FEDERAL MAGISTRATES COURT OF AUSTRALIA

VXAJ v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 234

MIGRATION – Application to review a decision of the Refugee Review Tribunal – applicant forced into sex slavery upon arrival in Australia after having been recruited under deception by an international network of people traffickers – applicant assisted police with the prosecution of alleged Australian traffickers – whether the Tribunal misconstrued and misapplied the legal principles relevant to the existence of a particular social group – whether the Tribunal considered the operation of cultural, social, religious and legal factors bearing upon victims of sex trafficking and whether the Tribunal applied the correct legal principles endorsed by the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 – whether the question of whether an applicant belongs to a particular social group is a question of fact and law – significance of country information and evidence – whether misconstruction of section 91R(1)(a) of the *Migration Act 1958* (Cth) by characterising the applicant's debt and betrayal as providing the context of the harm feared but failing to characterise the applicant's status as a sex worker as the motivation – whether the Tribunal failed to consider material relevant to applicant's claim that Thai officials aided the trafficking of the applicant from Thailand and whether the information supported the applicant's claim of official corruption – whether the Tribunal failed to deal with a claim or an essential integer of the applicant's claim on the question of whether the applicant would be forcibly re-trafficked – whether the Tribunal findings are mutually exclusive and inconsistent – jurisdictional error established – decision quashed – writs issued.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91R1(a), 414, 475A
Refugees Convention, Article 1A(2)

Morato v Minister for Immigration (1992) 39 FCR 401
Ram v Minister for Immigration (1995) 57 FCR 565
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225
Re Attorney-General of Canada and Ward; United Nationals High Commissioner for Refugees et al, Interveners (1993) 103 DLR (4th)
Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387
R v Immigration Appeal Tribunal, Ex parte Shah [1999] 2 AC 629
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1
Chan v Canada [1993] 3 FC 675
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Minister for Immigration and Multicultural Affairs v X [2001] FCA 858
VCAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 1
VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 965
SZCJH v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1660
Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Anor (1986) 162 CLR 24
NADR v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 167
SZASB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1420
SZASB v Minister for Immigration [2004] FMCA 496
Minister for Immigration and Multicultural and Indigenous Affairs v VOAO & VOAP [2005] FCAFC 50
SZFDJ v Minister for Immigration [2005] FMCA 733
SFGB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 231
SZGBR v Minister for Immigration [2005] FMCA 824
S469 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 64
S469 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 214
Kaur v Minister for Immigration & Multicultural Affairs [2000] FCA 1401
Minister for Immigration & Multicultural Affairs v Ndege [1999] FCA 783
Minister for Immigration & Multicultural Affairs v Applicant S (2002) 124 FCR 256
Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR 1
VAT v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 255
SCAT v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 80
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration and Multicultural Affairs v Rajamanikkam (2002) 210 CLR 222
R v Deputy Industrial Injuries Commissioner; Ex parte Moore [1965] 1 QB 456
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12
SZEEO v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 546
Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S20/2002 (2003) 198 ALR 59

Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003 (2004) 205 ALR 487
Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S20/2002 (2003) 198 ALR 59
Reg v The District Court; Ex Parte White (1966) 116 CLR 644
Waterford v The Commonwealth (1987) 163 CLR 54
Roads Corporation v Dacakis [1995] 2 VR 508
Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411
Minister for Immigration and Multicultural Affairs v Anthonypilllai (2001) 106 FCR 426
Gamaethige v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 424
NACB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 235
NATC v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 52
VTAG v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 447
UNCHR, *Guidelines, Department of Immigration, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*
UNCHR, *Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02 (7 May 2002)
US State Department Report on Human Rights Practices in Thailand for 2002
Ant-Slavery International Report, *Human Traffic, Human Rights: Redefining victim protection* (2002)

Applicant:	VXAJ
First Named Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Named Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLG 906 of 2005
Judgment of:	Pascoe CFM
Hearing date:	16 February 2006
Delivered at:	Sydney (via telephone to Melbourne)
Delivered on:	20 April 2006

REPRESENTATION

Counsel for the Applicant:	Ms D Mortimer SC
Counsel for the Applicant:	Mr C Horan
Solicitors for the Applicant:	Mallesons Stephen Jaques
Counsel for the Respondent:	Mr R Knowles
Solicitors for the Respondent:	Phillips Fox Lawyers

ORDERS

(1) The Court declares that the decision of the Refugee Review Tribunal handed down on 8 April 2005 is invalid and of no effect.

(2) That a writ of certiorari issue quashing the decision of the Refugee Review Tribunal handed down on 8 April 2005.

(3) That a writ of mandamus issue requiring the Refugee Review Tribunal to redetermine the applicants' application according to law.

(4) That the first respondent pay the applicant's costs fixed in the sum of $5000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY (VIA TELEPHONE TO MELBOURNE)

MLG 906 of 2005

VXAJ
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

REFUGEE REVIEW TRIBUNAL
Respondents

REASONS FOR JUDGMENT

Introduction

1. This is an application under s.39B of the *Judiciary Act 1903* (Cth) and s.475A of the *Migration Act 1958* (Cth) in respect of a decision of the Refugee Review Tribunal (the Tribunal) dated 21 March 2005 and handed down on 8 April 2005 affirming a decision of a delegate of the respondent to refuse the grant of a protection visa to the applicant. The applicant was notified of that decision on 18 April 2005.

