

# A Step Forward in Protecting Human Rights: *Canada v. Ward*

Linda E. Tranter

"International refugee law was formulated to serve as a backup to the protection one expects from the state of which an individual is a national." (Par. 28)

In its first thorough examination of the Convention refugee definition, the Supreme Court of Canada has powerfully affirmed that protection of those at risk of serious human rights violations is the lens through which refugee law must be focused. The decision of June 30, 1993 in the appeal of Patrick Francis Ward is a carefully tailored guide to interpreting almost every aspect of the refugee definition in this light. This formulation broadens the scope of the definition to include those genuinely lacking protection from imminent harm while cutting shy of those who have other viable options than to seek refugee status. The decision steers a course away from the days when refugee law was used to condemn publicly enemy states for their misbehaviour or to weed out the undesirable immigrants from the welcome ones.

The *Immigration Act* (s. 2(1)) defines a Convention refugee as:

"any person who

- a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a social group or political opinion,
- i) is outside the country of the person's nationality and is unable or, by reason of that fear, unwilling to avail himself of the protection of that country..."

In recent years, as the Federal Court of Appeal has gradually defined the parameters of refugee status, it has issued a series of somewhat conflicting precedents as to whether the persecution feared must come from the government or, if not, when one may rely on international refugee protection against a pri-

vate abuser of one's rights. Likewise, the boundaries defining the classes of persons offered protection as Convention refugees and in particular those who are persecuted on the basis of their "particular social group" have remained slightly hazy. It is in these two areas that the *Ward* decision offers the most assistance.

"The 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 the claimant's sole option... The assessment of Convention refugee status must consistent with this theme requires consideration of the availability of protection in all countries of citizenship." (Par. 130)

By focusing on the goal of protection, Justice La Forest separates out those who have more appropriate solutions at their disposal, while extending protection to some who have been excluded as Convention refugees in the past. He identifies two categories of persons who are not in need of refugee status. Those who can gain protection from their own governments or from another country of citizenship must avail themselves of that protection in lieu of refugee status. Refugee protection is a last resort reserved for those who need it most.

"My conclusion that state complicity in persecution is not a prerequisite to a valid refugee claim is reinforced by an examination of the history of the provision, the prevailing authorities, and academic commentary." (Par. 37)

Writing for a unanimous court, Justice La Forest includes in the gamut of the Convention those whose rights are at risk of violation from actors other than the state but only in circumstances where the state is unable to secure effective protection. Thus he resolves conflicting positions in the Court of Appeal and cuts to the heart of the matter. Those who may obtain protection of their rights from

their own government are denied international protection, but those who have no protection from the harm that they fear are included in the class of possible refugees.

By focusing on protection and not condemnation of wayward states, the previous artificial equation of a state's inability to protect with state complicity in persecution is jettisoned. The artificiality of this equation, advocated in such decision as *Rajudeen*, *Surujpaul* and *Zalzali*, is clear on the facts of this case. Mr. Ward feared persecution from the INLA, a military organization seeking to overthrow the Irish government. Despite the government's admission that it was powerless to protect Mr. Ward, clearly that government cannot be characterized as an accomplice in the group's activities.

The Supreme Court also does away with previous attempts to distinguish those who are "unable to avail themselves of the protection of the state" from those who are "unwilling" to avail themselves of state protection because of a fear of persecution. This distinction, relied on by the Federal Court in this case, required that those who were unwilling to rely on the state for protection were only eligible for refugee status if the state was complicit in persecuting the claimant. The Supreme Court recognizes that Mr. Ward was both unable and unwilling to depend on the Irish government's protection because they had informed him that they were unable to protect him effectively.

"It 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 its ineffectiveness." (Par. 67)

This decision also disposes of any strict requirement that the individual must formally request protection before concluding that it is unavailable. Again, this is done in view of best achieving the

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goal of effective protection. The test which Judge La Forest advocates is that formulated by Professor James Hathaway—that the person would only be required to approach the state for protection “if it might reasonably be forthcoming.” This allowance is tempered by a new presumption that nations are capable of protecting their citizens. The presumption can only be rebutted by “clear and convincing confirmation” of a state’s inability to effectively protect the claimant.

