14. STATE PROTECTION IN OWN COUNTRY OR OTHER COUNTRY OF NATIONALITY

As to the issue of protection in a second country of nationality see ***A v MIMA* (1999) 53 ALD 545 [1999] FCA 116** (FFC) citing ***Prathapan v MIMA* (1997) 47 ALD 41**. In A a Full Court considered the problems confronting a person of dual nationality where one of the countries, of which the person was a national, is a democratic country governed by the rule of law and with generally effective judicial and law enforcement institutions. The Full Court at [34]-[43] explained why, in such cases, a person cannot be said to be at risk of persecution if he or she can access effective protection in either country of nationality. At [42] the Full Court observed that it was necessary that the decision maker form a conclusion about the effectiveness of the relevant State protection and do so on material presented by the claimant or on material otherwise available to the decision maker.

In the context of access to effective own-State protection a guarantee of State protection is not what is required by the Convention (see A (supra)), ***Prathapan v MIMA* (1997) 47 ALD 41** at 48) The issue of adequate State protection was summarised in ***Svecs v MIMA* [1999] FCA 1507** by Hely J. at [26]:

"The issue is not whether the authorities can guarantee that the applicants will not suffer harm for a Convention reason, but whether, in the language of the Full Court in A, B & C v Minister for Immigration & Multicultural Affairs [1999] FCA 116 at par 42, [the relevant country] has "effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort said to be feared" by the applicants."

In the Federal Court decision of Thiyagarajah v MIMA (1997) 143 ALR 118 at 121 "protection by no means implies that the authorities must, or can, provide absolute guarantees against harm"

In ***Mehmood v MIMA* [2000] FCA 1799** Von Doussa J. noted:

"However it is well recognised that beyond these acts of commission carried out by entities with which the State is formally or implicitly linked, persecution may also consist of either the failure or inability of a government effectively to protect the basic human rights of its nationals: James C Hathaway "The Law of Refugee Status", Butterworths Canada Limited, 1991, at 125-127; Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331 per McHugh J at 354; Ahmed v Minister for Immigration and Multicultural

Affairs [2000] FCA 123 at par 15; Re Attorney-General (Canada) & Ward (1993) 103 DLR (4th) 1 and Minister for Immigration and Multicultural Affairs v Prathapan (1998) 86 FCR 95 at 102.

Mc Hugh J. in ***Applicant A v Minister for Immigration and Ethnic Affairs*** **(1997) 190 CLR 225** at 258 referred to above said:

"Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State it either encourages or is or appears to be powerless to prevent that private persecution .

Brennan CJ said earlier at 233:

As the justification for the refugee's not availing himself of the protection of that country is is the existence of the relevant "circumstances", those circumstances must have been such that the country of the refugee's nationality was unable or unwilling to prevent their occurrence. Thus the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated, or uncontrollable by the authorities of the country of the refugee's nationality.

Again in ***Mehmood v MIMA*** **[2000] FCA 1799** Von Doussa J. opined:

"[15]…What is required is that the State offer effective protection from private persecution sufficient to remove any real chance that it will occur: see Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 at 566-568; Prathapan at 101-106; Minister for Immigration and Multicultural Affairs v Kandasamy [2000] FCA 67 at par 50-52 and Ahmed at par 27. However good the level of protection offered by a State might be, random acts of thuggery or other criminal behaviour cannot always be prevented, and hence absolute guarantees against harm are impossible in fact, and are not required in law to negative a real chance of persecution".

MIMA v Khawar **(2002) 210 CLR 1 76 ALJR 667 187 ALR 574 67 ALD 577 [2002] HCA 14** Gleeson CJ., Mc Hugh, Gummow, Kirby JJ.; Callinan J dissenting.) dealt with the issue of the inability of the State to protect an individual from non-State actors of persecution **<u>(see above CHAPTER 7 b) women)</u>**

In ***Sowrimuthu v MIMA*** **[2001] FCA 300** Lindgren J., who was the judge in Prathapan . exhaustively dealt with the issue of a purported failure to address the issue of the sufficiency of protection available from the authorities in the case of feared harm from non –state actors.

Counsel submitted that the issue is whether such protection as the Indian authorities do provide is "effective", that is, that the test is not simply whether they provide a 'system' of protection, but whether that system is adequate. Counsel referred to what I said (in which Burchett J and Whitlam J agreed) in Minister for Immigration & Multicultural Affairs v Prathapan (1998) 86 FCR 95 (FC) ("Prathapan") at 102, 104-105, and to the Full Court's reasons in A v Minister for Immigration & Multicultural Affairs (1999) 53 ALD 545 ("A") at [38]-[54].

47 In Prathapan, I expressly reserved (at 105-106) the question whether there is a "presumption" in the absence of evidence of a breakdown in state protection, that a country of nationality can provide to its nationals effective protection against persecution. A presumption of that kind had been approved by the Supreme Court of Canada in Re Attorney-General (Canada) & Ward (1993) 103 DLR (4th) 1 ("Ward") at 23. In Prathapan, I said that the Full Court's apparent approval of the relevant passage from Ward in Minister for Immigration & Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 was persuasive as to the general approach the Court should take.

48 Ultimately, however, Prathapan was decided on the basis that there was evidence establishing the existence of effective law enforcement and judicial systems in France and of the respect of the French government for human rights, and that the respondent had failed to prove he would not be given adequate protection. I stated (at 106):

> "It is not countervailing evidence to show that the authorities cannot guarantee immunity from persecution and reprisals. The material on which Mr Prathapan relied did not even begin to suggest that level of ineffectuality of state protection that would allow or give rise to a real chance that he would be persecuted by the LTTE regardless of his resorting to the French authorities."

49 In A, the Full Court stated that the obligations imposed on states by the Convention is "conditioned upon the need for protection" (at [36]) and that a person "cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin" (also at [36], quoting from Hathaway, The Law of Refugee Status, Butterworths, Toronto, 1991 at 135 - my emphasis). The Full Court stated (at [38]):

> "...the language of Art 1A [of the Convention] focuses upon the well-founded fear of persons claiming Convention protection and their inability or unwillingness, owing to such fear, to avail themselves of the protection of the country of nationality. In that sense the willingness or ability of the country of nationality to provide protection is not the ultimate question. But it is a question which must be considered in the assessment of refugee status. The availability of protection in the country of origin or nationality is relevant to the existence of an objective basis upon which the well-founded fear of persecution that is necessary for Convention protection rests." (my emphasis)

50 Their Honours made the following observations concerning the approach to be taken in relation to the question whether effective protection is available:

* Firstly, there is no "golden rule" that a person may never be given refugee protection if the person comes from "a democratic country governed by the rule of law and with generally effective judicial and law enforcement institutions" (at [39]).
* Secondly, the proposition that "a person claiming refugee status is not ordinarily entitled to rely upon the supposed inadequacy of reasonable state protection available to him or her if it is not inferior to that available to a fellow citizen at risk of serious criminal harm for non-convention reasons" may need to be treated with caution (at [40]).
* Thirdly, the Court rejected the presumption which had been recognised in Ward that nations are capable of protecting their own citizens, and stated that the conclusion of the

primary Judge, Nicholson J, in A, "that 'there is no foundation in authority or principle which should lead this court to accept the [Minister's] submission for the existence of a presumption in terms of Ward' is plainly correct" (at [41]). Their Honours characterised the rejected presumption as one "without a basic fact" and therefore as "a rule of law relating to the existence of a burden of proof [which] has no part to play in administrative proceedings which are inquisitorial in their nature" (also at [41]).

* Fourthly, the Court stated "the broad proposition that there must be information or material available to the decision-maker from some source or sources on the issue of effective protection", and added "[i]n some cases the claimant may have to do little more than to show that [he or she] falls within a particular class of person or possesses particular attributes to make out want of effective protection as a basis for a well-founded fear of persecution and inability or unwillingness to avail [himself or herself] of the relavant protection [while] [i]n other cases the claimant may face a very difficult task indeed" (at [43]).

Their Honours stated (at [42]):

> "Thus the delegate may well have the view that a particular country is one which has effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort said to be feared by the claimants. In such a case and in the absence of evidence advanced by the claimant, the delegate will be entitled to reject the contention that the claimant is unable or unwilling because of a well-founded fear of persecution for a convention reason, to avail him or herself of the protection of that country...In other cases a delegate or the [RRT] might be apprised of information indicating that for persons of particular classes or circumstances the relevant protection was ordinarily not forthcoming from their state of nationality."

51 Counsel for the Minister relied on the decision of Beaumont J on 23 November 2000 in Minister for Immigration & Multicultural Affairs v Tas [2000] FCA 1657. In that case, his Honour thought that the RRT had addressed the wrong question, namely, whether the German authorities could "guarantee an adequate level of protection", rather than, as they should, according to his Honour, have done, "whether there [was] a reasonable willingness on the part of the law enforcement agencies and the courts to detect, prosecute and punish offenders" (at [55]). In this respect, his Honour followed the House of Lords in Horvath v Secretary of State for the Home Department [2000] 3 WLR 379, where their Lordships held, according to his Honour's summary, that "when determining whether there is sufficient protection against persecution in the person's country of origin, it is sufficient that there is in that country a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies" (at [37]).

52 It may be that his Honour intended by his reference to "reasonable willingness" to incorporate a reference to the notion of effectiveness of enforcement. If not, what his Honour said would not be consistent with what the Full Court said in A, to which his Honour does not seem to have been referred. As Merkel J said, in summarising the effect of A in Paramanayagam v Minister for Immigration & Multicultural Affairs [2000] FCA 1744, "it [is] necessary that the decision maker form a conclusion about the effectiveness of the relevant State protection and do so on material presented by the claimant or on material otherwise available to the decision maker" (at [8]).

53 There was material before the RRT both ways as to the effectiveness of the Indian authorities' protection of the Christian minority against Hindu zealots… Ultimately, the treatment of this material was a matter for the RRT, not for this Court.

54 It is a sufficient answer to Mr Sowrimuthu's submission to say that in my opinion, when the RRT said that the Indian authorities in the states where Naxalites were active were "committed" to providing the citizens with effective protection, and described the action taken by governments against the perpetrators of religious persecution as "appropriate", and said that Mr Sowrimuthu "would have recourse to the protection of the state", it was deciding as a matter of fact, based on the country information before it, that Mr Sowrimuthu would have recourse to protection which would be effective to safeguard him. Whether I would have reached that conclusion on the material which was before the RRT is beside the point. Of course, there can be no guarantee, no matter how effective State protection is, that an instance of ineffectiveness will not occur. But that possibility does not signify that a person is "unable" to avail himself or herself of state protection or that his or her fear of persecution is well-founded, for the purposes of the Convention definition of "refugee"; cf Minister for Immigration & Multicultural Affairs v Kandasamy [2000] FCA 67 at [51] per Whitlam and Carr JJ.

Note ***NABO of 2001 v MIMA*** **[2002] FCAFC 178** per Allsop J.(Lindgren and Finkelstein JJ. agreeing on the issue of whether the Tribunal directed itself adequately to the issue of state protection):

[the appellant's argument was that] the Tribunal concerned itself only with the ability of the Fijian authorities to protect the appellant from harm which would, or may well, be inflicted on him for racial reasons, and not their willingness to provide that protection. It is convenient to set out the relevant paragraph of the Tribunal's reasons:

> Relevant to the applicant's claims to fear that he may be bashed again, and whether this indicates a real chance of persecution, is the overall security situation in Fiji and the response of the police to such attacks. The applicant has claimed that people who complain to the police can be further harmed by those reported, that the police can do little to protect Indian Fijians and that a police member had told him this. It is important to state that absolute protection of an individual is not required before a conclusion that adequate State protection is available can be reached. According to Professor Hathaway, protection through refugee law arises when the degree of protection normally to be expected of the government is either lacking or denied. For example, in situations where the quality of internal protection fails to meet basic norms of civil, political and socio-economic human rights, or where internal safety is otherwise illusory or unpredictable, State accountability for the harm is established and Convention protection may be justified (Hathaway, J C The Law of Refugee Status Toronto, Butterworths, 1991, p 134). Factors relevant in this case are whether there is a 'reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights' (Prathapan v MIMA (1998) 47 ALD 41 Madgwick J at 48: this judgment was overturned on appeal but this point was not the basis for the appeal). Information from the Department of Foreign Affairs and Trade is that the military and the police have worked to stabilise the law and order situation. I am satisfied that there is in Fiji a reasonable infrastructure of laws and institutions which together provide protection for people such as the applicant from the type of harm he fears.

6 It should be noted that, by this point in its reasons, the Tribunal had accepted that the appellant had been assaulted in the past and that there was, or may well have been, a racial element to the assault or assaults.
7 In my view, the argument referred to in [5] above simply cannot be maintained. On a common sense and fair reading of the whole paragraph, the Tribunal was directing itself, not merely to capacity, but also to willingness…
…

See also ***SFGB v MIMIA*** **[2003] FCAFC 231** per the Full Court (Mansfield Selway and Bennett JJ.) concerning the inability of the state to provide the protection of the state and its agencies to an applicant :

23 The general conclusions reached by the Tribunal relating to the position of the Taliban generally in Afghanistan were supported by the material to which the Tribunal referred. It is clear enough that the Taliban have been removed from government in Afghanistan. An interim government was established. But the appellant's case did not depend upon the general situation in Afghanistan. The Tribunal clearly understood that the case being put by the appellant was that he faced a real risk of persecution if he was returned to his home region in the north of Oruzgan province. And it was accepted before us that there was no analysis by the Tribunal or the parties as to whether the appellant could return to any other area in Afghanistan: see e.g. Randhawa v Minister for Immigration Local Government and Ethnic Affairs (1994) 52 FCR 437.
24 As to that claim as put before the Tribunal, the Tribunal found:
(a) as a general statement the Taliban had been defeated in Afghanistan. An interim government had been established. Previous circumstances of religious and political persecution were being addressed;
(b) the area where the appellant lived was under the de facto or de jure control of Karim Khalili, a Hazari leader from the adjoining province of Bamian;
(c) although there were reports of Taliban / al Qaeda in Oruzgan, those reports refer to areas that are not close to or accessible to the part of the province where the appellant lives;
(d) in any event in recent reports the US Defence Secretary has reiterated a commitment to 'go after' the elements of the Taliban that remain.
25 The difficulty with all this is that there is no material that either party could point to that would support the factual conclusions (b) and (c). On the other hand, there is information that is clearly to the contrary. For example, a report in Time Magazine ('After Shah-I-Kot: The Next Campaign' vol 159, issue 12) of 25 March 2002, which was cited with apparent approval by the Tribunal, referred to the strength of the Taliban and al Qaeda in Oruzgan province and said that they had dispersed into small fighting forces. But most importantly the Tribunal set out at some length a DFAT report ('Oruzgan province', Country Information Report No 81/02, 2 April 2002, CX63508) dealing expressly with the situation in Oruzgan province. That report stated:

> 'The security situation in Oruzgan is uncertain. There are reportedly pockets of Taliban/al Qaeda in the northern part of the province, although there have been some signs that security in the rest of the province is improving slightly.'

….

27 Given that the Tribunal had already accepted that the appellant had a well founded fear of persecution for a Convention reason from the Taliban at the time that he left Afghanistan

and given that all of the evidence before the Tribunal seemed to point to at least a possibility that 'pockets' of the Taliban remained effective in the area from which he had come the Tribunal should have considered the question of whether the government or governments in Afghanistan were capable of and willing to protect the appellant: see Minister for Immigration and Multicultural Affairs v Khawar (2002) 187 ALR 574 and see Minister for Immigration and Multicultural Affairs v Prathapan (1998) 156 ALR 672 at 678, 681. Alternatively, the question whether the appellant could safely return to some other area in Afghanistan could have been considered. The Tribunal did not address those issues. It did not do so because it had reached a critical factual conclusion:

> 'I accept the independent information set out above that the Taliban is no longer a force in Afghanistan.... There is no evidence before me to support the applicant's claim that elements of the Taliban remain viable in Afghanistan, and especially not that any such elements are in positions of power or influence, or that they still function but in other forms.'

28 The totality of this factual conclusion was incorrect. There was no evidence before the Tribunal to support that conclusion in relation to northern Oruzgan province. What evidence there was was that the Taliban remain viable in the area from which the appellant came and that the security situation 'is uncertain'. There was no evidence, one way or the other, as to whether the Taliban are in positions of power or influence in Afghanistan generally or in the northern part of Oruzgan. Accepting that there are pockets of Taliban/al Quaeda in the northern part of Oruzgan, the crucial questions are, first, whether they are in that part of the province where the appellant lives and, if they are, whether they are in positions of power or influence such that the appellant faces a real risk of persecution if he returned. The risk of persecution may come from the Taliban in circumstances where the failure of the state to intervene to protect the appellant is due to a state policy of tolerance or condonation of the persecution or where (relevantly to the present claim) the state is unable to provide the protection of the law and its agencies to the appellant: see Minister for Immigration & Multicultural Affairs v Khawar [2002] HCA 14 per Gleeson CJ at [29], McHugh and Gummow JJ at [87] and Kirby J at [101] and [112]-[115]. The Tribunal's unsupported findings in (b) and (c) purport to answer these questions. They remain unanswered.

….

In ***Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002*** **[2003] HCA 60** Kirby J. said:

74 A common factual element in the establishment of a "well-founded fear" of the stated kind is the existence, for reasons of a prohibited ground, of an inability on the part of the person claiming to be a refugee to rely upon the police or other governmental officials of the country of that person's nationality to provide basic protection[22] Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 12 [26], 28-29 [84]-[87], 35 [107], 38-40 [114]-[118].

Note the qualification regarding the seeking of protection in circumstances where it might reasonably have been forthcoming, implicitly accepted by Hill J in ***MIMA v***

Kandasamy **[2000] FCA 67** at [26]-[27] and by Carr and Whitlam JJ at [49] [51] in terms of there being a realistic choice of availing oneself of state protection.

Hill J. said:

26 A person is a refugee within the meaning of Article 1A(2) of the Convention if, but only if in a case such as the present, where the alleged persecution arises not from the State itself but from some other group in the State and there is no effective protection in the State against the persecution inflicted. The Tribunal in its reasons quoted Hathaway J in the Law of Refugee Status, Butterworths 1991, at 130 as saying:

"obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming."
27 The Tribunal was of the view that the failure to seek state protection in all the circumstances on Mr Kandasamy's part was unreasonable and that there had been no failure of state protection in Denmark and, if the state had been asked for it, protection would have been both available and effective.

Whitlam and Carr JJ. said:

51 In terms of Article 1A(2) of the Convention, if the Tribunal were to find as a fact (as it did) that Denmark could and would provide the respondent with effective protection, then:
(a) it could not be said that the respondent was, in the relevant sense, "unable" to avail himself of the protection of Denmark. He had a realistic choice of availing himself of that protection and reliance on Denmark would have been of practical utility - see the discussion on this point by Lindgren J (with whom Burchett and Whitlam JJ agreed) in Minister for Immigration and Multicultural Affairs v Prathapan (1998) 156 ALR 672 at 674; … b) any fear of persecution on the respondent's part would not be well-founded; his unwillingness to avail himself of Denmark's protection could not be said to be "owing to such fear".
52 The material question of fact was whether there was effective protection in Denmark. There was evidence before the Tribunal from which it was open to it to find as a fact that Denmark could and would provide the respondent with effective protection…

In ***Labara v MIMA*** **[2002] FCAFC 145** the Full Court (Lee Moore and Madgwick JJ.) allowed an appeal from ***Labara v MIMA*** **[2001] FCA 652** and set aside a RRT decision for jurisdictional error. the Tribunal erred by not considering whether the Ukrainian government was able, in a practical sense, to prevent harm in circumstances where it had accepted that the first appellant had been assaulted by private citizens and suffered property damage because of his adherence to the Jehovah's Witness religion. There was error because examination of the Tribunal's reasons indicated it only went so far as considering whether the appellant sought and failed to obtain protection from the Ukrainian authorities. There was no specific

consideration of the State's ability, in a practical sense, to provide protection. The High Court in ***MIMIA v Respondents S152/2003*** **[2004] HCA 18 (2004) 78 ALJR 678 205 ALR 487 77 ALD 296** (Gleeson CJ. . McHugh, Gummow Kirby Hayne JJ.)in allowing the appeal from ***Labara v MIMA*** held that the nature of the case sought to be made and the case it was addressing was not one of the inability of the State to afford protection but rather one of instigation or encouragement or condonation by the Ukrainian authorities of the harm suffered. There was no error in the Tribunal's approach so the orders of Wilcox J. at first instance were affirmed. The majority set out, however, the principle at [26] that the State was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. However, the country information gave no cause to conclude that there was any failure of state protection in the sense of a failure to meet the standards of protection required by international standards.

Gleeson CJ., Hayne and Heydon JJ. said:

1. The issue in this appeal concerns the application of the definition of "refugee" in the Refugees Convention as amended by the Refugees Protocol ("the Convention") in a case where the feared conduct in a person's country of nationality is that of private individuals, and where neither the government nor its officers encourage, condone or tolerate conduct of the kind in question.

…

4…it is necessary to examine the case that was put to the Tribunal, the findings of the Tribunal, and the Tribunal's reasons for affirming the delegate's decision.

5 The first respondent said that he became interested in the Jehovah's Witnesses religion in about May 1998. He was given some literature by a friend, and started to attend meetings on Sunday evenings. He began to distribute publications to his neighbours, and to engage in other forms of proselytising. Sometimes his activities were received with hostility and insults. On an occasion in June 1998, a group of drunken teenagers set upon him as he was returning to his home unit. They called him "a stinking sectarian", and punched and kicked him. He suffered severe injuries. An ambulance was called. He was given emergency treatment at a hospital, and then spent a week at home in bed. A policeman visited him at home, and asked for his account of what happened. The first respondent, who did not know the identity of his attackers, did not make a formal statement.

6 On an occasion in July 1998, there was an apparent attempt to set fire to the front door of the unit in which the first respondent was living. Written on a nearby wall were the words: "Death to sectarians! Bitch, if you want to live, stop your filthy activities, or else!"

7 In September 1998, on an occasion when the first respondent went into a building to distribute magazines, he was attacked and beaten by four men.

8 The first respondent's religious beliefs and activities also incurred the resentment of his employer. He was dismissed on a ground that he regarded as spurious. He then decided to leave Ukraine.
9 The Tribunal took account of country information from the United States Department of State, the British Home Office, and the Australian Department of Foreign Affairs and Trade. That information was consistent. It contained no suggestion that the Ukrainian government was not in control of the country, or that the police force and the judicial system were not reasonably effective and impartial…..
10 The Tribunal found "that the [first respondent] was assaulted and that he was assaulted because some individuals were affronted by his religious beliefs. However, these incidents must be seen as individual and random incidents of harm directed at the [first respondent] and not as persecution for a Convention reason."
11 The first respondent set out to convince the Tribunal that the government of Ukraine, both directly and through the state-controlled media, encouraged persecution of Jehovah's Witnesses. That proposition was rejected. The first respondent also asserted that the police condoned violence towards Jehovah's Witnesses. The Tribunal did not accept that. The Tribunal said:
"On the basis of the above information, the Tribunal is not satisfied that the authorities can be said to be unwilling or unable to protect their citizens. The fact that the [first respondent] experienced incidents about which he either did not make a statement, or did not persevere in any way if discouraged from making a statement, cannot be taken as evidence that the authorities condoned such incidents. On the occasion on which the police were alerted to an assault by the ambulance officers, they responded appropriately."
12 The Tribunal also said:
"In short, the Tribunal accepts the independent evidence of the US State Department, the British Home Office and DFAT, but more particularly of the official Jehovah's Witness website itself, that Jehovah's Witnesses in the Ukraine do not face State-sanctioned persecution. It accepts that harm may sometimes befall individual church members, probably more frequently when they go out and proselytise - putting themselves deliberately into an interaction with members of the general public - but that this harm befalls them on a one-off, individual basis.
…
13 In the light of what the Full Court later said, it is to be noted that the Tribunal twice expressed the conclusion that it was not satisfied that the Ukrainian authorities were unable or unwilling to protect citizens from violence based on antagonism of the kind here involved.
14 It is also to be noted that the first respondent's case before the Tribunal was that the government of Ukraine actively encouraged persecution of Jehovah's Witnesses. It was not asserted that the judicial system, or the police force, of the country lacked the power to deal effectively with unlawful violence, if they wanted to do so. The allegation was not one of absence of power, or even one of mere absence of will. It was one of positive encouragement of certain forms of unlawful violence. That was the context in which the Tribunal's reasons were expressed. As sometimes happens, by the time the case reached a further level of decision-making, a new point was made. But a fair reading of the Tribunal's reasons requires an understanding of the case it was addressing.
15…. His claim was that the authorities were unwilling to provide protection in the sense that they were the instigators of the harm. The Full Court said that the Tribunal was entitled to find that there was no evidence that the Ukrainian authorities encouraged persecution of Jehovah's Witnesses. "However, the Tribunal did not address the question of possible future harm befalling the [respondents] or whether the Ukrainian government was able, in a

practical sense, to prevent such harm, given the history of violence towards [the first respondent] on account of his religious beliefs. These matters were relevant in determining whether the [respondents'] fear of persecution was well-founded."

16 The Full Court went on:

"Counsel for the [Minister] submitted that the Tribunal did make a finding that the State had the ability to protect its citizens ... However, examination of the Tribunal's reasons indicates it only went so far as considering whether the [first respondent] sought and failed to obtain protection from the Ukrainian authorities. There was no specific consideration of the State's ability, in a practical sense, to provide protection. It is not an answer, in our opinion, simply to assert that the harm suffered by the first [respondent] 'must be seen as individual and random incidents of harm and not persecution'."

17 It is not completely clear what the Full Court meant by its references to the Ukrainian government's ability "in a practical sense" to prevent harm to the first respondent. It appears, however, that what the Full Court had in mind was that the first respondent had suffered harm in the past (in the manner and on the occasions described above), and that there was no assurance that the same would not happen to him again in the future. The suggested error of the Tribunal, said by the Full Court to be jurisdictional error, lay in failing "to consider the right question, namely, whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm". Since the Tribunal had found that the three attacks on the first respondent were random and uncoordinated, that the attackers were different, and that each group was unknown to the others, the "pervasive pattern of harm" must be the hostility, in certain elements of the community, towards "sectarian" religious practice and proselytising, and the propensity of some of those elements to express their hostility in a violent manner. The Full Court said that the practical ability, or lack of ability, to provide protection was relevant in determining whether the first respondent's fear was well-founded. It did not advert expressly to whether it was also relevant to determining whether that which the first respondent feared was persecution, or to whether the first respondent's unwillingness to avail himself in Australia of the protection of the Ukrainian authorities was "owing to" such fear.

18 It was pointed out in Minister for Immigration and Multicultural Affairs v Khawar[1] that, although the paradigm case of persecution contemplated by the Convention is persecution by the state or agents of the state, it is accepted in Australia, and in a number of other jurisdictions, that the serious harm involved in what is found to be persecution may be inflicted by persons who are not agents of the state. But not all serious harm inflicted upon a person by his or her fellow-citizens amounts to persecution, even if it is inflicted for one of the reasons stated in the Convention. The word used by Art 1A(2) is "persecuted", not "harmed", or "seriously harmed". Furthermore, it is used in a context which throws light on its meaning.

19…. As explained in Khawar[2], we accept that the term "protection" there refers to the diplomatic or consular protection extended abroad by a country to its nationals. In the present case, the first respondent must show that he is unable or, owing to his fear of persecution in Ukraine, unwilling to avail himself of the diplomatic or consular protection extended abroad by the state of Ukraine to its nationals. Availing himself of that protection might result in his being returned to Ukraine. Where diplomatic or consular protection is available, a person such as the first respondent must show, not merely that he is unwilling to avail himself of such protection, but that his unwillingness is owing to his fear of persecution. He must justify, not merely assert, his unwillingness. As the Supreme Court of Canada put it in Canada (Attorney General) v Ward[3] [1993] 2 SCR 689 at 724., a claimant's unreasonable refusal to seek the protection of his home authorities would not satisfy the requirements of Art 1A(2). In Applicant A v Minister for Immigration and

Ethnic Affairs[4] (1997) 190 CLR 225 at 233., Brennan CJ referred to Art 1C(5), which refers to the possibility that circumstances may change in such a way that a refugee can no longer refuse to avail himself of the protection of the country of his nationality. This indicated, he said, that the definition of "refugee" must be speaking of a fear of "
that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality"[5] (1997) 190 CLR 225 at 233..
20 …., the international responsibility has been described as a form of "surrogate protection"[6] The term was used in Hathaway, The Law of Refugee Status (1991) at 135, and adopted by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 495. "Protection" in that sense has a broader meaning than the narrower sense in which the term is used in Art 1A(2) but, so long as the two meanings are not confused, it is a concept that is relevant to the interpretation of Art 1A(2). The wider context was referred to by Dawson J in Applicant A[7] (1997) 190 CLR 225 at 248 when he said that international refugee law was meant to serve as a substitute for national protection where such protection was not provided in certain circumstances, and by Lord Hope of Craighead who said in Horvath v Secretary of State for the Home Department[8] [2001] 1 AC 489 at 495 that the general purpose of the Convention is to enable a person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community. ..
21 Having regard to both the immediate and the wider context, a majority of the House of Lords in Horvath took the view that, in a case of alleged persecution by non-state agents, the willingness and ability of the state to discharge its obligation to protect its citizens may be relevant at three stages of the enquiry raised by Art 1A(2). It may be relevant to whether the fear is well-founded; and to whether the conduct giving rise to the fear is persecution; and to whether a person such as the first respondent in this case is unable, or, owing to fear of persecution, is unwilling, to avail himself of the protection of his home state. Lord Hope of Craighead quoted with approval a passage from the judgment of Hale LJ in the Court of Appeal in Horvath[9] [2001] 1 AC 489 at 497 where she said, in relation to the sufficiency of state protection against the acts of non-state agents:
"[I]f it is sufficient, the applicant's fear of persecution by others will not be 'well founded'; if it is insufficient, it may turn the acts of others into persecution for a Convention reason; in particular it may supply the discriminatory element in the persecution meted out by others; again if it is insufficient, it may be the reason why the applicant is unable, or if it amounts to persecution unwilling, to avail himself of the protection of his home state."
…
23…In a case where the harm feared by a putative refugee is harm inflicted by the state, or agents of the state, in the country of nationality, the significance for the application of Art 1A(2) of the complicity of the state in the harm inflicted is clear. Assuming the harm to be sufficiently serious, and the reason for it to be a Convention reason, the fear of harm will be well-founded (because of its source); it may readily be characterised as persecution, and identified as the reason the person in question is outside the country of nationality; the external protection, which may involve being sent back, is illusory; and the unwillingness to seek such protection may be explained and justified by the fear of persecution. (It is unnecessary in the present case to examine what is involved in the concept of inability to seek external protection. There is a Ukrainian Embassy in Australia, and before that there was a consulate. The first respondent must rely upon unwillingness.) Even where the harm feared is harm not inflicted by the state, or agents of the state, but where the state is complicit in the sense that it encourages, condones or tolerates the harm, the same process of reasoning applies. The attitude of the state is relevant to a decision whether the fear of harm is well-founded; it is consistent with the possibility that there is persecution; it is

consistent with the person being outside the country of nationality because of a well-founded fear of persecution; and it supports a conclusion of unwillingness to seek (external) protection based on a fear of persecution because of the state's encouragement, condonation or tolerance of the persecution.

24 What of a case such as the present? The Full Court held that the Tribunal failed to consider Ukraine's ability to provide internal protection, the question being "whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm". In addition to rejecting explicitly a claim that the state encouraged the harm suffered by the first respondent, the Tribunal, on more than one occasion, said that it was not prepared to find that the Ukrainian authorities were unable or unwilling to protect him. This was in a context where there were two physical attacks on the first respondent and one on his property, the attacks were random and unco-ordinated, the police had interviewed the first respondent about one of them and he had been unable to identify his attackers, he had never made a statement to the police, and the police were found to have "responded appropriately".

25 The first respondent is outside his country of nationality owing to a fear resulting from a violent response of some Ukrainian citizens to his religious proselytising. The Tribunal's conclusion that the violence was random and unco-ordinated was not merely an assertion. It was a finding based on the evidence, and it was directly relevant to the case the first respondent was seeking to make, which was that the violence was orchestrated and state-sponsored. The first respondent did not set out to demonstrate that his country was out of control. On the contrary, he was claiming that the government was in control, and was using its power and influence to harm people like him. The new case, raised for the first time in the Full Court, has to be related to the terms of Art 1A(2). What kind of inability to protect a person such as the first respondent from harm of the kind he has suffered would justify a conclusion that he is a victim of persecution and that it is owing to a well-founded fear of persecution that, being outside his country, he is unwilling to avail himself of his country's protection?

26 No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the Tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.

27 In fact, there was no evidence before the Tribunal that the first respondent sought the protection of the Ukrainian authorities, either before he left the country or after he arrived in Australia. According to the account of events he gave to the Tribunal, he made no formal complaint to the police, and when the police interviewed him after the first attack, he made no statement because he could not identify his attackers. The Tribunal considered the response of the police on that occasion to be appropriate. It is hardly surprising that there was no evidence of the failure of Ukraine to provide a reasonably effective police and justice system. That was not the case that the first respondent was seeking to make. The country information available to the Tribunal extended beyond the case that was put by the first respondent. Even so, it gave no cause to conclude that there was any failure of state protection in the sense of a failure to meet the standards of protection required by

international standards, such as those considered by the European Court of Human Rights in Osman v United Kingdom[12]. 1998) 29 EHRR 245

28 The first respondent sought to explain and justify his unwillingness to seek the protection of the Ukrainian authorities, either at home or abroad, on the basis that they were the instigators, directly or indirectly, of the attacks on him. That case was rejected by the Tribunal. The Full Court found no fault with that part of the Tribunal's decision. The only other basis upon which the first respondent's unwillingness to seek the protection of the Ukrainian government could be justified, and treated as satisfying that element of Art 1A(2), would be that Ukraine did not provide its citizens with the level of state protection required by international standards. It is not necessary in this case to consider what those standards might require or how they would be ascertained. There was no evidence before the Tribunal to support a conclusion that Ukraine did not provide its citizens with the level of state protection required by such standards. The question of Ukraine's ability to protect the first respondent, in the context of the requirements of Art 1A(2), was not overlooked by the Tribunal. Because of the way in which the first respondent put his claim, it was not a matter that received, or required, lengthy discussion in the Tribunal's reasons. If the Full Court contemplated that the Tribunal, in assessing the justification for unwillingness to seek protection, should have considered, not merely whether the Ukrainian government provided a reasonably effective police force and a reasonably impartial system of justice, but also whether it could guarantee the first respondent's safety to the extent that he need have no fear of further harm, then it was in error. A person living inside or outside his or her country of nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the state.

29 The Tribunal's finding that it was not satisfied that the Ukrainian government was unable to protect the first respondent, and its finding that the first respondent was not a victim of persecution, must be understood in the light of the terms of Art 1A(2), the evidence that was before the Tribunal, and the nature of the case the first respondent sought to make. Once the Tribunal came to the conclusion that the contention that the Ukrainian authorities instigated or encouraged the harm suffered by the first respondent must be rejected, and that the attacks on him or his property were random and unco-ordinated, then its finding about the government's willingness and ability to protect the first respondent must be understood as a finding that the information did not justify a conclusion that the government would not or could not provide citizens in the position of the first respondent with the level of protection which they were entitled to expect according to international standards. That being so, he was not a victim of persecution, and he could not justify his unwillingness to seek the protection of his country of nationality. It was not enough for the first respondent to show that there was a real risk that, if he returned to his country, he might suffer further harm. He had to show that the harm was persecution, and he had to justify his unwillingness to seek the protection of his country of nationality.

….

Mc Hugh J. said:

…

32…When a person fears persecution for a Convention reason from the random and uncoordinated acts of private individuals, the ability of that person's country to eliminate or reduce the risk of persecution may be relevant in determining whether the person has a well-founded fear of persecution. It is likely to be relevant to that issue when the persecutor is known or readily ascertainable. But determining whether the government of the country of nationality is able to prevent harm from the random and uncoordinated acts of private individuals is not a necessary element in determining whether the person's fear of harm from random acts is well-founded. The need for such a determination is a variable factor that may be decisive in some cases but irrelevant in others. Nor is the absence of protection of the person by the State, in the context of a purported duty to protect, an element of persecution.

33 In determining the issue of well-founded fear, the critical question is whether the evidence established a real chance that the asylum seeker will be persecuted for a reason proscribed by the Convention, if returned to the country of nationality. If the evidence shows that the persecutors have targeted the asylum seeker, the ability of the country of nationality to protect that person will be relevant to the issue of well-founded fear. If the evidence shows no more than that private individuals randomly harm the class of persons to which the asylum seeker belongs but fails to show that that person has a real chance of suffering harm, the ability of the country to eliminate those acts is irrelevant. …

34. In the present case, the Tribunal found that in the past the male respondent had not suffered acts of persecution for a Convention reason and that there was only a remote chance that he would suffer such acts in the future. That was a factual conclusion open to the Tribunal and was not reviewable in the Federal Court. Having made that finding of fact, the Tribunal was not bound to determine whether the country of nationality had the ability - in a practical sense or otherwise - to eliminate those acts.

….

37…It was the husband's case before the Tribunal that the government of Ukraine encourages the persecution of Jehovah's Witnesses and that members of its police force condone violence towards Jehovah's Witnesses. He claimed that the harm that he suffered was the result of the policies of the Ukrainian governmen….

38 The Tribunal found that the incidents of which the husband complained were individual and random incidents and did not constitute persecution. It rejected the claim that the Ukrainian government encouraged or condoned attacks on Jehovah's Witnesses. The Tribunal found that, although a police officer came to the husband's apartment after the first assault, he took the matter no further when the husband "for some reason" did not make a statement. However, the husband claimed that he went to the police station after the second assault and that the police officers would not take his or another person's statement. The Tribunal found that, even if this was so, there were at least two police stations where the husband could have complained. One of them was the station that had sent the officer who had investigated the first assault. In addition, said the Tribunal, the husband could have gone to the office of the Procurator-General. He also had the option of complaining to his Church.

39 In concluding that the Ukrainian government did not encourage or condone attacks on the Witnesses, the Tribunal took into account a "recent Country Information report" of the Department of Foreign Affairs and Trade…

40 The Tribunal said:

"On the basis of the above information, the Tribunal is not satisfied that the authorities can be said to be unwilling or unable to protect their citizens." (emphasis added)

…

45…the husband's case before the Tribunal was that the Ukrainian government encouraged attacks on Jehovah's Witnesses. Before the Tribunal, the husband's case was that the State was responsible for the persecution that he feared. It does not seem to have been any part of his case before the Tribunal that he feared persecution by private citizens and that he was a refugee because the Ukrainian government was unable to prevent harm to him.
46 It is unnecessary to determine whether the appeal should be allowed on the ground that there was no jurisdictional error as found by the Full Court because the ability of the Ukrainian government to protect the husband was never an issue before the Tribunal. As will appear, even if that issue had been raised, the findings of the Tribunal did not require it to be decided.
47 After finding that the Tribunal had only considered whether the husband sought and failed to obtain protection from the Ukrainian authorities, the Full Court said that "[t]here was no specific consideration of the State's ability, in a practical sense, to provide protection".
…
52 The question then is whether the Tribunal fell into jurisdictional error in failing to determine whether "in a practical sense" the State was able to protect the husband, as a member of the Jehovah's Witness Church, from one-off, individual harmful incidents that from time to time befall those members. The Full Court thought that determining this issue was a necessary element in determining whether the husband and wife had a well-founded fear of persecution. Thus, this question raises issues concerning:

. a well-founded fear of persecution;

. a State's obligation to protect its citizens from Convention-related attacks by non-State agents; and

. a Convention signatory's obligation to give asylum to persons who are persecuted by private citizens in circumstances where the home State is unable to protect those persons against such persecution.