Factual background

2. The applicant's original application was filed in the Federal Court of Australia on 13 May 2005. The matter was then transferred to the Federal Magistrates Court on 26 July 2005 by Marshall J.

3. The applicant, a 33 year old citizen of Thailand, arrived in Australia on 15 May 2003. On 25 August 2003 the applicant lodged with the Department of Immigration & Multicultural & Indigenous Affairs (the Department) an application for a protection visa.

4. The applicant arrived in Australia after having been recruited by an international network of people traffickers to work in the sex industry. She claimed to have voluntarily entered this arrangement on the basis she had been led to believe her work would be legal and she would have freedom of movement in Australia. However, in fact upon her arrival in Australia, the applicant was locked in a small apartment with other young women and forced to work as a sex slave in a brothel.

5. On 30 May 2003, Australian officials raided the brothel. The applicant was taken to an Immigration Detention Centre. On 6 June 2003 she was released into police protection. She cooperated with police and provided information about traffickers in Thailand and assisted with the prosecution of those involved, resident in Australia. She was granted a criminal justice stay visa.

6. In a decision dated 13 May 2004 a delegate of the respondent refused to grant the applicant a protection visa and on 15 June 2004 the applicant sought review of that decision with the Tribunal.

7. On 16 February 2005 the Tribunal conducted a hearing. The applicant attended with the assistance of a lawyer aided by a Thai interpreter.

The amended application

8. The amended application relies on four grounds of review:

   a) That the Tribunal misunderstood the legal principles pertinent to the question of a particular social group.

   b) That the Tribunal failed to consider relevant material.

   c) That the Tribunal failed to deal with a claim or an essential integer of the applicant's claim.

   d) That the Tribunal erred in making mutually exclusive findings.

9. The respondent's case was argued on the basis that there were two separate justifications for the Tribunal decision and if the Court were to find against the applicant on the first ground then the Tribunal decision stands. It was however argued for the applicant that if the Court were persuaded to find in favour of the applicant on the question of being forcibly re-trafficked, then the applicant is left with a positive finding that she was a member of a particular social group constituted by sex workers. Ms Mortimer submitted on behalf of the applicant that it is possible to find that there was a nexus between being a member of a particular social group and being forcibly re-trafficked and if that proposition is accepted then that error shows the applicant was deprived of a successful outcome. Mr Knowles for the respondent further argued that even if it were found that error existed on the social group ground the findings of the Tribunal in relation to state protection immunise its decision.

The applicant's claims

10. The applicant claimed before the Tribunal in her statutory declaration and her written submissions to fear persecution if she returned to Thailand because:

    a) Persons within the trafficking network would know that she had cooperated with Australian police and provided information to the police about the traffickers, and would blame her for the arrest of those persons;

    b) The trafficking network would be able to locate her in Thailand, and also knew where her family lived;

    c) Persons within the trafficking network would realise that the applicant had significant information and would kill her to ensure that she did not speak to anyone about the network;

    d) Persons within the trafficking network may seek to re-traffic her from Thailand to another country;

    e) Persons within the trafficking network would also be angry because she had escaped before she had paid off her debt to them,

and because they had lost profits that they would have made by exploiting her; and

f) The Thai authorities were unwilling or unable to protect her from being harmed by persons within the trafficking network, which was rich and powerful and could afford to pay off police and government officials.

The tribunal decision

11. The Tribunal found at pages 116 to 117 of the Court Book that the applicant did not belong to a particular social group:

> *The Tribunal does not accept that Thai women, young Thai women, or Thai women without male protection, constitute particular social groups. Their gender, age or marital status, do not sufficiently link them; they are not sufficiently defining characteristics. They do not make the women in question a socially distinct group, given the stronger forces (such as socio-economic status, geographic location) that separate those women. The Tribunal does not accept that "vulnerable" women of any age group could be a particular social group. Women are made vulnerable by many factors, and in any event the claimed group is circular (they are vulnerable to persecution?). The Tribunal does not accept that Thai women trafficking victims (or trafficking victims in Thailand) are a particular social group. They are individual victims of the same crime; they are not socially distinct. The Tribunal does not accept that trafficking victims who give evidence are a particular social group. The fact that they give evidence if of significance in the criminal justice system but it does not link them in and set them apart in wider society: it is not a social attribute.*
>
> *The Tribunal accepts that sex workers in Thailand are a particular social group. Their occupation is a unifying characteristic that sets them apart in society. But to come within Article 1A(2) as qualified by s.91R(1)(a), a membership of a particular social group (or membership of such a group together with other Convention reasons) must constitute at least the essential and significant reason or reasons for the persecution. The fact that the applicant is a sex worker (or has been, in Australia at least) will not be the essential and significant reason for the harms she fears. It provides the context (because she has been a sex worker she is in this situation), but it is not the*

motivation. The motivation is her so called debt and betrayal of the traffickers.

