Act and Regulations is to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives, is insufficient to mandate application of the principle of family unity. The onus is on the person seeking to be recognized as a Convention refugee to prove that he or she falls within the scope of the definition.

(3) The female applicants' claims cannot be founded on the basis that they are persecuted members of a social group. The family unit forms a social group which is protected against persecution by the Act. But there must be a clear nexus between the persecution that is being levelled against one of the family members and that which is taking place against the others. There was no evidence of persecutory activities against the female applicants.

(4) The female applicants could not rely upon the principle of indirect persecution to obtain refugee status because that principle, as defined by Jerome A.C.J. in *Bhatti v. Canada (Secretary of State)*, is not part of Canadian refugee law. To establish a claim to refugee status, there must be a clear link between a refugee claimant and one of the five prescribed grounds in the Convention refugee definition. Indirect persecution does not require the claimant to have a well-founded fear of persecution or to be persecuted; it arises out of the fact that the claimant is the unwilling spectator of violence against other members of the social group. Jerome A.C.J. held that the scope of the principle of indirect persecution could be extended beyond traditional grounds of persecution, to support or economic considerations. Such an extension is unacceptable as lack of economic, monetary or emotional support do not constitute a ground for being found a Convention refugee.

statutes and regulations judicially considered

Immigration Act, R.S.C., 1985, c. I-2, ss. 2(1) "Convention refugee" (as am. by R.S.C., 1985 (4th Supp.),

c. 28, s. 1), "dependant" (as am. by S.C. 1992, c. 49, s. 1), 3(*c*), 46.04 (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 38).

Immigration Regulations, 1978, SOR/78-172, s. 2(1) (as am. by SOR/92-101, s. 1).

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

cases judicially considered

not followed:

Bhatti v. Canada (Secretary of State), [1994] F.C.J. No. 1346 (T.D.) (QL).

applied:

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 153 N.R. 321; *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; (1989), 57 D.L.R. (4th) 153 (C.A.); *Requena-Cruz v. Minister of Employment and Immigration*, Doc. No. 83-10559, judgment dated 8/2/84, Imm. App. Bd.; *Rizkallah v. Minister of Employment and Immigration* (1992), 156 N.R. 1 (F.C.A.).

distinguished:

Cheung v. Canada (Minister of Employment and Immigration), [1993] 2 F.C. 314; (1993), 19 Imm. L.R. (2d) 81 (C.A.).

considered:

Keyakumaran v. Canada (1994), 74 F.T.R. 64 (T.D.); *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1590 (C.A.) (QL); *Moore v. Minister of Employment and Immigration*, Doc. No. 78-3016, judgment dated 6/12/78, Imm. App. Bd.

referred to:

Gonzalez v. Canada (Minister of Employment & Immigration) (1991), 14 Imm. L.R. (2d) 51; 129 N.R. 396 (F.C.A.); *Taheri v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 389 (C.A.) (QL); *Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 16 Imm. L.R. (2d) 119; 139 N.R. 208 (F.C.A.).

authors cited

Helton, Arthur C. "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983), 15 *Colum. Hum. Rts. L. Rev.* 39.

United Nations. Office of the United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. Geneva, September 1979

United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/SR.3

APPLICATION for judicial review of CRDD decision (*S. (K.E.) (Re)*, [1993] C.R.D.D. No. 303 (QL)) that the wife and daughters of a Convention refugee were not Convention refugees. Application allowed as to wife but denied as to daugthers.

counsel:

Stuart Beverley Scott for applicants.

Mark M. Persaud for respondent.

solicitors:

Stuart Beverley Scott, Toronto, for applicants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Nadon J.: This application for judicial review, from a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board, (the Board) rendered September 28, 1993 [[1993] C.R.D.D. No. 303 (QL)], raises several interesting issues concerning the family and its relevance in Canadian refugee law.