The purpose of the Convention

53 Views differ as to the extent of a signatory's obligation where non-State agents carry out the persecution[15] Goodwin-Gill, The Refugee in International Law, 2nd ed (1996) at 72-74.

The accountability theory

54 The "accountability" theory reflects one of these views of the Convention. Under the accountability theory, a signatory State is required to extend protection only when the government of the country of nationality is responsible for the persecution of a person for a Convention reason either by inflicting, condoning or tolerating the persecution[16] Wilsher, "Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?", (2003) 15 International Journal of Refugee Law 68 at 71. Under this theory, a signatory State owes no obligation in respect of persecution caused by non-State agents that the government of the country of nationality does not condone or tolerate[17] Wilsher, "Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?", (2003) 15 International Journal of Refugee Law 68 at 71; Grahl-Madsen, The Status of Refugees in International Law, vol 1 (1966) at 189. Thus, no Convention obligation is owed where the government of the country of nationality has reacted effectively to prevent the persecution or the persecution is beyond its resources or capacity to prevent[18] Wilsher, "Non-State Actors and the

Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?", (2003) 15 International Journal of Refugee Law 68 at 71; Grahl-Madsen, The Status of Refugees in International Law, vol 1 (1966) at 189. That is because, on the accountability theory, the country of nationality cannot be held responsible for the acts of non-State agents that it has not condoned or tolerated[19] European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 6. The accountability theory of the Convention prevails in Germany[20] European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 7. The German Federal Administrative Court, following principles laid down by the Federal Constitutional Court, has held that, if the country of nationality "is generally unable to provide protection including when it attempts to do so, refugee status will be denied"[21 European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 7, France[22] Goodwin-Gill, The Refugee in International Law, 2nd ed (1996) at 72-73; European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 14, Italy[23] European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 14. and Switzerland[24] European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 14. are other countries that have applied the accountability theory of the Convention although these countries now "appear to have broken away, if not in doctrine, in practice, though in a discretionary and informal way"[25] European Council on Refugees and Exiles, Non-State Agents of Persecution and the Inability of the State to Protect - the German Interpretation, London, September 2000 at 14. . In Minister for Immigration and Multicultural Affairs v Khawar[26] (2002) 210 CLR 1 at 25-26 [73]-[75], Gummow J and I said that there was no need to determine, for the purpose of that case, whether the accountability theory was part of Australian law. Gummow and Callinan JJ also left the question open.

The protection theory

55 Many countries that reject the accountability theory - and they constitute the majority of signatories - favour the "protection" theory of the Convention[27] Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 496C. That theory proceeds from the widely accepted premise that the object of the Convention is to provide "substitute protection" and "fair treatment" where such treatment is lacking in the country of nationality[28] R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958 at 992-993; Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 495, 509; Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: Horvath v Secretary of State for the Home Department", (2001) 13 International Journal of Refugee Law 16 at 18, 20. Professor James Hathaway, a leading exponent of the protection theory, has argued that "refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming"[29] Hathaway, The Law of Refugee Status, (1991) at 124. He has referred to this class of protection as "surrogate or substitute protection"[30] Hathaway, The Law of Refugee Status, (1991) at 135.

56 Influenced by Professor Hathaway's writings, the House of Lords[31] Horvath v Secretary of State for the Home Department [2001] 1 AC 489 and the New Zealand Court

of Appeal[32] Butler v Attorney-General [1999] NZAR 205 have determined a signatory State's Convention obligations by reference to the protection theory. In Horvath v Secretary of State for the Home Department[33] [2001] 1 AC 489 at 495H., Lord Hope of Craighead said:

> "If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals." (emphasis in original)

57 The protection theory imposes greater obligations on signatory States than the accountability theory imposes. It can require a signatory State to provide protection in cases where a person is likely to be persecuted for a Convention reason as the result of the inability of the country of nationality to provide protection. State complicity - whether by perpetration, condonation or approbation - is not a requirement of the protection theory of the Convention because it is based on the premise that the purpose of the Convention is to help those who are in need of international protection[34] Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 423)….. according to proponents of the protection theory, persecution by non-State actors occurs only when there is a violation of a right and the State has a duty to prevent that violation[36] Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: Horvath v Secretary of State for the Home Department", (2001) 13 International Journal of Refugee Law 16 at 20. And, as interpreted by the House of Lords in Horvath, a person may not be a refugee although that person has a well-founded fear of persecution by non-State agents. In Horvath, Lord Hope of Craighead said[37] [2001] 1 AC 489 at 497F. :

> "A person may satisfy the fear test because he has a well-founded fear of being persecuted, but yet may not be a 'refugee' within the meaning of the article because he is unable to satisfy the protection test."

58 Lord Hope went on to say[38]: [2001] 1 AC 489 at 497G-498A.

> "I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word 'persecution' implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme."

> <u>The protection theory should be rejected</u>

59 This construction of the Convention, however, leads to the implausible result that what is "persecution" for the purpose of the Convention when carried out by the State is not persecution when carried out by non-State agents. The construction was developed from the analysis of Art 1A(2) by Lord Lloyd of Berwick in Adan v Secretary of State for the Home Department[39] [1999] 1 AC 293 at 304E who said that "the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'". In Horvath[40] [2001] 1 AC 489 at 497F, Lord Hope of Craighead, basing himself on

this statement, held that persecution required an absence of State protection. Lord Lloyd, who also delivered a speech in Horvath, adhered to the two separate tests, although his Lordship came to the same result[41] [2001] 1 AC 489 at 503A-G. Thus, when the State or its agents persecute, the protection test is automatically satisfied. Yet the same acts carried out by non-State agents do not constitute persecution within the meaning of the Convention. The applicant must show both persecutory acts by the non-State agents and that the State has breached its duty to protect the applicant.

60 The decision in Horvath[42] [2001] 1 AC 489 illustrates the point. In Horvath, the House unanimously held that a person was not a refugee, within the meaning of Art 1A(2), even though the person had a well-founded fear of violence from "skinheads"[43] Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 493H against whom the police of the home State had failed to provide protection. Lord Hope said[44] [2001] 1 AC 489 at 499G-500A:

> "I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of a refugee."

61 Lord Clyde thought that it was not possible to give a complete or comprehensive formulation of what constituted the relevant level of protection. His Lordship said[45] [2001] 1 AC 489 at 510F :

> "The use of words like 'sufficiency' or 'effectiveness', both of which may be seen as relative, does not provide a precise solution. Certainly no one would be entitled to an absolutely guaranteed immunity. That would be beyond any realistic practical expectation. Moreover it is relevant to note that in Osman v United Kingdom (1998) 29 EHRR 245 the European Court of Human Rights recognised that account should be taken of the operational responsibilities and the constraints on the provision of police protection and accordingly the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities ... There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case."

62 Both the House of Lords in Horvath and Lord Lloyd of Berwick in Adan concluded that the words "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" required the construction they placed on Art 1A(2). As the United Nations High Commissioner for Refugees has pointed out[46] "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", (2001) 20 Refugee Survey Quarterly 77 at 87, on this view of the concluding words, "protection by the state apparatus inside the country of origin ... forms an indispensable part of the test for refugee status, on an equal footing with the well-founded fear of persecution test".

63 In Khawar, Gummow J and I rejected this construction of Art 1A(2)[47] (2002) 210 CLR 1 at 24-25 [72]-[73]. We held that the concluding words of Art 1A(2) referred to external protection and not internal protection. We rejected the "internal protection" theory accepted by the House of Lords in Horvath. We concluded that the reference to the unwillingness of the applicant to avail him or herself of protection meant unwillingness to be returned to the country of nationality where the feared persecution could occur. It was not directed to protection within the country of nationality but to seeking diplomatic or consular protection available to citizens who are outside that country. We adopted[48] (2002) 210 CLR 1 at 25 [73] the statement of the United Nations High Commissioner for Refugees:

> "[I]t may surely be legitimate for a person who fears non-state agents not to accept diplomatic protection outside the country as this would provide the country of origin with the possibility of lawfully returning him or her to that country. This would expose the refugee to the feared harm and therefore would make his or her unwillingness to avail of such external protection both reasonable and 'owing to such fear' of persecution."

64 For the reasons that Gummow J and I gave in Khawar, the protection theory of the Convention, as expounded by the House of Lords in Horvath, does not represent the law of Australia. The judgment of Gleeson CJ in Khawar also rejects the view that "protection" in Art 1A(2) refers to internal protection[49] (2002) 210 CLR 1 at 10 [21].

65 If conduct constitutes persecution for a Convention reason when carried out by the State or its agents, it is persecution for a Convention reason when carried out by non-State agents. In neither its ordinary nor its Convention meaning does the term "persecution" require proof that the State has breached a duty that it owed to the applicant for refugee status. Where the State is involved in persecution, it will certainly be in breach of its duty to protect its citizens from persecution. But that is beside the point. State culpability is not an element of persecution. The attitude of the State may be relevant, however, to whether a person has a well-founded fear of persecution, a point recognised by Gleeson CJ in Khawar[50] (2002) 210 CLR 1 at 11 [24]..

The accountability theory should also be rejected

66 Rejection of the protection theory of the Convention is not necessarily inconsistent with the accountability theory of the Convention. But once it is accepted that State culpability is not an element of "persecution", it is difficult to accept the accountability theory…

67 No doubt the widespread State persecution of refugees was the catalyst for enacting the Convention. But the Convention's reference to persecution is general; it does not refer to persecution by a State or its agents…

….

70 In my view, the accountability theory has no part to play in interpreting Art 1A(2) of the Convention.

Well-founded fear of persecution

71 The findings of the Tribunal show that the individual assaults and the other conduct of which the husband complained were not part of a pattern. Nor did they involve sustained discriminatory conduct. The Tribunal regarded them as individual acts by different perpetrators. However, the Full Court said that "[t]hese findings clearly raised an issue about whether there was a risk of harm for a Convention reason that the authorities could not provide protection against". And, as I have said, the Full Court held that the Tribunal had fallen into jurisdictional error by not considering whether, in a practical sense, the State was able to provide protection against individual acts by different perpetrators. Hence, as I

have indicated, the Full Court must have considered that that question was a necessary element in determining whether the husband and wife had a well-founded fear of persecution.

72 In its ordinary meaning, persecution involves selective harassment or oppression of any kind. The terms "harassment" and "oppression", particularly the former, imply repetitive, or the threat of repetitive, conduct. In its ordinary meaning, persecution always involves discrimination of some kind although discrimination is not necessarily persecution[55] Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 388; Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 18-19 [55]; Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 26 [76]-[77]. The harassment or oppression will ordinarily be motivated by enmity or by the desire to achieve an objective. It frequently involves the infliction of systematic harm over a period directed against those who hold particular beliefs or who refuse to comply with the persecutor's wishes.

73 In the Convention, however, the notion of persecution is not at large. Either expressly or by necessary implication or inference, the Convention controls and narrows the meaning of persecution for its purposes. Thus, the selectivity and motivation of the harassment or oppression is defined by reference to five matters: reasons of race, religion, nationality, political opinion and membership of a particular social group[56] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 284 per Gummow J. …. the feared harm must be of a serious nature that goes beyond simple discrimination and requires the country of asylum to protect the refugee. It is not to be supposed that the Convention required signatory States to give asylum to persons who were persecuted for a Convention reason but who were unlikely to suffer serious infringement of their rights as human beings. Thus, for the purpose of the Convention, the feared harm will constitute persecution only if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person[57] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 20-21 [61]-[65], 32 [99]. Implicit in that statement is the further proposition that there is a real chance that the feared conduct will be repeated or, if it has not already occurred, will occur, if the asylum seeker returns to the country of nationality.

74 Most forms of persecution involve sustained discriminatory conduct or a pattern of discriminatory conduct against an individual or a group of individuals[58] cf Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 7 [18] per Gaudron J. But a well-founded fear of persecution may be established for the purpose of the Convention although it does not derive from conduct that is part of a pattern or involve sustained discriminatory conduct. The fear may arise from an announcement as to a future course of conduct or from a single act[59] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 32 [99] that was directed at the asylum seeker or at others. It is not necessary that the asylum seeker should have been persecuted in the past[60] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 7 [16] per Gaudron J. The Convention looks to the future. What has occurred in the past does not determine whether a person is a refugee for the purpose of the Convention. In determining whether that person has a well-founded fear that he or she will be persecuted if returned to the country of nationality, the past is a guide - a very important guide - as to what may happen[61] Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 574-575. But that is all.

75 The Convention does not refer to persecutors. It refers to persecution, not persecutors. The persecution to which the Convention refers may be carried out by the State or its

agents or by one or more private citizens[62] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 7 [17] per Gaudron J.

…

76 Where fear of persecution springs from the conduct of the State and there is a real chance that the conduct will continue and affect the asylum seeker, a finding that the fear is well-founded will be virtually inevitable. Similarly, where the persecutory conduct of State agents is widespread, a finding that the fear is well-founded will be virtually inevitable. On those hypotheses, refusal to return to the country of nationality is the only practical means of avoiding the real chance of persecution. More difficult issues arise where the persecution is the work of private individuals, particularly where there are many of them and their conduct is uncoordinated, or where the persecution is perpetrated by isolated State agents. As Gaudron J pointed out in Minister for Immigration and Multicultural Affairs v Haji Ibrahim[63] (2000) 204 CLR 1 at 7 [16], "a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion". If the threat of persecution arises from an individual or a small group of individuals and the State is prepared to act against the individual or group, in most cases the threat is likely to be eliminated or greatly reduced. In such a case, the proper conclusion may well be that the fear is not well-founded because there is no real chance that the persecutory conduct will occur. If the State refuses to act or tolerates the conduct of the individual or group, the State itself will be complicit. On that hypothesis, unless there is only a remote chance that the asylum seeker will be persecuted, ordinarily the proper conclusion is that the fear is well-founded. Both the State and the individual or group will be guilty of persecution.

77 The case that presents most difficulty is one where harm to individuals for a Convention reason may come from any one or more of a widely dispersed group of individuals and the State is willing but is unable to prevent much of that harm from occurring. In societies divided by strongly held ethnic or religious views, it commonly happens that members of one group have a real chance of suffering harm - often violent harm - because of the pervasive but random acts of members of another group. Such harm occurs although the State makes every effort to prevent it. In such cases, it would be a misuse of language to say that the fear of persecution is not well-founded because the State has "a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected"[64] Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 510H. In Horvath, relying on the protection theory, the House of Lords limited the scope of the definition of "refugee" by requiring that a State be unwilling or unable to eliminate persecutory conduct by private individuals. Nothing in the Convention, however, supports this limitation. It should not be read into the Convention.

78 If there is a real chance that the asylum seeker will be persecuted for a Convention reason, the fear of persecution is well-founded[65] Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 389, 398, 407, 429 irrespective of whether law enforcement systems do or do not operate within the State. In Haji Ibrahim, all members of this Court recognised[66] (2000) 204 CLR 1 at 5 [7], 7 [18], 24 [73], 51-53 [145]-[150], 65-66 [185]-[188], 73-74 [205]-[208], 80 [227] that persons may be persecuted for a Convention reason although the State is unable to protect them because a civil war is raging in the country. No different view should be taken where in peace-time a State is unable to protect its citizens from harm inflicted for a Convention reason. As Gleeson CJ pointed out in Haji Ibrahim[67] (2000) 204 CLR 1 at 5 [7], "[p]ersecution and disorder are not mutually exclusive". In the same case, Gaudron J said that persecution may exist for the purpose of the Convention "whether or not the conduct occurs in the course of a civil war,

during general civil unrest or ... [where] it may not be possible to identify any particular person or group of persons responsible for the conduct said to constitute persecution"[68] (2000) 204 CLR 1 at 7 [18].

79 In order to establish that fear is well-founded in cases of private persecution, an asylum seeker will no doubt have to show more than that persons holding the same beliefs, opinions or membership of races, nationality or particular social groups are being persecuted. The asylum seeker will have to show that there is a real chance that he or she will be one of the victims of that persecution. That person will have to show some fact or circumstance that indicates that there is a real chance that he or she will be among the victims. Thus, it may be enough to show that, by reason of the conduct of the asylum seeker, he or she stands a greater chance of harm than other persons who hold the same beliefs or opinions, or membership of the particular group. Or it may be enough to show that a very high percentage of such persons are persecuted for a Convention reason and the circumstances of the applicant are similar to those who have been persecuted.

80 In many - perhaps most - cases, however, more will be needed than proof that a percentage of members holding beliefs, opinions or membership similar to the asylum seeker have been harmed for a Convention reason…

…

83 However, once the asylum seeker is able to show that there is a real chance that he or she will be persecuted, refugee status cannot be denied merely because the State and its agencies have taken all reasonable steps to eliminate the risk. Nothing in the Convention supports such a conclusion.

The Tribunal did not err

84 It follows that the ability of the Ukrainian government to protect the husband from harm because of his religious beliefs was potentially relevant to whether his fear of persecution was well-founded. But it was relevant only if there was otherwise a real chance that private individuals would persecute the husband in the future. If the Tribunal found that there was no real chance of private individuals persecuting him, the ability or inability of Ukraine to protect him from harm did not arise. And the reasons of the Tribunal show that it found as a fact that the husband had not been persecuted in the past and there was only a remote chance that he would be persecuted in the future…

…

86…the matter for the Tribunal's determination was not whether the husband's previous suffering amounted to persecution, although that was a relevant consideration, but whether he had a well-founded fear of future persecution. The reasons of the Tribunal show that it thought that the incidents that had befallen the husband were random events by different individuals. There was thus no reason for concluding that the husband would suffer harm in the future from these individuals. …

87 In finding that "the chance that [the husband] would so suffer in the reasonably foreseeable future is remote", the Tribunal probably concluded from all the evidence that attacks on Jehovah's Witnesses did not occur frequently enough to conclude that there was a real chance that he would suffer harm. There was no evidence that suggested that the husband was the target of attacks or that he stood a greater chance than other Jehovah's Witnesses of being harmed. Nor was there any evidence that the circumstances that he would face as a Jehovah's Witness were not materially dissimilar from the circumstances faced by those who had been harmed in the past. Not only was there no evidence as to the frequency or the percentage of Jehovah's Witnesses who "sometimes" suffered harm but there was no evidence as to the times or places of such occurrences. It was open to the Tribunal to conclude, therefore, that, despite the husband's earlier experiences, and those of

other Jehovah's Witnesses, the statistical chance of his being harmed was too small to classify that chance as a real one.
88 Whether the Tribunal's finding on future persecution was correct in fact is beside the point. It was a finding of fact that was not reviewable in the Federal Court. Having found that the husband and, through him, his wife did not have a well-founded fear of persecution, the Tribunal was not required to determine whether Ukraine had the ability in a practical sense or otherwise to eliminate acts that harmed Jehovah's Witnesses. The Full Court erred, therefore, in finding that the Tribunal had fallen into jurisdictional error.
….

Kirby J. said:

Rejection of state complicity in the harm to the male applicant
94 Before the Tribunal, the applicants' claim to fall within the Convention definition of "refugee" substantially relied upon the basis that Ukraine, and in that sense its state apparatus, agencies and officials, was complicit in the attacks suffered by the male applicant. It was submitted that Ukraine had encouraged the violence directed at the male applicant through the media and otherwise. This was the essential evidentiary case presented, upon the basis of which the applicants sought protection visas in Australia. …
95 However, upon this case of complicity and involvement by Ukraine in the harm suffered by the male applicant, the applicants failed before the Tribunal. They did so on the evidentiary merits…
…
The case of harm by non-state actors
…
99 In Khawar, as in this case, the applicant for refugee status was unable to succeed on the case common in persecution claims, namely persecutory activity by the apparatus of the state, its agencies and officials, in the country of nationality of the applicant for refugee status. In Khawar the complaint, by a female citizen of Pakistan, was that she was the victim of repeated violence by non-state actors (her husband and his family) which state agencies (namely the police) had failed to investigate or follow up by laying charges in respect of complaints by women, including Mrs Khawar, who alleged domestic violence against them by their husbands and by members of their husbands' families.
100 In Khawar, this Court by majority[79] Gleeson CJ, McHugh and Gummow JJ and myself. Callinan J did not decide the point but dissented from the orders of the Court held that "persecution" within the Convention definition of "refugee" could exist as a matter of law although the relevant harm was inflicted on the applicant by non-state actors. Such non-state actors could include private citizens. "Persecution" could arise where the relevant conduct was tolerated or condoned by the state in a discriminatory manner[80] Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 12-13 [29]-[31] per Gleeson CJ, 26-27 [76]-[80] per McHugh and Gummow JJ, 37-40 [112]-[118] of my own reasons. The principle endorsed by the Court rejected the notion that "persecution" as used in the Convention's criteria for "refugee" status inherently implied a necessity of intolerable conduct by agents of the state in inflicting, condoning or tolerating the persecution ("the accountability theory")[81] For discussion of the accountability theory see the reasons of McHugh J at [54]. Also see Moore, "Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection", (2001) 13 International Journal of Refugee Law 32; Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 417-423; Marx, "The Notion of Persecution by Non-State Agents in German

Jurisprudence", (2001) 15 Georgetown Immigration Law Journal 447; Phuong, "Persecution by Third Parties and European Harmonization of Asylum Policies", (2001) 16 Georgetown Immigration Law Journal 81 at 82-83; Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents", (1999) 31 Columbia Human Rights Law Review 81 at 106-108. See further Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 53-54 [151]-[154] per Gummow J; R v Secretary of State for the Home Department; Ex parte Adan [2001] 2 AC 477 at 522-523 per Lord Hutton; R (Yogathas) v Secretary of State for the Home Department [2003] 1 AC 920 at 935-936 [39]-[42] per Lord Hope of Craighead, 944-945 [65] per Lord Hutton. I considered that it was sufficient if the "persecution" involved serious harm and the failure of state protection. In my reasons, at some admitted risk of oversimplification, I adopted the concise formula which Lord Hoffmann had propounded in R v Immigration Appeal Tribunal; Ex parte Shah[82] [1999] 2 AC 629 at 653 and Lord Clyde had endorsed in Horvath v Secretary of State for the Home Department[83] [2001] 1 AC 489 at 515-516:

"Persecution = Serious Harm + The Failure of State Protection."

This represents the alternative theory of "persecution" accepted by most contemporary elaborations of the Convention ("the protection theory")[84] For discussion of the protection theory, see the reasons of McHugh J at [55]-[58]. It is also sometimes referred to as the "persecution theory": R v Secretary of State for the Home Department; Ex parte Adan [2001] 2 AC 477 at 518 per Lord Steyn, 522 per Lord Hutton. See further Randall, "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution", (2002) 25 Harvard Women's Law Journal 281; Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: Horvath v Secretary of State for the Home Department", (2001) 13 International Journal of Refugee Law 16; Anker, "Refugee Status and Violence Against Women in the 'Domestic' Sphere: The Non-State Actor Question", (2001) 15 Georgetown Immigration Law Journal 391; Moore, "Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection", (2001) 13 International Journal of Refugee Law 32 at 33-35; Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 424; Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents", (1999) 31 Columbia Human Rights Law Review 81 at 102, 119; Adjin-Tettey, "Failure of State Protection within the Context of the Convention Refugee Regime with Particular Reference to Gender-Related Persecution", (1997) 3 Journal of International Legal Studies 53 at 54-55.

101 The most obvious failure of state protection will arise when the state and its agencies and officials are the actual perpetrators of serious harm to a person who subsequently claims protection on the ground of refugee status. However, another class that will enliven the Convention is a case like Khawar, where the agencies of the state are unable or unwilling to provide protection to their nationals[85] Hathaway, The Law of Refugee Status, (1991) at 125-128. Where the evidence establishes that this is the case it will potentially lend support to claims of "fear". It may sustain such claims of fear as "well-founded". This is because, to the extent that state agencies or officials engage in the harmful conduct or neglect or omit to provide protection or redress, they render subjective fears substantial and "well-founded". They are "well-founded" because of the protective role ordinarily to be attributed to a state and its functionaries, the resources that the state

normally has to carry out its functions and the scope for sustained oppression where the state is actively or passively involved in the conduct amounting to "persecution".

102 When these qualifications are met, the relevant acts and omissions will arguably fall within the notion of "persecution" as used in this context. They will help establish the necessary link between the "well-founded fear" and the propounded ground, in this case "for reasons of ... religion". In the case of an applicant for refugee status who is outside the country of nationality, they will potentially explain why he or she is "owing to such fear ... unwilling to avail himself [or herself] of the protection of [the] country [of nationality]"[86] Applying the criteria for "refugee" status in the Convention. See the reasons of Gleeson CJ, Hayne and Heydon JJ at [2]. As to the last criterion, see Fortin, "The Meaning of 'Protection' in the Refugee Definition", (201) 12
International Journal of Refugee Law 548.

Consideration of the issues by primary judge

103 Although the primary judge did not have Khawar available to him, he did not overlook the possibility that the Tribunal had committed an error warranting intervention of the Federal Court on the basis of the inability, as well as the unwillingness, of the Ukrainian authorities to protect their citizens from persecution on religious grounds[87] [2001] FCA 652 at [24] where the "ability" of the national authorities is specifically referred to. His Honour expressly referred to, and considered, an argument of the applicants that "the government [of Ukraine] condoned such mistreatment, or was unwilling to do anything about it in a proper case". On the basis of the Tribunal's conclusions, and the evidence before it, the primary judge detected no error requiring intervention by the Federal Court on this footing. He said[88] [2001] FCA 652 at [26]:

"[T]here was nothing in this case to indicate any general attitude of condonation [of mistreatment] or unwillingness [of police to do anything about it in a proper case]."

104 The primary judge went on[89] [2001] FCA 652 at [29] (emphasis added).:

"[I]t seems a large jump to infer, from the reaction of one officer in one police station [about which the male applicant complained], that the government of the Ukraine, considering that entity as a whole, was unable or unwilling to protect Ukrainian citizens against assault arising out of their religious beliefs ... I can understand the Tribunal's unwillingness to make a finding that the Ukrainian government was unwilling or unable to protect its citizens in the absence of evidence of ... other options having been tried [by the male applicant] and proved unsuccessful."

105 The primary judge pointed out that the issues belatedly raised by the applicants were ones of fact and merits for the Tribunal[90] [2001] FCA 652 at [30], and that the Federal Court's powers of judicial review were strictly limited[91] The Act, Pt 8, especially s 476. See [2001] FCA 652 at [31]-[34].. His approach appears orthodox, careful and correct. Clearly enough, it was expressed in terms of the protection theory hitherto generally adopted as the international approach to the Convention definition. The primary judge did not adopt the narrower accountability theory of persecution that would limit "persecution" to the acts of a state or its agencies or those acts of non-state actors impliedly condoned or tolerated by the state. The accountability theory has not been accepted in this country. In advance of Khawar, correctly, the primary judge appears to have turned his attention to, and considered, the issue of practical neglect and inability on the part of the authorities in Ukraine to protect the male applicant from serious wrongdoing by non-state actors. As his Honour pointed out, partly because of the way the applicants had presented their case before the Tribunal, the evidence did not sustain a case of unwillingness or inability of Ukraine to protect its nationals. On the face of things, this made the case an unpromising one for judicial review within the limited grounds available for the Federal Court to disturb a decision of the Tribunal.

The competing theories of "persecution"

106 In his reasons in this appeal, McHugh J has suggested that the protection theory of "persecution" is as flawed as the accountability theory[92] Reasons of McHugh J at [32], [59]-[65], [75]-[79. He points to the primary duty of a national court to give effect to the Refugees Convention according to its language[93] Reasons of McHugh J at [67]. Also see Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969, [1974] Australian Treaty Series No 2, Art 31(1). According to McHugh J, the notion of "persecution" itself contains no foothold for importing a necessity of some state involvement (by conduct or relevant omission), and this Court should now reject that approach and accept a new theory of its own ("the third theory"). The new theory of "persecution" would confine the consideration of responses, if any, of state agencies and officials to the question whether the "fear" is "well-founded". The consideration would not be relevant to whether the impugned conduct was "persecution".

107 I accept the power of the arguments of text and policy that McHugh J has deployed in support of his approach. On the other hand, there are some contrary indications in the Refugees Convention, its history, nature, language and purpose, that suggest that the protection theory of persecution may not be incorrect.

….

109…. The "fear" will not ordinarily be "well-founded" at all if the asylum seeker can properly look to the state of nationality, its agencies and officials, to sanction the conduct of private individuals who are acting oppressively…

110 The ultimate purpose of the Convention is to shift a very important obligation of external protection from the country of nationality to the international community. On the face of things, this may suggest that there is some good reason for doing so - either the active participation or collusion of that country, its agencies and officials in the persecutory acts, or the failure of that country to afford protection where ordinarily, by international standards, that could be expected.

111 I do not decide finally, in this appeal, whether the third theory suggested by McHugh J should now be accepted by this Court. It is not necessary to do so in order to reach a conclusion. On the outcome of this appeal, we are unanimous. The points of difference are not determinative. Nor was a third theory fully argued at the hearing and supported by reference to legal writings and relevant materials…

112 Whilst reserving the issue for another day, it is therefore appropriate for me to continue to approach the alleged conduct of non-state actors in accordance with the protection theory that I have previously accepted as applicable to claims of "persecution" under the Convention, at least where there is a functioning state apparatus as in Ukraine[95] See Khawar (2002) 210 CLR 1 at 39-40 [118]. See also Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 66 [188], 70-71 [198]-[199].

….

114 The Full Court expressed the error that it detected in various ways. At one stage it said that the Tribunal had failed to ask itself the right question, namely "whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm"[97] 2002] FCAFC 145 at [22]. Elsewhere, the default was explained as the omission to consider "whether the Ukrainian government was able, in a practical sense, to prevent such harm, given the history of violence towards [the male applicant]"[98] [2002] FCAFC 145 at [16] and "whether there was a risk of harm for a Convention reason that the authorities could not provide protection against"[99] [2002] FCAFC 145 at [17].

115 With respect to the Full Court, I consider these findings of errors of omission and neglect on the part of the Tribunal, and of the primary judge, to be strained and unconvincing. There is no absolute obligation on the part of a state to "provide protection"

to its nationals, whatever the circumstances. Nor, within the protection theory, can it reasonably be expected that a state will prevent every harm perpetrated against a national by antisocial elements in that person's society. No reasonable reader of the Convention could expect the text to effectively oblige the fulfilment of such standards. They are not the standards against which the obligations to provide protection were written in the Convention. They are not the standards that were accepted in Khawar. There it was demonstrated that a systematic and discriminatory denial of legal protection by agencies and officials of the state existed on a Convention ground. Such was not the evidence before the Tribunal in the present case. Certainly, it was not the evidence that the Tribunal accepted.

116 Every case turns on its own facts. Cases will doubtless exist where the evidence shows neglect or indifference on the part of the state to the action of private parties, or turning a blind eye to it, that will enliven the criteria for protection of a person as a refugee, either because the harm involved is so serious or the conduct so repeated and intolerable. Khawar was such a case. However, in this case the evidence of harm directed at the male applicant, and of the official response to it, fell far short of the circumstances that would attract the Convention to the case. Certainly, it was open to the Tribunal to so conclude on the evidence before it. As it did.

117 The Convention does not require or imply the elimination of all risks of harm. As Lord Hope of Craighead said in Horvath[100] [2001] 1 AC 489 at 500, the Convention adopts a "practical standard, which takes proper account of the duty which the state owes to all its nationals". It posits a reasonable level of protection, not a perfect one[101] See Williams, "The Correlation of Allegiance and Protection", (1950) 10 Cambridge Law Journal 54. It must apply to the variety of nations in the world with their differing resources, traditions and institutional attitudes. It is not geared to the fears of the supersensitive. By the same token, it is not indifferent to conditions which reasonable human beings should not have to accept and are entitled to escape from and in respect of which they are entitled to seek protection from the international community[102] Canada (Attorney General) v Ward [1993] 2 SCR 689; Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 231-232 per Brennan CJ, 247 per Dawson J; Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 307-308 [45]-[47] because they feel that invocation outside their country of nationality of protection from that country will only lead to their being returned to conditions of risk of harm that they ought not to have to tolerate[103] Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548.

Conclusion: there was no such oversight

118 The Tribunal did not fail to consider such matters in the applicants' case. It specifically rejected any suggestion that "the authorities [of Ukraine could] be said to be unwilling or unable to protect their citizens". It concluded that:

"The fact that the [male] applicant experienced incidents about which he either did not make a statement, or did not persevere in any way if discouraged from making a statement, cannot be taken as evidence that the authorities condoned such incidents. On the occasion on which the police were alerted to an assault [of the male applicant] by the ambulance officers, they responded appropriately."

119 It was therefore unsurprising that the Tribunal, having rejected the propounded case of systemic or institutional neglect or indifference to protecting the male applicant and having earlier rejected the claim of state complicity in the acts directed against him, rejected the suggestion that what had happened to him was "persecution" within the Convention. The Tribunal, instead, classified that harm as nothing more than "individual and random

incidents of harm ... and not as persecution". That was clearly a view of the facts open to the Tribunal on the evidence.
120 In accordance with the protection theory, such incidents would not amount to "persecution" without some indication of complicity or condonation and approbation of discrimination and violence against the male applicant on the part of Ukrainian state authorities and agencies. This was an inference which the Tribunal rejected. Such rejection was clearly open to the Tribunal on the evidence. It was not amenable to criticism, or correction, by the Full Court.
121 Contrary to the Full Court, I do not read the Tribunal's reasons as suggesting that harm inflicted on the male applicant for his religious beliefs could only amount to persecution if it were shown to have followed a coordinated pattern[104] [2002] FCAFC 145 at [19]. This is not what the Tribunal concluded. All that the Tribunal said was that the incidents were random. For that reason, they did not demonstrate any state complicity. Nor did they evidence serious neglect and discriminatory indifference on the part of state authorities and agencies to providing a level of protection proper to nationals in a civilised community. In such circumstances both the affirmative and negative aspects of "persecution" were duly considered by the Tribunal. There was no failure on the Tribunal's part to consider and decide any issue inherent in the case.
…
124 As I approach this appeal it thus involves no new principle and no important proposition of law. It concerns nothing more than the application of the hitherto established law on refugees and the clear law governing the functions of judicial review of primary administrative decisions…

Applicant A169 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs **[2005] FCAFC 8** ((Finn Marshall and Mansfield J.) dismissing appeal from ***Applicants 169 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2004] FCA 727** (Lander J.) One does not infer from the fact that some persons, even persons of particular susceptibility, are vulnerable targets of non-state violence that the state does not have a reasonably effective and impartial peace force and justice system ***- Minister for Immigration & Multicultural Affairs v Respondents S152 of 2003*** **[2004] HCA 18; (2004) 78 ALJR 678 205 ALR 487** was applied . The Court held that the Tribunal applied the correct test in determining whether it was satisfied that the appellant would be unable or unwilling to avail himself of the protection of Sri Lankan authorities. The absence of evidence that the effectiveness of state protection in Sri Lanka fell below that required by international standards meant that there was no jurisdictional error

32…The Tribunal did not fail to understand or appreciate the risk that, in the period prior to the current ceasefire or peace talks, the LTTE might have presented a significant risk to a person suspected by the LTTE of providing significant information to the Sri Lankan

authorities adverse to the LTTE personnel and interests. It acknowledged and proceeded on that basis. It then accepted that there is a risk in the foreseeable future that such activities might be resumed. It made a further finding about the preparedness of the Sri Lankan authorities in those circumstances to endeavour to protect the potential informant, and about the quality of that protection. It had material available to it upon which it could reach those findings. Counsel for the appellants has not demonstrated that its findings were baseless, or could not reasonably have been made. One does not infer from the fact that some persons, even persons of particular susceptibility, are vulnerable targets of non-state violence that the state does not have a reasonably effective and impartial peace force and justice system. As was recognised in S152/2003 at 684, [26] per Gleeson CJ, Hayne and Heydon JJ:

> 'No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attack on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the Tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.'

33 In this matter there was no evidence identified by counsel for the appellants that there was any failure of state protection on the part of the Sri Lankan authorities in the sense of a failure to meet the standards of protection required by international standards. The High Court in S152/2003 did not discuss at length the nature that such evidence might constitute, or the nature of those standards, other than to refer to the standards referred to by the European Court of Human Rights in Osman v United Kingdom (1998) 29 EHRR 245.
34 If the submission was that it should be inferred from the nature of the decision that the Tribunal applied the wrong test or was not, in reality, satisfied in respect of the correct test because the Tribunal could not rationally have reached the finding of fact which it did, for the same reasons, in our judgment the foundation of the proposition has not been made out.

In ***SZBBE v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2005] FCA 264** (Jacobson J.) dismissed the appeal from *SZBBE v MI* [2004] FMCA 753. His Honour considered the test of whether the Egyptian authorities provided the necessary level of state protection to allay any well-founded fear of persecution. The test propounded by RRT was whether there was a reasonable willingness on the part of law enforcement agencies and the courts to detect, prosecute and punish offenders. It was held that the effect of ***S152*** was that the appellant had to justify his unwillingness to seek the protection of his country of nationality - such a justification would have turned upon the willingness and ability of the state to provide its citizens "with the level of protection which they were

entitled to expect according to international standards" . The relevant State is required to provide a "reasonably effective police force and a reasonably impartial system of justice". The caveat was expressed that the RRT cannot be satisfied that international standards have not been met unless there is evidence to that effect – here there wa no evidence put before the RRT of a failure to adhere to international standards which the RRT should have taken into account ***SHKB v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2004] FCA 545** was approved

A further issue – the ratio of ***S152*** does not include proposition that there will be jurisdictional error unless the RRT identifies and specifies the content of "international standards" of protection and matches the law enforcement machinery of the state against those standards - ***MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2004] FCA 1261** was approved . It was held there was no error in the RRT expressing the standard by reference to "reasonable willingness" cf in *S152* "**willingness and ability**" . In the absence of any suggestion that international standards were not met nothing turned on the distinction ; in any event the RRT's finding that the police acted reasonably to provide adequate state protection encompassed both willingness and ability. The RRT found the police had provided appellant with protection and had investigated the incidents . In dismissing the appeal His Honour said:

6 There were two issues on the application for review before the Federal Magistrate. ,,,
7 The second issue before the Federal Magistrate was whether the RRT had failed to apply the correct test in considering whether the Egyptian authorities provided the necessary level of state protection to allay any well-founded fear of persecution.
…
12 The appellant gave evidence of threats and said that he had been attacked with a knife about a month after the acquittal of his client. He said he reported the attack to the police but he could not identify his attackers. He was told by the police there was nothing they could do without further evidence.
13 His evidence as to the police's efforts in relation to each incident was to the same effect. That is to say, they could not assist because he was unable to identify the perpetrators. However, he gave evidence that the police had provided him with protection. There was also documentary evidence which pointed to action taken by the police in relation to the complaints made to them.
…
19 The RRT made the following important findings on the appellant's claims that the police had been ineffective:-

"On the appellant's own evidence the police received and made written reports of each complaint made by the applicant and provided him with a police guard for one week at following an attack on him. The applicant admits that he was not able to identify the perpetrators of any of the criminal incidents against him and he was not even able to speculate on the names of persons who might be involved other than they were members of a group of vegetable traders. The documents provided by the applicant indicate that the police took the incidents seriously, investigated them and in most cases referred them to the Director of Prosecutions for further consideration."