12. I now propose to deal with each of the grounds of review as outlined in the amended application.

Whether the Tribunal misunderstood and misapplied the legal principles relevant to the existence of a particular social group

13. The first ground relied upon by the applicant alleges that the Tribunal misunderstood and misapplied the correct legal principles pertinent to the question of whether the applicant belonged to a particular social group for the purposes of the Refugees Convention. The applicant claimed before the Tribunal that she feared persecution for the essential and significant reason of her membership of a particular social group, namely that Thai women who were victims of people trafficking and/or Thai women who were victims of people trafficking who have co-operated with the law enforcement officials in prosecutions.

14. The UNCHR Guidelines on Gender-Related Persecution supports the proposition that trafficked women may have valid claims to refugee status. At para 18 of those Guidelines it states:

> *Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women and minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, sever community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.*

15. Identification of whether an applicant belongs to a "particular social group" requires a decision maker to take a broad interpretation of the circumstances. The expression is flexible intended to apply whenever persecution is found directed at a group or section of a society not necessarily persecuted for racial, religious, national or political reasons. The word "social" is of wide import and may be defined to mean "pertaining, relating, or due to… society as a natural or ordinary condition of human life. "Social" may also be defined as "capable of being associated or united to others" or "associated, allied, combined" (*Morato v Minister for Immigration* (1992) 39 FCR 401 at [416], per Lockhart J and see also the reasoning in *Ram v Minister for Immigration* (1995) 57 FCR 565). A broad interpretation is needed to encompass all those who fall fairly within its language and should be construed in light of the context in which it appears (*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at [241], per Dawson J). In *Re Attorney-General of Canada and Ward; United Nationals High Commissioner for Refugees et al, Interveners* (1993) 103 DLR (4th), La Forest J of the Canadian Federal Court of Appeal commenting on the question of belonging to a particular social group said that meaning assigned to a 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 (at [33]). His Honour at [34] identified three possible categories. Firstly, groups defined by an innate or unchangeable characteristic and groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association and groups and thirdly groups associated by a former voluntary status, unalterable due to its historical permanence. It is important to note that there is no 'closed list' of what may constitute a 'particular social group' within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups which might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms (UNCHR, *Guidelines on International Protection: Membership of a particular social group within the context of Article*

1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 (7 May 2002) at page 3).

16. A number of principles have been established in relation to whether or not an applicant is said to belong to a particular social group. It is important to this case that I set out those principles.

17. Firstly, determination of whether an applicant falls within the expression "particular social group" for the purposes of Article 1A(2) of the Convention requires the group to be identifiable by a characteristic or attribute that is common to all members of the group. However the relevant common characteristic or attribute must not be the shared fear of persecution. Secondly, possession of that characteristic or attribute must distinguish the group from the rest of society (*Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [400], per Gleeson CJ, Gummow and Kirby JJ; *R v Immigration Appeal Tribunal, Ex parte Shah* [1999] 2 AC 629 at [657], per Lords Hope and Craighead). There is however no requirement that the group be recognised or perceived by the society as a cognisable group within the society (*Applicant S* at [397-8], per Gleeson CJ, Gummow and Kirby JJ at [408], [410-1], per McHugh J). *Applicant S* suggests that in determining whether a group is a particular social group the decision maker must consider both objective and subjective perspectives. Objective perspectives will often involve reliance upon country information (at [400], per Gleeson CJ, Gummow and Kirby JJ) and this will require the decision maker to have regard to other considerations such as the cultural, social, religious and legal factors affecting those members of the group in the relevant society (*Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [28], per McHugh and Gummow JJ; *Applicant S* at [400], per Gleeson CJ, Gummow and Kirby JJ). The common characteristic or attribute that unites a particular social group may constitute any attribute, activity, belief or interest that distinguishes the group from other members of society (*Applicant A* at [234], per Brennan CJ; *Applicant S* at [410-1], per McHugh J). Brennan CJ in *Applicant A* held in relation to this point that there is no requirement that a characteristic must be innate or unchangeable before it can distinguish a group (at [236]). There is no requirement that the group be a certain size before it can be said to be a particular social group (*Applicant A* at

[241]; *Khawar* at [13-4], per Gleeson CJ, at [28], per McHugh and Gummow JJ) nor is there a requirement for the group to be cohesive (*Khawar* at [13], per Gleeson CJ). After considering the judgment of Heald JA sitting on the Canadian Federal Court of Appeal in *Chan v Canada* [1993] 3 FC 675 at [692-3] about a claim for membership of a particular social group, McHugh J found that while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even create a particular social group (at [264] and affirmed in *Applicant S* at [396-7], per Gleeson CJ, Gummow and Kirby JJ). There is no artificial distinction between what people are and what people have done (*Applicant A* at [307], per Kirby J; *Morato*). Further, identification of whether an applicant belongs to a particular social group is a question of fact (*S469 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 64 at [28], per Bennett J and affirmed on appeal in [2004] FCAFC 214 at [7], per Kiefel, Allsop and Crennan JJ; *Ex parte Shah* [1999] 2 AC 629 at [635], per Lord Steyn and [657], per Lords Hope and Craighead; *Kaur v Minister for Immigration & Multicultural Affairs* [2000] FCA 1401 at [17], per Moore J; *Minister for Immigration & Multicultural Affairs v Ndege* [1999] FCA 783 at [75], per Weinberg J; *Minister for Immigration & Multicultural Affairs v Applicant S* (2002) 124 FCR 256 at [274], per Stone J) and in part a question of law (*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at [394], per Gummow and Callinan JJ). Moreover, it is vital for a decision maker to accurately apply the correct principles in identifying a particular social group (*Applicant S* at [401), per Gleeson CJ, Gummow and Kirby JJ; *Dranichnikov* at [404], per Kirby J).