I. Facts

Mrs. Natalia Monsievich and her two daughters, Irina and Natalia, currently aged 19 and 6, respectively, arrived in Canada at Gander, Newfoundland on September 3, 1992 along with her husband and their father, Mr. Amador Pena Casetellanos. They were returning from a vacation in the wife's country of origin, the Ukraine, when they elected to disembark the plane during a routine refuelling stop *en route* to Cuba and make a refugee claim before the Canadian authorities.

Mr. Casetellanos was granted refugee status under the *Immigration Act*, R.S.C., 1985, c. I-2 (the Act) by the same decision which forms the basis of this judicial review. He has Cuban citizenship as do his daughters, applicants in this matter. His ground for claiming such status was a fear of persecution by reason of his political opinion, which was at odds with that of the Cuban government. Apparently, following the reawakening of the Union of Soviet Socialist Republics (U.S.S.R.) under the impetus of *glasnost*, Mr. Casetellanos had attempted to propagate these principles to his co-workers at the Cuban Ministry of Transport. Following these actions, he was demoted from his job and two suspicious automobile accidents occurred that led him to believe that attempts were being made on his life by government agents.

With respect to Mrs. Monsievich and her two daughters, the situation was not as straightforward because there was no evidence that they were ever the subject of persecution by the Cuban authorities or otherwise.

Mrs. Monsievich was born in the Ukraine in 1951, and moved permanently to Cuba after she married Mr. Casetellanos in 1974. There she obtained a special permit which allowed her to stay in Cuba (renewable every five years), but never actually obtained citizenship. Throughout this period, she retained her U.S.S.R. passport. She has never been a citizen of the Ukraine, as this was impossible under the political organization of the now-defunct U.S.S.R. Once Mrs. Monsievich arrived in Canada, she did not pursue Ukrainian citizenship with much fervour, but she did make several inquiries that led to negative responses from the Ukrainian General Consulate in Toronto.

II. Issues

The four principal issues to be addressed are as follows:

1. Did the Board err in finding Natalia Monsievich, on a balance of probabilities, to be a citizen of the Ukraine?

2. Does the concept of family unity exist in Canadian refugee law?

3. What is the current acceptance of the family as a social group for the purposes of the definition of Convention refugee in the Act?

4. What is the scope of the concept of indirect persecution, and is it applicable to the case at bar?

The last three issues relate to the concept of family, and will therefore be considered together.

III. Nationality of Mrs. Natalia Monsievich

The issue of the nationality of Mrs. Monsievich was resolved by the Board as follows:

After hearing the testimony of the female claimant and submissions from counsel for the claimant and from the RHO, the panel ruled that on the balance of probabilities the claimant is a Ukrainian national and that her claim would be assessed in relation with Ukraine.

. . .

In the panel's view, the female claimant should have sought the protection of her nationality, before seeking international protection. The fact that the female claimant never attempted to obtain Ukrainian citizenship when she was in Ukraine, even after she was told that her Soviet passport was only valid for her last trip to Ukraine leads the panel to conclude that she has not discharged her onus to seek national protection, or that this protection was not available to her.

The Board determined that she was a citizen of the Ukraine and that she should therefore seek the protection of that state before she could gain admission to Canada as a refugee.

However, upon a closer examination of the facts in present case, it can be seen that Mrs. Monsievich has never been a citizen of the Ukraine, nor is there any evidence that she could be if she wanted. She was born in the Ukraine at a time when it was one of the federated republics of the U.S.S.R., and she therefore only officially had the national Soviet citizenship.

The Ukraine has been an independent country since August, 1991. As a result, the laws and policies that previously affected citizenship in the U.S.S.R. are no longer relevant. Ukrainian citizenship is currently regulated by a law that came into force on October 8, 1991. An uncertified translation of this statute was provided to the Board at the original hearing. The statute declares that all persons residing in the Ukraine as of the date of the adoption of the new law may qualify as Ukrainian citizens, so long as they are not nationals of another state. However, the law is somewhat more complicated with respect to persons residing outside of the Ukraine who wish to acquire citizenship. The following articles of the *Ukrainian Law on Ukrainian Citizenship* (*Pravda Ukrainy*, 14 November 1991. [FBIS-USR-91-962, 30 December 1991]) are relevant:

Article 2"Vesting as to Ukrainian Citizenship

The following are Ukrainian citizens:

. . .