20 The RRT then stated that the test of reasonable state protection as being not whether the state can guarantee the safety of an applicant but whether there is a reasonable willingness on the part of law enforcement agencies and the courts to detect, prosecute and punish offenders. A number of authorities were cited.

21 The RRT's conclusion on the question of state protection was as follows:-

"The Tribunal is satisfied on the evidence of the applicant that the police acted reasonably to provide adequate state protection in circumstances in which the applicant was not able to identify his attackers or to provide any evidence to assist in establishing their identity."

….

State protection

…

41 I will deal first with the issue of the test of state protection. The appellant submits that *S152* is only authority for the proposition that if state protection is not sought, an applicant must provide a reasonable excuse, being that the standard of protection required by international standards is not available.

42 However, the appellant's submission on this question does not accurately express the principles stated in the judgment of the High Court in *S152*.

43 As Gleeson CJ, Hayne and Heydon JJ said in *S152* at [29], it was not enough for the applicant in that case to show that there was a real risk that if he returned to the Ukraine he may suffer further harm. He had to show that the harm was persecution and he had to justify his unwillingness to seek the protection of his country of nationality. Such a justification would have turned upon the willingness and ability of the state to provide its citizens "with the level of protection which they were entitled to expect according to international standards".

44 I respectfully agree with the view of Selway J in *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545 at [32] ("*SHKB*") that in *S152* the conclusion of the majority judgment was that the relevant state is required to provide a "reasonably effective police force and a reasonably impartial system of justice". What is "reasonably effective" is to be determined by "international standards" although these were not specified in their Honours' judgment.

45 But there is an important caveat to this as was noted by Selway J in *SHKB* at [32]. This is that the RRT cannot be satisfied that international standards have not been met unless there is evidence to that effect. The observations of Heerey J in *MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1261 ("*MZ RAJ*") at [26] are to similar effect. The learned Magistrate referred to both of these authorities in his judgment.

46 It was not suggested either before the Federal Magistrate or on appeal that there was evidence put before the RRT of a failure to adhere to international standards which the RRT should have taken into account. As Heerey J said in *MZ RAJ* at [26], the ratio of *S152* does not include the proposition that there will be jurisdictional error unless the RRT identifies and specifies the content of "international standards" of protection and matches

the law enforcement machinery of the state against those standards. It is for an applicant to put forward international standards of protection with which the state failed to comply.
47 It is true, as the learned Magistrate stated, that in this matter, the RRT may not have expressed the test of state protection with due precision. This may well be because the test was expressed before the decision in *S152*.
48 Nevertheless, I can see no error in the Federal Magistrate's finding that the RRT applied the correct test. The RRT stated, as was recognised in *S152* at [26], that the test is not whether the state can guarantee protection. The RRT expressed the standard by reference to "reasonable willingness" whereas the majority judgment in *S152* refers to "willingness and ability". But in the absence of any suggestion that international standards were not met, I do not see that anything turns on the distinction in the present case.
49 In any event, the RRT's finding that the police acted reasonably to provide adequate state protection seems to me to encompass both willingness and ability. Indeed, the RRT found that the Egyptian police had provided the appellant with protection for a week and had investigated the incidents, most of which they had referred to the Director of Public Prosecutions. Accordingly, I agree with the learned Magistrate that the RRT did apply the correct test.
50 Moreover, in my opinion, this finding, namely that the police acted reasonably, disposes of the appellant's complaint about the "not ineffective" formulation used by the Federal Magistrate. The RRT's finding was made in circumstances in which the appellant was unable to identify his attackers or provide evidence to assist in establishing their identity….
…..

Applicant ***S70 of 2003 v MIMIA*** **[2004] FCAFC 182** (Emmett Conti and Selway JJ.) (appeal from ***S70 v MIMIA*** **[2004] FCA 84** (Hely J.) was dismissed. The Court said:

23 The second ground of appeal relates generally to the conclusion by the Tribunal that 'there is nothing to suggest that [state] protection would be ineffective or that it would be withheld by the Fijian authorities'….
24 In our view the primary judge's analysis of the Tribunal's reasons is clearly correct. It is clear from the Tribunal's reasons that the Tribunal's comments that the appellant had failed to seek State protection was related directly to its finding that 'The applicant failed at any time to seek redress for the damage to his personal property.'
25 More fundamentally, however, the appellant's argument that he was not afforded State protection at the time he was evicted from tenancy in 2000 is simply not relevant to the finding actually made by the Tribunal that the situation had changed since that time. Having reached that conclusion the evidence of what had occurred prior to that change was of limited relevance to the question of whether the appellant would have a well founded fear of persecution if he returned to Fiji at the date of the Tribunal's decision.
26 Further, the primary judge was clearly correct in his conclusion that the failure of the police to respond on a particular occasion or occasions when a person's rights are breached by private individuals does not necessarily mean that that person has suffered 'persecution' for the purposes of the Convention. The treatment of Indian Fijians at the time of the 2000 coup may well have constituted 'persecution' (indeed, the decision of the Tribunal in this case assumes that Indian Fijians may have suffered persecution at that time), but that does not mean that the individual acts of which the appellant gave evidence were sufficient in themselves to establish 'persecution'. Individual acts by persons other than State agents are

not usually sufficient for this purpose: see Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18 at [25]-[29]. It was only when that evidence was considered in the context of the country information to which the Tribunal referred in its reasons that a conclusion could properly be reached that the appellant had suffered persecution in the past.
27 On the other hand, if the appellant had argued before the Tribunal that a failure of State authorities to provide compensation for past persecution could constitute current persecution then it would be an answer to that argument that the appellant had not sought such compensation. As mentioned above, that appears to be the context in which the Tribunal made the comment about which the appellant complained both to the primary judge and to us. However, the sufficiency of that answer does not mean, of course, that a failure to provide compensation for past persecution would necessarily form a basis for a well founded fear of 'persecution' if the appellant and his family returned to Fiji.

The RRT had addressed both the abiltiy of the State to provide effective protection but whether it would do so. Actual exercise of a power,demonstrates both its existence and a willingness to use it. The Full Court (Carr Sackville and RD Nicholson JJ.) in Ahmed v MIMA [2000] FCA 123 said relevantly:

7 Before the Tribunal, the appellant's case was based upon two types of harassment. The first was by police and government forces. The appellant's evidence about this was not accepted, and no issue arises on that matter in the appeal. The second basis was persecution by the Haqiqi faction. It was the appellant's case before the Tribunal that such persecution was with "the actual or implied" consent of the Pakistan Government.
…
9 The Tribunal next addressed the appellant's submission that the Pakistani police aided the Haqiqi faction. The Tribunal noted that the MQM alleged police support for the Haqiqi faction, but it found that there was no independent evidence to support the allegation. The Tribunal then cited the following passage from the reasons for judgment of McHugh J in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331 at 354:

> "The Convention is primarily concerned to protect those racial, religious, national, political or social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution." [Emphasis added]

10 The Tribunal expressed its conclusion on this submission in the following terms:

> "Despite persistent allegations by the MQM that Government agencies such as the intelligence agencies and the paramilitary Rangers are involved in the attacks by the Haqiqi faction on the MQM, I do not consider that the evidence before me supports the allegations of the MQM that the killing of its workers in the context of the violence between the MQM and the Haqiqi faction is encouraged or condoned by the present Government of Pakistan. It should not be forgotten that the MQM was until very recently part of that Government.

….

13…the Tribunal was reciting the allegations put forward by the MQM, and a belief expressed in the US State Department 1998 Country Report and in the Human Rights Watch World Report for 1999, that some attacks were believed to have been carried out either with the participation or at least the acquiescence of police or other government agencies. However, as the Tribunal noted, neither report suggested that the police or such agencies were specifically supporting one side or the other.

14 The Tribunal then moved on to the question whether the attacks by the Haqiqi faction were encouraged or condoned by the Government of Pakistan. As the above extract from its reasons shows, it found that that was not the case. Finally, the Tribunal considered whether the Pakistan Government had power to halt the political violence in Karachi and had exercised that power, to the extent that the appellant could expect effective protection by that Government if he were to experience further harassment from the Haqiqi faction.

15 In our view, it is quite clear that the Tribunal, by taking the course of reasoning which we have outlined, was not implicitly adopting the view that the Government itself must take a partisan political position before persecution can arise on a Convention ground. It recognised that a person may have a well-founded fear of persecution for reasons of political opinion even though the Government is neither the persecutor nor offering partisan support to the persecutors. The Tribunal accepted that it would be enough, for example, for the Government simply to condone political violence regardless of the identity of the perpetrators. The Tribunal addressed whether this was such a case, but found against the appellant.

…

17 In written submissions, the appellant suggested that the Tribunal, by referring to the circumstances that he had not sought police protection either in Dubai or in Pakistan and that there was no evidence that his family had sought such protection since he left Pakistan, had taken the position that the appellant could not rely upon a claimed lack of effective protection in such circumstances. Again, we do not think that that is a fair reading of the Tribunal's reasons. It makes no such express conclusion. The fact that an applicant for refugee status has not sought police protection may, of course, be due to fear of the police or knowledge, based on common experience, that such an approach would be futile. The appellant told the Tribunal that he had not reported the telephone harassment to the Dubai police because he would have had to explain why he had received the threats. This would have disclosed his political activities in a country where political activity was banned. The appellant does not appear to have tendered any explanation for his failure and his family's failure to seek police protection in Pakistan. Perhaps some explanation is implicit in the appellant's assertion (eventually rejected by the Tribunal) that the police supported the Haqiqi faction. Our reading of the Tribunal's reference to the matter of protection not having been sought is that it was referring to a fact i.e. failure to seek protection, bearing on its ultimate findings, but that the Tribunal did not take the further step suggested by the appellant in his submissions. The significance of the failure of the appellant and his family to seek police protection, as we see it, was that the Tribunal had no direct and particular evidence of what would be the likely result of such an approach. This leads us to the appellant's main point.

18 The appellant submitted that the Tribunal had erred by finding only that the Pakistan Government was able to provide effective protection but did not address the question whether that government would do so. In particular, so the appellant submitted, the Tribunal had erred in law by not considering whether there was a real chance that the Pakistan Government would not in fact provide protection….

20 Actual exercise of a power, of course, demonstrates both its existence and a willingness to use it.

21 At p 6 of its reasons, the Tribunal referred to evidence of what took place after the imposition of what was known as "Governor's rule" in Sindh in late 1998. It noted that:

> "Around 1050 suspects have been arrested since the imposition of Governor's rule, 296 of whom came from the MQM while 90 are from the breakaway "Haqiqi" faction and the rest are from other groups."

22 The Tribunal, in the passage which we have earlier set out above, referred also to the reduction in number of murders in Karachi following the imposition of Governor's rule in Sindh. It again referred to evidence that members of the Haqiqi faction as well as the MQM had been arrested in what it described as "the current crackdown". The acceptance of this evidence demonstrates, in our view, that the Tribunal found not only that the Government of Pakistan had the power to halt political violence in Karachi but that it was prepared to exercise that power to that end.

23 It was on the basis of those findings i.e. of governmental power and preparedness to exercise it, that the Tribunal reached its conclusion that the appellant would receive effective protection from the Government of Pakistan if he experienced further harassment from the Haqiqi faction…..

…

27 It must be remembered that it is not for this Court to consider the correctness of the Tribunal's finding that the appellant would receive effective protection from the Government of Pakistan…. There are cases in which this Court has noted, with apparent approval, the fact that the Tribunal has approached the matter of effective protection from non-governmental persecution by asking whether there was a real chance that the relevant governmental authorities would be unable or unwilling to provide a level of protection sufficient to remove a real chance of persecution of the applicant for refugee status if returned to the country in question. The authorities include Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 at 566-568 (per von Doussa J with Moore and Sackville JJ agreeing); Minister for Immigration and Multicultural Affairs v Prathapan (1998) 86 FCR 95 at 101-106 (per Lindgren J expressly agreeing with the decision in Thiyagarajah and Burchett and Whitlam JJ agreeing with him); Minister for Immigration and Multicultural Affairs v Kandasamy [2000] FCA 67 at 50-52. In Prathapan at 101-102 Lindgren J pointed out that in terms of the Convention definition of "refugee", while "unwillingness" of an applicant to avail himself or herself of the protection of the relevant country was limited to an unwillingness to do so because of ("owing to") a well-founded fear of persecution for Convention reasons, an inability to do so was not so limited. We do not think that anything turns on that distinction in the present case.

28 There are also indications in Minister for Immigration and Multicultural Affairs v Guo (1997) 191 CLR 559 at 576 that a subsidiary question, such as whether a political profile might be attributed to an applicant for refugee status, may need to be answered by a Tribunal when considering whether there is a real chance of an affirmative answer to the question.

29 However, the fact that this Court has endorsed such an approach by a Tribunal to the question of effective protection, does not, in our view, require that in every such case the Tribunal must take such a course. In the earlier part of the reasoning of six of the judges in Guo (at 572) their Honours emphasised that using the real chance test as a substitute for the Convention term "well-founded fear" was to invite error. Their Honours went on to say this (at 572-573):

> "A fear is "well-founded" when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50

> per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the Tribunal and the Federal Court have used the term "real chance" not as epexegetic of "well-founded", but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

30 In our view, the Tribunal was engaged in a purely factual assessment of whether the Pakistani authorities could and would provide the appellant with effective protection from the harassment of the Haqiqi faction…

The principle that it is not for the Court to take into account the fact that a right of residence may have expired by the time the application comes before it and remit the matter for consideration of this issue was reaffirmed in Al Anazi v MIMA [2000] FCA 262 following MIMA v Thiyagarajah (2000)1999 CLR 343 (2000) 74 ALJR 549 [2000] HCA 9.

In ***SZBBP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 167** the Full Court Wilcox Branson and Merkel JJ.) dismissed an appeal from Federal Magistrates Court concerning a Coptic Christian who claimed religious persecution by local community Muslims. The court stated that it was troubled by the conclusion of the RRT that the neighbourhood dispute, rather than the appellant's religion, was the essential and significant reason for the appellant's harassment . His evidence, which the RRT appeared to accept, was to the effect that some of the more serious threats made to him were specifically related to his religion. This approach raised the question of whether the RRT fell into jurisdictional error because it failed to ask the correct question. It was unecessary to finally resolve this point because there was an alternative ground on which the decision could be sustained. Held that the appellant's claim was correctly rejected by the RRT on the alternative ground that, even if the appellant had a well-founded fear of religious persecution by reason of being a Coptic Christian, Egypt provides adequate and effective protection to Christians against the harm claimed to have been feared by the appellant - claims concerning the issue of state protection were similar to those made by the applicants in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18 (2004) 205 ALR 487 ('*S152*') - in

that case the allegation was that the government had instigated, or had not prevented, the attacks and could not provide assurances regarding their safety. In the present case FMC had erred in finding error in relation to treatment of State protection. It was held on appeal that it was clear from the majority judgment in *S152*, the question of whether state protection was sought is a matter, among others, that can be relevant to the three stages of the enquiry raised by Art 1A(2). In the present case the RRT was entitled to have regard to the failure of the appellant to seek state protection as a relevant matter . While it is correct that a failure to seek such protection is not, of itself, dispositive of any of the relevant questions held that RRT had not treated it as such. It was further held that it was not correct to say that the RRT did not consider the ability of the state to protect appellant from the risks of persecution he claimed to fear . It addressed and rejected each of the bases put forward by the appellant for claiming he could not rely on the state to protect him because he was a Christian Indeed the RRT was satisfied that the state 'has made genuine efforts to contain violence and protect the Christian community. In regarding the protection as 'effective and adequate', it was satisfied that it met the requisite standards . The Court said:

6…we are satisfied that the appellant's claim was correctly rejected by the RRT on the alternative ground that, even if the appellant had a well-founded fear of religious persecution by reason of being a Coptic Christian, Egypt provides adequate and effective protection to Christians against the harm claimed to have been feared by the appellant.

7 In a number of respects, the appellant's claims concerning the issue of state protection are similar to those made by the applicants in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 ('*S152*'). In *S152*, the applicants, who were de facto husband and wife, were Ukranian nationals. The applicant husband claimed to fear religious persecution because he was a Jehovah's Witness, if he were to return to Ukraine. The claim was based on physical assaults perpetrated by non-state actors on the applicant husband as a result of his status as a Jehovah's Witness. The applicants alleged that the Ukrainian Government had instigated, or had not prevented, the attacks and could not provide assurances regarding their safety. Gleeson CJ, Hayne and Heydon JJ, after citing the House of Lords in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, stated at 493 [21]:

> *'...a majority of the House of Lords in* Horvath *took the view that, in a case of alleged persecution by non-state agents, the willingness and ability of the state to discharge its obligation to protect its citizens may be relevant at three stages of the enquiry raised by Art 1A(2). It may be relevant to whether the fear is well-founded; and to whether the conduct giving rise to the fear is persecution; and to whether a person such as the respondent in this case is unable, or, owing to fear of persecution, is unwilling, to avail himself of the protection of his home state.'*

8 At 494-495 [26]-[29] their Honours stated:

'[26] No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.

[27] In fact, there was no evidence before the tribunal that the first respondent sought the protection of the Ukrainian authorities, either before he left the country or after he arrived in Australia. According to the account of events he gave to the tribunal, he made no formal complaint to the police, and when the police interviewed him after the first attack, he made no statement because he could not identify his attackers. The tribunal considered the response of the police on that occasion to be appropriate. It is hardly surprising that there was no evidence of the failure of Ukraine to provide a reasonably effective police and justice system. That was not the case that the first respondent was seeking to make. The country information available to the tribunal extended beyond the case that was put by the first respondent. Even so, it gave no cause to conclude that there was any failure of state protection in the sense of a failure to meet the standards of protection required by international standards, such as those considered by the European Court of Human Rights in Osman v United Kingdom.

[28] The first respondent sought to explain and justify his unwillingness to seek the protection of the Ukrainian authorities, either at home or abroad, on the basis that they were the instigators, directly or indirectly, of the attacks on him. That case was rejected by the tribunal. The Full Court found no fault with that part of the tribunal's decision. The only other basis upon which the first respondent's unwillingness to seek the protection of the Ukrainian government could be justified, and treated as satisfying that element of Art 1A(2), would be that Ukraine did not provide its citizens with the level of state protection required by international standards. It is not necessary in this case to consider what those standards might require or how they would be ascertained. There was no evidence before the tribunal to support a conclusion that Ukraine did not provide its citizens with the level of state protection required by such standards. The question of Ukraine's ability to protect the first respondent, in the context of the requirements of Art 1A(2), was not overlooked by the tribunal. Because of the way in which the first respondent put his claim, it was not a matter that received, or required, lengthy discussion in the tribunal's reasons. If the Full Court contemplated that the tribunal, in assessing the justification for unwillingness to seek protection, should have considered, not merely whether the Ukrainian government provided a reasonably effective police force and a reasonably impartial system of justice, but also whether it could guarantee the first respondent's safety to the extent that he need have no fear of further harm, then it was in error. A person living inside or outside his or her country of nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to

provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the state.

[29] The tribunal's finding that it was not satisfied that the Ukrainian government was unable to protect the first respondent, and its finding that the first respondent was not a victim of persecution, must be understood in the light of the terms of Art1A(2), the evidence that was before the tribunal, and the nature of the case the first respondent sought to make. Once the tribunal came to the conclusion that the contention that the Ukrainian authorities instigated or encouraged the harm suffered by the first respondent must be rejected, and that the attacks on him or his property were random and unco-ordinated, then its finding about the government's willingness and ability to protect the first respondent must be understood as a finding that the information did not justify a conclusion that the government would not or could not provide citizens in the position of the first respondent with the level of protection which they were entitled to expect according to international standards. That being so, he was not a victim of persecution, and he could not justify his unwillingness to seek the protection of his country of nationality. It was not enough for the first respondent to show that there was a real risk that, if he returned to his country, he might suffer further harm. He had to show that the harm was persecution, and he had to justify his unwillingness to seek the protection of his country of nationality.'

9 In the course of hearing the present case, the RRT observed that independent country information indicates that the Egyptian Constitution provides for freedom of religion and that, generally, apart from isolated incidents, there is a good relationship between the Islamic and Christian communities. The appellant's response was to present a number of examples of discrimination against Christians. In its reasons for decision, the RRT considered the examples and concluded that they did not evidence the discrimination against Christians for which the appellant had contended.

10 The appellant's agent also made a number of submissions which were said by the agent to demonstrate that Egyptian Muslims had become less tolerant of the Christian community. In its reasons for decision the RRT's response to those submissions was as follows:

'There is no evidence, however, that there has been a shift in the attitudes of the general population. Such a change would be difficult to measure and there are no reports which would indicate that there has been a large scale change in attitudes resulting in harm caused to Christian or other non Muslims. Even if there were a demonstable shift in attitude as suggested by the applicant's agent, such a shift will only be relevant if it can be shown that it results in a real chance that the applicant will be persecuted for a Convention reason. Taking into account the independent country information the Tribunal is not satisfied that any shift in attitude by the Egyptian population has resulted in either a risk of serious harm to the applicant or a risk of systematic and targeted discrimination which would amount to persecution.

The applicant's agent states that the government cannot control persecution and

protect its citizens. The independent information suggests that whilst the police have been criticised by some in the community for an inadequate response to incidents of communal violence the government does not accept this criticism and has made genuine efforts to contain violence and protect the Christian community. The independent country information suggests that the state has provided adequate protection to Christians (2002 International Religious Freedom Report, US-DOS 2001). The applicant does not claim that he sought the assistance of the police in relation to the threats made to himself and his late wife. The applicant's agent's submission is not supported by any credible evidence and accordingly the Tribunal is satisfied that the state provides adequate and effective protection to Christians.'

…

13…as is clear from the passages we have cited from the majority judgment in *S152*, the question of whether state protection was sought is a matter, among others, that can be relevant to the three stages of the enquiry raised by Art 1A(2), and which are referred to in [21] of the majority judgment in *S152*. Thus, the RRT was entitled to have regard to the failure of the appellant to seek state protection as a relevant matter. While it is correct that a failure to seek such protection is not, of itself, dispositive of any of the relevant questions, we do not consider that the RRT treated it as such. More particularly, on a fair reading of its reasons, it did not ask itself the wrong question on that issue.

14 Secondly, it is not correct to state, as the FMC did, that the RRT did not consider the ability of the state to protect the appellant from the risk of persecution 'that he faced', which we take to mean the risks of persecution he claimed to fear. As is apparent from our discussion of the RRT's decision in relation to state protection, it addressed and rejected each of the bases put forward by the appellant and his agent for claiming that the appellant could not rely on the state to protect him because he was a Christian. Indeed, the RRT was satisfied that the state 'has made genuine efforts to contain violence and protect the Christian community' and appeared to accept independent country information that 'the state provides adequate and effective protection to Christians'. In arriving at those conclusions the RRT was addressing the case the appellant was seeking to make. It is not suggested that those conclusions were not open to the RRT on the evidence and material before it. Rather, the appellant argued that the RRT failed to consider whether that protection met 'international standards' and also failed to deal with the discrete question of whether the state could adequately protect the appellant from the harm he feared as a result of the neighbourhood incident about which he gave evidence.

15 In our view, neither criticism of the RRT's decision is warranted. The RRT addressed and rejected the case the appellant was seeking to make which was that adequate state protection was being denied to Christians in Egypt. In addressing that case, the RRT concluded that state protection was adequate and effective in respect of the kind of harm feared by the appellant. Thus, the RRT addressed the issues it was required to address in order to determine the appellant's claims. It is also clear that the RRT, in regarding the protection as 'effective and adequate', was satisfied that it met the requisite standa…

…

15. COMMUNAL VIOLENCE / CIVIL WAR (SEE ABOVE)

In Ibrahim v MIMA (2000) 204 CLR 1 Gummow J. stated the general principle as:

141…it is generally accepted that the Convention definition, based on individual persecution, limits the humanitarian scope of the Convention. The definition does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention[133] Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?", (1986) 26 Virginia Journal of International Law 857 at 857-859. For example, it appears that in 1986 the number of civilians fleeing their countries of origin by reason of internal armed conflict exceeded the number of Convention refugees[134] Perluss and Hartman, "Temporary Refuge: Emergence of a Customary Norm", (1986) 26 Virginia Journal of International Law 551 at 558. In Applicant A v Minister for Immigration and Ethnic Affairs, Dawson J observed[135] (1997) 190 CLR 225 at 248. These passages were adopted by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [2000] 3 WLR 379 at 385-386; [2000] 3 All ER 577 at 583-584:

The Full Court in MIMIA v VFAY; MIMIA v SHBB [2003] FCAFC 191 (2003) 134 FCR 402 allowed the Minister's appeals from VFAY v MI [2003] FMCA 35 SHBB v MI [2003] FMCA 82 (Driver FM) where the issue of children and unaccompanied minors of Hazara ethnicity as a particular social group had been considered (Note special leave application stood over pending judgment of High Court in appeal from MIMIA v Applicant S [2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256) . The Court said in relation to the situation of civil war or civil disturbance:

REASONING

49 In Applicant A v Minister, at 242, Dawson J accepted, by reference to Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, at 568, per Burchett J, that there is a "common thread" which links the expressions "persecuted", "for reasons of" and "membership of a particular social group" in Article 1A(2) of the Convention. As was said in Ram v Minister, the link is

> "a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of the particular social group. He is persecuted because he belongs to that group".

50 Dawson J's approach was endorsed in Chen Shi Hai v Minister, at 299, 302, per Gleeson CJ, Gaudron, Gummow and Hayne JJ. The Honours added this observation:

> "As was pointed out in Applicant A, not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from

> the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct."

….

53 Gummow J (with whom Gleeson CJ and Hayne J agreed) endorsed this passage in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1, at 49. Gummow J pointed out (at 49) that the Convention's definition

> "does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention."

54 The decision in Haji Ibrahim establishes that it is an error to employ the notions of "differential operation" or "differential impact" as criteria for determining whether an applicant has a well-founded fear of persecution for one of the Convention reasons. As Gummow J observed (at 51) such expressions are distractions from the text of the Convention definition.

55 Chen Shi Hai v Minister establishes that persecution for the purpose of the Convention (in that case of "black" children born in breach of China's one child policy) can proceed from reasons other than "enmity" or "malignity": at 305. That does not, however, deny the need for a fear of discriminatory infliction of harm amounting to persecution. The joint judgment endorsed (at 304) the proposition put by French J that

> "the apprehended persecution which attracts Convention protection must be motivated by the possession of the relevant Convention attributes on the part of the person or group persecuted".

56 Similarly, McHugh and Gummow JJ said in Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1, at 28, that the reason for the persecution must be found in the "singling out of one or more of the five attributes expressed in the Convention definition".

57 In our view, the RRT in the present case correctly appreciated the questions that it had to ask. It plainly accepted that VFAY was at risk of harm if he were to return to Afghanistan. The RRT also plainly understood, on the assumption that separated children or unaccompanied Hazara minors were particular social groups, that it had to consider whether the feared harm would be inflicted by reason of VFAY's membership of those social groups. The RRT answered this question in the negative, finding that any difficulty VFAY might encounter would be because of his limited capacity to manage in the generalised insecurity and hardship prevailing in Afghanistan.

58 In answering this question in the negative, the RRT drew a distinction that has been recognised in the authorities. In Haji Ibrahim, for example, the RRT found that the applicant's fear of harm in conditions of class warfare prevailing in Somalia was not by reason of his membership of a particular clan, but was the consequence of civil unrest (at 53). This finding was held by the High Court not to involve any error.

59 In effect, the RRT in the present case found that VFAY would not be subject to discriminatory conduct amounting to persecution by reason of his status as an unaccompanied Hazara minor or a separated child. Indeed, the RRT's finding that, in view of the changed circumstances in Afghanistan, Hazaras were not at risk of persecution necessarily led it to conclude that VFAY was not at risk of persecution by reason of membership of a social group comprising unaccompanied Hazara minors.

…

Note the earlier Full Court authority of Abdalla v MIMA(1998) 51 ALD 11 [1998] 1017 FCA which (subject to the effect of Ibrahim (above) where relevant) is useful for an analysis of whether feared harm in the context of civil war can amount to Convention-related persecution i.e have a nexus to one of the Convention grounds. Ibrahim establishes that it is an error to employ the notions of "differential operation" or "differential impact" as criteria for determining whether an applicant has a well-founded fear of persecution for one of the Convention reasons. The Court (Burchett Tamberlin and Emmett JJ.) said:

Persecution

The appellant submits that the decision-maker incorrectly interpreted and applied the law to the facts as found with respect to what may constitute "persecution" within the meaning of the Convention. In particular, the claim made is that the RRT erred in holding that the persecution had to consist of a systematic course of conduct.

The error is said to reside in categorising the harm, which may result to the appellant as a consequence of clan warfare in Somalia, as not being relevant to a Convention reason. The error is said to be indicated in the statement by the RRT that:

"The evidence in this case indicates a situation where the patterns of communal violence do not form part of 'a course of systematic conduct' against the Marehan. Clearly, the Applicant claims fear of suffering harm within the recurring pattern of communal violence in Somalia but, according to the authorities cited, this is not persecution for the purposes of the Convention."

The reference to the need for a systematic course of action harks back to the remarks of Wilcox J in Periannan Murugasu v The Minister for Immigration and Ethnic Affairs (unreported, 28 July 1987 at 13), where his Honour said:

"The word 'persecuted' suggests a course of systematic action aimed at an individual or at a group of people. It is not enough that there be a fear of being involved in incidental violence as a result of civil or communal disturbances."

This concept of systematic violence was taken up by McHugh J in Chan v The Minister for Immigration and Ethnic Affairs (supra) at 429-430 in the following passage:

"The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. He or she may be 'persecuted' because he or she is a member of a group which is the subject of systematic harassment...Nor is it a necessary element of 'persecution' that the individual should be a victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of the class, he or she is 'being persecuted' for the purposes of the Convention. The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances that the Government has failed or is unable to protect the person in question from persecution..."

In substance the RRT decided, in the present case, that the recurring pattern of communal violence, which it found to exist in Somalia, did not amount to persecution because there was no systematic course of conduct. The requirement, in our view, was too widely

expressed. Where there is a recurring pattern of violence towards a person on a Convention ground, there is no reason why such conduct may not constitute 'persecution'. Clearly 'persecution' involves more than a random act. To amount to 'persecution' there must be form of selective harassment of an individual or of a group of which the individual is a member. One act of selective harassment may be sufficient. The fact that a recurring pattern can be loosely described as communal violence or even civil war does not mean that it cannot amount to 'persecution'. It is necessary to examine the situation further in an attempt to determine the purpose which gives rise to the violence or danger.

The decision in respect of whether recurring communal violence amounts to 'persecution' depends on whether there is a purpose behind the recurring pattern which is referrable to a Convention ground. In the present case, the RRT has found that the frequent fighting against the Marehan clan is partly based on settling long standing scores dating back to the Siad Barre regime and partly based on competition for territory. Insofar as the threatened oppression arises from the settling of scores with the Marehan as a clan, it can be concluded that the fighting was directed at them as a group which had the former president as a member. This, in our view, is within the concept of persecution. Competition for territory, depending on the circumstances, may also lead to persecution.

This precise question as to whether the present circumstances amounted to persecution was apparently not investigated before the RRT, presumably because the decision-maker formed the view that communal violence within the framework of a civil war is not a form of 'persecution' within the meaning of the Convention. This approach, in our view, is not correct. Much will depend on the purposes for which the war is being fought. For example, if it is fought to eliminate or punish members of another clan, it may amount to 'persecution' for a Convention reason.

The respondent referred to the recent decision of the House of Lords in Adan v The Secretary of State for the Home Department [1998] 2 WLR 702. This decision was referred to in support of a proposition that a state of civil war, in which widespread clan killing and torture takes place, will not give rise to a well-founded fear of persecution where the individual claimant is at no greater risk of adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership. Their Lordships held that on the material in that case the applicant was not a refugee within the Convention.

Lord Lloyd (with whom all other members agreed) after reviewing the authorities, concluded (at 713) that:

"... where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show ... a differential impact. In other words he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."

At 714 his Lordship continued:

"Mr Adan's evidence was that members of his own sub-clan were particularly at risk because they had attacked a militia stronghold of the main opposing sub-clan. But I do not consider that this throws doubt on the tribunal's conclusion that all sections of society in northern Somalia are equally at risk so long as the civil war continues. There is no ground for differentiating between Mr Adan and the members of his own or any other clan."

It is evident from these observations that the decision in Adan turned on the particular evidence as to the circumstances of Mr Adan and the nature of the war in the north of Somalia at the relevant time. It is not in any way a controlling authority in relation to the present case. The question to be investigated before reaching a conclusion as to whether there is persecution in the present case which it raises is whether the evidence establishes that all sections of society are equally at risk so long as the civil war continues. In the RRT decision, this issue is not addressed.

The decision in Adan deals with what was apparently indiscriminate violence or oppression manifested towards all clans without any differential impact based on clan membership. In the present case the RRT was concerned with what the evidence indicates is the special position of the Marehan clan by reason of its association with the former regime. There is support in the findings of the RRT for the conclusion that the Marehan are in a different position as to risk in the civil war because of their identification with the former president.
In the present case, we consider that the approach adopted by the RRT was erroneous because it failed to accept that communal violence arising from the civil war could amount to persecution for a Convention reason. It is not correct to proceed on the basis that because a fear arises within a recurring pattern of communal violence in a civil war context therefore it cannot amount to 'persecution' for a Convention reason.
…

16. RELOCATION / INTERNAL FLIGHT

In *Ismail v Minister* [2000] FCA 194 Emmett J succinctly addressed two questions that arise in relation to the possibility of relocation.

"25 The first is whether an applicant could, in fact, relocate to another area. The second, is whether he could reasonably be expected to do so. That second question is an important one, because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law, the practical realities facing a person who claims to be a refugee, must be carefully considered (see Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 at 442)."

The correct approach to the assessment of re-location is set out in ***Randhawa v MILGA*** **(1994) 52 FCR 437** which principally concerned persecution by non-state actors. The Full Court made it clear that the decision-maker must ask himself or herself the question whether or not an applicant's fear of persecution is well-founded in relation to his country of nationality, not simply the region in which he lived (thereby rejecting the first proposition advanced by the appellant). However, in order to do so it is necessary to assess the claims against the particular part of the country in relation to which they are made, and if upheld to then proceed to look at the reasonableness of the internal flight alternative so as to reach a conclusion on the ultimate question for determination

The relevant principles appear in the judgment of Black CJ in ***Randhawa*** at 442-3:

".This further question [whether the appellant could be reasonably expected to relocate to another area of India] is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.

Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in R v Immigration Appeal Tribunal Ex parte Jonah (1985) Imm. AR 7. Professor Hathaway, op cit at 134, expresses the position thus: "The logic of the internal protection principle must, however, be recognised

to flow from the absence of a need for asylum abroad. It should be restricted in its application for persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized." [Original emphasis]

If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled (emphasis added) to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole (emphasis added) is well-founded."

The various factors set out in Randhawa, adopting Hathaway's characterisation, will always need to be addressed. Failure to do so, or incorrect application of these principles, can constitute jurisdictional error.

In MIMA v Jang (2000) 175 ALR 752 ; (2000) 63 ALD 661 [2000] FCA 1075 the Minister's appeal raised the question whether it is appropriate to apply the relocation principle to feared persecution arising from enforcement of a national law. Wilcox J. held that it was not [25-28,33].

It is settled that in relation to issues concerning relocation the Tribunal should not place upon an applicant a burden or proof with which he could not possibly cope, and in some cases it may be necessary to give an applicant the benefit of the doubt. (see Randhawa per Beaumont J. at 451-2, Sulakhan Singh v MIMA [2000] FCA 1063 at [14] and at [17-18] regarding significance of practical difficulties of relocation referring to Ismail (supra) and Perampalam v MIMA (1999) 55 ALD 431, 84 FCR 274 [1999] FCA 165 per Moore J.)

The relocation principle does not require a person to modify their beliefs or to to hide the fact that they are of a certain racial or particular social group. Nothing in Appellant S395/2002 v MIMA (2003) 78 ALJR 180 78 ALD 8 (cuts across the principle because when it is applied the putative refugee is not at risk of persecution in his country of origin. The Full Court (Branson Finn and Finkelstein J.) so held in SKFB v MIMIA [2004] FCAFC 142:

10 In the appeal before us the tribunal's decision is challenged on different grounds. The focus of the attack is on the tribunal's application of the relocation principle. The attack is founded on the High Court's recent decision in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 78 ALJR 180. That case involved a claim for asylum by two homosexual men from Bangladesh. The tribunal accepted that homosexuality is not acceptable in Bangladesh and that homosexual men are liable to be persecuted. The appellants, however, had lived together for over four years without experiencing anything more than "minor problems": cited at (2003) 78 ALJR 180, 183. This caused the tribunal to find that the appellants "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home": cited at (2003) 78 ALJR 180, 183. For that reason they were denied a protection visa.

11 In the High Court the appellants argued that the tribunal had fallen into error by finding that a person could not be a refugee if he were able to avoid adverse consequences by hiding or being "discreet" about beliefs or conduct which would otherwise be the subject of persecutory attack for a Convention reason. The High Court accepted this contention. McHugh and Kirby JJ (at 188) said:

> "History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention."

Similar views were expressed by Gummow and Hayne JJ (at 194-195):

> "But to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant must do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. ...
>
> Addressing the question of what an individual is entitled to do (as distinct from what the individual will do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning ... leads to error. It distracts attention from the fundamental question. It leads to confining the examination undertaken ... merely 'to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in [the country of nationality] disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result. That narrow inquiry would be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do

on return was not only comprehensive but exhaustively described the circumstances relevant to the fear that the applicant alleged."

12 The appellant seeks to apply this reasoning to his case. In effect the argument is that to require a person to live in a safe part of his country, even when it is reasonable for him to do so to avoid persecution, avoids addressing the fundamental question that the tribunal must consider namely, whether the appellant has a well founded fear of persecution.

13 We do not believe that the relocation principle require a person to modify their beliefs or opinions or to hide the fact that they are of a certain racial or national origin or member of a particular social group. The question is whether there is a real risk that the applicant for asylum would be persecuted for a Convention reason if required to return to his country of nationality. The question is concerned principally with the protection which can be given to the putative refugee by his own country: Minister for Immigration and Multicultural Affairs v Respondents v S152/2003 [2004] HCA 18. The application of the relocation principle enquiries whether the appellant is able to obtain that protection. That is to say, if the principle is applied that only means that the putative refugee is not at risk of persecution in his country of nationality. Nothing said by the High Court in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 78 ALJR 180 cuts across this principle.

In VRAW v MIMIA [2004] FCA 1133 Finkelstein J. said:

26…internal flight or relocation may not be of much relevance in this case. In Zhuravlvev v The Minister of Citizenship and Immigration [2000] 4 CF 3, 18 Pelletier J reminded us that internal flight might not be applicable in states (like Russia) where internal movement is restricted. In this case there is the added problem that the husband faces harm from the FSB and this may not be avoided if he were to move to another city.