18. The limited role of the Court in reviewing administrative decisions must be borne in mind. It is not the function of the Court to substitute its own decision for that of the Tribunal by exercising a discretion which the legislature has vested in the Tribunal (*Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Anor* (1986) 162 CLR 24 at [40], per Mason J). Findings of fact, including findings of credibility, are uniquely held within the jurisdiction of the Tribunal and not within the Court's jurisdiction (*NADR v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 167 at [9], per Heerey, RD Nicholson and Selway JJ). However, the Court must be satisfied that the Tribunal understood and applied the correct

principles pertinent to the question of whether the applicant belonged to a particular social group. Thus, it was submitted for the applicant that the Tribunal decision falls into error for failing to apply the principles endorsed by the High Court in *Applicant S*. In that case, Gleeson CJ, Gummow and Kirby JJ at [400] concluded that determination of whether an applicant falls within the expression of a particular social group must firstly be identified by reference to a characteristic or attribute that is common to all members of the group. Secondly, the characteristic or attribute common to those members of the group cannot be the shared fear of persecution and thirdly the possession of that characteristic or attribute must distinguish the group from the rest of society. The Tribunal record discloses no consideration of the principles set out in *Applicant S* other than a general reference at the commencement of its decision. It was also submitted for the applicant that the Tribunal fell into error in failing to assess material that went to the operation of the cultural, social, religious and legal factors that affected victims of sex trafficking as endorsed by the High Court in *Applicant S* and *Khawar*. It was further submitted on behalf of the applicant that the task for the Tribunal was to ask itself as a matter of law, whether the applicant belonged to a particular social group and then engage in a fact finding exercise, applying the relevant principles, look to the evidence before it and then making a finding, as a matter of fact, whether in accordance with *Applicant S*, the group claimed by the applicant fell within the expression of a particular social group.

19. The Tribunal had before it the following country information which the applicant argued supported the proposition that victims of trafficking were dealt with as a distinct social group within Thai society:

    a) The US State Department Report on Human Rights Practices in Thailand for 2002. This report noted that trafficking in women and children was a serious problem in Thailand. There were many non-government organisations and government agencies working with and providing assistance to trafficking victims. In particular two national committees had been formed in Thailand that were directed to combat trafficking, including the National Committee on Trafficking in Women and Children.

b) The US Department of State Trafficking in Person Report dated 14 June 2004 noted that Thailand did not comply with minimum standards for elimination of trafficking, and was therefore placed on a Watch List. The report also noted that in September 2003 the Government of Thailand had declared a national campaign against criminal organisations including trafficking of women and children.

c) Specific laws enacted in Thailand in relation to trafficking, including the Prevention and Suppressing of the Trafficking in Women and Children Act (1997) and the Prostitution Prevention and Suppression Act (1996).

d) The UNCHR Guidelines which recognised that trafficked women may face (among other things) severe community or family ostracism, or severe discrimination.

20. The Tribunal also had before it material which indicated that persons involved in the trafficking network would retaliate against trafficking victims who gave evidence against them. The question of protection of witnesses is recognised in Thailand as a critical issue in the investigation and prosecution of traffickers. In the Anti-Slavery International Report cited by the Tribunal at pages 112 and 119 of the Court Book records that the Draft Witness Protection Bill was under consideration in Thailand at the time and s.8(2) of the Bill recognises witness who have been trafficked for prostitution as witnesses in need of protection.

21. It is evident that the Tribunal correctly referred to the principles which arise from the decision of the High Court in *Applicant A* although I note the lack of any detailed reference to *Applicant S* which is the most recent authority. The question for determination is whether the Tribunal misunderstood and/or misapplied the legal principles pertinent to determination of a particular social group. The Tribunal did not accept that trafficking victims who give evidence constitute a particular social group. It simply rejected the claim that trafficked women who have given evidence against traffickers could constitute a particular social group without giving reasons as to how it reached its conclusion. In doing so the Tribunal misdirected itself in that it treated the facts of the case merely as providing the context and not the means to identify

whether a particular social group existed. It therefore clearly misapplied the established legal principles set out with great clarity in *Applicant S.*

22. Having failed to identify the relevant social group the Tribunal deprived itself of the opportunity to properly assess the applicant's fear of persecution and serious harm.