(2) persons working for the state, doing military service, or studying outside Ukraine, on condition that they were born on its territory or can prove that they have been residing permanently on its territory, and who are not citizens of other states, and who no later than one year after the entry of this law into force express a desire to become citizens of Ukraine.

This article clearly shows that Mrs. Monsievich is technically ineligible to become a citizen *ab initio*, as

she does not come within the enumerated eligible classes of persons who can become Ukrainian citizens upon application.

Other relevant articles are:

Article 17"Adoption of Ukrainian Citizenship

Foreign citizens and stateless persons may at their own request acquire citizenship of Ukraine.

Conditions for adoption as citizens of Ukraine are the following:

(1) resignation of foreign citizenship;

(2) permanent residence on the territory of Ukraine for the previous five years. This rule does not apply to persons who have expressed a desire to become citizens of Ukraine, on condition that they were born on its territory, or can prove that at least one of their parents, grandfathers or grandmothers was born on its territory, and are not citizens of other states;

(3) knowledge of Ukrainian language at a level adequate for normal dealings;

(4) availability of legal sources of income;

(5) recognition of and compliance with the Constitution of Ukraine.

These requirements may be disregarded only in exceptional cases with the permission of the president of Ukraine, with respect to particular persons who have rendered outstanding services to the Ukrainian state.

Article 29"Powers of the President of Ukraine

The president of Ukraine decides the following:

. . .

(2) granting citizenship of Ukraine to foreign citizens and stateless persons residing abroad who make appropriate application to the president of Ukraine.

As can be seen from the above-quoted articles, Mrs. Monsievich faces several barriers to citizenship in the Ukraine. That the standard is rather ambiguous is confirmed by the possibility of a direct appeal to the president to obtain citizenship if all else fails: *vide* article 29.

That there is a lack of certainty that Mrs. Monsievich will be able to obtain citizenship is further bolstered by the terse response from the Consulate General of Ukraine dated July 20, 1993 which reads as follows:

This is to certify that Mrs. MONSIEVICH Natalia, the holder of the Passport OK-II#410422, isn't considered to be a citizen of Ukraine in accordance with the Law on citizenship of Ukraine which is in force from November 13, 1991 and can't get the Ukrainian citizenship automatically.

There can be no doubt after such an unequivocal reply that Mrs. Monsievich is not a Ukrainian citizen. In passing, I find it somewhat surprising that a representative from the Consulate General of Ukraine was not called to offer evidence on this point at the hearing before the Board.

Therefore, I am of the view that the Board erred, in fact and in law, in determining that Mrs. Monsievich was a Ukrainian citizen. This finding is sufficient to allow her judicial review application and send her before a newly constituted panel of the Board to have her claim for refugee status heard *de novo*. Although this resolves Mrs. Monsievich's application, it still leaves the issue of the status of her two daughters open.

IV. The Family Issues

A. Distinction Between the Concepts

The three issues to be canvassed below all relate in one way or another to the family unit. Although the concepts of family unity, family as a social group and indirect persecution may appear similar, they are in fact very different.

Family unity is a "togetherness" concept rather than a legalistic interpretation of the principles of international refugee law contained in the Act. Family unity only applies when all claiming family members are already on Canadian soil whereas the policy of family reunification does not have this requirement. It is also separate from the recognition of the family as a social group for the purposes of the Convention refugee definition, as it is not necessary to show that there is persecution *per se* in order to rely on family unity.

The characterization of the family as a social group goes to the persecution that is directly suffered by a person simply because he is a member of a certain family. Such would be the case, for example, where the son of a revolutionary is consistently detained and harassed by the authorities simply because of the political leanings of his father.