The Full Court in NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 37)(Branson RD Nicholson (dissenting) and North JJ.) allowed an appeal from the Federal Magistrates Court concerning relocation/internal flight alternative. The following principle was affirmed:- where a person is in Australia having fled his or her country of nationality because of a well-founded fear of being persecuted for a Convention reason in one part only of that country, Australia will have a protection obligation in respect of that person only if he or she is outside that country 'owing to well-founded fear of being persecuted' for a Convention reason. If a putative refugee could reasonably have re-located within the country of nationality, rather than fled that country, he or she will fail the first element of the Convention definition. Inadequate State protection in a portion of her country of nationality is not sufficient to meet the second part of the Convention definition of 'refugee i.e an unwillingness to avail himself or herself of the protection of the country of nationality would not be owing to a well-founded

fear of persecution for a Convention reason. The majority held that there had been a misapplication/misconstruction of relocation test – whether reasonable to expect appellant to return to live in Fiji in a new neighbourhood. The appellant expressed concerns about where she would live if she left her own home and how, without a friend or family member in close proximity, she could 'be looked after' in the way that, as a 55-year old unemployed widow in Fiji, she needed to be looked after. It was held that the summary way in which RRT dealt with issue of relocation, including its failure to explore the significance of the appellant's references to having no-one in Fiji 'to look after her', indicated the Tribunal did not apply the right test when it concluded that it was satisfied that, with the assistance of her daughter (understood on evidence as 'financial assistance) , the appellant would be able to relocate within Fiji . The RRT did not give consideration to the practical realities facing the appellant with respect to accommodation and care should she seek to relocate within Fiji. The RRT misconceived the content of the requirement that it not be unreasonable for the appellant to relocate within Fiji. RRT did not ask itself the right questions before determining that it was not satisfied that the appellant is a person in respect of whom Australia owes protection obligations (per RD Nicholson J. dissenting on issue of treatment of reasonableness of relocation as involving a jurisdictional error – not a case of RRT asking wrong question- error of law within jurisdiction). Branson J. (North J.agreeing) said:

2 The appellant has submitted that this appeal raises for consideration two issues of principle. First, what is the breadth and content of the so-called 'internal flight alternative' under the 1951 Convention….

3…I have concluded that the fourth ground of appeal identified in the notice of appeal should be upheld, namely that the learned Federal Magistrate should have found that the Tribunal misconstrued or misapplied the relocation test. On this basis, in my view, the decision of the Tribunal was affected by jurisdictional error in that it did not ask itself the right questions before determining that the appellant was not entitled to a protection visa.

…

6 In this case the Tribunal took the view that if the appellant relocated within Fiji there would not be a real chance of her suffering serious harm as defined by s 91R of the Act. It thus concluded that she was not entitled to a protection visa.

7 The appellant contended that the breadth and content of the 'internal flight alternative' was to be identified by reference to the obligation imposed on contracting States by Article 33 of the Convention. Article 33 provides:

> 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

8 The appellant argued, as I think uncontentiously, that the Convention shows a clear intention to protect persons from being returned by contracting States to places where they face a threat to life or freedom on account of one of the five Convention reasons…
9…it is now accepted in Australia that 'protection' in Article 1A(2) refers to the diplomatic or consular protection extended abroad by a country to its nationals (Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 per Gleeson CJ, Hayne and Heydon JJ at [19]).
10 Where a person is in Australia having fled his or her country of nationality because of a well-founded fear of being persecuted for a Convention reason in one part only of that country, Australia will have a protection obligation in respect of that person only if he or she is outside that country 'owing to well-founded fear of being persecuted' for a Convention reason. If the putative refugee could reasonably have re-located within the country of nationality, rather than fled that country, he or she will fail the first element of the Convention definition of a refugee. I put to one side the case of a person who is outside the country of his or her nationality because the circumstances inside that country have materially changed since he or she departed the country. This is not such a case.
11 If the putative refugee satisfies the first element of the Convention definition of a refugee but is unwilling to seek diplomatic or consular protection in Australia from his or her country of nationality, the reason for the unwillingness needs to be determined. If the outcome of the putative refugee seeking diplomatic or consular protection would be that he or she would be returned to a part of the country of nationality in which he or she:

> (a) would not face persecution for a Convention reason; and
> (b) could reasonably be expected to live,

he or she will fail the second element of the Convention definition of a refugee. The unwillingness to avail himself or herself of the protection of the country of nationality would not be owing to a well-founded fear of persecution for a Convention reason.
12 If Australia were to seek to send such a person to a part of his or her country of nationality in which he or she had a well-founded fear of persecution the practical outcome is likely to be that the person would seek diplomatic or consular protection in Australia from his or her own country. However, Australia's conduct would not be subversive of the Convention if the person chose not to seek that protection. The purpose of the Convention is to provide protection to those who cannot reasonably be expected to look to their own States for protection; not to provide additional protection to those who can reasonably be expected to look to their own State.
13 I would therefore reject the appellant's contention that inadequate State protection in a portion of her country of nationality is sufficient to meet the second part of the Convention definition of 'refugee'. As Black CJ observed in Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 ('Randhawa') at 441:

> 'The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.'

14 In this case the Tribunal was satisfied that if the appellant moved away from her present neighbours she would not be at the same risk of harm as she had been in the past…

15 The critical issue for the Tribunal's determination was thus whether it was reasonable to expect the appellant on return to Fiji to live in a new neighbourhood. The second basis on which the appellant argued her appeal related to the Tribunal's approach to this issue.
16 In Randhawa Black CJ, with whose reasons for judgment Whitlam J agreed, said at 442-443:

> 'In the present case the delegate correctly asked whether the appellant's fear was well-founded in relation to his country of nationality, not simply the region in which he lived. Given the humanitarian aims of the Convention this question was not to be approached in a narrow way and in her further analysis the delegate correctly went on to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.
>
> ... In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.
>
> ...
> If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded.'

…
18 It seems to me that the statements of the appellant summarised by the Tribunal member in the above passage were intended to convey a concern by the appellant about where she would live if she left her own home and how, without a friend or family member in close proximity, she could 'be looked after' in the way that, as a 55-year old unemployed widow in Fiji, she needed to be looked after. I conclude from the summarised statements that the appellant said that she had been living in a friend's home but that home had become unavailable to her because the friend was moving elsewhere. I also conclude that the appellant had intended to convey that neither of her sons would provide her with a home in Fiji.
….
21 The assistance from the appellant's daughter to which the Tribunal referred must, having regard to the evidence, be understood to be financial assistance. The Tribunal's reasons for decision give no explicit consideration to how, even with some financial assistance from her daughter, the appellant would find a new home in which to live in Fiji and access such support as she might reasonably require to live in that home.
22 I do not accept the appellant's submission that there was no probative evidence on which the Tribunal could conclude that it would not be unreasonable for the appellant to relocate within Fiji. However, the summary way in which the Tribunal dealt with the issue of relocation, including its failure to explore the significance of the appellant's references to having no-one in Fiji 'to look after her', causes me to conclude that the Tribunal did not apply the right test when it concluded that it was satisfied that, with the assistance of her daughter, the appellant would be able to relocate within Fiji. The Tribunal did not, as the passage from Randhawa set out in [16] above requires, give consideration to the practical realities facing the appellant with respect to accommodation and care should she seek to relocate within Fiji. This is not to say that it was not open to the Tribunal to conclude that the appellant could deal with those practical realities, perhaps with financial help from her daughter. However, the Tribunal was required to give consideration to how, in a practical sense, the appellant could reasonably be expected to relocate within Fiji.

23 For the above reasons, in my view, the Tribunal's reasons for decision reveal that it misconceived the elements of the test for determining whether the appellant is a person in respect of whom Australia owes protection obligations under the Convention within the meaning of s 36 of the Act. The Tribunal appreciated that it was required to consider the 'internal flight alternative', and that for that purpose it was required to determine whether it would be unreasonable for the appellant to relocate within Fiji. However, I am satisfied that, because it misconceived the content of the requirement that it not be unreasonable for the appellant to relocate within Fiji, it did not ask itself the right questions before determining that it was not satisfied that the appellant is a person in respect of whom Australia owes protection obligations under the Convention. …
….

RD Nicholson J. said:

39 In par 91 of the UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979, re-edited 1992) it was said:

> 'The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.'

INTERNAL PROTECTION PRINCIPLE

40 The long standing authority with respect to the internal protection principle is the decision of the Full Court in Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437. That case concerned a Sikh from the Punjab region of India in relation to whom it was found he could reasonably be expected to relocate to a part of India other than the Punjab. The consequence of this was that the Sikh was found not to have a well-founded fear of being persecuted. Black CJ, with whom Whitlam J agreed, said (at 443):

> 'If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded.'

41 Before that Full Court it had been argued that the internal protection principle had no place in refugee law in that, at least in relation to the part of the country that was the applicant's home, a person would be a refugee within the Convention definition, notwithstanding that he or she might not have the relevant fear in some other part of the country. That is, in considering the application of art 1A(2) of the Convention, the focus should be on the country of the refugee's nationality as a whole.
42 In his reasons, Black CJ rejected this primary argument. The Chief Justice stated at (440 - 441):

> 'Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of

persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country.'

RD Nicholson J. said:

39 In par 91 of the UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979, re-edited 1992) it was said:

> 'The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.'

INTERNAL PROTECTION PRINCIPLE

40 The long standing authority with respect to the internal protection principle is the decision of the Full Court in Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437. That case concerned a Sikh from the Punjab region of India in relation to whom it was found he could reasonably be expected to relocate to a part of India other than the Punjab. The consequence of this was that the Sikh was found not to have a well-founded fear of being persecuted. Black CJ, with whom Whitlam J agreed, said (at 443):

> 'If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded.'

41 Before that Full Court it had been argued that the internal protection principle had no place in refugee law in that, at least in relation to the part of the country that was the applicant's home, a person would be a refugee within the Convention definition, notwithstanding that he or she might not have the relevant fear in some other part of the country. That is, in considering the application of art 1A(2) of the Convention, the focus should be on the country of the refugee's nationality as a whole.

42 In his reasons, Black CJ rejected this primary argument. The Chief Justice stated at (440 - 441):

> 'Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country.'

His Honour said the focus of the Convention definition was upon a more general notion of protection by that country rather than the protection that the country might be able to provide in some particular region. This approach received support in Canadian, English and New Zealand decisions to which he referred.

43 On the hearing of this present appeal, counsel for the appellant submitted that the approach which he now urges, and which did not succeed before her Honour, would require a refinement of the construction stated by Black CJ (with the agreement of Whitlam J) in Randhawa at 440 – 441. Counsel does not contend – as was contended in Randhawa at 440 – that the 'internal protection principle' has no place in refugee law. When the appellant's case thus concedes continued operation for the internal relocation principle, it does so in two respects. The first is to suggest it may be limited to cases where the applicant for refugee status could, before leaving, reasonably have accessed a safe haven. The appellant accepts that this would support a finding that the person did not depart his or her country owing to a well-founded fear of persecution for a Convention reason. This approach is one followed by the UNHCR in its 1992 Handbook at par 91. The second is where Australia is returning an applicant directly into a 'safe haven'.

44 The appellant's contention is that inadequate state protection in a portion of the country of nationality, even if there is a safe haven somewhere in that country, is sufficient to meet the second part of the definition of 'refugee'. It is submitted that if this were not so and a person was not a refugee simply because a safe haven was available somewhere in that country, it would mean that the Convention would not prohibit a contracting state from returning such person even to the dangerous portion of their homeland. Such construction, it is submitted, would be inconsistent with the object of the Convention. It is said also to be unnecessary given that art 33(1) provides a mechanism for contracting states to return refugees to places that are safe if there is the practical capacity to do so and if it would be reasonable to do so.

45 The significance of the construction as contended for by the appellant is said to be that it discloses that her Honour should have found that the Tribunal erred by failing to appreciate that having a well-founded fear of being persecuted for a Convention reason in a portion of Fiji is sufficient to justify an unwillingness to take steps that could lead to the person's return to that country.

46 In making these submissions the appellant contended that the proposition advanced is not consistent with the decision of this Court in Minister for Immigration & Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 and cases which have followed it. However, the appellant said they were consistent with the dissenting judgment of Emmett J in NAGV v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 130 FCR 46.

47 In Thiyagarajah a Full Court (von Doussa J with Moore and Sackville JJ agreeing) held that the standard for the threat of harm under art 33 of the Convention was the same as that applied under art 1A(2), namely, the well-founded fear test. The decision involved also the application of art 1E of the Convention and a finding that Australia did not owe the applicant in that proceeding a protection obligation as he was a person to whom another country owed protection obligations. In NAGV Finn, Emmett and Conti JJ all agreed that Thiyagarajah was wrongly decided. However, Finn and Conti JJ were of the view that only the High Court could depart from what has been regarded as settled law: at [4] and [92].

48 The foundation of the defectiveness of the reasoning in Thiyagarajah as found by the members of the Full Court in NAGV was that it failed to recognise that if a person is a refugee within the meaning of art 1 of the Convention, Australia has protection obligations to that person. The significance of this arises from the fact that s 36 of the Act 'uses the Refugees Convention as a means for determining the circumstances in which a protection visa is or is not to be granted by the minister to a non-citizen': NAGV at [35] per Emmett J. Consequently, the existence of the right to refoule in accordance with art 33 does not mean such protection obligations do not exist: NAGV at [1], [61] and [92]. Indeed, art 33 itself is operative where there is a 'refugee' and hence an applicant found to be such: NAGV at

[41]. In NAGV the reasoning therefore rejected a submission by the Minister that the obligations recognised in s 36(2) be limited by obligations under international law: at [39].
49 It has now been authoritatively determined by the High Court in NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 6 that Thiyagarajah was wrongly decided. The rationale of the joint judgment by Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ (with Kirby J separately concurring) is that the reference in s 36(2) to the phrase 'to whom Australia has protection obligations under [the Convention]' describes no more than a person who is a refugee within the meaning of art 1 of the Convention. Therefore, no superadded derogation derives from that criterion by reference to what was said to be the operation upon Australia's international obligations of art 33(1) of the Convention.
50 That being the position, I cannot see any reason to depart from Randhawa. In my view Randhawa is not relevantly affected by NAGV and NAGW.
51 Furthermore, Randhawa is a decision of a Full Court which this Full Court should not differ from unless satisfied it is plainly wrong. Randhawa is also a decision of over a decade's standing which has been followed and applied in a significant number of decisions of the Court. It is settled law, followed and applied at primary and appellate levels in this Court. It should not be departed from except by the High Court: cf NAGV at [4] and [92].
52 I am strengthened in this view by the following added circumstances. It has been held that the relocation principle in Randhawa is not inconsistent with S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 203 ALR 112; SKFB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 142 at [10]-[13] per Branson, Finn and Finkelstein JJ; NAWD v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 770 at [11]-[15] per Bennett JJ. The Randhawa principle has also been considered not to be inconsistent with Minister for Immigration & Multicultural Affairs v S152/2003 (2004) 205 ALR 587; NAWD and Applicant S454/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1136 at [53] per Gyles J. See in particular S152/2003 at [19], [26], [28] and at [29].
…
55 In Randhawa, it was urged that the decision-maker's duty was not discharged by asking whether, in a general way, it was reasonable in the circumstances for an applicant to relocate to another part of a country. Rather a series of specific matters needed to be addressed, including the area, city or region to which it was contemplated that an applicant could relocate and also what counsel described as a general life style adjustment that would need to be made by a person were he or she to relocate within the country of nationality. Black CJ (at 442) said this was an important further question:

> '... because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country would remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person.'

56 He said further that 'in the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered'.
57 It is therefore submitted by the appellant that the Court should more readily infer the Tribunal asked itself the wrong test as a result of the following factors. The first is that the Tribunal did not consider whether it was positively satisfied that it was reasonable for the appellant to relocate. It is said that, rather, the Tribunal set itself a lower bar, finding only that it was not satisfied it was unreasonable for the appellant to relocate. Second, the

Tribunal failed to address all of the reasons advanced by the appellant as to why the Tribunal should conclude it was not reasonable to expect her to relocate. In particular, her age, lack of education and mental scars were not referred to, although they should have been addressed even on the Randhawa test. Third, the Tribunal took into account an irrelevant consideration in asking not whether it was reasonable to expect the appellant to relocate but whether it was reasonable to expect her daughter to effectively fund that relocation: see The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 at 119-120.

…

63 In my view, it is the case that the Tribunal was in error of law in that it did not apply itself to the realities of the appellant's relocation. The error arose from non-compliance by the Tribunal with the method of approach laid down by the Full Court in Randhawa. By not considering how in fact the appellant could relocate and in particular what assistance she would require and whether it was reasonable for her to relocate, the Tribunal failed to satisfy the requirements set in Randhawa for assessment of the practical realities of the appellant's relocation.

…

69…the Tribunal asked itself the right question; the particulars of the reasonableness did not go to the formulation of that question. In my view this is not a case in which the Tribunal asked itself the wrong question. The reasons of the Tribunal disclose that the member asked himself whether it would be 'unreasonable' for the appellant to relocate and went on to conclude she 'would be able to relocate within Fiji'. The way it went about answering the question it posed to itself was in error but that does not carry with it the proposition that the Tribunal asked itself the wrong question in the first place. To characterise what the Tribunal did as a failure to ask the jurisdictionally important question is to permit this Court to impermissibly review the merits of the way the Tribunal went about answering the correct jurisdictional question.

…

NOTE IN *S253 of 2003 v Minister for Immigration & Multicultural& Indigenous Affairs* [2005] FCA 458 (Branson J.) that the internal flight option is a **theoretical** construct:

8 The Tribunal accepted that it would be unsafe for the appellants to return to the village in which they had lived for about a month in 1989 as that village is in an area where the LTTE has mounted numerous attacks against Singhalese and Muslim farmers settled there by the Government. However, noting that the husband had lived in Colombo between 1977 and 1984 pursuing his trade as a textile worker, the Tribunal concluded that the appellants could be expected to re-settle there. It concluded that, even if its finding that the husband's life had not been threatened by the LTTE was wrong, the LTTE would not now bother to track him down in Colombo…

…

12 The second ground of appeal relied upon before this Court is that the learned Federal Magistrate erred by failing to consider the applicant's argument to the effect that the Tribunal forced a re-location unreasonably and unfairly upon the appellants. The appellants' representative contended that the Tribunal had unreasonably forced the appellants to live in Colombo. The Tribunal, of course, has no power to force the appellants to live anywhere. However, in considering whether the husband is a person in respect of

whom Australia owes protection obligations, the authorities reveal that the Tribunal was required to give consideration to what is known as the internal flight option (see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437).

13 There are two relevant elements to the definition of *'refugee'* contained in article 1A(2) of the Convention. The first element is that the putative refugee must be outside his or her country of nationality owing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion. The second element is that the putative refugee must be unable or, owing to such a fear, unwilling to avail himself or herself of the protection of his or her country of nationality. As the decision of the Full Court in *NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 37 reveals, the internal flight option must be considered by a decision-maker as part of the exercise of determining whether a putative refugee satisfies each of the two elements of the definition of a refugee. In this sense, it is a theoretical exercise. It does not involve forcing the claimants for protection visas to live in one area of their country of nationality rather than another. For this reason, the concession apparently made by the appellants' legal representative that they could reasonably live in one of the Sri Lankan villages from which the adult appellants' respective families come might be thought to be fatal to this appeal. However, I put that possibility to one side.

14 I am not satisfied that error attends the conclusion of the Tribunal that the husband, who lived in Colombo for some years in the past, could reasonably be expected to re-locate with his family to Colombo. The Tribunal found that the appellants would be safe from the LTTE in Colombo. I reject the submission of the appellants that the husband is a farmer and thus cannot reasonably be expected to relocate to Colombo. The husband is a textile worker by trade who has apparently only worked as a farmer for approximately a month. Although it may be, as the appellants suggest, that the cost of living is higher in Colombo than it is in Sri Lankan villages, this is not of itself sufficient to render illegitimate the Tribunal's conclusion that the appellants could reasonably be expected to relocate to Colombo. Colombo is a city in which the husband has previously worked and it was not suggested to the Tribunal that he would not be able to work there in the future. Nor was there anything before the Tribunal to suggest that, as a Singhalese family, the appellants would face discrimination in finding accommodation in Colombo…

…

17. MILITARY SERVICE

The established principle that where the fear propounded by an applicant is of conscription and its consequences ordinarily this does not constitute persecution for a Convention reason has been maintained and applied in : Murillo-Nunez v Minister (1995) 63 FCR 150; Timic v Minister [1998] FCA 1750; Mijoljevic v Minister [1999] FCA 834; Mehenni v Minister (1999) 164 ALR 192 [1999] FCA 789; Applicant NG v MIMA, unreported, Tamberlin J. 7 May 1999; Mpelo v Minister [2000] FCA 608; MIMA v Shaibo [2000] FCA 600; Trpeski v MIMA [2000] FCA 841; Vassiliev v MIMA [2001] FCA 424 at [6-8]

Leonid Zakinov v John Gibson & Anor [1996] 696 FCA 1 a judgment of North J. involved a treatment of the issue of absolute conscientious objection to military service. His Honour said:

The applicant, Leonid Zakinov, is a Jew from the former USSR aged in his early 20s. He is a national of the State of Israel, where he lived from 1990 until his departure for Australia in May 1993. He was a student in Israel and he claims to have left Israel to avoid service in the Israeli army. He claims to have an absolute objection to military service.
…
The applicant's claim for refugee status in part rested on his contention that he held an absolute conscientious objection to military service. In order to make out this case, the applicant had to persuade the Tribunal that his belief was based on the demands of his conscience. In the result, the Tribunal was not so persuaded and the challenge to its decision concerns the way in which the Tribunal arrived at this conclusion. In particular, it concerns the way in which the Tribunal dealt with the report and evidence of a psychologist called by the applicant to substantiate that he held a genuine conscientious objection.
Thus, I turn to examine the approach taken by the Tribunal. On this aspect, the Tribunal first defined its task as follows:
"I have given the facts of this case a great deal of thought. The applicant presented as an intelligent man who presented his arguments that he had a conscientious opposition to military service in a compelling fashion. It is necessary, however, to look at the whole of his evidence, the evidence of the expert called by him and the submissions made on his behalf to determine whether I can be satisfied that he genuinely holds an absolute objection which will entitle him to a grant of refugee status."
As part of a careful and comprehensive examination of the elements making up a conscientious objection, the Tribunal referred to an extract from a 1985 report of the Australian Senate Standing Committee on Constitutional and Legal Affairs on the subject of Conscientious Objection to Conscripted Military Service, which included the following:
"In describing what was meant by conscientious belief, the Committee relied particularly on one witness's analysis:
'.... the only possible definition of a conscientious belief is a belief based on a seriously held moral conviction. That is, of course, very broad and it is perhaps best understood if we

see what it leaves out. What it leaves out most clearly are beliefs based on selfish desires of one sort or another, personal interest, belief based on emotions like fear or ambition .... beliefs which are whimsical or based on impulse.' Testimony of Prof. Peter Singer, Professor of Philosophy, Monash University .... International Journal of Refugee Law, 1990, Vol. 2, No. 3, p.390 at 405)".
…

See too Jovicic v MIEA [1997] 174 FCA. Goldberg J. said:

Relevant test for refugee status

Before the Tribunal the applicant's case was that he was a refugee because, in accordance with Article 1A(2) of the Convention he had a well-founded fear of being persecuted if he returned to Yugoslavia because he would be imprisoned or suffer a penalty for evading military service which he had evaded because he had a conscientious objection to participation in the war in Yugoslavia which involved gross human rights abuses or had been internationally condemned. In order to determine whether an applicant is a refugee under Article 1A(2) of the Convention it is necessary to apply a subjective test and an objective test. First the question is to be asked whether the applicant has a subjective fear. If so, then the next question to be asked is whether from an objective viewpoint that fear is well-founded and, if so whether the fear is based upon persecution for a Convention reason (Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; Guo v Minister for Immigration and Ethnic Affairs (1996) 64 FCR 151). Put shortly, the question is - is there a real chance of persecution for a Convention reason.
…

…The particular reason relied upon by the applicant is "political opinion" which includes within it genuine conscientious objection to participating in military activity.
Evidence was placed before the Tribunal to support the applicant's claim that he had a genuine conscientious objection to military service in Yugoslavia. The Tribunal examined that evidence with some care and accepted:
"that the war in Yugoslavia is indeed one involving gross human rights abuses and one which has been internationally condemned, and that the applicant would face a real chance of forced conscription or
punishment for a refusal, as well as of punishment of his past draft evasion".
Was the applicant's conscientious objection genuine?
The Tribunal then said that the sole remaining question to be answered was whether the applicant "has a genuine conscientious objection to participation in that war". Mr Hurley who appeared for the applicant, accepted that this was the appropriate question to be asked and answered.
The Tribunal considered carefully all the evidence placed before it on this issue and noted that credibility of the evidence and the witnesses was of critical importance because the case essentially turned on whether the applicant's alleged conscientious objection to participation in the war in the former Yugoslavia was genuine. The Tribunal analysed the evidence and concluded that, on the evidence, the applicant did not have a genuine conscientious objection to the war in Yugoslavia and that his claim to have such conscientious objection was contrived with a view to obtaining refugee status.
Analysis of Grounds for challenge
…

…there was an express acceptance by the Tribunal that the war in Yugoslavia was one involving gross human rights abuses and one which had been internationally condemned and that the applicant would face a real chance of forced conscription or punishment for refusal as well as punishment for his draft evasion…

…It was submitted that the Tribunal erred in law and put a gloss on the relevant terms of the Convention when it said that satisfying the Tribunal that the conscientious objection was genuine involved or required "having thought seriously about the hard issues". It followed, Mr Hurley submitted that the Tribunal had failed to apply the correct test required by the Convention namely, to ask whether the applicant had a fear which was based upon a real change of persecution, that is a chance or possibility which was not baseless, for fetched or fanciful (Guo v Minister for Immigration and Ethnic Affairs (1996) 64 FCR 151 per Foster J at 191).

It was said that the determination of whether the relevant political opinion existed, which in this case was a genuine conscientious objection to participation in a war which involved gross human rights abuses or is internationally condemned, depended upon a well-founded fear of being persecuted and that the reason for that fear was the holding of a political opinion…

However, in my opinion, this submission misunderstands the task which the Tribunal was carrying out. It was accepted by Mr Hurley that the appellation of refugee would not apply simply because the applicant asserted or stated that he had the relevant conscientious objection. It was accepted that the conscientious objection had to be genuine which entitled the Tribunal to consider, analyse and weigh the evidence and the material before it. Mr Hurley relied upon passages in Chapter 5 in the Handbook of Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of refugees published by the Office of the United Nations High Commissioner for Refugees. Mr Hurley submitted, in effect, that it was wrong to ask whether the applicant had thought about the hard issues. However, in my opinion, the passages in the reasons of the Tribunal, of which Mr Hurley complains, are no more than one aspect of the Tribunal's consideration of the evidence and the material before it. The Tribunal considered carefully the issue of the credibility of the applicant when he said he had a genuine conscientious objection and it correctly identified Chan (supra) as establishing the relevant test.

The Handbook upon which Mr Hurley relied supports the approach taken by the Tribunal. In paragraph 171 the Handbook says:

"Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution."

Further, paragraph 174 of the Handbook is in the following terms:

"The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions."

The Tribunal considered all the evidence and having heard from the applicant and other witnesses reached its conclusion based upon its assessment of the evidence. …

…

Note the judgment of O'Loughlin J. in Magyari v MIMA [1997] 417 FCA (1997) 50 ALD 341:

Military Service

…

The applicant fears that by virtue of the current and ongoing conflict in the Balkans, (which, for the purposes of the applicant's case, I take to be the countries that were once part of Yugoslavia) Hungary will be drawn into the conflict and that as a consequence, he, a conscientious objector, will be called up for military service. The Handbook on Procedures and Criteria for Determining Refugee Status published by the Office of the United Nations High Commissioner for Refugees (Re-edited Geneva, January 1992) addresses the status of a deserter and draft-evader in par 168:-

"A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution."

The latter part of that passage would, in my opinion, have equal application to a conscientious objector. Professor Hathaway in his work "The Law of Refugee Status"; Butterworths Canada Ltd. 1991: refers (at p 182-183) to a paper by B. Frelick "Conscientious Objectors as Refugees", V. Hamilton, ed., World Refugee Survey: 1986 in Review, p 31 (1987), which states that:-

"The right to conscientious objection is an emerging part of international human rights law, based on the notion that "[f]reedom of belief cannot be truly recognized as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs". Drawing on this right to freedom of thought, conscience, and religion contained in both the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, the United Nations Commission on Human Rights has expressly recognized the right to conscientious objection as "a legitimate exercise of the right of freedom of thought, conscience and religion", and appealed to states to provide for alternative service of a civilian and non-combatant nature. This view is shared within the Council of Europe, where the right to an alternative to military service is recognized for persons who express compelling reasons of conscience against bearing arms. Thus, insofar as a state fails to make provision for the accommodation of conscientious objectors, a principled claim to refugee status may be established."

I see no reason why the passage just quoted should not be accepted as a statement of principle - that there may be cases in which conscientious objection to military service will be the basis of a well founded fear of persecution for a convention reason. For example, the refusal to perform military service may derive from one's religious beliefs, or it may be by virtue of one's political opinions.

In the subject case, it is not possible to ascertain from the papers why the applicant is opposed to military service…

…

There is, in my opinion, an obligation on the applicant for a protection visa to not only identify that he or she is conscientiously opposed to military service, but also to state the reason for that objection. It is not enough to make a bold assertion. An applicant must have

a conscientious objection and that conscientious objection must be the basis of the well founded fear of persecution for a convention reason. It would seem from the papers before the Court that neither the delegate nor the Tribunal made any inquiries about Hungary's policy on military service or its international standing in the Balkans. But in my opinion, the applicant did not put any information before the delegate or the Tribunal sufficient to warrant such investigations, if the Tribunal may indeed be obliged to investigate.
Even if it be accepted that the applicant is a conscientious objector and even if it be assumed that Hungary treats such persons harshly (to the point of persecution in the legal sense) one is left wondering whether the reason for the persecution is a convention reason. The applicant could have given evidence before the Tribunal on that subject; he could have explained the grounds for his objection to military service, but he failed to do so.
…
But if I am wrong and if further consideration should be given to this issue, I still consider that this application must fail…
If he returns to Hungary the applicant will only be persecuted if:-
- Hungary is engaged militarily in the Balkan conflict
- the applicant is called up for compulsory military service
- the applicant objects to such service for a convention reason
- the appropriate authorities react to his objection in such a harsh way that the reaction will amount to persecution

To the extent to which (if at all) there was any obligation on the Tribunal to inquire into any of these issues, its failure to do so was not the subject of complaint by the applicant. It was not listed as a ground of review and therefore need not be considered further. However, I should make it clear that I do not consider that the applicant placed sufficient information before the Tribunal to warrant it making any such inquiries. The applicant is now 33, he is single and a carpenter by trade. If there is a call-up in Hungary, would a person of that age be included? What is his state of health? What are his political, religious, social or moral beliefs that found his conscious objection? Does he know anything of the official (or unofficial) attitude of the Hungarian authorities towards conscientious objectors? This is the sort of information that the Tribunal would need to enable it to make an informed decision.
….

In Mijoljevic v Minister [1999] FCA 834 Branson J. said:

Persecution
12 The Tribunal accepted the applicant's claim that he is a pacifist, and that he has avoided being called up for military service during recent conflict. However, the Tribunal made a finding that the draft was the enforcement of a law of general application, and that although he has a conscientious objection to war, "[t]he obligation to perform military service is universal upon all males in the applicant's country, and hence it does not in itself amount to discrimination against him".
…
The Tribunal accepted that the applicant held pacifist views but took the view "that conscientious objection to military service is not a sufficient ground to attract the protection of the [Refugees] Convention."
20 The applicant contends that a law of general application, such as a law providing for compulsory military service can indirectly discriminate against particular classes of persons

by imposing particularly heavy burdens on members of those classes. He submitted that where a law providing for compulsory military service does not provide an "appropriate and adapted" provision for conscientious objectors, the law could effectively persecute such people. The Tribunal found that the law to which the applicant would be subject were he to return to Yugoslavia recognised conscientious objection only if it were claimed within fifteen (15) days of the person's first summons for military service. The applicant is now fifty-two years old. His first summons for military service took place many years ago when, on his evidence, he did not hold pacifist views. As mentioned above, the applicant developed pacifist views when his best friend died in the army during military service.

21 It may be that pacifist views which do not have a religious or political base, and which are not part of the belief system of a particular social group, are irrelevant to a claim to be entitled to a protection visa. However, it was not on this basis that the Tribunal found against the applicant so far as he claimed to be a conscientious objector. The Tribunal gave consideration to whether any harm that the applicant might suffer in Yugoslavia by reason of his pacifist views would amount to persecution (bold added).

22 The Tribunal rejected as incredible the applicant's claim that he would be singled out for military service because he was not accepted as a "true Serb" because his mother was a Croat and he was married to a Croat. It found that the obligation to perform military service is universal upon all males in the applicant's country, and that the relevant laws punishing those who avoided military service were laws of general application. The Tribunal concluded on this basis that any harm that the applicant might suffer in Yugoslavia by reason of his pacifist views would not amount to persecution (bold added). In any event, the Tribunal found that it was highly unlikely that a man of the applicant's age would be called-up for military service although, technically, the applicant would remain a member of the military reserve until he attained the age of sixty.

23 In my view, the conclusion of the Tribunal that the applicant's pacifist views did not provide a basis upon which it could be satisfied that he was a person to whom Australia owes protection obligations under the Refugees Convention was open to it on the evidence and material before it. …This Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service, and for the punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention (see for example, Murill-Nunez v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 150; Timic v Minister for Immigration and Multicultural Affairs [1998] FCA 1750). See also Hathaway, The Law of Refugee Status at para 5.6.2.

…

In Mehenni v Minister (1999) 164 ALR 192; [1999] FCA 789 Lehane J. said:

4 The Tribunal accepted evidence that under Algerian law men of military age were liable to conscription and that the Algerian army continued "to confront armed Islamic groups".

…

…

Applicant's submissions: conscientious objection

6 Counsel for [the applicant] Mehenni accepted that the Tribunal's decision, as to the matters with which it dealt, was not open to attack. He submitted, however, that Mr Mehenni had squarely raised the question whether he was a conscientious objector; there was material before the Tribunal capable of establishing that Algerian law provided no exemptions for conscientious objectors; and that the Tribunal should have considered, but did not consider, whether [the applicant] had a well-founded fear of persecution because he

was a conscientious objector: that is, whether he feared persecution by reason of conscientious objection as a political opinion or by reason of his membership of a social group comprising those who hold a conscientious objection to military service generally or to service in the particular campaigns against the Islamic groups.

7 Coulsel for the applciant relied on certain passages in the 1992 edition of the United Nations High Commission for Refugees (UNHCR) publication, Handbook on Procedures and Criteria for Determining Refugee Status, which, he submitted, suggested that in some circumstances the failure of a state to recognise conscientious objection, or punishment for desertion or draft evasion, might be regarded as persecution. He referred me also to a discussion of certain of the United States authorities by Kevin J Kuzas in his note, "Asylum for Unrecognised Conscientious Objectors to Military Service: Is There a Right Not to Fight?" (1991) 31 Virginia Journal of International Law 447. Additionally, the recent decision of the Full Court in Minister for Immigration and Multicultural Affairs v Israelian [1999] FCA 649 recognised the possibility that punishment of a conscientious objector for refusing conscription might amount to persecution for a Convention reason; and that conscientious objectors, or even deserters and draft evaders, might comprise a "particular social group" for the purposes of the definition of "refugee" in the Convention (the 1951 United Nations Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees).

…

15…Th(e) submission was to the effect that Mr Mehenni had sufficiently, indeed clearly, stated a claim that he had a selective conscientious objection to service in the Algerian army, of one of the kinds identified by Mr Kuzas, in the note to which I have referred, as sufficient to establish a well-founded fear of persecution. Mr Kuzas summarises the effect of his argument as follows, at 472, 473:

> "An applicant who cannot qualify as an absolute pacifist, but expresses a conscientious objection to a particular military action which is unrecognised by his country of origin, has established a well-founded fear of persecution if the requirements of either section (1) or (2) below are met:
>
> Section 1: The conduct of the armed forces engaged in the military action is condemned by the international community as contrary to the basic rules of human conduct, the government in question is unwilling or unable to control those individuals or groups engaged in the offending conduct, and the applicant can show a reasonable possibility that he will be personally forced to participate in such conduct.
>
> Credible documented evidence that, for example, the rules of war are being violated, or that other human rights violations are widespread, establishes a prima facie case that the actions are condemned by the international community. Relevant factors for determining whether the government in question is unwilling or unable to control the offending individuals or group include, but are not limited to, the prevalence or pervasiveness of the violations, and whether the individuals who engage in the violations are captured, prosecuted, and convicted.
>
> Section 2: The political justification or policy motivating the military activity of the country of origin is condemned by the international community, as evidenced by a resolution adopted by an international governmental organisation (such as the UN) by an overwhelming majority of states."

16 Counsel's submissions relied on "section 1" rather than "section 2" …

Discussion

17 Conscientious objection, whether the objection of a pacifist to all military service or a "selective" objection, may reflect religious beliefs or political opinions; and there is no reason to doubt that conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a "particular social group", defined as such by some characteristic, attribute, activity, belief, interest or goal that unites its members (Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 264 per McHugh J; R v Immigration Appeal Tribunal, Ex p Shah [1999] 2 All ER 545; Morato v Minister for Immigration, Local Government and Ethnic Affairs (No.2) (1992) 39 FCR 401; Ram v Minister for Immigration and Ethic Affairs (1995) 57 FCR 565). The Full Court in Israelian proceeded on the footing that it might be so; so did O'Loughlin J in Magyari v Minister for Immigration and Multicultural Affairs (Federal Court of Australia, 22 May 1997, unreported) at 25-27. But, of course, as O'Loughlin J pointed out at 30, that is only the first step: the fact that an applicant for a protection visa is a member of a particular social group is significant only if he or she has a well-founded fear of persecution "for reason of" membership of that group. As his Honour said, with reference to the facts of that case, at 30:

> "Even if it be accepted that the applicant is a conscientious objector and if it be assumed that Hungary treats such persons harshly (to the point of persecution in the legal sense) one is left wondering whether the reason for the persecution is a convention reason. The applicant could have given evidence before the Tribunal on that subject; he could have explained the grounds for his objection to military service, but he failed to do so."

18 That, I think, is necessary background to a consideration of the authorities and writings on which Mr Mehenni relied. Although it is lengthy, I think it is desirable to set out in full the section of the Handbook which deals with the position of "deserters and persons avoiding military service":

> "167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
>
> 168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
>
> 169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.
>
> 170. There are, however, also cases where the necessity to perform military service

may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.24 In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

24 Cf Recommendation 816 (1977) on the Right of Conscientious Objection to Military Service, adopted at the Parliamentary Assembly of the Council of Europe at its Twenty-ninth Ordinary Session (5-13 October 1977)."

19 To a large extent that passage speaks for itself. One aspect of it may be noted immediately. It is suggested in par 172 that if the country of which an applicant is a national does not take account of the applicant's genuine religious convictions in considering whether he should be subjected to compulsory military service, the applicant may be able to establish a claim to refugee status. It is not suggested that the mere

requirement that a person serve, in opposition to genuine religious convictions, in itself necessarily amounts to persecution for a Convention reason. Paragraph 173 then suggests that in the light of more recent developments in attitudes to compulsory military service and conscientious objection, "it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience": that, however, as I read it, is not a suggestion that Contracting States are bound by the Convention to adopt that approach, but rather an indication that States might consider it appropriate to do so.