23. The second argument in relation to particular social group involves a complaint about the Tribunal's construction of Article 1A(2) and s.91R(1)(a). Article 1A(2) defines a refugee as a person who:

> *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*

24. Article 1A(2) is qualified by s.91R. Section 91R provides as follows:

> *(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
>
> *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
>
> *(b) the persecution involves serious harm to the person; and*
>
> *(c) the persecution involves systematic and discriminatory conduct.*
>
> *(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of* serious harm *for the purposes of that paragraph:*
>
> *(a) a threat to the person's life or liberty;*
>
> *(b) significant physical harassment of the person;*
>
> *(c) significant physical ill-treatment of the person;*

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

25. The Tribunal correctly noted that to come within Article 1A(2) and s.91R(1)(a), membership of such a group together with other Convention reasons must constitute at least the essential and significant reason or reasons for the persecution. The Tribunal accepted that sex workers in Thailand constituted a particular social group because their occupation is a unifying characteristic that sets them apart in society. The Tribunal found however that the fact that the applicant is a sex worker (or has been, in Australia at least) was not the essential and significant reason for the harm she feared. The Tribunal concluded that the applicant's status as a sex worker provided the context for the harm but it was her debt and betrayal of the traffickers that was the essential and significant reason for the harm she feared. It was submitted for the applicant that this line of reasoning involves a misconstruction of Article 1A(2) and s.91R. The respondent argued that such an argument must fail because of the judgment of Moore J in *SZASB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1420. That decision was an appeal from a decision of Federal Magistrate Raphael (*SZASB v Minister for Immigration* [2004] FMCA 496). In that case the applicants challenged the Tribunal's construction of what was the essential and significant reason for the harm they feared. Moore J found that there is no point of principle in relation to this argument. His Honour dismissed the appeal and found that the Tribunal's construction of s.91R is a finding of fact with which the Court could not interfere (at [18]).

26. It is accepted by the applicant that her failure to pay off her debt and her betrayal of the traffickers were clearly factors leading to the risk that the applicant would be harmed. However, in my view the Tribunal's construction of s.91R(1)(a) appears to have treated specific factors as precluding the characterisation of the reason for the applicant's fear of persecution at a more general level. The Tribunal has assumed that the applicant's debt and betrayal of the traffickers

were factors exclusive of any motivation arising from the fact that the applicant was a sex worker. However, the fact that the harm feared by the applicant arose from her debt and betrayal of the traffickers did not preclude a finding that the applicant also feared harm because she was a sex worker. I am thus not satisfied that the Tribunal properly considered s.91R given that the applicant was a sex worker and there appears to be a fundamental connection between being a sex worker, the debt and her giving evidence against the traffickers.

Whether the Tribunal failed to consider relevant information

27. The second ground relied upon by the applicant alleges that the Tribunal failed to consider obvious country information supporting the claim that some local officials, immigration officers, and police reportedly either were involved in trafficking directly or took bribes to ignore it and that police personnel were paid poorly, and accustomed to taking bribes to supplement their income. The applicant claimed that the trafficking network was large, rich, powerful, international and connected to government officials and that there were many people involved in the trafficking network, which had the capacity to arrange sophisticated fraudulent documents such as a document which stated that the applicant owned her aunt's flower shop. The applicant also claimed that she believed that the traffickers had a corrupt connection with a person in the Australian Embassy in Bangkok because obtaining a visa was suspiciously easy.

28. It was contended for the respondent that even if the applicant could establish that the Tribunal's no evidence finding was in error, such error could not have materially affected the Tribunal's decision. A decision does not involve an error of law unless the error is material in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [353] per Mason CJ). For an error of law to be involved in a decision something more than the mere occurrence of error must have contributed to the decision in some way or, at the very least, it must be impossible to say that it did not so contribute. Conversely, an error is not involved in a decision if it did not contribute to the decision or if the decision must have been the same regardless of the error (at [384], per Toohey and Gaudron JJ

and affirmed in *Minister for Immigration and Multicultural Affairs v X* [2001] FCA 858 at [28], per Black CJ, Lee and Merkel JJ).

29. It was further contended by the respondent that even if the applicant could satisfy the Court that there was an error, there was an independent and alternate basis for the Tribunal decision (*VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 1 at [23], per Gray J; *VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965 at [32-3], per North J; *SZCJH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1660 at [23], per Sackville J) and any such error would not give rise to jurisdictional error because the Tribunal's exercise of power would not be affected. A Tribunal falls into error if it identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material. Such an error is jurisdictional error which will invalidate any order or decision of the Tribunal which reflects it (*Craig v South Australia* (1995) 184 CLR 163 at [179], per Brennan, Deane, Toohey, Gaudron and McHugh JJ and affirmed in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [351], per McHugh, Gummow and Hayne JJ; *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255 at [16], per Wilcox, Gray and RD Nicholson JJ). The respondent also argued that any error could not have resulted in the Tribunal failing to exercise its jurisdiction nor exceeding its jurisdiction (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [506], per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; *Minister for Immigration and Multicultural and Indigenous Affairs & Anor; ex parte Applicants S134/2002* (2003) 211 CLR 441 at [457], per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

30. The Tribunal at page 117 of the Court Book found:

> *In this case it was argued that rogue Thai officials participated in the trafficking of the applicant and would participate in her future persecution. However, the Tribunal does not accept this claim which is unsubstantiated. Although there is evidence that police and other officials connive at and benefit from the trafficking of non-Thai women into Thailand, there is no evidence before the Tribunal supporting the claim that Thai officials aided the*

trafficking of the applicant and that it was not necessary for them to do so.