On the other hand, indirect persecution, as its name implies, is somewhat of a step away from the usually rigorous characterization that must be found to bring a claimant within the meaning of refugee. Indirect persecution does not involve the claimant in question being persecuted *per se*, and it is arguable that it concerns "persecution" of a type that is far too remote to bring it within the definition of Convention

refugee in the Act.

B. Family Unity as a Concept in Canadian Refugee Law

The principle of family unity requires that persons granted refugee status should not be separated from their closest family members, particularly when a situation of dependency exists; it is a principle of togetherness.

The principle of family unity currently occupies a very ambiguous position in Canadian law. It is not explicitly stated in the Act, nor have any cases taken a definite position on the issue. The case of *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), at page 325 is frequently cited as authority for the proposition that family unity is an entrenched and accepted principle in Canadian refugee law:

> The Board also erred in its treatment of the minor appellant. As a minor child dependent on Ms. Cheung, Karen Lee may also claim the benefit of such status on the principle of family unity. Moreover, if Karen Lee were sent back to China, she would, in her own right, experience such concerted and severe discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution. She was poignantly described as a "black-market person," denied the ordinary rights of Chinese children. As such, she is a member of a particular social group, that is, second children. Karen Lee has already experienced certain deprivations and may be subject to further persecution should she be returned to China. [Emphasis added.]

It is clear that the Court in the *Cheung* case considers that the minor applicant is eligible to refugee status primarily on the basis of discrimination as a member of the social group of second children rather than by virtue of the family unity principle. Given this and the lack of any elucidation by the Court on how it came to the conclusion that family unity existed and should be applied, the *Cheung* case should be distinguished from the case at bar as it cannot be stated to lay down a principle of family unity.

Proof that the family unity principle remains unsettled is given by the Federal Court, Trial Division cases of *Keyakumaran v. Canada*, (1994), 74 F.T.R. 64 and *Bhatti v. Canada (Secretary of State)*, [1994] F.C.J. No. 1346 (T.D.) (QL). In both cases, the Court decided on other grounds, therefore being relieved from the necessity of addressing the issue of family unity. In the case of *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1590 (C.A.) (QL), the Court canvassed whether the applicant could be admitted under the family unity principle. However, no legal authority was given for the applicability of that principle.

The concept of family unity is based on Chapter VI of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: United Nations, 1979) published by the Office of the United Nations High Commissioner for Refugees. Paragraphs 182 to 185 of the Handbook are the product of the discussions of the *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (Summary Record

of the Third Meeting, held at the Palais des Nations, Geneva, on Tuesday, 3 July 1951. U.N. Doc. A/CONF.2/SR.3):

182. The Final Act of the Conference that adopted the 1951 Convention:

"Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or the 1967 Protocol.

184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependent member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention of the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them. [Emphasis added.]

The definition of Convention refugee to which Canada subscribes by virtue of its being a signatory to the *United Nations Convention Relating to the Status of Refugees* (Geneva, July 28, 1951), [1969] Can. T.S. No. 6, does not incorporate the concept of family unity.

The definition of "Convention refugee" in subsection 2(1) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1] of the Act is as follows:

2. (1) . . . .

"Convention refugee" means any person who

(*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(*b*) has not ceased to be a Convention refugee by virtue of subsection (2) . . . .

It is quite plain that there is no mention of family unity in the current definition. Therefore, in order to apply the principle of family unity in the case at bar, I would have to extend the definition of Convention refugee. There is no justification for doing so.

While the definition of Convention refugee is silent on the principle of family unification or re-unification, there is some recognition in the Act that consideration should be given to this concept when considering refugee claims. In particular, paragraph 3(*c*) of the Act indicates that one of the objectives of the Act and *Immigration Regulations, 1978,* SOR/78-172 is to "facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad." However, this is insufficient to mandate that this Court apply the principle of family unity.