20 Counsel referred also to J C Hathaway, The Law of Refugee Status at 179-181. The author's discussion is substantially similar to that in the Handbook. Some United States authority appears to go further. For instance, in Canas-Segovia v Immigration and Naturalisation Service 902 F 2d 717 (9th Cir 1990) the US Court of Appeals, Ninth Circuit, held that a Salvadoran law of general application, which imposed military service obligations on all males between the ages of 18 and 30, operated in a discriminatory way, and that persecution might arise in the application of the law to persons, such as the applicants, who refused service for conscientious reasons. The Court said, at 728:

> "A Salvadoran who prefers not to serve in the military for reasons not amounting to genuine reasons of conscience (for example, fear of combat) does not suffer disproportionately greater punishment when his will is overcome by being forcibly conscripted. By comparison, however, the Canases suffer disproportionately severe punishment when forced to serve in the military because that service would cause them to sacrifice their religion's fundamental principle of pacifism."

That view was based partly on a reading of the Handbook (the Court adopted at 724, 725, for reasons which, with respect, I find unconvincing, a different view of par 173 from that which I have expressed) and also on particular principles of United States constitutional law. The following passage, at 723, makes that clear:

> "The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy. Because nearly all conscription policies will appear facially neutral, the BIA's reasoning effectively means that no such policy can ever result in persecution within the meaning of the INA. Such a result ignores an elementary tenet of United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons. This tenet has been deemed particularly important where religion is concerned."

A footnote to that portion of the judgment makes the position clear:

> "While we do not suggest that United States constitutional law is binding upon the Salvadoran government, we do believe that United States jurisprudence is relevant to analysis of new issues of United States refugee law. Here we consider solely whether the Canases are entitled to relief afforded under United States refugee law."

21 Both the text of the Convention and the course of Australian authority require, in my view, that I should not follow that approach. The terms of Art 1A(2) of the Convention make it clear that a refugee is a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The importance of the words "for reasons of", was emphasised by the Full Court in Ram. Burchett J (with whom O'Loughlin and Nicholson JJ agreed) said at 568:

> "The link between the key word 'persecuted' and the phrase descriptive of the position of the refugee, 'membership of a particular social group', is provided by the words 'for reasons of' - the membership of the social group must provide the reason.

> There is thus a common thread which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group'. That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group."

Again, in Applicant A, McHugh J said at 257:

> "When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group."

22 That is the perspective from which the sufficiency of the Tribunal's reasons must be assessed. It is important also that Mr Mehenni did not suggest, to the Department or to the Tribunal, that, assuming that his attitude to military service might properly be characterised as conscientious objection, he would on that account be singled out for discriminatory treatment. Nor was it suggested that there was any material before the Tribunal which indicated that those who objected to military service on conscientious grounds were specially targeted by the Algerian authorities. Mr Mehenni's fears, as he described them to the Tribunal, concerned the harsh punishment which he said was meted out to draft evaders generally, what he saw as the likely consequence of his failure to cooperate with the Algerian authorities in Yemen coupled with his failure to return to Algeria (he would be seen as an opponent of the government) and his likely treatment (and the likely treatment of his family) at the hands of the Islamic groups if he were compelled to serve in the army. But the Tribunal found that Mr Mehenni was not likely to have come "to the adverse attention" of the Algerian authorities; it did not accept that Mr Mehenni would be singled out by the Islamic groups; and it accepted that Algerian draft evaders were not subjected to excessive or discriminatory punishment, so that an Algerian claiming to fear persecution only on the ground of being a deserter or draft evader would not be a refugee for Convention purposes. Those findings were not challenged. On the last matter, the Tribunal expressed its finding as follows:

> "The Tribunal notes the published evidence of the penalties for draft evasion, cited above in the Amnesty International Report, and that the US Bureau of Democracy, cited above, in its 1996 report said that draft evaders were among those targeted by the Algerian authorities. The Tribunal accepts the UNHCR statement, cited above, that Algerians claiming persecution on the mere ground of being deserters or draft evaders do not normally qualify unless other elements are involved in the case. It does so in light of the UNHCR capacity to have access to a broad range of Algerian asylum claims made in a number of countries. Following the logic applied by Mr Mehenni, all Algerian draft evaders would be regarded by the Algerian Government as holding an imputed political opinion in opposition to the Government. Yet the evidence of UNHCR is that, 'in the context of Algeria, UNHCR is not aware of any cases where excessive or discriminatory punishment and/or inhumane or degrading treatment has been applied vis-à-vis deserters and/or draft evaders."

23 In circumstances where, as I have pointed out, Mr Mehenni did not suggest that he would be singled out from draft evaders generally and there was no material suggesting that conscientious objectors were singled out, it is not surprising that Mr Mehenni's adviser did

not seek, in submissions to the Tribunal, to rely upon a claim that Mr Mehenni was a conscientious objector…
….

Applicant M v MIMA [2001] FCA1412 at [23]-[24] [28]-[33] concerned the question of objection to military service in the context of laws of general application such that even where there is such a law it does not prevent conscientious objectors defined by reference to a particular belief from being imputed with a political opinion and coming within the definition provided their fear is on account of that Convention reason. In that case and the judgment of Applicant S v MIMA [2001] FCA 1412 (BUT NOTE overturned by MIMA v Applicant S [2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256) (by a majority) a finding that the applicant faced a real chance of persecution could be said to be Convention related where the law could not be said to be one of general application as in the case of Afghanistan at [52]-[59].

The Full Court (Whitlam, North and Stone JJ.) in MIMA v Applicant M [2002] FCAFC 253 allowed the appeal from Carr J.'s judgment [2001] FCA 1412 stating that on the facts of the case the issue of lack of a law of general application was not to the point in deciding whether there was a real chance of persecution for a Convention reason. The Court said:

The Court said:

3 The respondent arrived in Australia on 11 July 2000. When interviewed after arrival, he said that he came to Australia in order to avoid being pressed into fighting for the Taliban in Afghanistan…
…

The Decision of the Refugee Review Tribunal

…
5 The Tribunal did not accept that the respondent had ever spoken out against the Taliban or that the Taliban regarded him as an opponent…
It said of his fear of being recruited by the Taliban (at pp 18-19):

> "While the ad hoc practice of recruitment and press ganging new recruits including young students as described in the independent material cited above, is not one which would be condoned internationally, Taliban's motivation is solely based on whether or not the recruits are capable of fighting. This selective process which targets young, able bodied males does not amount to discrimination for a

> Convention reason. The selection of young men or men of fighting age albeit in an 'ad hoc' manner does not amount to discrimination and is not Convention related any more than regularised conscription is in other countries."

The Tribunal then cited (at p 19) a statement of Branson J in Mijoljevic v Minister for Immigration and Multicultural Affairs [1999] FCA 834, where her Honour said at [23]:

> "... This Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service, and for the punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention ..."

…

The Decision of the Primary Judge

7… His Honour held at [25] that the Tribunal accordingly failed to consider whether the respondent "would be singled out from other objectors to conscription on the basis that he was a conscientious objector and thus held a political opinion for which he would be persecuted".

An Imputed Political Opinion as a Conscientious Objector?

8 His Honour thought that the respondent had "put forward" to the Tribunal a claim that he would be at risk of persecution by reason of a political opinion attributed to him on the basis of his pacifist views…

9 In the statement dated 25 July 2000 the respondent said:

…

I do not agree that the Taliban should make young people go to the war zone and fight. I will never agree to kill anybody. If the Taliban caught me and wanted me to go and fight and I refused, they would either have taken us by force, put me in jail or killed me.

…

Why I believe they will harm or mistreat me if I go back:

First of all they would kill me because I escaped from Afghanistan, second of all because they asked us to go to the fight and I refused.

…

14 So far as the appeal papers disclose, the respondent never advanced any argument before the Tribunal under the rubric of "conscientious objection to military service". However, in its discussion of Mijoljevic, the Tribunal mentioned (at p 19) that the asylum claimant in that case objected to military conscription on the basis of his pacifist views. In the Court below counsel for the respondent, with considerable ingenuity, seized on this notion to link it with a political opinion allegedly to be imputed to his client.

15 We think that the Tribunal's reference in the present case to the respondent's "pacifist" views is entirely equivocal. The delegate's decision shows that what the respondent said about his unwillingness to fight was intended to buttress his evidence to the effect that he was not a supporter of the Taliban and that he feared being conscripted by them. By the time of the Tribunal hearing, Ms Fitzpatrick was advancing on behalf of the respondent a quite explicit "political opinion" as the relevant reason for persecution under the Refugees Convention, and it was not a reason based upon a principled objection to military service…(bold added)

16. We do not read the respondent's claim that he would be killed if he refused to fight as an assertion that such a fate would befall him because he was perceived to be a conscientious objector. In our view, there simply was no case raised by the evidence and material before the Tribunal that the respondent would have attributed to him a political opinion such as that identified by the primary judge. In the present case the respondent never suggested that he articulated or demonstrated in any way any principled opposition to

conscription so that a political opinion might be imputed to him (bold added). It follows that, in our opinion, the primary judge erred in holding that the Tribunal was obliged to consider the issue he formulated

Conscription and the Concept of Persecution

17 The primary judge also held that the Tribunal fell into error when it relied on the decision in Mijoljevic. His Honour distinguished at [29] that case and the authorities cited by Branson J in that case on the basis that "they concerned the enforcement of laws of general application providing for compulsory military service." His Honour said at [33] that in the present case "there was no evidence of a law of general application on the matter of conscription. All the evidence points to forcible conscription by the Taliban without any lawful justification."

18 It may be that the Tribunal has misunderstood the reasoning in Mijoljevic. In Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 Gleeson CJ, Gaudron, Gummow and Hayne JJ observed (at 302) that the question whether conduct is undertaken for a so-called "Convention reason" cannot be entirely isolated from the question whether that conduct amounts to persecution. Conscription into the Yugoslav armed forces in the 1990s might well have been regarded as involving a real chance that a person would suffer serious harm, and Mijoljevic may stand for no more than the undeniable proposition that such a person must be able to show that he was singled out for conscription for one of the five reasons under the Refugees Convention (bold added).

19 The fact that there was not a law of general application in the present case is, in our opinion, not to the point. That merely meant that there was no need to inquire whether there was a sanction for disobedience. In any event, for what it is worth, here the Tribunal noted that there was no such penalty. It was clear that, if a person suffered the misfortune to be recruited by the Taliban, he went into service. There was no alternative. That is why the Tribunal accepted that a person may face serious harm or death as a consequence of being recruited by the Taliban. (Incidentally, the expression, a law of "general application", is hardly a term of art. For example, in England, the prerogative of the Crown to impress seafaring men survived for many years as an exception to the right of personal liberty. This arbitrary power was not founded on any statute, but on immemorial usage. See Holdsworth, A History of English Law, (1938), vol X, pp 381-382.)

20 An argument about the lawfulness of the Taliban's random recruiting is sterile. So long as the "accountability" theory of the interpretation of the Refugees Convention holds sway, the way in which the Taliban treat people under their control will have to be assessed, whether or not the Taliban are non-State actors. The critical point is that, even if such treatment is regarded as amounting to "persecution", there is still the further requirement of "a Convention reason".

…

The High Court (Gleeson CJ. Mc Hugh Gummow Kirby and Callinan JJ. in Applicant S v MIMA [2004] HCA 25 25 (2004) 206 ALR 242 77 ALD 541 78 ALJR 854 allowed the appeal from MIMA v Applicant S [2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256) (by a majority) and in dismissing the appeal to the Full Court restored the orders of Carr J. setting aside the decision of the RRT. The majority judgments emphasised the general principle is not that a particular social group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of society. Its possession of a common

attribute or characteristic must distinguish the group from society at large (at [36] per Gleeson CJ. Gummow and Kirby JJ. It is not necessary that the society in which the group exists must recognise the group as a group that is set apart from the rest of the community (at [67]) per Mc Hugh J.The Court upheld the submission that Afghan society's perceptions of whether there is a particular social group is relevant to the question of whether there is such a particular social group, but it is not a requirement . The correct issue was not considered by the Tribunal.

The majority judgments dealt with the issue of persecution and laws of general application in the context of the forced and random and arbitrary conscription conducted by the Taliban. the judgment of the Full Court in Applicant M should be read in the light of the following reasoning. The Taliban were not pursuing a "legitmate nationol objective", nor (if it was) would their onduct have been considered appropriate and adapted in the sense of proportionate in the means used to achieve that policy. The Taliban's policy did not allow for conscientious objectors. The Tribunal appeared to accept the appellant's claims that he was a pacifist and that he was not committed to the aims and objectives of the Taliban. Given the Tribunal's findings about the nature of the Taliban's recruitment practices, it was open to the Tribunal to find that the Taliban was not applying a law of general application, but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution by the standards of civilised society (at [83] per McHugh J.) .

Gleeson CJ Gummow and Kirby JJ. said:

Persecution

…

38 Chen decided that persecution can proceed from reasons other than "enmity" and "malignity"[48] (2000) 201 CLR 293 at 305 [35], 311-312 [60]. From the perspective of those responsible for discriminatory treatment, the persecution might in fact be motivated by an intention to confer a benefit[49] 2000) 201 CLR 293 at 305 [35]. This in itself does not remove the spectre of persecution.

39 Secondly, during oral argument the Minister sought to apply the decision in Minister for Immigration and Multicultural Affairs v Israelian[50] (2001) 206 CLR 323, heard together with Minister for Immigration and Multicultural Affairs v Yusuf. ….

40 In concluding that the applicant was not a member of a particular social group comprised of either or both deserters and draft evaders, McHugh, Gummow and Hayne JJ

found that the Tribunal had not committed an error of law and concluded[51] (2001) 206 CLR 323 at 354-355 [97]; see also at 342 [55] per Gaudron J; cf at 380 [183] per Kirby J dissenting.
:

> "that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application".

Law of general application

41 In the present appeal, the Minister submitted that the facts here also reveal "a law of general application" and therefore the conclusion in Israelian must follow. This is not the case. There was no evidence before the Tribunal that the actions of the Taliban amounted to a law of general application. The policy of conscription was ad hoc and random.
42 Further, what was said in Israelian does not establish a rule that the implementation of laws of general application can never amount to persecution. It could scarcely be so given the history of the Nuremberg Laws against the Jews enacted by Nazi Germany which preceded, and help to explain, the purposes of the Refugees Convention. Rather, the Court majority determined that, on the facts of that case, it had been open to the Tribunal to conclude that the implementation by Armenia of its laws of general application was not capable of resulting in discriminatory treatment. A law of general application is capable of being implemented or enforced in a discriminatory manner.
43 The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]"[52] 1997) 190 CLR 225 at 258 These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen[53] (2000) 201 CLR 293 at 303 [28]. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in Israelian. Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.
44 In Applicant A, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the State and its citizens[54] (1997) 190 CLR 225 at 258. His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory[55] (1997) 190 CLR 225 at 258. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.
45 The joint judgment in Chen expanded on these criteria[56 (2000) 201 CLR 293 at 303 [29] :

> "Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of

> an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective." (emphasis added)

That ultimate consideration points to the answer in the present case.

46 The Taliban can be taken to have been the de facto authority in Afghanistan at the relevant time, but it does not necessarily follow that it pursued legitimate national objectives in the sense indicated above. An authority recognised by Australia and other states as the government de facto, if not de jure (to use the terminology which was employed in customary international law when the Convention was adopted[57] Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 at 906, 957-958. In 1988, Australia abandoned the practice of formally recognising or withholding recognition of foreign governments; rather, relations, formal or informal, would be conducted "with new régimes to the extent and in the manner which may be required by the circumstances of each case": Starke, "The new Australian policy of recognition of foreign governments", (1988) 62 Australian Law Journal 390 at 390. See also Shaw, International Law, 5th ed (2003) at 376-383.), of a state may pursue objects that offend the standards of civil societies which seek to meet the calls of common humanity. Such regimes would also have been all too well known in Europe itself when the Convention was adopted. The traditional view that the recognising state was not concerned with the legality of the state of things it was recognising[58] Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 at 957 is not all that is involved here. The notion in the case law construing the "refugee" definition of a law of general application, given the nature of the Convention, involves more. The point may be seen in the discussion by Lord Wilberforce in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)[59] 1967] 1 AC 853 at 954, with reference to Locke, of a government without laws as inconsistent with at least "a civilised and organised society" and by Lord Salmon in Oppenheimer v Cattermole[60] 1976] AC 249 at 282-283 and Lord Steyn in Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)[61] [2002] 2 AC 883 at 1101-1102of arbitrary activities not deserving of recognition as a law at all.

47…it could be said that the objective of the conscription policy was to protect the nation. Generally speaking, this is an entirely legitimate national objective[62] See, for example, Pt IV of the Defence Act 1903 (Cth), which is headed "LIABILITY TO SERVE IN THE DEFENCE FORCE IN TIME OF WAR". However, in this case the position of the Taliban as an authority which was, according to the Tribunal, considered by international standards a ruthless and despotic political body founded on extremist religious tenets must affect the legitimacy of that object.

48 Furthermore, assuming for a moment that the object was a legitimate national objective, it appears that the conduct of the Taliban could not have been considered appropriate and adapted, in the sense of proportionate in the means used to achieve that objective. The policy of conscription described by the evidence was implemented in a manner that was random and arbitrary. According to the Tribunal, this would not be condoned internationally[63] The Taliban's policy did not allow for conscientious objectors. The Tribunal appeared to accept the appellant's claims that he was a pacifist and that he was not committed to the aims and objectives of the Taliban.

49 These conclusions by the Tribunal indicate that, had it by application of the correct principles respecting "perception" reached the stage of considering whether no more was involved than a law of general application, the Tribunal correctly would have concluded that the Taliban was not pursuing a "legitimate national objective" spoken of in Chen.

Mc Hugh J. said:

54 This appeal …raises the question whether proof of "a particular social group" requires evidence that the relevant society in which the group exists perceives the group to be a collection of individuals who are set apart from the rest of that society.

…

56 The appellant claims that, if he were returned to Afghanistan, he would be persecuted for reasons of his membership of a particular social group. He identifies the social group as "young, able-bodied Afghan men" and claims that, as a member of that group in Afghanistan, he would be subject to forcible conscription by the Taliban and required to fight in the Taliban army

….

Persecution

…

80 This Court has not yet considered, in any detail, whether compulsory military service can amount to persecution for the purpose of the Convention. The issue was touched upon in Minister for Immigration and Multicultural Affairs v Israelian[106]
2001) 206 CLR 323 (heard together with Minister for Immigration and Multicultural Affairs v Yusuf), a case concerning an Armenian national who had sought to avoid being called up for military service in his home country. The primary issues in that appeal were whether - as the Minister argued - the Tribunal was obliged to make findings on material questions of fact and, if so, whether a failure to make such findings constituted reviewable error. The Minister succeeded. As a result, Mr Israelian's notice of contention - that the Tribunal had failed to consider whether he had a well-founded fear of persecution for reasons of his membership of a particular social group consisting of deserters and/or draft evaders - became relevant.

81 In our joint judgment, Gummow and Hayne JJ and I said that, even if Mr Israelian was a member of a particular social group comprising deserters or draft evaders, the Armenian law which operated to punish those who had avoided a call-up notice was one of general application. Accordingly, Mr Israelian would not be the subject of persecution. Gummow and Hayne JJ and I said[107] Israelian (2001) 206 CLR 323 at 354-355 [97]:

> "[The Tribunal] concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The Tribunal is not shown to have made an error of law in that respect."

82 Gaudron J said[108] Israelian (2001) 206 CLR 323 at 342 [55]:

> "The Tribunal's conclusion that the punishment Mr Israelian would face 'for avoiding his call-up notice ... would be the application of a law of common application' necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution." (footnote omitted)

83 This case is different from Israelian. Given the facts found by the Tribunal in the present case, the finding was open that the conscription methods of the Taliban constituted persecution. On the Tribunal's findings, the Taliban had an ad hoc practice of recruitment, which practice included press-ganging new recruits in a manner that would not be "condoned internationally"[109] RRT Reference: N00/35095 (Unreported, Refugee Review Tribunal, 4 January 2001, Fordham TM) at [49].. Accordingly, if the Tribunal had decided the particular social group issue in favour of the appellant, it was also open to the Tribunal to find that the appellant had a well-founded fear of persecution for a Convention reason. Given the Tribunal's findings about the nature of the Taliban's recruitment practices, it was open to the Tribunal to find that the Taliban was not applying a law of general application,

but instead was forcibly apprehending members of the particular social group in an ad hoc manner that constituted persecution by the standards of civilised society.
…

Gray J. canvassed the relevant authorities in Erduran v MIMA [2002] FCA 814 (2002) 122 FCR 150 (but see now below MIMIA v VFAI of 2002 [2002] FCAFC 374 setting aside the judgment on the basis that the claim of conscientious objection had not been raised). His Honour set out the Tribunal's reasons:

The Tribunal's reasons

9 The Tribunal summarised its view of the applicant's case as follows:

> "The applicant does not want to return to Turkey because he does not want to undergo compulsory military service and is afraid that he maybe [sic] injured or killed, like his friends were, whilst undergoing military service."

10 The Tribunal found that in Turkey, military service is compulsory for all men over twenty. It lasts for eighteen months. Exemption is granted only to unfit persons. Service can be deferred for university study. There is no option to perform unarmed service. Conscripts who avoid military service are liable to gaol sentences, although some sources indicate that after May 1994 the penalty for draft evasion was converted to a fine, followed by a requirement to undergo the military service. The Tribunal found that the applicant is liable to undergo military service on his return to Turkey and that could entail fighting in the east of Turkey.

11 The Tribunal then said:

> "Conscription or compulsory military service or punishment for avoidance of military service, does not of itself constitute persecution within the meaning of the Convention. Without evidence of selectivity in its enforcement, conscription generally amounts to no more than a non-discriminatory law of general application.
>
> To amount to persecution and found a claim for refugee status the applicant must be at risk, of the requirement to perform military service, or the punishment for failing to undergo military service, being imposed in a discriminatory manner for a Convention reason."

12 The Tribunal referred to Mijoljevic v Minister for Immigration & Multicultural Affairs [1999] FCA 834 as authority for its view as to the relationship between compulsory military service, or the punishment for avoiding it, and the Convention. It quoted from the judgment of Branson J in Mijoljevic. The Tribunal then continued:

> "Based on the material before the Tribunal there is nothing to indicate that the applicant will be forced to undergo military service for any Convention reason; rather it is a requirement for all males over 20. Further if he evades military service there is nothing to suggest that he will receive a harsher penalty on account of his race, his nationality, his religious beliefs, his political opinions or because of his membership of a particular social group. The requirement to perform military service and the punishment for failing to do so are laws of general application and the Tribunal finds they will not be differentially applied for a Convention reason in the applicant's case. Therefore the requirement to undergo military service and the likelihood of a penalty for failing to undertake military service does not amount to

> persecution within the meaning of the Convention and the applicant is not a refugee for this reason."

…

Gray J. then dealt with the authorities on the issue:

Military conscription and the Convention

18 So far as its analysis of the question whether Australia has protection obligations towards a person who is liable for compulsory military service went, the Tribunal was correct. There is a line of authority establishing that the liability of a person to punishment for failing to fulfil obligations for military service does not give rise to persecution for a Convention reason. See Murillo-Nunez v Minister for Immigration & Ethnic Affairs (1995) 63 FCR 150 at 159, Timic v Minister for Immigration & Multicultural Affairs (Federal Court of Australia, Einfeld J, 23 December 1998, unreported) at 3, Minister for Immigration & Multicultural Affairs v Shaibo [2000] FCA 600 at [28] and Trpeski v Minister for Immigration & Multicultural Affairs [2000] FCA 841 at [27] - [28]. Laws relating to compulsory military service for all men of a certain age are generally to be regarded as laws of general application. Liability to punishment under a law of general application does not ordinarily provide a foundation for a fear of persecution for a Convention reason. As the Tribunal said, if a law is applied in a discriminatory manner to persons within the protected categories, its application will amount to persecution for a Convention reason. Thus, if persons of a particular race, religion or political opinion are more likely to be punished, or if their punishment is likely to be of greater severity, than others to whom the law applies, this may amount to persecution of those within the group concerned.

19 The Tribunal's analysis did not go far enough. There is also a line of authority to the effect that a refusal to undergo military service on the ground of conscientious objection to such service may give rise to a well-founded fear of persecution for a Convention reason. In Magyari v Minister for Immigration & Multicultural Affairs (Federal Court of Australia, O'Loughlin J, 22 May 1997, unreported), O'Loughlin J cited the Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status 1992 and Hathaway The Law of Refugee Status 1991. His Honour accepted:

> "that there may be cases in which conscientious objection to military service will be the basis of a well founded fear of persecution for a convention reason. For example, the refusal to perform military service may derive from one's religious beliefs, or it may be by virtue of one's political opinions."

20 In Mehenni v Minister for Immigration & Multicultural Affairs [1999] FCA 789 (1999) 164 ALR 192 at [17] Lehane J said:

> "Conscientious objection, whether the objection of a pacifist to all military service or a 'selective' objection, may reflect religious beliefs or political opinions; and there is no reason to doubt that conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a 'particular social group', defined as such by some characteristic, attribute, activity, belief, interest or goal that unites its members."

21 In Mijoljevic v Minister for Immigration & Multicultural Affairs [1999] FCA 834, on which the Tribunal relied, at [21], Branson J recognised that:

> "It may be that pacifist views which do not have a religious or political base, and which are not part of the belief system of a particular social group, are irrelevant to a claim to be entitled to a protection visa."

22 Hill J discussed the matter at some length in Applicant N 403 of 2000 v Minister for Immigration & Multicultural Affairs [2000] FCA 1088 at [20] - [27]. At [23], his Honour said:

> "The draft laws as implemented in Australia during the Vietnam War permitted those with real conscientious objections to serve, not in the military forces, but rather in non-combatant roles. Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal operation. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult, I think, to argue that in such a case the cause of the imprisonment would be the conscientious belief, which could be political opinion, not merely the failure to comply with a law of general application."

23 In Applicant M v Minister for Immigration & Multicultural Affairs [2001] FCA 1412, Carr J held that it was necessary to consider not only whether a person refusing to undergo military service in Afghanistan under the Taliban Government might be persecuted by reason of political opinion, but also the possibility that there was a particular social group of such persons. At [31] - [34], his Honour said:

> "Even if there exists a conscription law of general application in the country from which a claimant refugee has fled, conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a particular social group - see Lehane J in Mehenni v Minister for Immigration and Multicultural Affairs [1999] FCA 789 and the authorities there cited. As his Honour pointed out, it would be necessary for an applicant for a protection visa to show that he or she had a well-founded fear of persecution for reason of membership of that group.
>
> ...
>
> In the present matter, as I have mentioned, there was no evidence of a law of general application on the matter of conscription. All the evidence points to forcible conscription by the Taliban without any lawful justification. In my opinion, when the Tribunal relied on Branson J's decision in Mijoljevic v Minister for Immigration and Multicultural Affairs [1999] FCA 834, which was a case of enforcement of laws of general application providing for compulsory military service, it fell into error.
>
> In my view, the Tribunal was obliged to consider whether the applicant had a well-founded fear of persecution by reason of his membership of a particular social group comprising those persons who held a conscientious objection to military service. In failing to do so I consider the Tribunal erred in law to the extent that it fell into jurisdictional error."

24 In the case reported as Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30 (2001) 180 ALR 1, the High Court of Australia dealt with a case of Israelian, who

claimed to have a fear of persecution if he returned to Armenia because of his failure to perform compulsory military service in that country. In the case of Mr Israelian, the Tribunal had made a specific finding that Mr Israelian was not opposed to all war. His opposition to the particular war that he might be called upon to fight in if he returned to Armenia was not based on ethical, moral or political grounds, but on a desire to avoid personal danger. It was argued before the High Court that the Tribunal should have made a finding as to whether or not Mr Israelian was a member of a particular social group comprised of deserters or draft resisters. At [55], Gaudron J said:

> "Nor, in my view, does the failure of the tribunal to make a finding as to whether or not Mr Israelian was a member of a particular social group comprised of deserters and/or draft resisters reveal reviewable error for the purposes of s 476(1) of the Act. The tribunal's conclusion that the punishment Mr Israelian would face 'for avoiding his call-up notice . . . would be the application of a law of common application' necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution. In that context, the question of Mr Israelian's membership of a particular social group comprised of deserters and/or draft resisters became irrelevant."

25 McHugh, Gummow and Hayne JJ, with whom Gleeson CJ expressed agreement, said at [97]:

> "Nevertheless, it must be recalled that the tribunal did not base its conclusion affirming the decision to refuse Mr Israelian a protection visa only on its finding about conscientious objection. It concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The tribunal is not shown to have made an error of law in that respect. Moreover, the evidence to which counsel for Mr Israelian pointed as suggesting that the sanctions imposed on Mr Israelian would go beyond the application of the general law related to deserters, not draft evaders. It was not demonstrated that those groups formed part of a single 'social group' within the meaning of the Convention definition."

26 At [245] - [246], Callinan J adopted a passage from the judgment of Emmett J in the Full Court of this Court, who said:

> "it is difficult to see how the Tribunal could have come to a view, on the material before it, that deserters or draft evaders constitute a particular social group. That is to say, in so far as they are persecuted by the harshness of punishment, that would be no more than the application of a law of common application to them in respect of their contravention of that law. In any event, that would be a finding of fact which would not be subject to review in the Court."

27 Nothing in those passages suggested that the High Court was intending to overrule the second line of authority to which I have referred above. The specific finding of the Tribunal in relation to Mr Israelian, that he was not opposed to all war and that his opposition to a particular war did not have an ethical, moral or political basis, made any discussion of that line of authority irrelevant. Nor, in my view, is the High Court to be taken as having said that there can never be a particular social group consisting of conscientious objectors, or some class of conscientious objectors. The passages I have quoted from the judgments in the High Court are based on the absence of any evidence before the Tribunal in that case that draft evaders and deserters together formed a particular social group. In my view, the line of authority from Magyari to Applicant M represents the law on this subject.

28 It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.
29 In the present case, the Tribunal did not even embark on the first stage of this process. Having recited the applicant's claims, including his initial claim that he does not believe in war and does not want to kill anyone and wants world peace, the Tribunal did not go on to consider whether the applicant was a conscientious objector. It appears to have assumed that, even if he were, his liability to punishment for that conscientious objection would not give rise to a real chance of persecution for a Convention reason. It also appears to have assumed that only a real chance of a harsher than normal penalty, by reason of a Convention attribute, would give rise to a well-founded fear of persecution. Those assumptions reveal a failure to understand the law.
30... The Tribunal made no finding in the present case as to whether the applicant did or did not have "pacifist views". As I have said, it bypassed the issue.
31 In doing so, the Tribunal failed to deal with the case made by the applicant. It ignored the essence of what the applicant had said, by determining that the case was concluded on the basis that the law of Turkey relating to compulsory military service was a law of general application…

In MIMIA v VFAI of 2002 [2002] FCAFC 374 the Full Court (Black CJ, North and Merkel JJ.) set aside the judgment of Gray J. on the basis that the claim of conscientious objection had not been raised by the applicant. Where they are not inconsistent with the proposition that such a claim must be squarely raised Gray J.'s dicta stand as those of a single judge (noting that in Erduran the applicant failed to raise the issue when he was presented with the opportunity to do so at the Tribunal hearing). The Court said:

5 The respondent appeared in person before the primary Judge and stated that his case to the RRT had been that his objection to compulsory military service was a conscientious

objection. Counsel for the Minister did not object to the matter being considered on the basis that the Tribunal may have overlooked that aspect of the respondent's case before it.
6 On the limited material before him the primary judge concluded that, as the respondent raised a case of conscientious objection before the RRT, it was necessary for it to make a finding as to whether the respondent was claiming that he intended to refuse to undergo military service by reason of a conscientious objection to such service and, if so, whether that objection arises for a Convention-related reason, such as political opinion or religious conviction. Earlier in his reasons the primary judge had referred to a line of authority to the effect that a refusal to undergo military service on the ground of conscientious objection to such service may give rise to a well founded fear of persecution for a Convention reason. In one of the authorities cited by his Honour, Mehenni v Minister for Immigration and Multicultural Affairs (1999) 164 ALR 192 at 197-198, Lehane J observed that conscientious objection to military service:

> "may reflect religious beliefs or political opinions, and there is no reason to doubt that conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a "particular social group", defined as such by some characteristic, attribute, activity, belief, interest or goal that unites its members."

7 Lehane J also made the point (at 198) that a fear of persecution arising from a conscientious objection to military service must be established to be a fear which is held by a particular applicant for a Convention reason.
…

9 In his appeal to the Full Court the Minister contended that the primary Judge erred as the RRT had in fact dealt with the case the respondent had put. Without objection on the part of the respondent, who was represented by counsel appearing pro bono, the Minister produced to the Full Court and relied on the transcript of the hearing before the RRT, which had only been transcribed shortly prior to the hearing of the appeal. For present purposes it is unnecessary to set out the detail of the transcript other than to record that the Tribunal member raised directly, and on a number of occasions, with the respondent his reasons for not wanting to undergo military service in Turkey.
10 In its reasons for decision the RRT stated that in his evidence to it the respondent:

> "confirmed that the reason he did not want to return to Turkey was because he did not want to undergo military service. He cited the PKK situation in Turkey. Three of his friends were killed when they did their military service, some were injured and are now disabled. His friends were sent to the East of Turkey."

11 In the section of its reasons headed "Findings and Reasons" the RRT stated:

> "The applicant does not want to return to Turkey because he does not want to undergo compulsory military service and is afraid that he may be injured or killed, like his friends were, whilst undergoing military service."

12 When regard is had to the transcript of the hearing before the RRT to see what was actually put it is clear that the RRT had dealt with the case the respondent had put. In particular, the RRT considered the various statements made by the respondent, especially those made by him in direct answer to questions asked of him by the Tribunal member at the hearing, and concluded that the reason why the respondent did not want to undergo compulsory military service is that he:

> "is afraid that he may be injured or killed, like his friends were, whilst undergoing military service."

13 The RRT must be taken to have found as a fact, which was a matter for it to determine, that the respondent did not have a fear of harm for a Convention reason as a result of him not wanting to undergo compulsory military service. That finding was determinative, against the respondent, of his claim to have a well founded fear of persecution for a Convention reason if returned to Turkey. Thus, the RRT dealt with the case put, or more accurately the claims made, by the respondent and concluded that he did not have a conscientious objection to military service in the sense in which that term has been used in the cases

In Applicant VEAZ of 2002 v MIMIA [2003] FCA 1033 Gray J. identified two errors in dealing with the issue of conscientious objection to military service and re-affirmed his views expressed in Erduran which he noted had not been affected by the Full Court judgment of MIMIA v VFAI.

His Honour said in holding that an unreviewable finding of fact was conclusive against the application notwithstanding the errors:

The applicant's claims

4 The applicant claimed to fear persecution, if he should be returned to Turkey, for reasons of his race and his political opinion, and also because of his liability to compulsory national service

…

13 The Tribunal then turned its attention to the applicant's claims based on his conscientious objection. It did so in the following terms:

> 'The Applicant states that he is a conscientious objector to serving in the battle between the Turkish government and the PKK and its supporters. He provided an Amnesty International report (EUR 44/55/99 of 27 August 1999) that reports on the deaths of four Kurdish men in service in 1997 - 1999 and suggests they were killed because they objected to the war, although the evidence to that effect is fairly scant. The Amnesty report explains that the military has a policy of sending conscripts to areas away from their native region but some, who have previously migrated to urban areas in the west from the war-torn southeast, were sent to their former residential area. That is not the case for the Applicant, who has lived in Istanbul at times but has always returned to his home area in the southeast. If he is conscripted, it is likely he would be sent out of that area. The Tribunal finds accordingly. The Applicant has also provided an account of a returned draft evader who had written to the Turkish authorities from abroad to state he would not serve in the Army. That is not the case with the Applicant.
>
> The instances of mistreatment he has referred to are isolated and, on the flimsy available evidence, might have been perpetrated by unidentified soldiers. They are clearly not part of a systematic pattern of discrimination as required by section 91R of the Act. Furthermore, they occurred before the arrest of Ocalan, whose PKK has

since renounced the armed struggle and a separate state and sought to rejoin the political process.'

14 The Tribunal then referred to 'country information', indicating a decrease in fighting since the arrest of Ocalan and the absence of discrimination on ethnic grounds in the military and civil courts in Turkey. It continued:

> 'The Tribunal finds that the Applicant, if he is conscripted, is most unlikely to be sent to the southeastern emergency zone, as that is where he comes from and it would be a break in government policy if he was sent there. More to the point, for the purpose of assessing his refugee status, his fears about the consequences of objecting to military service are not Convention-related. If he refuses to join the military the Tribunal is satisfied, on the basis of the above information (Cisnet CX31285), that he will not encounter any excess punishment because he is Kurdish. It is satisfied that whatever sanctions might be applied will result from the imposition of laws that apply to all Turkish citizens, regardless of their ethnicity. In those circumstances, such punishment does not fall within the Convention, even if it would otherwise be sufficiently serious as to amount to persecution.
>
> In arriving at that conclusion, the Tribunal refers to Federal Court decisions that have held that whether or not the Applicant is a conscientious objector, per se, is irrelevant in assessing his refugee status. That is, unless the Applicant could show that punishment for avoiding military service is imposed for Convention reasons, such punishment would not bring him within the ambit of the Convention. Australian courts have diverged from the view held by Professor Hathaway and the UNHCR that conscientious objection might be the basis for a refugee claim, without anything further'.

15 The Tribunal then quoted from Trpeski v Minister for Immigration & Multicultural Affairs [2000] FCA 841 at [27] - [29]. It continued:

> 'In the present Applicant's case, even if he does object to serving with the Turkish armed services for reasons of conscience, such a philosophical view would not necessarily bring him within the ambit of the Convention. That would require that he be treated differently from other conscientious objectors in being called up and serving or in being punished for failure to respond to a call up notice. That is not the policy of the Turkish authorities and the Tribunal is not satisfied he faces any Convention-related [sic] at the hands of those authorities in respect of military service. Nor is the Tribunal satisfied that the Applicant faces a real chance of encountering persecution at the hands of soldiers who might act outside the law. As mentioned above, those incidents have been very few and isolated and unsystematic, and are far less likely to occur now than occurred before Ocalan's arrest.'