31. Ms Mortimer on behalf of the applicant argued that this finding was relevant both to the question whether the harm feared by the applicant had an official quality and whether Thai authorities were willing and able to provide adequate protection to trafficking victims.

32. The Tribunal also found that there was no evidence before it that in Thailand sex workers or former sex workers or trafficking victims are discriminated against or otherwise seriously harmed to a degree constituting persecution. In reaching its finding the Tribunal failed to have regard to evidence that trafficked women may face serious repercussions upon return to Thailand including real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. This was evident at paragraph 18 of the UNCHR Guidelines. This evidence appears to support the claim that trafficking victims face discrimination and serious harm amounting to persecution.

33. The country information before the Tribunal supported the claim that Thai authorities were unwilling or unable to protect the applicant from being harmed by persons within the trafficking network, who were rich and powerful and had the means to pay off police and government officials. There were six significant points relevant to this claim before the Tribunal, one of which was that prostitution was often protected by local officials with a commercial interest. The US State Department Report on Human Rights Practices dated 14 June 2004 in Thailand acknowledged that Thai law prohibits trafficking in women and children but says: *However, trafficking in persons was a serious problem. The country was a source, transit and destination.* Relevantly, that information informed the Tribunal that there were three kinds of trafficking prevalent in Thailand, namely that Thai women trafficked out of Thailand, women trafficked through Thailand and non-Thai women trafficked into Thailand. The report goes onto say:

> *There are a variety of purposes, indentured servitude, forced labour and prostitution and plainly notes that some local officials, immigration officers and policemen reportedly either were involved directly in trafficking or taking bribes to ignore it.*

34. Further the report clearly noted that there was credible evidence of some corrupt military government officials involved directly in trafficking and taking bribes to ignore it. The other issue of significance in the report which is not recorded on the decision is the issue of source, transit and destination and the fact that trafficked women were chiefly trafficked for sexual exploitation on an international basis. The report also discusses the role of local government, police and other officials directly involved in trafficking. Reference was made by the Tribunal at the hearing to the possibility corruption may exist within the Australian Embassy. However the Tribunal did not decide whether the material contained in the US State Department Report and the UNCHR Guidelines was relevant to the applicant's claim. I am satisfied that the Tribunal either ignored or overlooked relevant material or incorrectly treated it as limited to the trafficking of non-Thai women. In my view this error is of the kind identified by the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v VOAO & VOAP* [2005] FCAFC 50. That case involved a claim made by two people, one of whom was a male applicant of Jewish background. The Tribunal in that case made the following statement that is extracted at para [9] of the Full Court's decision:

> *The Tribunal notes the country information above and remarks on the absence of any mention of either an event or an attitude that would support the applicant's claim that he was and would be persecuted as a Jew in Kyrghyzstan. The country information submitted by the applicant with the 1 May 1999 submission only points to some resentment and there is no evidence of persecution against Jews in Kyrghyzstan.*

35. The error identified by the Full Court was that the Tribunal relied on country information from a 2001 source which was accurate but there was new country information in the 2002 edition of the report that was relied on, added the following:

> *In March 2002, members of the country's Jewish Cultural Society reported that they had heard calls for violence against Jews issued in Russian and Kyrgyz from a loudspeaker at a mosque in central Bishkek. According to the Israeli Embassy in Almaty, the Government is investigating.*

36. It was for the Tribunal to assess the significance of that information. Inevitably, the outcome of that assessment would be a finding of fact and would not give rise to sustainable grounds of review (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259). However, the Full Court found that the Tribunal had failed to undertake any such evaluation in finding an absence of an event that would support the respondent's claim. In the present case it is clear that the Tribunal failed to assess the information before it. The Tribunal's reference to a lack of evidence is confined to evidence in support of the claim that Thai officials aided the trafficking of the applicant herself. It is agreed that the country information before the Tribunal did not relate specifically to the applicant herself. However, in my view it would have been impossible for the applicant given her personal circumstances to appear before the Tribunal and prove the existence of official State corruption in her particular case given that her circumstances appear to have involved endemic corruption amongst State officials. The task for the Tribunal was to look at the material before it and consider whether that material substantiated the applicant's claims. These findings were relevant to both the question of whether the harm feared by the applicant had an official quality and whether the authorities were willing and able to provide adequate protection to trafficking victims. In my view the Tribunal's findings of fact were reached without any supporting probative evidence and thus its decision is affected by jurisdictional error (*VOAO* at [11-3], per Wilcox, French and Finkelstein JJ) because it did not consider material relevant to the applicant's claims. It is possible to conclude that not only was there no probative evidence supporting the no evidence finding but that there was evidence to the contrary (*SZFDJ v Minister for Immigration* [2005] FMCA 733 at [20], per Scarlett FM; *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [28], per Mansfield, Selway and Bennett JJ; *cf SZGBR v Minister for Immigration* [2005] FMCA 824 at [29-32], per Smith FM).