While this presumption increases the burden on the claimant, a second favourable presumption comes into play if one is able to demonstrate the state’s inability to protect oneself.

“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.” (Par. 62)

The *Ward* decision makes lack of protection by the state the central element of the refugee definition. The above presumption indicates that those who are so marginalized as to feel their security to be threatened and who lack protection by the state can be presumed to be in need of international protection as refugees. Of course, this presumption only acts in conjunction with the presumption that states are presumed to be able to protect their citizens except in the face of clear evidence to the contrary.

“...[T]he international community did not intend to offer a haven to all suffering individuals.” (Par. 85)

The focus on protection of the marginalized is taken up again in Justice La Forest’s lengthy discussion of the classes of persons included in the provision for protection from persecution because of “membership in a particular social group.” The Convention refugee definition requires not only that the claimant be at risk of serious human rights violations but that one be at risk because of one’s race, nationality, religion, political opinion or membership in a particular social group. Justice La Forest affirms that these five grounds were intended to narrow the class of persons eligible for

protection to those marginalized through discrimination.

Therefore, he rejects an interpretation of “social group” which would offer protection to any persecuted person who merely belongs to an association or sociological classification. Instead he imports an interpretation from Canadian antidiscrimination law by finding that “membership in a particular social group” subsumes grounds of persecution which are analogous to the other four grounds.

“Canada’s obligation to offer haven to those fleeing persecution is not unlimited... Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted. Surely there are some groups, the affiliation in which is not so important to the individual that it would be appropriate to have the person dissociate him- or herself from it before Canada’s responsibility should be engaged.” (Par. 102)

Justice La Forest identifies as most in need those who face mistreatment because of a personal characteristic which they cannot change or should not be required to change because it is fundamental to their human dignity. These persons fall into three 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. (Par. 103)

While these categories cover most persons persecuted on a discriminatory basis, note that what is omitted are those who face persecution for a former involuntary status, for example, persons formerly conscripted into an army, former prisoners or persons born in a particular region or taken there by their parents. These too are conditions which are unalterable due to their historical permanence.

Nonetheless, the framework is extremely helpful in putting an end to ad hoc characterizations of social group and

steers clear of any temptation to find those persons in current political favour to fit within the “particular social group” ground while excluding others equally deserving and in need of protection.

On the facts of the *Ward* case, the court found that the INLA is not a “particular social group” for the purpose of the refugee definition because its commitment to violently overthrow the Irish government is not a purpose which is so fundamental to their human dignity that they should not be required to forgo it. More importantly, it ruled that Mr. Ward was persecuted by the INLA not because of his membership or former membership in that group but because of his dissenting opinions and actions against the group. Therefore, the court concluded that Mr. Ward was persecuted because of his political opinion in opposition to the INLA.

This decision thus clarifies that it is essential to correctly identify the reason for the persecution when determining whether it is within the five grounds. It is not enough to show that the claimant belongs to a particular social group, but the claimant must show that her fear of persecution is because of that membership or characteristic.

Finally, Judge La Forest examines the claimant’s fear of persecution on the basis of his dissenting political opinion. He adopts Professor Goodwin-Gill’s broad definition of political opinion which encompasses “any opinion on any matter in which the machinery of the state, government, and policy may be engaged.” (Par. 118)

Justice La Forest lays out the governing principles for assessing a fear of persecution based on political opinion. He writes that the perception of the persecutor is the determinative one. That is to say that if the persecutor believes that the claimant holds an opposing political opinion and persecutes the claimant for that reason, the claimant can be said to fear persecution on the basis of political opinion. It is immaterial whether the claimant has expressed or actually holds the imputed opinion.

He emphasizes that the relevant view is not necessarily that of the governing authority, the claimant or the refugee

board, but the perception of the persecutor.

Justice La Forest notes that this principle would also apply to each of the other four grounds. (Par. 120)

The court concludes that Mr. Ward feared persecution from the INLA because his political opinion opposes their stance on hostage taking.