16 On this basis, the Tribunal expressed its lack of satisfaction that the applicant faced Convention-related punishment in respect of military service

The finding of fact

18 As the Tribunal recited in its reasons for decision, the applicant claimed to have been born in the administrative region of Mardin in Turkey. He completed school there and then went overseas (to St Petersburg in Russia) to study for several years, graduating in business management. He returned to his home village to work in the family business and then went to Istanbul in the late 1990s, where he remained until he left for Australia. Despite this evidence, the Tribunal made a finding, in the passage quoted above, that the applicant has lived in Istanbul 'at times but has always returned to his home area in the southeast'. This

finding was the basis for the Tribunal's conclusion that the applicant would not be required to do his national service in his home area.
19 It has long been recognised that an error of fact within a decision-maker's jurisdiction will not justify relief of the kind sought by the applicant…
20 In any event, I am not convinced that the Tribunal was in error in the manner suggested by counsel for the applicant. For the Tribunal to phrase its finding in terms that the applicant has lived in Istanbul 'at times' was not necessarily for it to be taken to have found that the applicant lived in Istanbul for more than one period. The expression 'at times' is apt to describe the single period during which the Tribunal recognised that the applicant had lived in Istanbul. The point that the Tribunal was making was that the Turkish government's policy of not forcing Kurdish conscripts from the south-east of Turkey to fight in that area would be applicable to the applicant. It cannot be said that the Tribunal made any error in reaching this conclusion. The applicant did come from the south-east. If the policy were as the Tribunal found it to be, and if it were applied to the applicant, he would not be forced to fight against Kurdish rebels in the south-east.
The conscientious objection issue
21 In Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814 (2002) 122 FCR 150 at [18] - [28], I attempted a survey of the authorities relating to the relevance of conscientious objection to the Convention. At [28], I concluded that conscientious objection might be relevant if it arises from a political opinion or from a religious conviction, and also that it might itself be regarded as a form of political opinion. I also expressed the view that conscientious objectors, or some particular class of them, might constitute a particular social group for the purposes of the Convention.
22 I do not regard anything said by the Full Court in Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374 at [6] - [7] as contradictory of the views I expressed in Erduran.
23 In the present case, therefore, the Tribunal was in error in suggesting that Australian Courts have diverged from the view that conscientious objection might be the basis for a refugee claim, without anything further. Conscientious objection might demonstrate that a person is a member of a particular social group. As I suggested in Erduran at [28], the very process of being forced to perform military service might itself amount to persecution for a Convention reason.
24 This is not to say that the error on the part of the Tribunal necessarily affected the result in the present case…
25 It does not appear that the applicant placed before the Tribunal any evidence to suggest that his conscientious objection extended beyond the fighting of fellow Kurds. There is no suggestion that he was a conscientious objector to all wars, or to wars of a particular kind or particular kinds. His objection was to being forced to do harm to those of his own race. The Tribunal found as fact that, in accordance with the policies of the Turkish military, the applicant would not be sent to the south-east and would not be compelled to fight against Kurds. Given this finding, it is apparent that the Tribunal was justified in reaching the conclusion that the applicant would not be persecuted for a Convention reason by being required to perform national service. The error that the Tribunal made in its approach to the relevance of conscientious objection was not such as to affect the result of the applicant's case.
A law of general application
26 I am also of the view that the Tribunal made an error in treating the Turkish laws relating to national service as laws of general application. The error is not so much in the characterisation of such a law, as in the assumption that the Tribunal appears to have made as to the consequences of the characterisation. The Tribunal seems to have assumed that,

because a law of general application applied to all Turkish citizens, regardless of their ethnic origins, it could not result in persecution of any such citizen for a Convention-related reason. It was made clear in Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599 (2000) 105 FCR 548 at [63] and [65] per Merkel J, that the equal application of the law to all persons may impact differently on some of those persons. The result of the different impact might be such as to amount to persecution for a Convention reason. An obvious example is a law forbidding the practice of a particular religion which, while it forbids the practice of that religion equally by all persons, only impacts on those who wish to practice that religion. In a similar way, a law relating to compulsory military service has no Convention-related impact on those who have no conscientious objection to such service, but may have a very significant impact in relation to those who do. Simply to regard the case as closed because there is in place a law of general application is to misapply the Convention.

27 Again, however, the Tribunal's error in the present case does not entitle the applicant to the relief he seeks. This is because the Tribunal's finding of fact that the applicant will not be sent to the south-east to fight against Kurds removes the case from the ambit of the Convention as a matter of fact. The result might have been different if the applicant had disclosed a conscientious belief based on something other than an unwillingness to fight against those of his own race.

….

Sepet (FC) and Another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2003] 1 WLR 856 [2003] UKHL 15 involved appeals concerned with the raising of a claim of objection to military service which was based on a political objection to the government policy of waging a war against fellow Kurds (on pain of imprisonment if the applicants refused to serve) rather than upon other accepted categories giving rise to such a claim (At [8]) . The facts as found (that punishment was not excessive and they would not be required to engage in military action contrary to basic rules of human conduct) meant that the Appellants had to establish the existence of a fundamental right of conscientious objection to military service in order to succeed. Their Lordships' House comprised Lord Bingham of Cornhill Lord Steyn Lord Hoffmann Lord Hutton Lord Rodger of Earlsferry. It held unanimously that there was no core right of conscientious objection in international law which could support a Convention-related claim in these circumstances.

Lord Bingham of Cornhill said:

1. The issue in this appeal is whether the applicants, both of them Turkish nationals of Kurdish origin, should have been granted asylum on the ground that they were refugees within the meaning of article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol to that Convention. The ground upon which asylum was

claimed related to their liability, if returned to Turkey, to perform compulsory military service on pain of imprisonment if they refused…

…

3. In any asylum case the facts are all-important and these cases are no exception. The first applicant, now aged 32, has not claimed to have a conscientious objection to bearing arms, serving his country or donning a uniform. His objections to military service stemmed from his political opposition to the policies of the then Turkish Government and from his wish not to be required to participate in actions, including atrocities, which he alleged to be perpetrated against his own people in the Kurdish areas of the country. The special adjudicator accepted that this applicant's reluctance to perform military service stemmed from his genuine political opinions, but found no reasonable likelihood that he would be required to engage in military action contrary to the basic rules of human conduct, even assuming that he was required to serve in a predominantly Kurdish area of Turkey. This applicant's wish to avoid military service was at least one of his reasons for leaving Turkey (which he did in 1990). He would still be regarded as liable for conscription on his return and might be charged with the offence of draft evasion, not having returned sooner. Any further refusal on his part would almost certainly lead to the preferment of charges against him.

4. The second applicant is now 25. He arrived in the United Kingdom in 1996. He later claimed that he would have received his call-up papers in August 1997 and become liable to call-up in about February 1998. He would be liable to be apprehended on his return to Turkey and to face a charge of draft evasion if he continued to refuse to serve. He has not claimed that he would refuse to wear uniform in all circumstances. His objection to performing military service related to his general antipathy towards the policy of the then Turkish Government to oppose self-determination for the Kurdish people. He also feared that he might be sent to the operational area and required to take part in military action, possibly involving atrocities and abuse of human rights, against his own people. The special adjudicator found that this applicant's objection was not one of moral conviction but, rather, stemmed from his political views. He found no reasonable likelihood that this applicant would be required to engage in, or be associated with, acts offending against the basic rules of human conduct.

5. Turkish law at present provides no non-combatant alternative to military service. Draft evaders are liable to a prison sentence of between 6 months and 3 years. On completion of the sentence the offender is required to undertake his military service. It is an agreed fact that those who refuse to perform military service in Turkey (including Kurds) are not subject to disproportionate or excessive punishment, in law or in fact, as a result of their refusal. Draft evaders are liable to prosecution and punishment irrespective of the reasons prompting their refusal.

6… It is plain that the Convention has a single autonomous meaning, to which effect should be given in and by all member states, regardless of where a decision falls to be made: R v Secretary of State for the Home Department Ex p Adan [2001] 2 AC 477. It is also, I think, plain that the Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will. I would agree with the observation of Sedley J in R v Immigration Appeal Tribunal, Ex p Shah [1997] Imm AR 145, 152:

> "Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism."

I would also endorse the observation of Laws LJ in R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477, 500:

"It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded."

7. To make good their claim to asylum as refugees it was necessary for the applicants to show, to the standard of reasonable likelihood or real risk, (1) that they feared, if they had remained in or were returned to Turkey, that they would be persecuted (2) for one or more of the Convention reasons, and (3) that such fear was well-founded…. Valuable guidance is given by Professor Hathaway (The Law of Refugee Status (1991), p 112) in a passage relied on by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 495:

"In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community."

In this passage Professor Hathaway draws attention to a second requirement, no less important than that of showing persecution: the requirement to show, as a condition of entitlement to recognition as a refugee, that the persecution feared will (in reasonable likelihood) be for one or more of the five Convention reasons. As Dawson J pointed out in the High Court of Australia in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 247-248:

"By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees."

8. There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment: see, for example, Zolfagharkhani v Canada (Minister of Employment and Immigration) [1993] FC 540; Ciric v Canada (Minister of Employment and Immigration) [1994] 2 FC 65; Canas-Segovia v Immigration and Naturalization Service (1990) 902 F 2d 717; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paras 169, 171. But the applicants cannot, on the facts as found, bring themselves within any of these categories. Nor have they been found to have a rooted objection to all military service of any kind, or an objection based on religious belief. Their unwillingness to serve is based on their strong and sincere opposition to the policy of the Turkish Government towards their own Kurdish community. (bold added) There can be no doubt that the applicants' fear of the treatment which they will receive if they are returned to Turkey and maintain their refusal to serve is well-founded: it is the treatment described in paragraph 5 above. The crucial question is whether the treatment which the applicants reasonably fear is to be regarded, for purposes of the Convention, as persecution for one or more of the Convention reasons.

9. The core of the applicants' argument in the Court of Appeal was summarised by Laws LJ in paragraph 19 of his judgment in these terms:

"(i) There exists a fundamental right, which is internationally recognised, to refuse to undertake military service on grounds of conscience.

(ii) Where an individual, motivated by genuine conscientious grounds, refuses to undertake such service and the state offers no civilian or non-combative alternative, the prospect of his prosecution and punishment for evading the draft would if carried into effect amount to persecution for a Convention reason within article 1A(2) (assuming, what is not in contention in these cases, that the nature of the punishment would be sufficiently severe to amount to potential persecution).

(iii) Proposition (ii) applies alike to cases of absolute and partial conscientious grounds; and the [applicants], on the proved or admitted facts, are refugees according to this reasoning."

This was the thrust of the applicants' case before the House also. The key is to be found in submission (i): for while discriminatory infringement of a recognised human right may not necessarily constitute persecution for Convention reasons, Mr Nicol QC for the applicants accepted that there could be no persecution for Convention reasons without discriminatory infringement of a recognised human right. So it is necessary to investigate whether the treatment which the applicants reasonably fear would infringe a recognised human right.

10. The leading international human rights instruments, literally interpreted, give little assistance to the applicants' argument. The Universal Declaration of Human Rights …made no express reference to a right of conscientious objection. … in article 8(3)(c) of the ICCPR it is expressly provided that "forced or compulsory labour" shall not include:

"(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors."

Despite minor differences of wording, article 4(3)(b) of the ECHR is to identical effect. At the time when these provisions were drafted and adopted, it was plainly contemplated that there could be states, parties to the respective conventions, which did not recognise a right of conscientious objection and did not provide a non-combatant alternative to compulsory military service. Articles 4(3)(b) and 8(3)(c) have not been amended by international agreement, and there has been no later convention recognising or defining or regulating a right of conscientious objection.

11… it is plain that several respected human rights bodies have recommended and urged member states to recognise a right of conscientious objection to compulsory military service, to provide a non-combatant alternative to it and to consider the grant of asylum to genuine conscientious objectors. But resolutions and recommendations of this kind, however sympathetic one may be towards their motivation and purpose, cannot themselves establish a legal rule binding in international law. I shall accordingly confine my attention to five documents which seem to me most directly relevant in ascertaining the point which international opinion has now reached.

12. Mention must first be made of the UNHCR Handbook which, subject to minor editing, dates from 1979 and is recognised as an important source of guidance on matters to which it relates. It is necessary to quote paragraphs 167-174:

[quoted in Mehenni above]

… Some of these paragraphs may very readily be accepted. The paragraph most helpful to the applicants is paragraph 170. But this appears to be qualified by paragraph 171, which immediately follows and is much less helpful to the applicants. Less helpful also is paragraph 172, in its tentative suggestion that a person "may be able to establish a claim to refugee status". The same comment may be made of paragraph 173: "it would be open to contracting states to grant refugee status". Read as a whole, these paragraphs do not in my opinion provide the clear statement which the applicants need.

13. The applicants understandably placed reliance on General Comment No 22 of the United Nations Human Rights Committee (30 July 1993), which in paragraph 11 said (with reference to article 18 of the ICCPR):

"11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of states have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites states parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service."

This is perhaps the nearest one comes to a suggestion that a right of conscientious objection can be derived from article 18 of the ICCPR. But it is, again, a somewhat tentative suggestion …

His Lordship at [14]-[16] referred to the EU position then said:

17. It is necessary to consider whether the applicants' contention finds compelling support in the decided cases. There are undoubtedly authorities on which they can properly rely, notably Canas-Segovia v Immigration and Naturalization Service (1990) 902 F 2d 717; Canas-Segovia v Immigration and Naturalization Service (1992) 970 F 2d 599 and Erduran v Minister for Immigration and Multicultural Affairs [2002] FCA 814. But the first of these decisions is in my opinion open to the criticism made of it by Jonathan Parker LJ in paragraphs 147-150 of his judgment, and the second does not sit altogether comfortably with the decision of the majority of the High Court of Australia in Minister for Immigration and Multicultural Affairs v Yusuf and Israelian [2001] HCA 30. They can scarcely be said to constitute a settled body of judicial opinion. Against them must be set a line of decisions of the European Commission on Human Rights which have, at least until recently, held the right asserted by the applicants to be excluded by article 4(3)(b) of the ECHR: Grandrath v Federal Republic of Germany Application No 2299/64, (1965) 8 YB 324 and (1967) 10 YB 626; X v Austria Application No 5591/72, (1973) 43 CD 161; A v Switzerland Application No 10640/83, (1984) 38 DR 219; Johansen v Norway Application No 10600/83, (1985) 44 DR 155; Autio v Finland Application No 17086/90, (1991) 72 DR 245; Heudens v Belgium Application No 24630/94, (unreported) 22 May 1995. The applicants drew support from the dissent of one Commission member in Tsirlis and Kouloumpas v Greece (1997) 25 EHRR 198, 224-226, a dissent which was repeated and elaborated, with a greater body of support, in the Report of the Commission adopted on 4 December 1998 in the case of Thlimmenos v Greece Application No 34369/97, (unreported), at pp 13-14, paras 3-4. This dissenting view was not however adopted by the court when the case came before it: (2000) 31 EHRR 411. Whether the imposition of sanctions on conscientious objectors to compulsory military service might, notwithstanding article 4(3)(b) of the ECHR, infringe the right to freedom of thought, conscience and religion guaranteed by article 9(1) was a point which the court expressly left open at pp 424-426, paras 43 and 53 of its judgment. I am in respectful agreement with the detailed analysis of this authority made by Jonathan Parker LJ in paragraphs 124-139 of his judgment. While, therefore, there are indications of

changed thinking among a minority of members of the European Commission, there is as yet no authority to support the applicants' contention.

18. It is not in my opinion necessary to explore the circumstances in which the practice of states may give rise to a right commanding international recognition, since the evidence before the House does not disclose a uniformity of practice… in Europe several states currently have no conscription, and of those that do the great majority recognise a right of conscientious objection. But figures based on a 1998 report by War Registers International show a somewhat different picture world-wide. Of 180 states surveyed, some form of conscription was found to exist in 95. In 52 of those 95 states the right of conscientious objection was found not to be recognised at all. In a further 7 of those 95 states there was no known provision governing a right of conscientious objection. In the remaining 36 states the right of conscientious objection appeared to be recognised to some extent. It could not, currently, be said that there is de facto observance of anything approaching a uniform rule.

19…. The problem, to my mind, is that the treaties have treated compulsory military service as an exception from the forced labour prohibition without making any other provision, and I do not think there is, as yet, a new consensus.

20. On the main issue to which this opinion has so far been addressed, the Court of Appeal was divided. Of absolute conscientious objectors Laws LJ concluded, in paragraph 79:

> "In the result, I would hold that there is no material to establish a presently extant legal rule or principle which vouchsafes a right of absolute conscientious objection, such that where it is not respected, a good case to refugee status under the Convention may arise. No such putative rule or principle is to be found in the Convention's international autonomous meaning or common standard."

Turning to partial conscientious objectors, in paragraph 84, he reached a similar conclusion:

> "It is plain, however, that no matter how clear the political basis for a partial objection may be, there is in such a case no more of an international underpinning, by treaty or customary law, to quicken the objector's claim into a legal right than in the case of the absolute objector. In my judgment, therefore, such a claim is stillborn for all the reasons I have already given."

Jonathan Parker LJ, in paragraph 100, shared his view. Waller LJ took a view more favourable in principle to the applicants. Of absolute objectors he said, in paragraph 201:

> "Thus if someone can show that he/she is a genuine conscientious objector, that he/she is to be conscripted into a military in a state that simply does not recognise the possibility of such conscientious belief, and that he/she will be prosecuted as a result, in my view he/she will have established a well founded fear of persecution for a Convention reason. That however does not dispose of the appeals before us."

His opinion, at paragraph 208, in the case of partial objectors was similar:

> "In my view thus a partial objector may be able to show a deep-seated conscientious reason why he/she should not be conscripted by reference to the fact that he/she will be required to take part in a war against his/her own ethnic community, and may show an infringement of article 9(1), but it takes more than mere disagreement with a policy that allows Kurds to be conscripted to fight Kurds to establish that position."

Thus although there was agreement on the outcome, there was disagreement on the intervening steps. Despite my genuine respect for the care and thoroughness with which Waller LJ has put forward his conclusions, and with a measure of reluctance since they may well reflect the international consensus of tomorrow, I feel compelled to accept the view of the Court of Appeal majority on the state of the law today as revealed by the abundant materials before us…

21. This conclusion makes it strictly unnecessary to determine a further issue raised by the respondent Secretary of State…. It was argued that, in deciding whether an asylum applicant had been or would be persecuted for Convention reasons, "the examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution: Ward v Attorney General of Canada [1993] 2 SCR 689, 747." Support for this approach is found in Immigration and Naturalization Service v Elias-Zacarias (1992) 502 US 478, a decision very strongly criticised by Professor Hathaway ("The Causal Nexus in International Refugee Law" (2002) 23 Michigan Journal of International Law 207). The Court of Appeal unanimously rejected this argument (paragraphs 92, 154 and 182) and some of the authorities point towards a more objective approach: Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, 304, 313, paras 33 and 65; Refugee Appeal No 72635/01 of the New Zealand Refugee Status Appeals Authority, (unreported) 6 September 2002, paragraphs 167-173.

22. I would express the test somewhat differently from the Court of Appeal in this case. In his judgment in Sivakumar v Secretary of State for the Home Department [2001] EWCA Civ 1196; [2002] INLR 310, 317, para 23, Dyson LJ stated:

> "It is necessary for the person who is considering the claim for asylum to assess carefully the real reason for the persecution."

This seems to me to be a clear, simple and workmanlike test which gives effect to the 1951 Convention provided that it is understood that the reason is the reason which operates in the mind of the persecutor and not the reason which the victim believes to be the reason for the persecution, and that there may be more than one real reason. The application of the test calls for the exercise of an objective judgment. Decision-makers are not concerned (subject to a qualification mentioned below) to explore the motives or purposes of those who have committed or may commit acts of persecution, nor the belief of the victim as to those motives or purposes. Having made the best assessment possible of all the facts and circumstances, they must label or categorise the reason for the persecution. The qualification mentioned is that where the reason for the persecution is or may be the imputation by the persecutors of a particular belief or opinion (or, for that matter, the attribution of a racial origin or nationality or membership of a particular social group) one is concerned not with the correctness of the matter imputed or attributed but with the belief of the persecutor: the real reason for the persecution of a victim may be the persecutor's belief that he holds extreme political opinions or adheres to a particular faith even if in truth the victim does not hold those opinions or belong to that faith. …

23. However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. That reason would, in this case, be the applicants' refusal to serve in the army. But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason. The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason for the persecutory treatment. On the facts here, that would not be a tenable view, since it is clear that anyone refusing to serve would be treated in the same way, whatever his personal grounds for refusing.

Lords Steyn and Hutton agreed.

Lord Hoffman said:

25. The applicants are Kurdish Turks who came to this country at the ages of 19 and 18 respectively. They were shortly to become liable under Turkish law to military service. On arrival in the United Kingdom they claimed asylum on various grounds, of which the only one now relied upon is a fear that if returned to Turkey they would be prosecuted for refusing to enlist. They claim that their refusal was on the ground of their deeply held political objections to the policies of the then Turkish government towards the Kurdish minority. This, they say, was sufficient to entitle them to asylum because punishment for refusing military service on such grounds would be persecution for reasons of their political opinions within the meaning of the Convention relating to the Status of Refugees ("the Refugee Convention").

26. I emphasise that the case is put simply on the basis that they would be liable to punishment for refusing to perform military service. This is because of two important findings of fact by the special adjudicator which are now not challenged and which form part of the agreed statement of facts. The first is that the penalty for draft evasion (a prison sentence of 6 months to 3 years) is not disproportionate or excessive. The second is that there is no reasonable likelihood that the applicants would have been required to engage in military action contrary to basic rules of human conduct, whether against Kurds or anyone else.

27. The Secretary of State says that in these circumstances there is nothing wrong or unusual in Turkey having compulsory military service and suitable penalties for disobedience. If the applicants refuse to serve, the state is entitled to punish them, not for their political opinions but for failing to enlist. Their political opinions may be the reason why they refuse to serve but they are not the reason why they will be punished. They are free to hold whatever opinions they please about Turkish policy towards the Kurds as long as they report for duty. Putting the same point in a different way, imposing a punishment for failing to comply with a universal obligation of this kind is not persecution.

28…[The appellants submit that] Treating some group of people in the same way as everyone else may be persecuting them if their group has a right to be treated differently…

…

31. I shall consider later whether this principle of discrimination by failing to treat different cases differently can be fitted into the language of the Refugee Convention. Accepting for the moment that it can, I pass on to the next stage in Mr Nicol's argument, which is to show that it applies to laws imposing a general obligation to do military service. The question here is whether people who object to such service on conscientious religious or political grounds have a human right to be excused.

32. Mr Nicol accepts that ordinarily a conscientious religious or political objection is not a reason for being entitled to treat oneself as absolved from the laws of the state…

33…it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.

…

35. Mr Nicol was, I think, inclined to accept these principles as correct for most forms of civil disobedience. Conscientious objection to a law is not enough to make punishment unjust. It is not a reason why the objector has a right to be treated differently. But he said

that military service was different. An obligation to kill people was something which the state could not justly impose upon anyone who had a deeply held objection to doing so.
36. The difficulty about this argument is that it is accepted that in general the state does have the right to impose upon its citizens an obligation to kill people in war. It would of course be different if they were being asked to commit war crimes; in such a case, anyone could legitimately object. But ordinary army service, though demanding and often inconvenient, sometimes unpleasant and occasionally dangerous, is in many countries (and was in many more, including the United Kingdom) part of the citizen's ordinary duty.
37. Mr Nicol did not offer a rational ground for distinguishing between objection to military service and objection to other laws. One might feel intuitively that some such ground might be constructed around the notion of the sanctity of life, although I am not sure that even that could be described as rational. In any event, it would not have served Mr Nicol's purpose because it does not form the basis of these applicants' objections. They would have no objection to fighting in a war for a Turkish (or Kurdish) government of the right political complexion. He appealed instead to the practice of nations and the opinions of jurists, which he says support the proposition that conscientious objection to military service on any religious or political ground should be recognised.
38. The question in this appeal is the meaning of the term "refugee" in the Refugee Convention. That in turn raises the question of what is meant by "persecuted.". Mr Nicol says that if people are subjected to punishment which would be regarded as discriminatory by reference to their fundamental human rights, they are being persecuted. If those fundamental rights relate to their religious beliefs or political opinions, then they are being persecuted for reasons of those beliefs or opinions. My Lords, I have not attempted to examine all aspects of these propositions but for present purposes I am content to accept them. I shall therefore consider whether punishing conscientious objectors is an infringement of their fundamental human rights to freedom of conscience and opinion.
39. How does one establish the scope of fundamental human rights for the purposes of an international convention such as the Refugee Convention? Many state parties to the Convention are also parties to human rights conventions, such as the ECHR and the International Covenant on Civil and Political Rights ("ICCPR"). Mr Nicol says that the current state of human rights as expressed in those and other similar conventions is the best guide to their content for the purposes of the Refugee Convention.
40. Mr Howell QC, who appeared for the Secretary of State, said that the question was whether a right of conscientious objection had become part of customary international law. For that purpose there had to have been a general and consistent practice of states which was recognised as conforming to a legal obligation: see Oppenheim's International Law, vol 1, 9th ed (1992) (ed Jennings and Watts), pp 27-31. There was plainly no such settled practice relating to conscientious objection. There are many countries, of which I shall mention some in a moment, which do not recognise it.
41. I do not think it is possible to apply the rules for the development of rules of international law concerning the relations of states with each other (for example, as to how boundaries should be drawn) to the fundamental human rights of citizens against the state. There are unhappily many fundamental human rights which would fail such a test of state practice and the Refugee Convention is itself a recognition of this fact. In my opinion a different approach is needed. Fundamental human rights are the minimum rights which a state ought to concede to its citizens. For the purpose of deciding what these minimum rights are, international instruments are important even if many state parties in practice disregard them. (The African Charter on Human and People's Rights, adopted in 1981, is perhaps a conspicuous example). But the instruments show recognition that such rights ought to exist. The delinquent states do not normally deny this; they usually pretend that

they comply. Equally, the fact that many states openly deny this existence of a human right is not necessarily a reason for saying that it does not exist. One may think, so much the worse for them. But state practice is nevertheless important because it is difficult to assert the existence of a universal fundamental human right disavowed by many states which take human rights seriously.

42. As I have said, there are many countries which do not, or did not until relatively recently, recognise any form of conscientious objection. Those that do are not agreed on the grounds upon which it should be allowed. The Rapporteur of the Committee on Legal Affairs and Human Rights of the Council of Europe reported on 4 May 2001 on "Exercise of the right of conscientious objection to military service in Council of Europe member states" (Doc 8809 revised), paragraph 24:

> "Grounds for exemption from military service range from a very limited list of reasons to a very broad interpretation of the concept of conscience."

…

44…It seems to me that even in Europe and the United States, the recognition of conscientious objection, sometimes as a prelude to the abolition of conscription, does not demonstrate any recognition of a principle that conscientious objectors have a moral right to be treated differently. On the contrary, I think that practice supports Dworkin's view that recognition of the strength of the objector's religious, moral or political feelings is only part of a complex judgment that includes the pragmatic question as to whether compelling conscientious objectors to enlist or suffer punishment will do more harm than good…..

His Lordship considered the opinion of jurists and the EU position at [45]-[47] then said:

53…the applicants have not made out their case for saying that there exists a core human right to refuse military service on conscientious grounds which entails that punishment of persons who hold such views is necessarily discriminatory treatment. The existence of such a right is not supported by either a moral imperative or international practice.

54. This conclusion makes it unnecessary to decide whether Mr Nicol is right in saying that, for the purposes of the Refugee Convention, to apply a general law imposing significant punishment on people who have a human right to be treated differently because of their conscientious opinions amounts to persecution on the grounds that they hold those opinions, or whether, as the Secretary of State says, it is a complete answer that the Turkish authorities are not concerned with their political opinions but only with their refusal to enlist. My present inclination is to agree with Laws LJ that it would be inconsistent to say that a general conscription law which did not make an exception for conscientious objectors was an infringement of their fundamental human rights but that punishing conscientious objectors under such a law was not persecution for reasons of their opinions…

Lord Rodger of Earlsferry said:

57. My noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann have explained that, until now, with only minor exceptions the relevant bodies have been unwilling to affirm the existence in international law of a right to object to military service on grounds of conscience. Those bodies have preferred, at most, to commend to states that they should recognise such a right within their domestic legal order. The reluctance to go further doubtless reflects the real difficulty of identifying the scope of any right that all

states would have to recognise, whatever their circumstances. It is not obvious, for example, that the recognition in peacetime of a right to exemption from military service on grounds of conscience raises precisely the same issues as the recognition of such a right by a state which is fighting for its very survival, which, lacking more sophisticated weapons, requires all the manpower it can muster and which may not be in a position to scrutinise applications for exemption. The dilemma of the conscientious objector asserting a right to exemption in an hour of national peril is correspondingly the more exquisite.
58. The applicants do not object to performing military service in all circumstances. This only makes defining the scope of the right which they assert more problematical. In Gillette v United States (1970) 401 US 437, in a powerful opinion delivered at the height of the controversy over the selective draft for military service in Vietnam, Marshall J analysed the particular difficulties of recognising anything short of an absolute objection to military service. He drew attention to the inevitable competition between the values of conscientious objection and of equality of sacrifice, a competition that has to be resolved while bearing in mind that in practice an extensive right of conscientious objection will tend to be asserted by the educated and articulate rather than by the less fortunate members of society. States with different histories, different social mixes and different political, cultural, religious or philosophical values may legitimately differ as to how such a sensitive issue should be determined. It is hardly surprising therefore that no universal solution which all must follow has so far been identified. In these circumstances, for the reasons given by Lord Bingham of Cornhill and Lord Hoffmann I agree that the House cannot recognise the supposed core human right for which the applicants contend. …

In VCAD v MIMIA [2004[FCA 1005 Kenny J. accepted the analysis of Gray J. in Erduran as correct (on the basis of both parties accepting this position which His Honour had re-affirmed in Applicant VEAZ.) Her Honour held that the Tribunal had proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. This was plainly erroneous, and involved the Tribunal asking itself the wrong question, Her Honour said. Nonetheless the error was not material to the decision. The applicant's claim that, on account of his religious beliefs, he had a conscientious objection to military service was relevant only because he claimed to fear punishment as a deserter if he returned to Yugoslavia. The Tribunal found that an amnesty had been declared for "draft dodgers and deserters". This finding disentitled the Applicant to the relief he sought.

THE TRIBUNAL'S DECISION

…
6 The essence of the applicant's claim was that he feared persecution as a result of his failure to comply with a call-up notice requiring him to attend for military service.
…

9 The Tribunal noted that the situation in Yugoslavia had "changed considerably" after the applicant had made his initial claims. Referring to an item of country information, the Tribunal observed that:

> The people turned on the Milosevic regime in what some commentators have called a 'bloodless coup' and a number of reforms have already been put into place in the FRY.

The Tribunal found that:

> [A]n amnesty was declared for draft dodgers and deserters as indicated in the article below (CX51204) "Yugoslavia pardons draft dodgers, deserters". By Beti Bilandzic Reuters Business Briefing sourced from Reuters News Service 26 FEB 2001.

The Tribunal reproduced this article in its reasons.
10 Referring to DFAT country information No 85/99 of 17 March 1999, concerning calls for military exercises, the Tribunal stated:

> The Tribunal notes the discrepancies in the version of his claims in relation to military service prior to the hearing and at the hearing but will not consider these discrepancies as determinative in its findings on these claims.
>
> Even if the applicant were to face some punishment, penalty or sanctions (even though this has been ruled out by the amnesty) such sanctions would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground. The Tribunal finds that any punishment the applicant may face for refusal to perform military service is not for a Convention reason.

…

24 At the hearing, counsel for the respondent…, affirm(ed) that the Tribunal was alive to the religious basis of the applicant's claimed conscientious objection, although counsel was unable to explain why the Tribunal confined its finding to the political aspect of the applicant's opposition. According to the respondent's counsel, the Tribunal's approach to the religious aspect of the applicant's conscientious objection claim was consistent with the decision of Gray J in Erduran v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 150 ("Erduran"), which stated the appropriate approach in this context.
…

CONSIDERATION

Both parties accepted that the decision of Gray J in Erduran set out the correct approach to a claim for refugee status based on a claim of conscientious objection to military service. For present purposes and in the absence of argument to the contrary, I accept his Honour's analysis in that case.
32 In Erduran at 153-4, Gray J held that the Tribunal erred in failing to consider whether the applicant had a conscientious objection to military service, which was based on his religious or political convictions. His Honour observed that, whilst there was "a line of authority establishing that the liability of a person to punishment for failing to fulfil obligations for military service does not give rise to persecution for a Convention reason", there was "also a line of authority to the effect that a refusal to undergo military service on the ground of conscientious objection to such service may give rise to a well-founded fear of persecution for a Convention reason". Turning to the consideration by the High Court of the case of Mr Israelian, which is reported as Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, Gray J said at 156:

> Nothing in those passages suggested that the High Court was intending to overrule the second line of authority to which I have referred ... . The specific finding of the Tribunal in relation to Mr Israelian, that he was not opposed to all war and that his opposition to a particular war did not have an ethical, moral or political basis, made any discussion of that line of authority irrelevant. ...
>
> It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See Wang v Minister for Immigration & Multicultural Affairs (2000) 105 FCR 548 at 563 [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason. [Emphasis added]

33 In Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374, the Full Court reversed Gray J's decision in Erduran only because, when the Court had regard to the transcript of the hearing before the Tribunal (which was not before Gray J) it was clear that the Tribunal had in fact dealt with the case that had been made to it (see [12]). In Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1033 at [21] - [22], Gray J said of his own decision and the decision of the Full Court:

> In Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814 (2002) 122 FCR 150 at [18] - [28], I attempted a survey of the authorities relating to the relevance of conscientious objection to the Convention. At [28], I concluded that conscientious objection might be relevant if it arises from a political opinion or from a religious conviction, and also that it might itself be regarded as a form of political opinion. I also expressed the view that conscientious objectors, or some particular class of them, might constitute a particular social group for the purposes of the Convention.
>
> I do not regard anything said by the Full Court in Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374 at [6] - [7] as contradictory of the views I expressed in Erduran.

34 His Honour continued at [23] –[27]:

In the present case, therefore, the Tribunal was in error in suggesting that Australian Courts have diverged from the view that conscientious objection might be the basis for a refugee claim, without anything further. Conscientious objection might demonstrate that a person is a member of a particular social group. As I suggested in Erduran at [28], the very process of being forced to perform military service might itself amount to persecution for a Convention reason.

This is not to say that the error on the part of the Tribunal necessarily affected the result in the present case. ...

It does not appear that the applicant placed before the Tribunal any evidence to suggest that his conscientious objection extended beyond the fighting of fellow Kurds. There is no suggestion that he was a conscientious objector to all wars, or to wars of a particular kind or particular kinds. His objection was to being forced to do harm to those of his own race. The Tribunal found as fact that, in accordance with the policies of the Turkish military, the applicant would not be sent to the south-east and would not be compelled to fight against Kurds. Given this finding, it is apparent that the Tribunal was justified in reaching the conclusion that the applicant would not be persecuted for a Convention reason by being required to perform national service. The error that the Tribunal made in its approach to the relevance of conscientious objection was not such as to affect the result of the applicant's case...

I am also of the view that the Tribunal made an error in treating the Turkish laws relating to national service as laws of general application. The error is not so much in the characterisation of such a law, as in the assumption that the Tribunal appears to have made as to the consequences of the characterisation. The Tribunal seems to have assumed that, because a law of general application applied to all Turkish citizens, regardless of their ethnic origins, it could not result in persecution of any such citizen for a Convention-related reason. It was made clear in Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599 (2000) 105 FCR 548 at [63] and [65] per Merkel J, that the equal application of the law to all persons may impact differently on some of those persons. The result of the different impact might be such as to amount to persecution for a Convention reason. An obvious example is a law forbidding the practice of a particular religion which, while it forbids the practice of that religion equally by all persons, only impacts on those who wish to practice that religion. In a similar way, a law relating to compulsory military service has no Convention-related impact on those who have no conscientious objection to such service, but may have a very significant impact in relation to those who do. Simply to regard the case as closed because there is in place a law of general application is to misapply the Convention.

Again, however, the Tribunal's error in the present case does not entitle the applicant to the relief he seeks. This is because the Tribunal's finding of fact that the applicant will not be sent to the south-east to fight against Kurds removes the case from the ambit of the Convention as a matter of fact. The result might have been different if the applicant had disclosed a conscientious belief based on something other than an unwillingness to fight against those of his own race.

35 As noted above, whilst the Tribunal in the present case referred to the applicant's claim that he was "religiously opposed to war", it made no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. The Tribunal apparently proceeded on the mistaken basis that a law of

general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. There may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason. As Branson J said in Okere at 118, in a passage quoted with approval in Wang at 564 per Merkel J:

> History supports the view that religious persecution often takes "indirect" forms. To take only one well known example, few would question that Sir Thomas Moore was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.

As we have seen, Gray J made the same point, in Applicant VEAZ of 2002, in the passage quoted above. Because the Tribunal misstated the law, it also failed properly to address the applicant's claim that he had avoided military service for religious reasons.

36 I do not consider, however, that the Tribunal's error in this regard entitles the applicant to relief. This was not a case in which a conscientious objector was a claimant for refugee status because he or she feared military conscription into active combat if returned to a country of origin. The applicant's claim that, on account of his religious beliefs, he had a conscientious objection to military service was relevant only because he claimed to fear punishment as a deserter if he returned to Yugoslavia. The Tribunal found, as a fact, that the situation in that country had "changed considerably" since the applicant first sought a protection visa. The Tribunal found that there had been a "bloodless coup" against the Milosevic regime and that an amnesty had been declared for "draft dodgers and deserters". Given this finding, the Tribunal was justified in concluding that the applicant would not be persecuted in Yugoslavia for any Convention reason that included his religious or political objections to military service. I accept that, as the respondent submitted, the applicant is not entitled to relief in a case where the decision must have been made regardless of an identified error in the decision-maker's reasons for decision.

37 I am also of the view that there was error in the Tribunal's statement that, even if the applicant were "to face some punishment, penalty or sanctions", this would "not [be] attributable to his political opinion, membership of a particular social group or any other Convention ground". This statement followed from the Tribunal's misunderstanding of the law, as discussed above, and of the question that it was, in consequence, to address in a conscientious objector case such as the present. Again, however, because of the Tribunal's finding that an amnesty had been declared, any error on the Tribunal's part does not entitle the applicant to the relief he seeks.

In ***VCAD v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 1** (Gray Sundberg North JJ.) dismissed the appeal from *VCAD v MIMIA* [2004] FCA 1005 (Kenny J.) . Per joint reasons - primary judge noted that the parties had accepted that the decision of Gray J in ***Erduran v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2002] FCA 814 (2002) 122 FCR 150** sets out the correct approach to a claim for refugee status based on a claim of conscientious objection to military service - *" It is first necessary to make*

a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction" - primary judge also referred to Gray J's later decision in *Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1033, in which his Honour said he did not regard anything said by the Full Court in ***Minister for Immigration and Multicultural and Indigenous Affairs v VFAI of 2002*** **[2002] FCAFC 374** to be inconsistent with what he had said at first instance. The error in the Tribunal's reasons in present case held by primary judge to be making no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. Her honour refused relief. She held that the applicant's claim that, on account of his religious beliefs, he had a conscientious objection to military service was relevant only because he claimed to fear punishment as a deserter if he returned to Yugoslavia not because he feared military conscription into active combat if returned to a country of origin. However the RRT found, as a fact, that the situation in that country had 'changed considerably - e.g an amnesty declared - It was held on appeal (the joint reasons and Gray J.) ; Although the Tribunal did not expressly find that the amnesty would be effective in practice, a fair reading of its reasons indicates that that was its view; this finding was open to it - the error in its reasons did not affect the result. Per Gray J. – it was correct to hold that the Tribunal had taken an erroneous approach to the relationship between persecution and compulsory military service.

Gray J. said:

1 The question in this appeal is whether a decision of the Refugee Review Tribunal ('the Tribunal'), refusing to grant the appellant a protection visa, was the result of jurisdictional error on the part of the Tribunal. The question arises from the manner in which the Tribunal dealt with the appellant's claim that he would be liable to suffer persecution in his country of origin by reason of his evasion of compulsory military service.