Whether the Tribunal failed to consider an essential claim or integer of the applicant's claims

37. The third ground relied upon by the applicant alleges that the Tribunal failed to deal with the applicant's claim of being forcibly re-trafficked if she returned to Thailand. There was agreement between the applicant and respondent that failure to deal with a claim amounts to jurisdictional error. The area of disagreement however involved the extent of the task the Tribunal was required to perform and what amounts to a material error. The Tribunal has an obligation to consider an applicant's claim or an essential integer of a claim. The requirement to review a decision under s.414 of the Act requires the Tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration (*Htun v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802 at [42], per Allsop J (with whom Spender J agreed); *Minister for Aboriginal Affairs v Peko-Wallsend*); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1; *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 80 at [29-3], per Madgwick and Conti JJ; *W396/01 v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 103 at [33], per Black CJ, Wilcox and Moore JJ).

38. The applicant claimed in her written material before the Tribunal that she feared physical harm or death if she returned to Thailand. She also expressly claimed that she feared being forcibly re-trafficked to another country. In her statutory declaration (at page 32 of the Court Book) the applicant claimed that:

> *I know the trafficking network is very rich, large and powerful. I think the traffickers would realise I know a lot about them and may wish to kill me so that I can't speak to anyone about them. I also fear that I will be re-trafficked to another country.*

39. That claim was made in the context of the applicant's evidence as to the knowledge traffickers had about her, her family and her activities and her inability to avoid being targeted by them. Ms Mortimer submitted for the applicant that the way in which this matter was dealt

with is important for two reasons. First, that it illustrates how the finding of the Tribunal came about and secondly what happened at the hearing.

40. At page 13 of the Transcript[1] of the Tribunal hearing, a relevant exchange between the Tribunal and the applicant occurred in respect of the situation in Thailand regarding Thai police and officials and whether adequate state protection would be available. The relevant exchange is as follows:

> *Tribunal: Now you also mentioned in your application that you feared being trafficked again but it doesn't seem to me that you would allow that to happen to yourself again.*
>
> *Applicant: That's right.*
>
> *Tribunal: So I think I can conclude that there isn't a real chance of that happening, that you will be re-trafficked again unless you are actually abducted… and taken abroad which of course would be against Thai law as well.*
>
> *Applicant: That's correct.*

41. It was contended for the applicant that the Court should read this exchange as meaning that the Tribunal was satisfied that the applicant agreed not to voluntarily enter into an arrangement of re-trafficking similar to the arrangement that brought her to Australia and that there remains a risk that she could face abduction in Thailand and be taken to a third country and that would be unlawful. The applicant's then representative submitted to the Tribunal at pages 91 to 92 of the Court Book:

> *Applying the relevant facts and principles, it is submitted that young women in Thailand can and do, in fact constitute a particular social group. The country information cited above indicates that they are united and set apart by their: gender, age, physical attributes (including being attractive and sexually desired). Additionally, these identifiers together with the applicant and her family being relatively impoverished, constitute young women in Thailand who are particularly vulnerable. They are readily recognisable and indeed, defined in many of the common social, cultural, economic and legal features of Thai*

[1] See Annexure A of the Affidavit of Mr Christopher Francis Miller filed 7 February 2006.

> *society, which identify and differentiate them from other groups in society. In the context of a society with such a pervasive sex industry involving mainly young women as prostitutions (especially those who are particularly vulnerable to family background and poverty) and where trafficking of such women is such a widespread and known problem, they are readily cognizable in and by Thai society.*

42. And further at page 92:

> *In addition, the country information clearly and compellingly indicates that young women in Thailand throughout Thailand have and continue to be subjected to wide ranging, systematic and pervasive forms of persecution, involving trafficking and other forms of sexual exploitation.*

43. And further on the same page:

> *young women in Thailand who are also sex workers, have been trafficked or given evidence against traffickers, are placed at even greater risk of persecution by reason of those features.*

44. It was conceded that those submissions did not directly relate to the claim of being forcibly re-trafficked but it plainly encompassed it. That argument was put to the Tribunal in light of the inadequate protection by the Thai legal system against the trafficking of women. The Tribunal however found that:

> *However, this is not the harm she now fears. Her evidence in the hearing was that she would not be re-trafficked again.*

45. In my view that is a complete misstatement of the applicant's evidence. The respondent without any cogent evidence submitted that the applicant somehow through the course of the Tribunal hearing abandoned the claim of being forcibly re-trafficked. I do not accept this submission. The Tribunal's expectation was confined to the situation of the applicant voluntarily being re-trafficked. Therefore the Tribunal incorrectly stated that the applicant's evidence at the hearing was that she would not be trafficked again. In my view the applicant had merely indicated her agreement to the proposition that she would not be deceived into being re-trafficked. It is plainly apparent that the Tribunal was aware that the applicant feared being forcibly re-trafficked, the claim being clearly stated in the applicant's statutory

declaration. It is difficult to conceive that a claim so clearly made and intimately connected with the question as to how the applicant arrived in Australia could have been abandoned. It was fundamental for the Tribunal to consider this claim and assess what could potentially happen to the applicant if she were to return to Thailand.