The applicants argue that paragraphs 182 to 185 of the Handbook in fact import the concept of family unity into Canadian law. The Supreme Court of Canada considered the applicability of the Handbook to refugee proceedings in the case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pages 713-714:

While the drafting history of the Convention may not go far in justifying the exclusion of state complicity from the interpretation of "Convention refugee", other sources provide more convincing support. A much-cited guide on this question is paragraph 65 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook"). While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states. [Emphasis added.]

In other words, even if one accepts that paragraphs 182 to 185 establish a concept of family unity, their authority is only persuasive, not mandatory. The onus is on the person seeking to be recognized as a Convention refugee to prove that he or she is a person falling within the scope of the definition. That is, that he or she has a well-founded fear of persecution for a reason enumerated within the definition: *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.). Thus, the principle

cannot be applied with respect to the female applicants.

C. The Family as a "Social Group"

For a person to be considered a Convention refugee, it must be shown that they are a member of one of the five enumerated classes in subsection 2(1) of the Act. The class of membership in a particular social group is the basket clause of this definitional provision. As stated by Arthur C. Helton in his article "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983), 15 *Colum. Hum. Rts. L. Rev.* 39, at pages 45 and 51:

The intent of the framers of the Refugee Convention was not to redress prior persecution of social groups, but rather to save individuals from future injustice. The "social group" category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up.

. . .

Examples of "social groups" which can reasonably be defined include "kin, family, ethnic, territorial, age, sex, political, governmental, language, religious, residential, class, occupational, recreational, propinquity, business, nationality, scientific, charity, insurance, educational, honorary, learned, [etc.] . . ." The essential character of the "social group" is that it may be defined in "as many [ways] as convenience may dictate . . . ."

Therefore, "social group" is a broad concept that is capable of encompassing several types of associations among persons. The Supreme Court of Canada decision in *Ward*, *supra*, is the leading case on this issue. On page 739, La Forest J. defines the new test for "particular social group":

The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers* [(1992), 97 D.L.R. (4th) 729], *Cheung* [1993] 2 F.C. 314] and *Matter of Acosta* [Interim Decision 2986, 1985 WL 56042 (B.I.A.)], *supra*, 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.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights

activists. 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.

When considering such associations or social groups, one cannot imagine a closer-knit or easier to confirm unit than the family. This is especially true with respect to immediate family, being a person's sons, daughters, parents and any other blood relative they permanently reside with. There can be absolutely no doubt that the family unit forms a social group which is protected against persecution by the Act.

The acceptance of the family as a social group can be seen in the jurisprudence. In *Requena-Cruz v. Minister of Employment and Immigration* (8 February 1984), Doc. No. 83-10559 the Immigration Appeal Board stated at page 3 that:

The application, based on social group, raises the question as to whether or not a family can be considered a social group for the purposes of the *Immigration Act, 1976*. The answer to that question is a qualified yes. In some cultures, including Latin America, certain African nations and some others, for example, it is quite likely that an individual will be assumed to be a supporter of specific social, religious or political ideas merely because a father, uncle or other prominent family member is a known advocate of those ideas.

This principle was recently confirmed by the Federal Court of Appeal in *Gonzalez v. Canada (Minister of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 51 and *Taheri v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 389 (QL).

It is clear that the scope of the family as a social group is not limitless, as was mentioned in *Requena-Cruz*, *supra*, at page 4:

[E]ach case must be decided on its own merits on the basis of evidence presented.

One will not, for example, be deemed to be a Convention refugee just because one has a relative who is being persecuted. There has to be a clear nexus between the persecution that is being levelled against one of the family members and that which is taking place against the others: *vide Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 16 Imm. L.R. (2d) 119 (F.C.A.). The family can only be considered to be a social group in cases where there is evidence that the persecution is taking place against the family members as a social group. For example, it is possible that a claimant may be persecuted for his own political views, and not because of those of his parents, who may also be dissidents.