…

The appellant claimed to be entitled to protection on the basis of his conscientious objection to military service and on the basis of his active membership of a political party in opposition to President Milosevic. He said that he had refused to fight in or support the war in Bosnia because he was a Christian and was firmly opposed to killing another human being. He said that he was 'morally and religiously' opposed to war. He was served with a number of notices to appear for army training during the civil war in Bosnia and was in hiding to avoid military service. He was eventually arrested in the street and taken to the

army barracks. His father was able to obtain the necessary supporting signatures to nominate him as a candidate for the Senate, which had the effect of freeing him from military duties.

7 The appellant claimed that, because of his support of an opposition political party, he was 'on a number of occasions severely beaten up by police' for attending street meetings in Belgrade in March 1993 and March 1996.

8 In October 1998, there were renewed military call-ups. Someone came to serve the appellant with a call-up notice, but he was not at home. He decided to leave Yugoslavia. On 26 March 1999, a summons to report for military duties, directed to the appellant, was served on his parents.

The Tribunal's reasons

9 With respect to the appellant's claim to fear persecution because of his refusal to perform military service, the Tribunal said:

> *'It is not enough that an Applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious objector or a partial conscientious objector; there may be cases where conscientious objection to military service may be the basis of a well-founded fear of persecution for a Convention reason, for example the refusal to perform military service may derive from one's religious beliefs or may be by virtue of one's political opinion. It is not enough to found a claim for refugee status based on punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons...*
>
> *The applicant did imply a Convention reason for not wanting to fight in a war. It is implied in the reading of his claims that he did not agree with the Milosevic regime and its policies...*
>
> *Conscription or compulsory military service, does not of itself constitute persecution. As stated in* Mijoljevic v MIMA *[1999] FCA 834, the Federal Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service and punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Convention (Branson J at 23).'*

10 The Tribunal then referred to pars 167 – 169 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and to certain information it had about the law in Yugoslavia relating to draft evasion. The Tribunal continued:

> *'It is a law of general application and in the present case there is no evidence before the Tribunal that the Applicant would suffer disproportionate punishment on account of his race, nationality, religion, membership of a particular social group or actual or imputed political opinion. Nor is there evidence to suggest that punishment under the code is applied in a discriminatory manner and for Convention reasons.'*

11 The Tribunal then found that the situation in Yugoslavia had changed considerably after the appellant's initial claims were made. The Milosevic regime had been overthrown by a bloodless coup and a number of reforms had been put into place. An amnesty was declared for draft dodgers and deserters. The Tribunal referred to an article from Reuters News Service, dated 26 February 2001, concerning the passage through Yugoslavia's 'reformist-dominated parliament' of an amnesty law, covering 28 000 draft dodgers and deserters from the army during a series of Balkan wars in the 1990s, mainly during NATO's 1999

bombing of Yugoslavia. The Tribunal also referred to information supplied by the Australian Department of Foreign Affairs and Trade on the nature of compulsory military training in Yugoslavia. It concluded:

> *'Even if the applicant were to face some punishment, penalty or sanctions,(even though this has been ruled out by the amnesty) such sanctions would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground. The Tribunal finds that any punishment the applicant may face for refusal to perform military service is not for a Convention reason.'*

12 The Tribunal went on to reject the appellant's claim, to the extent that it was based on his political involvement, for a number of reasons that are not relevant to this appeal.

The primary judgment

13 At first instance, it was common ground that the correct approach to a claim for refugee status based on a claim of conscientious objection to military service was set out in *Erduran v Minister for Immigration & Multicultural Affairs* [2002] FCA 814 (2002) 122 FCR 150 at [18] – [28] and, particularly at [28]:

> *'It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See* Wang v Minister for Immigration & Multicultural Affairs *[2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.'*

14 Kenny J referred to Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374 and to Applicant VEAZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1033 at [21] – [27].

15 In the primary judgment at [35], Kenny J said:

> *'As noted above, whilst the Tribunal in the present case referred to the applicant's claim that he was "religiously opposed to war", it made no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. The Tribunal apparently proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-*

founded fear of persecution for a Convention reason. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. There may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason. As Branson J said in Okere *at 118, in a passage quoted with approval in* Wang *at 564 per Merkel J:*

> History supports the view that religious persecution often takes "indirect" forms. To take only one well known example, few would question that Sir Thomas Moore was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.

As we have seen, Gray J made the same point, in Applicant VEAZ of 2002*, in the passage quoted above. Because the Tribunal misstated the law, it also failed properly to address the applicant's claim that he had avoided military service for religious reasons.'*

16 At [36], her Honour said that she did not consider that the Tribunal's error in this regard entitled the appellant to relief. The appellant's claim was that he feared punishment as a deserter if he returned to Yugoslavia. The Tribunal found that an amnesty had been declared for 'draft dodgers and deserters'. Her Honour said:

> *'Given this finding, the Tribunal was justified in concluding that the applicant would not be persecuted in Yugoslavia for any Convention reason that included his religious or political objections to military service. I accept that, as the respondent submitted, the applicant is not entitled to relief in a case where the decision must have been made regardless of an identified error in the decision-maker's reasons for decision.'*

17 At [37], her Honour expressed the view that there was error in the Tribunal's statement that, even if the appellant were to face some punishment, penalty or sanctions, this would not be attributable to any Convention ground. The statement followed from the Tribunal's misunderstanding of the law and of the question that it was bound to address in a case involving a conscientious objector. Again, her Honour expressed the view that, because of the Tribunal's finding that an amnesty had been declared, the Tribunal's error did not entitle the appellant to the relief he sought.

…

The completeness of the Tribunal's finding on the amnesty

19 It is clear that the Tribunal's conclusion that the appellant did not have a well-founded fear of persecution for any Convention reason, should he return to Yugoslavia, was based on the Tribunal's findings that the situation in Yugoslavia had changed considerably since the occurrence of the events dealt with in the appellant's claims. One of these changes was the declaration of the amnesty for draft evaders and deserters. The Tribunal specifically found that the possibility of the appellant facing some punishment, penalty or sanctions had been ruled out by the amnesty. Although the Tribunal did not expressly find that the amnesty would be effective, such a finding is implicit in its reasons. The only basis on which the Tribunal could have found that the possibility of the appellant facing punishment, penalty or sanctions had been ruled out by the amnesty was that the Tribunal took the view that the amnesty would be effective to rule out this possibility. Otherwise, its reasons would make no sense.

20 It was clearly open to the Tribunal to reach the conclusion on the material before it, that the declaration of the amnesty excluded the possibility that the appellant would be

persecuted as a draft dodger or deserter, if he should return to Yugoslavia.

The correct question for the primary judge

21 When Kenny J said that, given the Tribunal's finding that an amnesty had been declared, it was justified in concluding that the appellant would not be persecuted in Yugoslavia for any Convention reason, her Honour was not applying an incorrect test. It is clear that her Honour was simply making the point that the Tribunal's conclusion was open to it. The critical question for the Court was not whether the decision might have been different if the Tribunal had expressed a further finding of fact, but whether the Tribunal's conclusion was open to it on the material before it. Her Honour clearly took this approach.

22 It is true, as counsel for the appellant submitted, that the Tribunal's expressed reasons can be taken to expose its reasoning. They may reveal errors of omission or commission. See *Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30 (2001) 206 CLR 323 at [69] per McHugh, Gummow and Hayne JJ. This does not lead to the conclusion that, whenever the Tribunal's reasons disclose that it has made an error, its decision must be set aside. In order to be a jurisdictional error of one of the kinds described by McHugh, Gummow and Hayne JJ in *Yusuf* at [82], the error must be of a kind that 'affects the exercise of power'. The powers of the Tribunal are found in s 415 of the Migration Act. They include powers to affirm or vary a decision, and the power to set aside a decision and substitute a new decision. When the Tribunal's decision as to how it will exercise its powers is based on a conclusion unrelated to the error, the exercise of power is not affected. Kenny J was correct in holding that the Tribunal's decision in the present case was based on its finding as to the amnesty, so that the error in the Tribunal's approach to the law requiring compulsory military service in the appellant's country of origin did not affect the exercise of the Tribunal's power.

…

The possibility of an ineffective amnesty

24 The contention that the Tribunal's consideration of the possibility of the appellant suffering punishment, penalty or sanctions involved a consideration by the Tribunal of such a possibility as a matter of fact flies in the face of the Tribunal's expressed reasons. It is inconsistent with the Tribunal's finding that this possibility had been ruled out by the amnesty. The attempt by counsel for the appellant to contend that the Tribunal's incorrect approach to the question of compulsory military service in Yugoslavia affected the result of its consideration of the appellant's case on this basis must also fail.

Conclusion

25 Kenny J was correct to hold that the Tribunal had taken an erroneous approach to the relationship between persecution and compulsory military service. Her Honour was also correct in holding that this error of the Tribunal did not affect the result in the appellant's case.

…

Sundberg and North JJ. said:

29 As to the first ground, the Tribunal said that conscription or compulsory military service does not itself constitute persecution, and went on:

> *"It is not enough that an Applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious objector or a partial conscientious objector; there may be cases where conscientious objection to military service may be the basis of a well-founded fear of persecution for a Convention reason, for example the refusal to perform military service may derive from one's religious beliefs or may be by virtue of one's political opinion. It is not enough to found a*

claim for refugee status based on punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons ...."

After noting that the Yugoslav law about draft evasion was of general application, the Tribunal observed that there was no evidence that the appellant would suffer disproportionate punishment on any Convention ground, and no evidence to suggest that punishment under the law is imposed in a discriminatory manner or for Convention reasons.

30 The Tribunal then referred to country information that the situation in Yugoslavia had changed considerably since the appellant had made his initial claims. It found that one of the reforms introduced was an amnesty for draft dodgers and deserters.

31 The Tribunal concluded as follows on the appellant's first claim:

"Even if the applicant were to face some punishment, penalty or sanctions (even though this has been ruled out by the amnesty) such sanctions would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground. The Tribunal finds that any punishment the applicant may face for refusal to perform military service is not for a Convention reason."

32 The Tribunal then rejected the appellant's claim of persecution on the ground of his membership of the Serbian Renewal Movement. This part of the Tribunal's decision was not challenged before the primary judge, and we need not deal further with it.

PRIMARY JUDGE

33 The primary judge noted that the parties had accepted that the decision of Gray J in *Erduran v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 122 FCR 150 sets out the correct approach to a claim for refugee status based on a claim of conscientious objection to military service. Her Honour set out passages from *Erduran*, including the following:

"It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. ***It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction.*** *It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. ... Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason."*

The emphasis is that of the primary judge.

34 Her Honour noted that *Erduran* had been reversed by the Full Court (*Minister for Immigration and Multicultural and Indigenous Affairs v VFAI of 2002* [2002] FCAFC 374), but only on the ground that the transcript of the hearing before the Tribunal (which was not before Gray J) showed that the Tribunal had in fact dealt with the case that had been put to it. The primary judge also referred to Gray J's later decision in *Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1033, in which his Honour said he did not regard anything said by the Full Court in *VFAI* to be inconsistent with what he had said at first instance.

35 The primary judge concluded that the Tribunal had erred in law in its treatment of the appellant's military service claim. Her Honour said:

> *"whilst the Tribunal in the present case referred to the applicant's claim that he was 'religiously opposed to war', it made no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. The Tribunal apparently proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. There may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason ....*
>
> *Because the Tribunal misstated the law, it also failed properly to address the applicant's claim that he had avoided military service for religious reasons."*

36 Notwithstanding the Tribunal's error, the primary judge refused relief. Her reasons were expressed as follows:

> *"This was not a case in which a conscientious objector was a claimant for refugee status because he or she feared military conscription into active combat if returned to a country of origin. The applicant's claim that, on account of his religious beliefs, he had a conscientious objection to military service was relevant only because he claimed to fear punishment as a deserter if he returned to Yugoslavia. The Tribunal found, as a fact, that the situation in that country had 'changed considerably' since the applicant first sought a protection visa. The Tribunal found that there had been a 'bloodless coup' against the Milosevic regime and that an amnesty had been declared for 'draft dodgers and deserters'. Given this finding, the Tribunal was justified in concluding that the applicant would not be persecuted in Yugoslavia for any Convention reason that included his religious or political objections to military service. I accept that, as the respondent submitted, the applicant is not entitled to relief in a case where the decision must have been made regardless of an identified error in the decision-maker's reasons for decision."*

37 Her Honour went on to identify a related error on the Tribunal's part when it said (see [5]) that even if the appellant were to face some punishment, this would not be attributable to any Convention ground. However, again because of the amnesty finding, that error did not entitle the appellant to relief.

…

39 Although the Tribunal did not expressly find that the amnesty would be effective in practice, a fair reading of its reasons indicates that that was its view. In reference to the country information about post-Milosevic Yugoslavia, it first said that "the situation in Yugoslavia ... has changed considerably", and that a number of reforms have "already been put into place in the FRY". The language of a changed situation in Yugoslavia, and reforms

put into place, is the language of effective change.
40 Further, the Tribunal's finding that "an amnesty was declared for draft dodgers and deserters" coupled with the later statement that punishment "has been ruled out by the amnesty", assumes the effectiveness of the amnesty.
41 In addition, given its findings about the amnesty, the Tribunal's conclusion that the appellant would not be punished as a deserter if he returned to Yugoslavia carries with it the assumption that the amnesty would be effective in practice. That was the primary judge's reading of the Tribunal's decision. Her Honour said that given the Tribunal's finding that an amnesty had been declared for "draft dodgers and deserters", it was justified in concluding that "the applicant would not be persecuted in Yugoslavia for any Convention reason that included his religious or political objection to military service". We agree.
42 It is to be noted that the appellant did not put material before the Tribunal to the effect that the amnesty was not being honoured. Nor, so far as appears, was it put to the primary judge that the amnesty was not in fact in operation.
43 For the foregoing reasons the submission that the Tribunal made no finding that the amnesty would be effective protection in practice must be rejected.
...

The Full Court in SZAOG v MIMIA [2004] FCAFC 316 by a majority (Beaumont J. agreeing with the judgment of Emmett J.; North J. dissenting) held that no claim had been made by the appellant of a conscientiously held objection to fighting in a war (in this case in Chechnya) and of a risk of punishment to such a degree that it could be seen as persecution on the grounds of political opinion. There was thus no finding that he had such an objection to fighting in the war that constituted a political opinion. The failure to make a finding to that effect did not amount to jurisdictional error. North J. (dissenting) considered that the Tribunal had treated the appellant as having made a claim based in part on his conscientious objection, and further, because the evidence relied on by the appellant substantiated this treatment by the Tribunal, he was unable to agree with the conclusion reached by Beaumont and Emmett JJ that there was no finding that a claim in relation to conscientious objection to service in the army was made by him. His honour held that the Tribunal was bound to address the question of whether further compulsory service in the army amounted to persecution of the appellant and had failed to address the appellant's conscientious objection claim on the basis that he objected to service in the Chechen conflict because the army in which he was required to serve had been involved in breaches of humanitarian law and human rights abuses.

North J. also noted the argument put by the appellant that a law of general application requiring military service may give rise to persecution even if it is not enforced in a discriminatory way, where it has a differential impact on conscientious objectors.

The majority, while dismissing the appeal for the reasons given, per Emmett J. said relevantly that while it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason.

Emmett J. said (Beaumont J. agreeing):

23 The original application for protection visas was accompanied by an undated declaration by the appellant…. It is significant that there was no reference to a claim based on conscientious objection to service in the army.
24 In his original declaration the appellant also said:

> 'Once I happened to be a witness as Russians wiped out a Chechen village killing all civilians. The officer who ordered to fire explained later that they (Chechens) started firing first... But I personally was at the helicopter and saw what was going on. No one was firing at us.'

25 In a written declaration in support of his application for review by the Tribunal, the appellant further stated:

> 'My numerous public protests against the policy and methods of the war between Russia and Chechnya, against meaningless and brutality of the slaughter of peaceful citizens by Russian troops, were considered by my commanders as a "political sabotage", and I was persecuted for that, and my life was put under fatal danger.
>
> In my complaints to the State Procurator and to the President I described the criminal activities of superiors, but the main point was the injustice of that war, and that, according to my deep belief, the Russian authorities had used that war for their political goals.'

26 On 31 October 2002, New Galaxy Consulting, migration agents, made a written submission to the Tribunal in support of the appellant's application for review ('the Submission'). In the Submission, the migration agents asserted that the appellant fears persecution 'on the basis of his actual and imputed political opinion'…

27… it is significant that no claim was made in relation to conscientious objection to service in the army.

….

29 The Tribunal's reasons for its second decision referred to the contention by the appellant that his numerous public protests against the policy and methods of the war between Russia and Chechnya and against the brutality of the slaughter of peaceful citizens by Russian troops were considered by his commanders in the army as political sabotage…

30 The Tribunal was not satisfied that the appellant was a witness of truth. It considered his claims were implausible and were not supported by the independent evidence…..

31…. The Tribunal was therefore not satisfied that the appellant's claims about criticising the commander or expressing his political views about the war, or obtaining any information about violations of human rights by the military, were plausible.

….

35….the Tribunal rejected all of the appellant's claims as formulated in his original application for a protection visa and in the Submission. No complaint has been made in relation to the Tribunal's rejection of those claims. Rather, the appellant asserts that the Tribunal failed to deal adequately with claims that he would be at risk of persecution because of his conscientious objection to military service.

…

Counsel for the appellant formulated the question before the Court as:

> '...whether a finding that a law punishing those who refuse to fight when conscripted is a law of general application, applied without regard to the reasons for the objection, is enough to determine that an applicant falls outside the terms of the Refugee Convention.'

40 It is by no means clear in what circumstances, if at all, the appellant made any claim that he feared persecution by reason of being required to fight as a conscript in the Russian army against Chechnya. He made no such claim in his original application for a protection visa. Nor did his migration agents make any such claim on his behalf in the Submission. He may have made such a claim during the course of a hearing before the Tribunal but there was no evidence before the Federal Magistrate of the hearing before the Tribunal other than as appears from the Tribunal's reasons. It is therefore difficult to see why the Tribunal would be addressing the question of conscientious objection to service as a possible basis for entitlement to a protection visa, if indeed that is what the Tribunal was doing in the passage cited.

41 In Chen Shi Hai v Minister for Immigration & Multicultural Affairs 201 CLR 293 (at [25] – [26]) the High Court held that not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention. The question whether conduct is undertaken for a Convention reason cannot be entirely isolated from the question whether the conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis, depending upon the particular reasons assigned for that conduct. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.

42 In Chen Shi Hai the High Court held that the position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups that warrant different treatment to protect society. So, too, it

may be necessary for the protection of society to treat persons who hold certain political views differently from other members of society. The question whether the different treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is appropriate and adapted to achieving some legitimate object of the country concerned: see Chen Shi Hai (at [27] –[28]).

43 The appellant, through his counsel, placed considerable store on observations made by Gray J in Erduran v Minister for Immigration & Multicultural Affairs ([2002] FCA 814, at [28]) to the effect that, where an issue of refusal to undergo compulsory military service arises, it may be necessary to look further than the question of whether the law relating to that military service is a law of general application. It is necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If a person will be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or a religious view, or if that of itself is political opinion, it may not be difficult to find that the person is liable to be persecuted for a Convention reason.

44 Counsel for the appellant contended, in effect, that a genuinely held conscientious objection to fighting in a war may constitute a political opinion. If one refuses to fight by reason of that objection and one is thereby at risk of punishment to a degree that could constitute persecution, the real or effective reason for the punishment could be seen to be persecution for a political opinion, notwithstanding that the punishment is by way of law of general application, applied without discrimination.

45 However, there was no finding that such a claim had been made by the appellant. A fortiori, there was no finding by the Tribunal that the appellant had a conscientious objection to fighting in the war against Chechnya that constituted a political opinion. The most that can be said is that the Tribunal accepted that the appellant held the belief that he objected to the Chechen conflict and the Russian military methods of dealing with that conflict. On the other hand, there was no finding as to what it was about the Chechen conflict that the appellant objected to. Nor was there any finding about the appellant's understanding as to the Russian military methods of dealing with that conflict. Indeed, the Tribunal's only conclusion about the appellant's evidence was that he was not a witness of truth and that his claims were implausible, as they were unsupported by independent evidence.

46 The Tribunal made no finding that any reluctance on the part of the appellant to serve in the Russian army was the result of any political opinion. While it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason. There was no claim to that effect made by the appellant. Accordingly, the failure by the Tribunal to make a finding to that effect could not amount to jurisdictional error.

….

North J. said:

3 The question to be resolved by this Court is whether the Tribunal made a jurisdictional error in its treatment of the appellant's conscientious objection. It is therefore necessary,

first, to examine whether the appellant raised a claim based on his conscientious objection which the Tribunal was required to determine.

4 On this issue, it is significant that the Tribunal treated the appellant's application as based, in part, on a claim of conscientious objection. The Tribunal said:

> 'The applicant claims he is still subject to call up and the war continues. Recognition of the right of a government to conscript its citizens is provided in the International Covenant on Civil and Political Rights. It is not enough that an applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious objector or a partial conscientious objector. It is not enough to found a claim for refugee status based on punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons. See: RAM v MIEA & Anor (1995) 57 FCR 565 at 568, Amanyar Anor v MIEA (1995) 63 FCR 194 and Jahazi v MIEA (1996) 133 ALR 437. The applicant claims that he objects to the Chechen conflict and the Russian military methods of dealing with this conflict. Whilst I accept the applicant has these beliefs, I have found no independent evidence to suggest that persons who object to the conflict are treated any differently or any punishment imposed upon citizens for disobeying the draft is enforced in a discriminatory manner. I find that any reservist call up is the enforcement of a law of general application.'

5 The Tribunal's reference to the appellant's objection to the Chechen conflict is supported by evidence given by the appellant in a declaration accompanying his original visa application. The appellant said:

> 'Once I happened to be a witness as Russians wiped out a Chechen village killing all civilians. The officer who ordered to fire explained later that they (Chechens) started firing first... But I personally was at the helicopter and saw what was going on. No one was firing at us.'

And, in a written declaration in support of his application for review by the Tribunal, the appellant further stated:

> 'My numerous public protests against the policy and methods of the war between Russia and Chechnya, against meaningless and brutality of the slaughter of peaceful citizens by Russian troops, were considered by my commanders as a "political sabotage", and I was persecuted for that, and my life was put under fatal danger.
>
> In my complaints to the State Procurator and to the President I described the criminal activities of superiors, but the main point was the injustice of that war, and that, according to my deep belief, the Russian authorities had used that war for their political goals.'

6 Because the Tribunal treated the appellant as having made a claim based in part on his conscientious objection, and further, because the evidence relied on by the appellant substantiated this treatment by the Tribunal, I cannot agree with the conclusion reached by Beaumont and Emmett JJ that there was no finding that a claim in relation to conscientious objection to service in the army was made by the appellant.

7 In all the circumstances, it is not decisive that the appellant's migration agent failed, in written submissions filed with the Tribunal, to articulate expressly that conscientious objection was one basis for the application. The evidence of the appellant obliged the Tribunal to consider this basis even if, contrary to my view, it had not been expressly articulated by the appellant: Bouianov v Minister for Immigration and Multicultural Affairs

[1998] FCA 1348 at 2; Saliba v Minister for Immigration and Multicultural Affairs (1998) 159 ALR 247 at 258.

8 Having determined that the appellant based his claim before the Tribunal on his conscientious objection, I turn to the question of whether the Tribunal made a jurisdictional error when it rejected the appellant's claim on the basis that military service in Russia results from a law of general application, and there was no evidence that the law was applied in a discriminatory way against the appellant.

9 The Tribunal's reasoning fails to deal fully with the legal issues raised by this aspect of the appellant's case. Perhaps surprisingly, the question of whether a person suffers persecution for the purposes of the 1951 United Nations Convention Relating to the Status of Refugees where, under a law of general application, they are obliged to render military service in a conflict in which they will or might be forced to engage in human rights abuses or breaches of humanitarian law has not been the subject of direct judicial authority in Australia. It is, however, recognised in the Handbook on Procedures and Criteria for Determining Refugee Status (1979) published by the Office of the United Nations High Commissioner for Refugees (the Handbook), by leading academic scholarship, and by United States, Canadian and United Kingdom case law.

10 The Handbook, at paragraph 171, states:

> 'Where... the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.'

In the United States, the Handbook has been held to provide significant guidance in construing the Convention: Immigration and Naturalization Service v Cardoza-Fonseca 480 US 421 (1987) at 439 footnote 22. In Australia, a similar view was expressed by Kirby J in Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor (1997) 190 CLR 225 at 302. Other Australian authorities emphasise that the Handbook provides a practical guide for the determination of refugee status: Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 392 per Mason CJ; Minister for Immigration & Multicultural Affairs v Yusuf (2001) 180 ALR 1 at 171 per Kirby J; WADA v Minister for Immigration & Multicultural Affairs [2002] FCAFC 202 at [42] per Gray, Nicholson and Emmett JJ; WACW v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 155 at [17] per Gray, Nicholson and Emmett JJ.

11 The leading academic text J C Hathaway, The Law of Refugee Status, Butterworths, Toronto, 1991, p 185 states:

> '... the specific form of military service objected to may be fundamentally illegitimate, as when it contemplates violation of basic precepts of human rights law, humanitarian law, or general principles of public international law. Where the service is itself politically illegitimate, refusal to enlist or remain in service cannot be construed as a bar to refugee protection.'

See also GS Goodwin-Gill, The Refugee in International Law, Clarendon, Oxford 1996, p 59 and, for an interesting case note which examines the issue of the grant of asylum in cases of selective conscientious objection, see K Kuzas, 'Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?' Virginia Journal of International Law vol 31, 1990-1991 p 447.

12 The Canadian courts have applied this approach. In Zolfagharkhani v Canada [1993] 3 FC 540, the Court of Appeal upheld the claim of an Iranian to object to military service on

the ground that it would involve him in the conflict with Iranian Kurds in which chemical warfare was being used. MacGuigan J said at 555:

> 'The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.'

Zolfagharkhani was followed in Ciric v Canada [1994] 2 FC 65 which upheld the claim of a Serbian who refused to fight in the Yugoslav civil conflict because the conflict involved violation of human rights and atrocities abhorrent to the world community.

13 The same approach has been applied in a series of cases at the appellate level in the United States: Barraza Rivera v Immigration & Naturalization Service 913 F2d 1443 (9th Cir 1990) especially [10]; Ramos-Vaszuez v Immigration & Naturalization Service 57 F3d 857 (9th Cir 1995) especially [13], [14] and [18]; Martirosyan v Immigration & Naturalization Service 229 F3d 903 (9th Cir 2000) especially [8]-[10].

14 The House of Lords endorsed this approach last year when Lord Bingham said in Sepet & Anor v Secretary of State for the Home Department [2003] UKHL 15 at [8]:

> 'There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment.'

15 As noted above, the appellant in this case objects to returning to military service because of the methods used by the Russian army against civilians in the Chechen conflict, particularly the targeting of civilians as part of the strategy of the federal forces.

16 Evidence of violations of human rights and humanitarian law in the Chechen conflict was before the Tribunal. For instance, the US Department of State Country Report on Human Rights Practices, Russia, 2001 included the following information:

> 'In August 1999, the Government began a second war against Chechen rebels. The indiscriminate use of force by government troops in the Chechen conflict resulted in widespread civilian casualties and the displacement of hundreds of thousands of persons, the majority of whom sought refuge in the neighbouring republic of Ingushetiya. Attempts by government forces to regain control over Chechnya were accompanied by the indiscriminate use of air power and artillery. There were numerous reports of attacks by government forces on civilian targets, including the bombing of schools and residential areas.
>
> ...
>
> Reportedly armed forces and police units routinely abused and tortured persons held at so-called filtration camps, where federal authorities claimed that fighters or those suspected of aiding the rebels were sorted out from civilians. Federal forces reportedly ransomed Chechen detainees (and at times, their corpses) to their families. Prices were said to range from several hundred to thousands of dollars.
> ...
> There were some reports that federal troops purposefully targeted some

infrastructure essential to the survival of the civilian population, such as water facilities or hospitals.'

17 Targeting a civilian population in civil conflict is a breach of humanitarian standards. For instance, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], opened for signature Dec. 12, 1977, art. 13, 1124 U.N.T.S. 609, 16 I.L.M. 1442 (1977) art 13. (entered into force 8 June 1977) provides that the civilian population shall enjoy general protection against the dangers arising from military operations and shall not be the object of attack.

18 In view of this evidence the Tribunal was bound to address the question of whether further compulsory service in the army amounted to persecution of the appellant. The Tribunal failed to address the appellant's conscientious objection claim on the basis that he objected to service in the Chechen conflict because the army in which he was required to serve had been involved in breaches of humanitarian law and human rights abuses. This was a jurisdictional error. It amounted to a constructive failure to exercise jurisdiction: Dranichnikov v Minister for Immigration & Multicultural Affairs [2003] 197 ALR 389 at 394. For this reason I would allow the appeal and make consequential orders.

19 The appellant also contended that a law of general application requiring military service may give rise to persecution even if it is not enforced in a discriminatory way, where it has a differential impact on conscientious objectors. The notion of indirect discrimination resulting from facially neutral legislation is well known in the area of discrimination law. There is good reason in principle that facially neutral legislation which impacts unequally on certain people for a Convention reason indicates such discrimination as to require the Tribunal to investigate whether persecution exists. The Tribunal did not make such an investigation in this case. However, in view of my conclusion on the alternative argument it is not necessary for me to further address this issue on which the authorities are not entirely clear….

18. ARTICLE 1 F (A)(B) EXCLUSION

The meaning of “serious non-political crime” was considered by the Full Court (Ryan, Branson and Leehane JJ.) in ***Daljit Singh v MIMA*** **(2000) 179 ALR 542, 63 ALD 53; [2000] FCA 1125** at [15-16]

At [21-2] the Court stated:

“21 The Convention concept of a "non-political crime" is a vexed and difficult one. It is clear at least that, although political motivation is essential to deprive a crime of non-political character, it is not always sufficient. Professor Goodwin-Gill (The Refugee in International Law, 2nd ed 1996) summarises the considerations at pp 105, 106 as follows:

> "The nature and purpose of the offence require, examination, including whether it was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards a modification of the political organisation or the very structure of the State, and whether there is a close and direct causal link between the crime committed and its alleged political purpose and object. The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature."

22 That passage is substantially to the same effect as par 152 of the UNHCR Handbook. It does not suggest, we think, that a crime is political only if the motivation of the criminal is pure, in the sense that it is exclusively political. On the other hand, the crime must be directly linked to the political object. Equally, there are some crimes which, whatever their motivation and whatever their link with a political objective, will be regarded as non-political. The suggestion is that a balancing exercise is to be undertaken: a crime may be non-political if it is grossly disproportionate to the alleged political objective or if it is "atrocious".

…

24 We have quoted various formulations…none of which appears to suggest that a crime is political (or not non-political) only if the motive of the criminal is purely political…

…

In our view, the true principle is that stated by Lord Mustill in T at 764:

> The general proposition, which I believe is binding on this House as a matter of English law, is known in the literature as the 'incidence' theory. The essence of this is that there must be a political struggle either in existence or in contemplation between the government and one or more

opposing factions within the state where the offence is committed, and that the commission of the offence is an incident of this struggle."

…

25 All the authorities agree that, in addition to "incidence", there is a further matter to be taken into account in ascertaining whether a particular crime is non-political. It is variously expressed in terms of weighing, proportionality or whether the crime is particularly atrocious. As the speeches in T reveal, all those formulations have their difficulties. But on one point the authorities are unanimous, and we do not think it is necessary for us to go beyond that point for the purposes of this appeal. It is that a crime will be non-political if it is calculated to cause death or injury indiscriminately to innocent persons not themselves involved in the political struggle. ..To seek to achieve political ends by attacking, rather than political or government targets, uninvolved members of the public is to commit a crime which is non-political; of course, it does not follow that to kill or maim low level government officials, having no particular influence or involvement in the political struggle, is to commit a political crime. It is impossible, we think, in the context of a judicial decision in a particular case to offer more precise guidance.

An application of these principles led to the conclusion that:

"26…that the primary Judge was correct in holding that the Tribunal erred in concluding, on the basis on which it put the conclusion, that the murder of the police officer was a non-political crime. It was insufficient, particularly, to reach that conclusion merely on the basis that the murder was a "revenge" killing. If there is a political struggle in which agents of the government, including police, have a policy of torturing and killing those who oppose the government, we see no reason why crimes directed at those agents, or police officers, may not be regarded as political (that is, as satisfying the "incidence" test) even though they may be characterised as crimes of revenge. It is, of course, necessary to look at the circumstances of the particular crime in order to decide (on the basis of what may be very limited information) whether there are serious reasons to believe that it cannot be characterised as political. It is necessary also, of course, to consider whether the crime has characteristics which, notwithstanding "incidence", require it to be regarded as non-political. Those are the steps which, in our view, the Tribunal did not take…

In relation to other acts said to be 'non-political' apart from the murder of a police officer which was the subject of the first finding, the Court found:

"31…the Tribunal did not explain the basis on which it came to the conclusion that the evidence to which it referred indicated that on one or more occasions a serious non-political crime had been committed by the appellant. All that that evidence showed was that there were "targets" which were "hit" and that firearms and explosives were supplied in order that they might be "hit". There is no indication that any consideration was given to the question whether, on the material before the Tribunal, there was anything to show whether the targets included uninvolved civilians or political targets only or, indeed, whether the crimes were (or were not) directed towards the attainment of the political goals of the KLF. Those were, in our view, matters which, in accordance with the authorities, the Tribunal should have considered.."

The High Court upheld the judgment of the Full Federal Court by a majority of 3/2 (***MIMA v Singh*** **(2002) 209 CLR 533 186 ALR 393; 76 ALJR 514; 67 ALD 257 [2002] HCA 7**); Gleeson CJ., Gaudron and Kirby JJ.(McHugh (although accepting the principles regarding motivation accepted by the majority) and Callinan JJ. dissenting).

As to to the concluding words of Article 1 F(b) prior to admission does not mean that the applicant must have been the subject of a decision regarding his or her substantive claim to refugee status before there can be any consideration of the Article 1F(b) exclusion; the words are to be taken to mean putative admission as a refugee See Gleeson CJ. at [4] – [6]; Gaudron J. at [30]-[31] per Mc Hugh J. at [61]; per Kirby J. at [85]-[87]

On the substantive issue of the meaning of 'non-political' crime, Gleeson CJ. said:

6. The error of law attributed to the Tribunal arose out of the reasoning by which it characterised the crimes of which it suspected the respondent as non-political crimes. I say "suspected" because, as the case was argued and decided in the Federal Court, there was no occasion to examine problems that, in other cases, might arise concerning the requirement that there be serious reasons for considering that a person has committed a crime, or that a crime be serious. Once the Tribunal rejected, as it was entitled to do, the respondent's attempts to resile from his earlier accounts of his activities as a senior officer of the KLF, then his own evidence provided serious reasons for considering that he was an accessory to the killing of a police officer, and that he was knowingly concerned in the movement of weapons and explosives which were used to "hit" people who were "targets" of the KLF. The context in which these admissions were made to the delegate was one in which the respondent was concerned to make the point that he was an important person in the KLF. The delegate had put to the respondent that, on the information available to him, low-level members of an organisation such as the KLF had no reason to fear persecution in India. It was by way of response to that suggestion that the respondent explained his involvement in killing a police officer, and in assisting with movements of weapons and explosives.
…

9. The Tribunal made the following findings of fact.

"1. The applicant knowingly and actively participated in the unlawful killing of the police officer referred to earlier in these reasons. The applicant did so by the provision of information and intelligence pertaining to the whereabouts and movements of the police officer knowingly for the purpose of the killing of him by other members of the KLF.
2. The applicant has on other occasions knowingly participated in the commission of similar acts by the provision of information and intelligence concerning the movement and whereabouts of other persons who were 'targets' for KLF purposes.

3. The applicant also knowingly and actively participated in acts of violence perpetrated by members of the KLF in so far as he assisted in the provision of weapons and explosives to those members full well knowing the purpose for which they were to be used and after these acts of violence were carried out, he arranged from time to time transportation for these members and places for them to hide."

…

12…. The Tribunal's conclusions were expressed as follows:

…

41. The obvious reason why the police officer was unlawfully killed, namely to avenge the torture of a KLF member, alleviates the necessity to enquire into the political nature or otherwise of the KLF involving as it would an enquiry as to whether that organisation is in fact a terrorist organisation and whether the applicant is in fact a terrorist. In short, the political nature or otherwise of the KLF (of which the applicant was a member) has no relevant bearing on whether the serious crime was political or not simply because the unlawful killing of the police officer out of retribution cannot, on the facts before the Tribunal, constitute a serious political crime for Article 1F(b) purposes

…

13. The matter of Hapugoda[3] Re Hapugoda and Minister for Immigration and Multicultural Affairs (1997) 46 ALD 659 was a case in which a member of the People's Liberation Front in Sri Lanka had made an armed attack on a police station, resulting in the death of six people. The motive for the attack was retribution for the death of a personal friend of the attacker. There was held to be no connection between the crime and the political objectives of the Front.

14. In due course, it will also be necessary to consider what the Tribunal had to say about the consequences of pars 2 and 3 of the findings quoted above. The main focus of argument in the appeal, however, was the reasoning based upon the finding in relation to the killing of the police officer. Mansfield J, and the Full Court of the Federal Court, found error of law in the Tribunal's reasoning, particularly in par 41, in that it proceeded upon an artificial and unwarranted antithesis between political action and revenge. The appellant in this Court, the Minister, does not seek to support such an antithesis as a matter of legal necessity; rather, he argues that the Tribunal's reasoning merely reflected a view taken of the facts of the particular case; a view that was open and that involved no error of law.

15The history of Art 1F(b), and of the expression "serious non-political crime", was considered by the House of Lords in T v Home Secretary[4] [1996] AC 742. The task of characterising a crime such as unlawful homicide as either political, or non-political, is difficult to relate to Australian concepts of criminal responsibility[5] See Gil v Canada (Minister of Employment and Immigration) (1994) 119 DLR (4th) 497 at 498-499 per Hugessen JA. But it has confronted courts in common law jurisdictions for more than a century; originally in the context of the Extradition Act 1870 (UK), and more recently in the context of the Convention. As one of the exceptions to an international obligation to afford protection on certain grounds, it recognises a state's interest in declining to receive and shelter those who have demonstrated a propensity to commit serious crime. The qualification to the exception is that the crime must be non-political. Part of the problem is that the concept of a political crime is not limited to conduct such as treason, sedition, or espionage, which in some cases might readily be recognised as related entirely to the political circumstances of the locality where it occurred, and as unlikely to carry any possible threat to public safety or order in the country of refuge.

16. That unlawful killing can, at least in some circumstances, be political, has long been accepted in extradition cases… when courts have endeavoured to state the principles

according to which a decision is to be made as to whether a crime which, by hypothesis, has been committed in another country, in circumstances utterly different from those that prevail in the country of refuge, is political, they have taken pains to confine the concept so as to avoid the consequence that all offences committed with a political motivation fall within it. An example is to be found in the definition proposed by Lord Lloyd of Berwick, and agreed in by Lord Keith of Kinkel and Lord Browne-Wilkinson, in T v Home Secretary[6] [1996] AC 742 at 786-787.:

"A crime is a political crime for the purposes of article 1F(b) of the Geneva Convention if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public."