46. On whether this is a material error, Mr Knowles argued that it does not matter because the Tribunal was not satisfied that the applicant belonged to a particular social group and the Convention nexus was not established and therefore it discloses no material error. Ms Mortimer argued that to accept Mr Knowles argument would be to ignore the finding of the Tribunal that the applicant was a member of a particular social group and that she was a member of a social group that the Tribunal identified as sex workers and that the claim of being forcibly re-trafficked could be linked to the claim of belonging to a particular social group. In applications seeking judicial review the applicant must satisfy the Court that she was deprived of the possibility of a different outcome. In my view the claim of being forcibly re-trafficked was central to the question of whether the applicant belonged to a particular social group and whether she had a well founded fear of persecution.

47. It is apparent on page 119 of the Court Book that the Tribunal in dealing with state protection, failed to consider and make a finding as to whether the applicant could be forcibly re-trafficked. Accordingly, as the Tribunal failed to deal with this claim and failed to make findings as to whether the applicant faced a real chance of being forcibly re-trafficked it has failed to deal with a crucial and essential element or integer of the applicant's claim which deprived her of the possibility of a different outcome and thus fell into jurisdictional error.

Whether the Tribunal decision is illogical and irrational

48. The fourth and final ground relied upon by the applicant alleges that the Tribunal's findings of fact were not supported by logical grounds. It was accepted on behalf of the applicant that there is difficulty in making good this ground in light of the High Court decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* (2004) 205 ALR 487. In that case, Gleeson CJ, Hayne and Heydon JJ found at [26] that no country can guarantee

that its citizens will at all times, and in all circumstances, be safe from violence. It was contended for the applicant that the findings that the applicant would face serious harm if she were to return to Thailand and the findings that Thailand had the requisite laws to protect the applicant are inconsistent and mutually exclusive and therefore the Tribunal decision is irrational, illogical and not based upon findings or inferences of fact supported by logical grounds. Review is permitted in cases where the satisfaction of the decision maker was based on findings of fact which were not supported by some probative material or logical grounds (*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [656-7], per Gummow J affirming Deane J in *Bond* at [366]). In *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 Gleeson CJ at [232] after noting what Diplock LJ in *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 said about the rules of natural justice to be observed by an administrative decision maker, relied on what Deane J said in *Bond*. Gleeson CJ noted that the requirements of procedural fairness were often described as part of a duty to act judicially. Deane J in *Bond* at [367] said:

> *If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirement of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationality or unreasonably… When the process of decision-making is disclosed, there will be a discernable breach of duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision.*

49. Ms Mortimer for the applicant argued that the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S20/2002* (2003) 198 ALR 59 is the relevant authority that supports a finding of illogicality or mutually exclusive and inconsistency in the Tribunal decision. She contended that *S20* should be read to stand for the proposition that where the Tribunal's findings are illogical or mutually exclusive and inconsistent, it will show that the Tribunal did not understand its task. At page 115 of the Court Book the Tribunal said:

> *The Tribunal accepts that there is a real chance that the applicant will be seriously harmed by the traffickers on return to Thailand.*

50. It is difficult to understand what the Tribunal meant by this statement. However, given the circumstances of the case it is reasonable to assume that the Tribunal meant something severe. At page 119 of the Court Book the Tribunal makes the following finding which is argued contradicts the earlier finding:

> *The Tribunal concludes that Thailand does have the will and resources to protect trafficking victims from reprisal for breaking their bondage; that Thailand has the requisite laws and adequate judicial institutions, and provides an adequate level of protection measured against international standards, against serious harm to the applicant.*

51. It was submitted by Ms Mortimer on behalf of the applicant that those two findings put together are nonsensical and show that the Tribunal misunderstood what it was required to do, having found that the applicant would face a real chance of harm.

52. There remains a degree of uncertainty as to the effect of illogicality and irrationality in judicial review (*S20* at [8-9], per Gleeson CJ and [34-7], per McHugh and Gummow JJ). However, even if the reasoning of the Tribunal were accepted by the Court as demonstrably unsound or nonsensical as Ms Mortimer described it, this does not amount to an error of law because to establish some illogical inference of fact does not disclose an error of law (*Reg v The District Court; Ex Parte White* (1966) 116 CLR 644 at [654], per Menzies J; *Waterford v The Commonwealth* (1987) 163 CLR 54 at [77], per Brennan J). At common law, want of logic is not synonymous with error of law. So long as some basis for an inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place (*Bond* at [356], per Mason CJ (with whom Brennan, Toohey and Gaudron JJ agreed) and affirmed by Batt J in *Roads Corporation v Dacakis* [1995] 2 VR 508 at [520] and by Black CJ, von Doussa and Carr JJ in *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at [421-2] and see also *Minister for Immigration and Multicultural Affairs v Anthonypilllai* (2001) 106 FCR 426 at [437], per Heerey, Goldberg and Weinberg JJ; *Gamaethige*

v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 424 at [428] and [444], per Hill, Finkelstein and Stone JJ; *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 235 at [21-30], per Tamberlin, Emmett and Sundberg JJ; *NATC v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 52 at [25-7], per Heerey, Sundberg and Crennan JJ; *VTAG v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 447 at [58-60], per Weinberg J). Given the present state of authorities this ground fails.

53. The Tribunal decision is affected by jurisdictional error in relation to each of grounds 1 to 3 and hence relief should be granted.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of Pascoe CFM

Legal Associate: Peter Smith

Date: 20 April 2006