Throughout this far-reaching examination of the law governing refugee status, the court keeps in centre-view the goal of protecting the human rights of those who have no effective protection in their home state. In order to best achieve this end, it includes in the definition those whom the state cannot protect from non-state persecutors and those who are persecuted on grounds analogous to the original four grounds identified by the Convention definition. Nonetheless, it recognizes that Canada's international obligations only extend to those who have no other options for protection in their own countries. It concludes that Mr. Ward was persecuted by the INLA because of his political opinion and that he could not be protected by the Irish authorities, but it directs the case back to the refugee board to decide if he would be able to find protection in Britain, his second country of citizenship. Thus, Convention refugee status is reserved for those who have no alternative but to seek international protection after a failure of domestic protection of their human rights.

The decision in *Attorney General of Canada v. Ward* brings Canadian law one large step closer to ensuring that those in danger of human rights violations receive protection. Professor James Hathaway has observed that this decision is "easily the most far-ranging decision issued by the senior court of any country." ■

## Note

1. James Hathaway, *Canada v. Ward*: Table of Concordance to the Law of Refugee Status, July 1993, unpublished. Note that paragraph numbers correspond to those of the preliminary version of *Canada v. Ward* [1993] SCJ 74, June 30, 1993.

# The New Public Security Portfolio

Honourable Douglas Lewis, P.C., M.P.

Let me say, at the very outset of my remarks, that the organizational changes introduced last month do not alter in any way Canada's immigration policy. There has been no shift in the focus of that policy. We begin and end any debate with the certainty that immigration is good for Canada.

It has often been said before that sometimes it sounds like a religious chant, but the plain fact is we are a nation built by immigrants; to reach Canada's full potential we must increase our population. There are many reasons. Let me give you one. It is easier to supply residents of California with consumer products than Canada's 27 million, 75 percent of whom are within 175 kilometres of the 6,000-kilometre Canadian-U.S. border.

As the grandson of an immigrant, I believe Canada's position in the world community owes as much to the genius and energy of waves of new Canadians as it does to our wealth in natural resources. And if you listen closely to those who predict the future, you will hear them say that it is our human resources that are the key to Canada's future prosperity.

That is why immigration has been an integral element of this government's social and economic agenda since 1984. We believe that the economic and social contributions made by new Canadians are essential to Canadian growth.

A decade ago, at a height of a previous recession, the government slashed immigration. This government chose another path. During nine years in office,

we have gradually increased the annual level of immigration. In 1993, Canada will welcome as many as 250,000 immigrants—almost three times the number we welcomed in 1983.

Our record demonstrates our belief in the importance of immigration. We have no intention of changing.

The approach we have taken towards immigration matters can probably best be described as yanking Canada's head out of the sand. The world is changing and we had better be prepared to meet the challenges it poses or lose control of valuable programs like immigration.

The global community is awash with people seeking new homes. This is a phenomenon that has steadily grown over the past decade. A United Nations report estimates that more than 100 million people are on the move as migrants or refugees.

In these circumstances, faced with this rising tide of humanity, developed nations such as Canada have two basic options. They can either retreat behind high walls or work to manage those pressures at home and seek solutions to the root causes of migration in the source countries. We can either reinforce and defend the integrity of a generous and valuable immigration policy, or we can watch public confidence and support for the policy collapse.

We choose to take action and not to retreat. During the past eight years, we have either reinforced existing programs or established new programs to help newcomers adjust to life in Canada. We rebuilt Canada's refugee determination system and introduced a specific five-year plan for immigration levels. Last winter, we passed Bill C-86. The legislation updated Canada's *Immigration Act* for the first time since 1976.

But through all these reforms, the heart of Canada's immigration policy has remained unchanged. Its primary objective is still to bring to Canada individuals who can contribute to our eco-

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*This article was extracted from notes for an address by the Honourable Douglas Lewis, Minister of Public Security, at a meeting with the representatives of ethnocultural agencies in Toronto on July 19, 1993. It is reproduced here in the hope of gleaningsome insight on what to expect in the new public security approach to refugee matters in Canada—an approach that has not yet been satisfactorily outlined.*