Here, the father qualified as a Convention refugee on the ground of political opinion. However, I must conclude that the Board was correct in its finding that the fear of persecution felt by the female applicants was insufficient to draw the required nexus. The Board found that there was no evidence whatsoever that any persecutory activities had been levelled against the mother or her daughters, let alone any based upon

their being members of Mr. Casetellanos's family. For that matter, there was no evidence presented that the female applicants could be the subject of future persecution by virtue of being part of Mr. Casetellanos's family if they were returned to Cuba, either. Their claims can therefore not be founded on the basis that they are persecuted members of a social group, and I must uphold the Board's finding in this regard.

D. The Principle of Indirect Persecution

The applicants in this matter have brought to my attention at the last moment the issue of indirect persecution. It should be noted that this issue was not argued before me, nor did the respondent prepare a memorandum in response.

Indirect persecution is a principle of questionable status in Canadian law. The decision of Jerome A.C.J. in *Bhatti v. Canada (Secretary of State), supra,* describes the concept of indirect persecution as follows, at page 4 [of the reasons for judgment]:

These cases demonstrate that the theory of indirect persecution has indeed been recognized in Canadian refugee law. The theory is based on a recognition of the broader harm caused by persecutory acts. By recognizing that family members of persecuted persons may themselves be victims of persecution, the theory allows the granting of status to those who might otherwise be unable to individually prove a well-founded fear of persecution.

With respect, I find myself unable to agree with Jerome A.C.J. "that the theory of indirect persecution has indeed been recognized in Canadian law." [Underlining added.]

In order to establish a claim to refugee status, a claimant must show that the harm or injury feared is linked to race, religion, nationality, membership in a particular social group or political opinion. This requirement was elaborated upon in *Rizkallah v. Minister of Employment and Immigration* (1992), 156 N.R. 1 (F.C.A.), where MacGuigan J.A. stated, at page 1:

To succeed, refugee claimants must establish a link between themselves and persecution for a Convention reason. In other words, they must be targeted for persecution in some way, either personally or collectively.

Therefore, there must be a very clear link between a refugee claimant and one of the five prescribed grounds in the Convention refugee definition. However, the principle of indirect persecution does not require the claimant to have a well-founded fear of persecution or to be persecuted; indirect persecution arises out of the fact that the claimant is the unwilling spectator of some incidents of violence targeted against other members of the family or the social group to which he or she belongs, for example.

Furthermore, in *Bhatti, supra,* Jerome A.C.J. held that the scope of the principle was such that it could extend beyond traditional grounds of persecution to support or economic considerations, at page 3:

The concept of indirect persecution is premised on the assumption that family members are likely to suffer great harm when their close relatives are persecuted. This harm may manifest itself in many ways ranging from the loss of the victim's economic and social support to the psychological trauma associated with witnessing the suffering of loved ones. [Emphasis added.]

In my opinion, such an extension of the so-called principle of indirect persecution is unacceptable as lack of economic, monetary or emotional support do not constitute a ground for being found a Convention refugee. It would therefore be surprising if the principle of indirect persecution could subsume such a concept. Under the current test for determination of persecuted social group as set out in *Ward*, *supra*, it is very unlikely that persons having insufficient "economic and social support" would qualify. Additional support for this proposition can be found in *Cheung*, *supra*.

I am not prepared to accept that the principle of indirect persecution, as defined by Jerome A.C.J. in *Bhatti*, *supra*, is part of our refugee law. In other words, since indirect persecution does not constitute persecution within the meaning of the definition of Convention refugee, a claim based on it should not be allowed.

Therefore, I need not make a finding on the facts of this case as they relate to the principle of indirect persecution. The female applicants in this matter cannot rely upon the principle of indirect persecution in order to obtain refugee status.

V. Section 46.04 of the Act: A Legislative Answer?

As demonstrated above, the principles of family unity and indirect persecution, cannot be considered elements of Canadian refugee law. Although the family unit has been accepted as a social group this is not sufficient to qualify Mrs. Monsievich and her daughters for refugee status.

The principles of family unity and indirect persecution, even though not incorporated in the Convention refugee definition, are nevertheless subscribed to by virtue of section 46.04 of the Act. This provision, which was originally added by virtue of Bill C-55, R.S.C., 1985 (4th Supp.), c. 28, s. 14, and modified by Bill C-86, S.C. 1992, c. 49, s. 38, embraces the principle of family unity in that it allows a person who has been determined to be a Convention refugee to apply to an immigration officer for the landing of that person and any dependants.

The section presently reads as follows:

46.04 (1) Any person who is determined by the Refugee Division to be a Convention refugee may, within the prescribed period, apply to an immigration officer for landing of that person and any dependant of that person, unless the Convention refugee is

(*a*) a permanent resident;

(*b*) a person who has been recognized by any country, other than Canada, as a Convention refugee and who, if removed from Canada, would be allowed to return to that country;

(*c*) a national or citizen of a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution; or

(*d*) a person who has permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.

. . .

(3) Notwithstanding any other provision of this Act, but subject to subsections (3.1) and (8), an immigration officer to whom an application is made under subsection (1) shall grant landing to the applicant, and to any dependant for whom landing is sought if the immigration officer is satisfied that neither the applicant nor any of those dependants is a person described in paragraph 19(1)(*c*.1), (*c*.2), (*d*), (*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

(*a*) more than six months has been imposed; or

(*b*) five years or more may be imposed. [Emphasis added.]

I note the imperative language in subsection 46.04(3). In other words, the immigration officer who receives such an application must grant landing unless the applicant is a citizen of another country, a criminal, or inadmissible on some other grounds. There does not appear to be any exercise of discretion allowed here; the Act must be followed.

Section 46.04 may be used by Mr. Casetellanos to land himself, as he has been determined to be a Convention refugee. It may also be used by Irina, Natalia and Mrs. Monsievich, but successful application here will turn on whether or not they can establish that they are dependants of Mr. Casetellanos. Subsection 2(1) [as am. by S.C. 1992, c. 49, s. 1] of the Act states that the term "dependant" "has the meaning assigned by the Regulations" [underlining added]. The terms "dependant" and "dependent daughter" are defined in subsection 2(1) [as am. by SOR/92-101, s. 1] of the *Immigration Regulations, 1978, supra*.

2. (1) . . . .

"dependant", means

. . .

(*c*) with respect to a person other than a person referred to in paragraph (*a*) or (*b*)

(i) the spouse of the person,

(ii) any dependent son or dependent daughter of that person or of the spouse of that person, and

(iii) any dependent son or dependent daughter of a son or daughter referred to in subparagraph (ii);

"dependent daughter" means a daughter who

(*a*) is less than 19 years of age and unmarried,

(*b*) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and

(i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by her parents since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, or

(*c*) is wholly or substantially financially supported by her parents and

(i) is determined by a medical officer to be suffering from a physical or mental disability, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting herself by reason of such disability. [Emphasis added.]

Applying these definitions to Mrs. Monsievich and her daughters, we see that she qualifies *prima facie* as a dependant under the definition given above, as does Natalia, given that she is less than 19 years of age. Furthermore, the case of *Moore v. Minister of Employment and Immigration* (6 December 1978), Doc. No. 78-3016 (Imm. App. Bd.) held that for the purposes of the Act, "dependant" is a term of art and includes a spouse whether or not that spouse is actually dependent for support. However, for Irina, her characterization as a dependant will turn on whether or not she can satisfy the criteria set out above.

VI. Conclusion

By virtue of the error committed by the Board with respect to the nationality of Mrs. Monsievich, her

judicial review application is allowed and it is ordered that a new panel of the Board should convene to reconsider her claim *de novo*.

With respect to the other applicants, Irina and Natalia, their application must be dismissed.

Should either party wish to have a question of general importance certified, they may speak to me by December 22, 1994.

Consequently, I will delay the issuance of my order until December 23, 1994.