17 Terrorist activities are not political crimes, for the reason given in that passage…

18 While the authorities accept the possibility that murder might, in some circumstances, be a political crime, they recognise one further qualification of direct relevance to the Tribunal's reasoning. Even if a killing occurs in the course of a political struggle, it will not be regarded as an incident of the struggle if the sole or dominant motive is the satisfaction of a personal grudge against the victim[7] R v Governor of Brixton Prison; Ex parte Schtraks [1964] AC 556 at 583. But it is only necessary to state the qualification in order to see the danger of over-simplification. People engaged in any kind of prolonged conflict, including military battle, and ordinary democratic politics, will have scores to settle with their adversaries. It is difficult to imagine serious conflict of any kind without the possibility that parties to the conflict will seek retribution for past wrongs, real or imagined. Revenge is not the antithesis of political struggle; it is one of its most common features.

19… The Tribunal said that the political objectives of the KLF had no bearing because this particular killing of a government agent was done "out of retribution". I agree with the conclusion of all four judges of the Federal Court. The reasoning of the Tribunal was legally erroneous, and cannot be explained upon the basis suggested by the appellant. It was not merely a finding of fact related to the particular circumstances of the case. There was no evidence to warrant a conclusion that the police officer was killed for reasons of personal animus or private retribution. On the respondent's account, which the Tribunal evidently accepted, the police officer became a "target" because he had tortured a KLF member. That can be described as a form of vengeance or retribution, but, if it were accepted that one of the political objectives of the KLF was to resist oppression of Sikhs, it is not vengeance or retribution of a kind that is necessarily inconsistent with political action in the circumstances which the respondent claimed existed in India. For the Tribunal to say, even by reference to the facts of the case, that such retribution cannot be political, was wrong.

20 The very fact that the Tribunal found it unnecessary to form a view as to the political nature of the KLF, or as to whether it was a terrorist organisation, demonstrates that it was proceeding upon a view that there is a necessary antithesis between violent retribution and political action. That was an error of law.

21. I do not suggest that, on the respondent's account of events and circumstances in India, and of the aims of the KLF, and of the circumstances of the killing of the police officer, it must follow that the crime was political. Once it was accepted that the concept of a political

crime was not limited to offences such as treason, sedition, and espionage, and could extend to what would otherwise be "common" crimes, including unlawful homicide, then it became necessary to find means of avoiding the consequence that any crime could be political if one of the motives for which it was committed was directly or indirectly political. There is no bright line between crimes that are political and those that are non-political. But, as the Tribunal rightly recognised in part of the reasoning quoted above, there must be a sufficiently close connection between the criminal act and some objective identifiable as political to warrant its characterisation as a political act. And the achievement of that objective must be the substantial purpose of the act. The UNHCR Handbook[8] states:

"There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature."

22. To identify homicide as a political act ordinarily requires a close and direct connection between the act and the achievement of an objective such as a change of government, or change of government policy, which might include relief from government sponsored or condoned oppression of a social group. In the present case, upon an evaluation of the circumstances in India at the time of the killing, the relevant policies of the government, the observance of the rule of law by the agencies of government, including the police, and the objectives and methods of the KLF, the Tribunal might well reach the same conclusion as that which it reached in the first place. Even so, the respondent is entitled to have his case considered according to law. The path by which the Tribunal came to its original decision took an impermissible short-cut.

…

25[in relation to the findings 2 & 3 of the RRT] the process of reasoning is flawed. First, it is affected by the errors that have already been found to exist in relation to the reasoning on the killing of the police officer; it commences by carrying that reasoning over into this context. Furthermore, there is no apparent consideration of the nature of the "targets" of the weapons and explosives. Whether they were civilians or government agents could be material. Nor was there any examination of the objectives claimed to be political, or their relationship to the criminal acts. The disinclination of the Tribunal to examine the political objectives of the KLF, and to consider the submission on behalf of the Minister that it was a terrorist organisation, might have favoured one side or the other, but these were matters to be taken into account in order to evaluate the competing contentions.

Gaudron J. said:

38 A preliminary question arises as to whether in characterising the killing of the police officer at Ludhiana solely as an act of revenge, the Tribunal was making a factual finding that it lacked any political objective. A factual finding to that effect would not be open to review in the Federal Court[9] ((By s 44(1) of the Administrative Appeals Tribunal Act 1975 (Cth) a party to a proceeding before the Tribunal may only "appeal" to the Federal Court of Australia "on a question of law"). and would necessarily lead to the conclusion that the killing was a serious non-political crime for the purposes of Art 1F(b) of the Convention.

39 The Tribunal's reasons are not entirely clear, but its statement that, given the motive of revenge, there could be "no nexus or proportionality or close or direct causal link between [the] crime and the alleged political objectives of the KLF" strongly suggests that it was of

the view that, as a matter of law, a crime which was motivated by revenge could never be characterised as a political crime. In my view, its reasons should be so understood.

40 The question whether a crime that is motivated by revenge can constitute a political crime requires consideration of the expression "a political crime". Historically, the notion of "a political crime" has not been confined to "pure" political crimes such as treason or sedition, whether for the purposes of extradition or refugee law[10](An early and authoritative statement to this effect is found in In re Castioni [1891] 1 QB 149 in which the murder of a member of the state council of a Swiss canton, in the course of a political insurrection, was considered to be a political crime. See also the discussion in Lord Mustill's speech in T v Home Secretary [1996] AC 742 at 761-762; Lord Simon of Glaisdale's observations in R v Governor of Pentonville Prison; Ex parte Cheng [1973] AC 931 at 953-954 and García-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law", (1962) 48 Virginia Law Review 1226 at 1239-1257.) . Of recent times, however, there has been a tendency, for the purposes of refugee law, to impose limits on the notion by reference to "atrocious" crimes[11] (See, for example, McMullen v Immigration and Naturalization Service 788 F 2d 591 at 596-598 (9th Cir 1986) per Wallace J; Immigration and Naturalization Service v Aguirre-Aguirre 526 US 415 at 429-430 (1999) per Kennedy J delivering the opinion of the Court; United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, rev ed (1992) at 36 [152]; Goodwin-Gill, The Refugee in International Law, 2nd ed (1996) at 105-106. See also in the context of extradition law, Carron v McMahon [1990] 1 IR 239 at 267 per Finlay CJ)., "terrorist" activities[12](See, for example, T v Home Secretary [1996] AC 742 at 772 per Lord Mustill. See also in the context of extradition law, Eain v Wilkes 641 F 2d 504 at 520-521 (1981) per Wood J; Ellis v O'Dea [1991] ILRM 346 at 362 per Hamilton P; affirmed [1991] 1 IR 251; La Forest, Extradition to and from Canada, 3rd ed (1991) at 92-95, referring to the decisions of Re State of Wisconsin and Armstrong (1973) 32 DLR (3d) 265 and Re Commonwealth of Puerto Rico and Hernandez (No 2) (1973) 42 DLR (3d) 541).

or "unacceptable" means[13](See, for example, Gil v Canada (Minister of Employment and Immigration) (1994) 119 DLR (4th) 497 at 518 per Hugessen JA. Equivalent expressions have included: "barbarous" (Goodwin-Gill, The Refugee in International Law, 2nd ed (1996) at 106); "brutal, cowardly and callous" (Shannon v Fanning [1984] IR 569 at 581 per O'Higgins CJ); and, "disproportionate" (Lord Mustill discusses the different ways in which this notion has been applied in relation to the political offence exception in T v Home Secretary [1996] AC 742 at 768-770)) , as though crimes which answered those descriptions were, on that account, incapable of constituting political crimes. And the reasons of the Tribunal might suggest that the same is true of a crime which is motivated either wholly or in part by revenge.

…

42 One reason why there is a tendency to exclude "terrorist" activities and the like from the notion of "a political crime" is that the latter notion is incapable of definition by reference to the criminal acts involved in such a crime. Such acts necessarily vary from place to place and time to time with changing political circumstances and changing technologies. Thus, it is possible to define "a political crime" only by reference to its object or purpose. A political crime is simply a crime which has a political object or purpose.

43 In R v Governor of Pentonville Prison; Ex parte Cheng, an extradition case, Lord Diplock said that an offence was not political:

"unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its

policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there."[14] [1973] AC 931 at 945.

44 This statement correctly identifies, in my view, political purpose as the defining feature of a political crime. However, there are two aspects of that statement that require consideration. The first is the requirement that political purpose be the only purpose of the crime in question. In the absence of anything in the text of the Convention to suggest otherwise, there is no reason why the political purpose should be the sole or, even, the dominant purpose of the crime, so long as it is a significant purpose. Further, and as Lord Slynn of Hadley pointed out in T v Home Secretary, it is not at all clear that "in order to be a political offence the act has to be directed against the government of the day"[15] [1996] AC 742 at 775.

45… I would consider a crime to be political if a significant purpose of the act or acts involved is to alter the practices or policies of those who exercise power or political influence in the country in which the crime is committed.

46 Once it is accepted, as in my view it must be, that political purpose is the defining feature of a political crime, references to "proportionality", "nexus" or "causal link", as made by the Tribunal, assume legal significance[16](See also R v Governor of Pentonville Prison; Ex parte Cheng [1973] AC 931 at 945 per Lord Diplock; T v Home Secretary [1996] AC 742 at 787 per Lord Lloyd of Berwick; Eain v Wilkes 641 F 2d 504 at 521 (1981) per Wood J; McMullen v Immigration and Naturalization Service 788 F 2d 591 at 595 (9th Cir 1986) per Wallace J; Gil v Canada (Minister of Employment and Immigration) (1994) 119 DLR (4th) 497 at 518 per Hugessen JA; United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, rev ed (1992) at 36 [152]; Goodwin-Gill, The Refugee in International Law, 2nd ed (1996) at 105). A crime is unlikely to have a political purpose if it has no relevant connection with the political aims of those involved in its commission. So, too, as has been explained in other legal contexts, "proportionality" is a useful indicator of purpose[17] (See with respect to constitutional powers that may be exercised for a particular purpose, The Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1 at 260 per Deane J; Richardson v Forestry Commission (1988) 164 CLR 261 at 311-312 per Deane J; Davis v The Commonwealth (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ (with whom Toohey J agreed on this point at 117); Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 29 per Mason CJ, 89 per Dawson J, 93-94 per Gaudron J, 101 per McHugh J; Cunliffe v The Commonwealth (1994) 182 CLR 272 at 296-297 per Mason CJ, 317-323 per Brennan J, 350-357 per Dawson J, 371-378 per Toohey J, 388 per Gaudron J; Leask v The Commonwealth (1996) 187 CLR 579 at 593 per Brennan CJ, 605-606 per Dawson J, 614-615 per Toohey J, 616 per Gaudron J, 616-617 per McHugh J, 624 per Gummow J, 634-635 per Kirby J. See with respect to discrimination laws, Street v Queensland Bar Association (1989) 168 CLR 461 at 511-512 per Brennan J, 572-574 per Gaudron J; Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 472-474 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ, 478-479 per Gaudron and McHugh JJ; Waters v Public Transport Corporation (1991) 173 CLR 349 at 363-364 per Mason CJ and Gaudron J. Note that in some of these cases the expression "appropriate and adapted" is used.) . The true purpose of actions which are unnecessary or disproportionate to the end which is said to justify those actions is unlikely to be the achieving of that end but is likely to be the satisfaction of some other and different purpose.

47 Actions which are either unnecessary or disproportionate to the political objectives which are said to justify them are, perhaps, usefully described as "terrorist" activities. But

for the purposes of Art 1F(b), that description is not, of itself, determinative. The issue is whether the actions in question were undertaken for a political purpose, in the sense that that purpose was a significant purpose.
48 It follows from what has been said that the Tribunal erred in the present matter by not determining whether, in relation to the killing of the police officer in Ludhiana, Mr Singh had a significant political purpose. Such a purpose was not negatived by the element of revenge. As the Chief Justice has pointed out in his reasons for judgment in this matter, revenge is likely to be an aspect of many political crimes. Moreover, and as the Chief Justice has also pointed out, it was not negatived by looking simply to the main political objective of the KLF, namely, the establishment of an independent state. It was necessary for the Tribunal to consider whether the purpose of the crime was the achieving of one of the other KLF objectives, including, for example, the protection of Sikh people from violence or torture.
49 The same error which has been identified in relation to the killing of the police officer at Ludhiana is to also be found with respect to other crimes which the Tribunal found Mr Singh had committed.

In the course of holding that the reasons of the Tribunal show no more than that it found as a matter of fact - not of law - that the particular killing had to be characterised as one of revenge and that it had no political character Mc Hugh J. said consistent with the approach of the majority:

54…the Tribunal would not have erred in law if it had found that the murder was done in furtherance of the armed political struggle between the Khalistan Liberation Force and the government of India and was a political crime. When a group, intent on seizing political power or forcing political concessions from the State, believes that it can attain that power or those concessions only through "the barrel of a gun", its members inevitably commit themselves to killing their opponents to attain the group's objectives. To murder State functionaries who torture or mistreat group members is an almost inevitable consequence of a decision to engage in such an armed struggle. Murdering State functionaries may intensify the extent to which group members are mistreated and tortured. But such revenge killings also strike terror in the minds of those functionaries, weaken their resolve to continue the political struggle and increase the morale of members of the group. Murdering a policeman because he has tortured or killed a member of the group, qua membership, cannot be regarded as so remote from furthering the political objectives of the group that the murder is necessarily non-political. But it will be non-political if the only motivation for the murder is personal revenge, divorced from the political struggle[21] R v Governor of Brixton Prison; Ex parte Schtraks [1964] AC 556 at 583.

Kirby said:

64 Defining a "serious non-political crime" has been described as a problem that presents "the gravest difficulties"[34](Grahl-Madsen, The Status of Refugees in International Law (1966), vol 1 at 290)
In an earlier manifestation of the phrase, it was said to present one of the "most acute" dilemmas of extradition law[35](Clark, Coudert and Mack, The Nature and Definition of

Political Offense in International Extradition, Proceedings of the American Society of International Law (1909) at 94 cited in García-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law", (1962) 48 Virginia Law Review 1226 at 1231 ("García-Mora")) So far as the Australian law on refugees is concerned, the scope of offences "of a political character" is not fixed[36] R v Wilson; Ex parte Witness T (1976) 135 CLR 179 at 191. This is the first time that this Court has had to consider Art 1F(b).

65 The difficulties of definition derive, in part, from the absence of any settled international consensus about the expression[37](García-Mora (1962) 48 Virginia Law Review 1226 at 1227-1231) and the changing views of national courts and tribunals about its meaning[38] Rv Wilson; Ex parte Witness T (1976) 135 CLR 179 at 191). The content of the expression depends on an almost infinite variety of factors[39] In re Castioni [1891] 1 QB 149 at 155. It has been influenced by the changing nature of crimes, of weapons, of the transport of criminals and of the global political order, and the increased vulnerability of modern societies to violent forms of political expression[40] cf T v Home Secretary [1996] AC 742 at 762 per Lord Mustill..

66 Long before the Convention was adopted, Grotius wrote that asylum was accepted by international law as available for those fugitives who suffered undeserved enmity but not for those who had done something injurious to human society[41] (Grotius, De Jure Belli ac Pacis Libri Tres, Kelsey trans (1925) at 530 cited in García-Mora (1962) 48 Virginia Law Review 1226 at 1244). Since that distinction was propounded, first in the field of extradition law and more recently in the Convention, courts have struggled to find a point that will allow decision-makers to differentiate between fugitives accused of a serious political crime[42](As stated in the Extradition Act 1870 (UK), s 3; cf Extradition Act 1988 (Cth), s 5, s 7(a). In s 5 of the Australian Act, "political offence" is defined "in relation to a country" as meaning "an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country)". The definition expressly excludes certain offences, including offences against international law, offences declared by bilateral regulations, a range of attacks, threats or attempts upon heads of state or governments and offences constituted by taking or endangering the life of a person committed in circumstances in which "such conduct creates a collective danger, whether direct or indirect, to the lives of other persons" and is declared by regulations not to be a political offence in relation to the country. There is no similar definition of "non-political crimes" for the purposes of the Act and the Convention, Art 1F(b)) and those in respect of whom there are "serious reasons for considering" that they have committed a serious non-political crime[43] As stated in the Convention, Art 1F(b).

67 Given that this kind of differentiation has troubled courts for more than a hundred years, there is wisdom in Viscount Radcliffe's warning[44] (R v Governor of Brixton Prison; Ex parte Schtraks [1964] AC 556 at 589), that it is now unlikely that the point of distinction will receive a definitive answer accepted by everyone as universally applicable. On the other hand, where important rights and duties turn on the meaning of the expression, being rights and duties that must be considered by judges and other decision-makers, it is reasonable to demand that there should be a measure of clarity about the concept. Even if the best that courts can do is describe the idea, and the appropriate ways to approach it, they should attempt to do so[45] (T v Home Secretary [1996] AC 742 at 787). The alternative is a negation of the rule of law and the surrender of such questions to idiosyncratic opinions that may have little or nothing to do with the context of the case at hand.

…

Kirby J. dealt extensively with authority and principle (including overseas judicial pronouncements and the international law context) at [90]- [120]. He then considered the discrimen of 'serious non-political crime:

Serious non-political crime - the discrimen

121 Approach to characterisation: Decision-makers are entitled to guidance from this Court on how they should approach the task of characterisation of criminal conduct presented by a case such as the present. In my view, this much can be said. A person who is otherwise entitled to protection as a "refugee" has, on the face of things, a high claim to that status. It is one written in Australia's own law. It also reflects obligations of international law, which Australia has accepted and by which it is bound. Even the existence of serious grounds for believing that he or she has committed a "serious" crime will not disqualify a person from protection, if a proper view of the crime in question, looked at as a whole, is that it is "political" rather than "non-political" in character.

122 The motives for the crime are not conclusive as to its character. But because crime in most societies, including our own, ordinarily involves a mental element, the perpetrator's intention may well be relevant to the character of the crime. It may, for example, constitute a reason for classifying a crime, performed by a person who happens to be a member of a political movement, as "non-political", if its purpose was mainly for extraneous, personal or selfish reasons. On the other hand, the mere fact that the crime has been committed by a person involved in a political movement, or during disorder associated with that movement, is not enough to warrant its classification as "political" rather than "non-political". Neither does the existence of some degree of personal motivation necessarily warrant the classification of the offence as non-political. The sometimes complex array of motivations for any offence must be considered before a characterisation of the offence for the purposes of the Convention is determined.

123 Nor are the consequences of the crime in question, known or implied, determinative of its character. The history of liberation movements, and rebellion against autocratic, colonial and tyrannical governments, has witnessed too many instances of serious crimes, involving innocent victims, to permit a hard and fast exclusion of otherwise "political" crimes because they had terrible outcomes. It is not possible, conformably with long established case law, to exclude, as such, the crime of murder[119](In re Castioni [1891] 1 AC 149; Ex parte Cheng [1973] AC 931 at 945).

124 If the target of the crime is an armed adversary[120] Gil (1994) 119 DLR (4th) 497 at 516 or armed agent of the State (such as a police officer or other public official)[121] García-Mora (1962) 48 Virginia Law Review 1226 at 1239, it is more likely that the crime should be classified as "political", than if the target comprises innocent civilians[122] Matter of Extradition of Atta 706 F Supp 1032 at 1047 (1989), or if there is no particular target and just the indiscriminate use of violence against other human beings[123] Ellis v O'Dea [1991] ILRM 346 cited in Gil (1994) 119 DLR (4th) 497 at 513. In such cases it is open to the decision-maker, in the context of "non-political crimes" in Art 1F(b) of the Convention, to conclude that the crimes are "serious" but outside the scope of the protection for serious "political" crimes.

125 In the context of a phrase used in an international treaty it would be inappropriate to apply to its elucidation, doctrines developed peculiarly by the common law, either to exclude classification as "political" by reference to notions of remoteness, or to inculpate persons on the basis of their indirect involvement in a joint criminal enterprise with others. On the other hand, where the achievement of "political" objectives may be viewed as "remote" from the conduct in question, this may just be another way of saying that the true

character of the serious crime is "non-political" rather than "political". The mere fact that the person did not actually "pull the trigger" does not necessarily exculpate him or her from involvement in a "serious crime" of the disqualifying kind[124] McMullen v Immigration and Naturalization Service 788 F 2d 591 at 599 (1986). Each case must be classified by reference to its own facts.
126 Given that what is posited is a "serious crime" and that, ordinarily, the "country of refuge" would be fully entitled to exclude a person suspected of such "criminal conduct" from its community, a duty of protection to refugees that exists under the Convention and municipal law giving it effect, must be one that arises in circumstances where the political element can be seen to outweigh the character of the offence as an ordinary crime[125] T v Home Secretary [1996] AC 742 at 784 citing Goodwin-Gill, The Refugee in International Law (1983) at 60-61. If the humanitarian purpose of the Convention is kept in mind and the decisions are made by people who have some knowledge of the history of the political movements of the world in recent times, the application of the foregoing criteria will be unlikely to involve error of law.
127 Decision-makers in Australia, judicial and otherwise, will ordinarily have little exposure to the circumstances that, in other countries, have given rise to political struggles that sometimes involve resort to serious crimes, including of violence, where other peaceful means of securing longed-for freedom fail. It is not only for a refugee from a European regime akin to that of Nazi Germany that the protection of the Convention is afforded. There are other political circumstances, later in time and closer geographically to Australia, that have notoriously involved serious criminal conduct that history has eventually viewed as justified. It is such cases which decision-makers, tribunals and courts have to determine without the wisdom of political hindsight, by reference to the exemption in Art 1F(b) of the Convention.
128. Conclusion: Adopting the foregoing approach, I agree with the analysis of the Full Court. The Tribunal, with respect, applied an over-simplistic view of the characterisation of the crimes which were before it. It failed to characterise the crimes in question as the law required. On its first two findings, it did so, as all judges in the Federal Court held, by incorrectly regarding the classification of the motives of the respondent as wholly determinative of the characterisation of the crime as "political" or "non-political". As to the third factual finding, it too was flawed because the Tribunal failed to consider, and to demonstrate that it had considered, whether the "targets" of the weapons, in the transport of which the respondent was involved, were purely political targets or indiscriminate targets necessarily involving innocent civilians.

Later His Honour summarised his relevant conclusions:

141…

(3) A decision-maker makes an error of law by assuming that the fact that an act was one of "revenge or retribution" necessarily makes it "non-political". There is no such dichotomy.
(4) The precise meaning of serious "non-political" crimes in Art 1F(b) of the Convention is not conclusively elaborated, for all possible cases, by the Convention itself, municipal law or judicial authority. However, some guidance can be offered:
(a) To characterise the crime as "political" or "non-political", it is necessary to consider all of the facts of the case in the context, and for the purposes, of the Convention. There is no bright line for distinguishing "non-political" from "political" crimes;
(b) "Political" crimes are not confined to crimes that fall within the purely political offences such as treason, sedition and the like. "Non-political crimes" take their meaning accordingly;

(c) Depending on the circumstances, murder may be a "political crime" if it is otherwise so characterised;
(d) The ascertainment of the object or purpose of the crime is relevant to deciding whether it is "political" or "non-political" in character. To be "political" it must, in some appropriately close way, be linked with the purpose of changing the political environment, commonly the government, by the commission of the crime;
(e) Whilst purely personal grudges or motivations for a crime may sometimes demand that the crime be classified as personal (and "non-political" for that reason), revenge and personal hatred are not, as such, inconsistent with political action. On the contrary, they may be its expression in a particular case;
(f) In deciding whether a crime is "political" or "non-political" it will sometimes be relevant to consider the weapons and means used; whether the "target" of the crime is a public official or a government agent as distinct from unarmed civilians chosen indiscriminately; and whether the crime is proportionate to the political end propounded. If it is excessive and disproportionate, it will be easier to infer that its true character is "non-political", that is, done for the satisfaction of some other and different, possibly entirely personal ("non-political") purpose. It will usually be necessary to examine the alleged objectives of any organisation involved and the applicant's connection, if any, with that organisation; and
(g) It will also be appropriate to read the exception for "serious non-political crimes" in the context of the burden that is placed by the Convention upon countries of refuge and the exceptions that are provided in the specified cases, including by Art 1F, where, in the particular case, that burden would be intolerable. The serious crimes mentioned in the exclusions in Art 1F are such that their extreme character is accepted as exempting the country of refuge from the protection obligations stated in the Convention, however much otherwise the applicant qualifies for recognition as a "refugee".

Weinberg J. considered the applicable principles in exclusion cases and the previous Full Court authorities dealing with ineligibility to be considered for a protection visa by reason of the operation of Article 1F(b) in an application for review of an AAT decision in Arquita v MIMA (2000) 63 ALD 321 [2000] FCA 1889:

19 The applicant's case before the AAT was that the allegations made against him were entirely false. He claimed that the delegate ought not to have concluded that there were serious reasons for considering that he had committed a serious non-political crime when he shot and killed Mr Bayarco. He said that Mr Bayarco's death had been accidental, and had occurred while he was engaged in performing his lawful duties as a police officer".

His Honour referred to the Tribunal's noting of conflicting accounts of what happened, credibility concerns about the applicant, and then referred to its understanding of the law and its finding on the ultimate issue as follows:

"22 …:

> "47. For the crime of murder, domestic law, in the common law jurisdictions, requires an intention to kill or an intent to inflict grievous bodily harm if death

results. Reckless intent will be sufficient intent for murder in the common law jurisdictions. On one, albeit untested, view of the facts, Mr Arquita's "intent" is in issue. Although in the present case, Mr Arquita has been charged with murder, the ordinary meaning of the phrase "serious reasons for considering" does not require a charge or a conviction (Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 158 ALR 289 per Whitlam J at 294), nor must every element of an identified offence be able to be identified and particularised before Article 1F(b) may be relied on (Ovcharuk per Branson J at 301).

48. I have come to the conclusion that on the whole of the evidence and material before the Tribunal, there are serious reasons for considering Mr Arquita has committed a serious non-political crime outside Australia.

23 In arriving at its conclusion, the AAT referred to what was said in relation to the construction of Art 1F(b) by the Full Court in Ovcharuk. The AAT observed:

"19. The construction of Article 1F(b) was considered by a Full Court of the Federal Court (Whitlam, Branson and Sackville JJ) in Ovcharuk ... in separate judgments, the members of the Court concluded that Article 1F(b) is not to be given a narrow construction. They found that Article 1F should be construed according to the ordinary meaning of the words of the Article. There is no reason to confine the ordinary meaning to persons who are fleeing from or otherwise seeking to avoid prosecution for offences committed outside the country of refuge. The Court accepted that the transparent policy of Article 1F(b) is to protect the order and safety of the receiving State. This was in accord with the conclusion expressed by French J in Dhayakpa v Minister for Immigration and Multicultural Affairs (1995) 62 FCR 556 at 565:

"The provisions of the Convention are beneficial and are not to be given a narrow construction. The exemption in Art 1F(b), however, is protective of the order and safety of the receiving State. It is not, in my opinion, to be construed so narrowly as to undercut its evident policy. The fact that a crime committed outside the receiving State is an offence against the laws of that State does not take it out of the ordinary meaning of the words of Art 1F(b). Nor does the fact that the crime has subsequently been punished under the law of the receiving State. The operation of the exemption is not punitive. There can be no question of twice punishing a person for the same offence. Rather it is protective of the interests of the receiving State. The protective function is not limited according to whether or not the punishment has been inflicted in Australia or elsewhere. Nor, on the language of the Article or its evident policy, is it necessary that the disqualifying crime have any connection to the reason for seeking refuge. A person who would otherwise qualify for admission as a refugee may be disqualified by the operation of Art 1F(b) if it were shown that such a person had a record of serious non-political crime offences whether in the county of origin or elsewhere."

His Honour implicitly accepted these quotations as correctly stating the law and then proceeded to set out the submissions made to the AAT and the evidence

before it. He noted the applicant's sole ground of the application was that the AAT erred in interpreting or applying the phrase "serious reasons for considering that ... he had committed a serious non-political crime".

He went on:

"[39] …[In] Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556 … French J observed at 563:

> "Article 1F excludes from the application of the Convention persons with respect to whom there are serious reasons for considering that they have committed the classes of crime or been guilty of the classes of act there specified. The use of the words "serious reasons for considering that" suggests that it is unnecessary for the receiving State to make a positive or concluded finding about the commission of a crime or act of the class referred to. It appears to be sufficient that there be strong evidence of the commission of one or other of the relevant crimes or acts. The precise construction of that phrase does not fall for consideration in the present case as it is not in dispute that the crime relied upon by the Tribunal to ground the rejection of the claim for refugee status was committed."

40 This dictum by French J was accepted as correctly stating the relevant legal principles in Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 153 ALR 385 by Marshall J at first instance. His Honour said at 388:

> "Notwithstanding that French J's views about the words "serious reasons for considering" were not central to his reasons for judgment and notwithstanding that Mr Dhayakpa had been found guilty of conspiracy, whereas Mr Ovcharuk has not, I consider his Honour's approach to the meaning of those words to be highly persuasive."

41 On appeal, the Full Court in Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 158 ALR 289 also considered the construction of Art 1F. In that context, Whitlam J at 294 observed:

> "What is most striking to me about Art 1F is the plain, matter-of-fact requirement that there should be "serious reasons for considering that" a person "has committed" a specified type of crime (paras (a) and (b)), or "has been guilty" of the proscribed acts: para (c). Charges or convictions are not required. Indeed, in some cases, even though a person claiming to be a refugee has been charged with or convicted of an offence, it may be perfectly clear that there are no serious reasons to consider that person has committed a crime. In other cases, such facts may be strongly probative of such serious reasons. It all depends on the facts of the particular case."

42 In W97/164 v Minister for Immigration and Multicultural Affairs AAT No 12974 [1998] AATA 618 Mathews J, sitting as President of the AAT, reviewed the authorities governing the meaning to be ascribed to the expression "serious reasons for considering" in Art 1F(b). Her Honour said:

> "... I do not agree with the standard which was set in Ramirez. I find it difficult to accept that the requirement that there be "serious reasons for considering" that a crime against humanity has been committed should be pitched so low as to fall, in

> all cases, beneath the civil standard of proof. The seriousness of the allegation itself and the extreme consequences which can flow from an affirmative finding upon it would, in my view, require a decision-maker to give substantial content to the requirement that there be "serious reasons for considering" (emphasis added) that such a crime has been committed. The process whereby the seriousness of the allegation influences the level of proof required to substantiate it is well known to Australian courts (Briginshaw v Briginshaw (1938) 60 CLR 336, Helton v Allen (1940) 63 CLR 691."

See also N96/1441 v Minister for Immigration and Multicultural Affairs AAT No 12977 [1998] AATA 619; and W98/45 v Minister for Immigration and Multicultural Affairs AAT No 13450 [1998] AATA 948.

Weinberg J. then referred to the submissions made by applicant and respondent (at [43-50]) then stated his conclusions on the appeal in the following terms:

"51 It was for the AAT to determine, upon all the evidence, whether Art 1F operated so as to preclude the applicant from being considered for the grant of a protection visa. As Branson J said in Ovcharuk at 301:

> "Whether there are serious reasons for so considering will depend upon the whole of the evidence and other material before the decision-maker."

52 I regard the observations of French J in Dhayakpa as being particularly helpful in elucidating the meaning of the expression "serious reasons for considering". It was unnecessary, in accordance with those observations, for the AAT to "make a positive or concluded finding about the commission of a crime". It was sufficient if there was "strong evidence of the commission of" the crime specified.

53 In my view the applicant's contention that Art 1F(b) requires the relevant decision-maker to be satisfied beyond reasonable doubt that the applicant has committed a serious non-political crime cannot be sustained. Nor can his alternative contention that Art 1F(b) requires proof on the balance of probabilities. There is nothing in the language of Art 1F(b) that suggests it should be read as imposing upon a decision-maker an obligation to apply either of these curial standards of proof.

54 It is sufficient, in my view, if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement the evidence must be capable of being regarded as "strong". It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant. Nor need it be of such weight as to do so on the balance of probabilities. Evidence may properly be characterised as "strong" without meeting either of these requirements.

55 To the extent that the reasons of Mathews J in W97/164 v Minister for Immigration and Multicultural Affairs; N96/1441 v Minister for Immigration and Multicultural Affairs; and W98/45 v Minister for Immigration and Multicultural Affairs suggest to the contrary, I respectfully disagree.

56 The expression "serious reasons for considering" means precisely what it says. There must be reason, or reasons, to believe that the applicant has committed an offence of the type specified. That reason or those reasons must be "serious".

57 It is dangerous to reason by analogy in this area. The meaning to be attributed to the word "serious" will depend upon the context in which that word is used. It would be wrong, for example, to equate the test under Art 1F(b) with what would arguably be a lesser

standard required for the grant of an interlocutory injunction, namely, that there be a "serious question to be tried": Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148 at 153. In both situations the word "serious" operates as a filter, ensuring that allegations of insufficient strength are discounted.
58 In determining the meaning to be ascribed to the word "serious" in the context of Art 1F(b) it is necessary to bear in mind the fact that the Article operates to deprive a claimant for refugee status of the opportunity to have his or her claim considered on its merits. An unduly wide interpretation of the word "serious" in this context would affect the rights of the individual in a most profound way. One would expect, therefore, that the material in support of a belief that a person has committed an offence of the type specified would have significantly greater probative value than the material required to support an interlocutory injunction. Certainly it would have to go beyond establishing merely that there was a "prima facie" case, the test formerly favoured for the grant of an interlocutory injunction: American Cyanamid v Ethicon Ltd [1975] AC 396 at 407.
59 Perhaps a more pertinent analogy may legitimately be drawn with the test that must be satisfied before a person may be committed to stand trial for an indictable offence. That test is expressed in different terms in legislation relating to committal proceedings in the States and Territories of Australia.

He quoted from the judgment of Lockhart J. in Thorp v Abbotto (1992) 34 FCR 366. at 372 and continued:

“60 It is clear that a magistrate would not, under any formulation of the committal test which applies in this country, commit a person to stand trial for an indictable offence unless there were at least "serious reasons for considering" that he had committed that offence. That does not mean that the evidence must persuade the magistrate beyond reasonable doubt, or even on the balance of probabilities, of that fact. It is interesting to note that the phrase "strong evidence" which French J adopted in Dhayakpa in explaining the expression "serious reasons for considering" in Art 1F(b), is not dissimilar to the statutory formulation which was used, historically, in relation to committal proceedings before the test was modernised, namely, that there be a "strong and probable presumption of guilt".
61 It seems clear that the material before the AAT in the present case does not exclude all hypotheses consistent with innocence. That simply means that if that material were to stand, in its present form, it would not, in this country, establish the guilt of the applicant beyond reasonable doubt. That is hardly surprising. The witnesses whose statements were before the AAT were not heard to give their evidence directly, and were not subjected to cross-examination. It does not follow that this material did not give rise to "serious reasons for considering" that the applicant had committed a crime of the type specified.
62 If there is no evidence capable of supporting a conclusion that the applicant has committed an offence of the type specified, Art 1F(b) will not be applicable.
63 If there is some evidence capable of supporting such a conclusion, but that evidence is so tenuous or inherently weak or vague that no trier of fact, acting properly, could be satisfied beyond reasonable doubt of the guilt of the applicant, then again Art 1F(b) will not be applicable: Doney v The Queen (1990) 171 CLR 207 at 212-214. A case which is built around nothing but suspicion will not be sufficient to meet the requirements of that Article.
64 "Suspicion", as Lord Devlin said in Hussien v Chong Fook Kam [1970] AC 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove"." The objective circumstances necessary to demonstrate a

reason to believe something, or to consider it to be so, need to point clearly to the subject matter of the belief. That is not to say that those objective circumstances must establish on the balance of probabilities, let alone beyond reasonable doubt, that the subject matter in fact occurred or exists. A fact may be considered to be true on more slender evidence than proof: George v Rockett (1990) 170 CLR 104 at 115-116.
65 The present case is not of that character. The applicant claims to have a complete answer to the charge of murder brought against him. That may, indeed, prove to be the case. However, as well as hypotheses consistent with innocence, there are also available hypotheses consistent with guilt. A trier of fact may accept the evidence of the witnesses who say that they saw the applicant point his rifle at Mr Bayarco, and saw Mr Bayarco raise his hands in the air, moments before he was shot. There is nothing inherently implausible about the accounts given by these witnesses. Nor is there anything to indicate that they lack credibility and should not be believed. It would be open to the trier of fact to conclude that the applicant had lied about these matters, which are plainly material, and that he thereby evinced a consciousness of guilt - Edwards v The Queen (1993) 178 CLR 193. Were the trier of fact to accept the evidence of these witnesses and conclude that the applicant had lied, there would be cogent evidence from which an inference of guilt could properly be drawn.
66 The AAT was obliged to give careful consideration to the material before it; in the words of Lockhart J in Thorp v Abbotto, "to sift the wheat from the chaff". In my opinion the AAT did give such consideration to the whole of the evidence before it. It did carry out its statutory function in accordance with law.

His Honour could find no error of law in the manner in which the AAT went about its task of construing Art 1F(b), nor in its application of that Article to the facts before it.

"The weight to be given to these facts was a matter for the AAT. Its conclusion that there were serious reasons for considering that the applicant had murdered Mr Bayarco was, in all the circumstances, one which was open upon the whole of the evidence".

The Full Court (Madgwick,Merkel and Conti JJ.) in Applicant NADB of 2001 v MIMA [2002] FCAFC 326 (2002) 71 ALD 41 (2003) 126 FCR 453 dismissed the appeal from Hely J.'s judgment in [2002] FCA 200 ; (2002) 189 ALR 293. Madgwick and Conti JJ. (agreeing with the conclusion and reasons for that conclusion of Merkel J.) said:

2 It is perhaps unfortunate that the consequence might well be that once a decision is properly made under Article 1F(b), as occurred here, it may necessarily follow that the Minister is thereby precluded from exercising a discretion in the context of an alternative application which might be made by the appellant in relation to a different visa. The present circumstances provide a possible illustration of what we have in mind. The fact that at his own initiative, the appellant volunteered to the Department of Immigration the existence of his prior criminal offence in Indonesia, and the grave circumstances thereof, may tend to demonstrate the existence of some degree of more recent integrity which might possibly be

material to an alternative application, if one be available. As well, the appellant's claim to have given the Australian authorities abroad valuable information in relation to drug dealing in Indonesia and people-smuggling into Australia would, if true (and this could readily be checked), provide further support for our concern as to preclusion from any possibility of exercise of discretion.
3 Indeed it may conceivably be a matter in the public interest, in similar cases of overseas criminal offences, that there be afforded to applicants for refugee status a measure of incentive to make full and frank disclosure of criminal behaviour prior to arrival in Australia, given that, in some cases, there may be a risk of torture or other inhuman retribution in the event of his or her return to the country from which he or she originated. Particularly might that be the case, in circumstances where the person concerned is able to provide valuable information concerning related overseas terrorist activity.
4 The Convention on Refugees very understandably does not oblige signatory states to afford asylum to serious criminals. It is another thing that, particularly in the world after September 11 2001 and October 12 2002, an Australian government might not be able to do whatever it reasonably sees fit to encourage the flow of valuable security intelligence to it.

Merkel J. said:

5 Shortly after his arrival in Australia the appellant, a national of Iran, applied for a protection visa on the ground that he has a well-founded fear of persecution by reason of imputed political opinion if he were returned to Iran…
6 While in Australia the appellant voluntarily disclosed to the authorities that he was involved in the sale and transportation of heroin in Indonesia. A delegate of the Minister refused the appellant's application for a protection visa relying on Art 1F(b) of the Refugees Convention….
7 7 It may seem anomalous that the appellant's frankness in relation to his criminal conduct resulted in the delegate finding that he was ineligible to obtain a protection visa. However, Art 1F(b) does not confer a general discretion on a decision-maker.
8 The appellant applied to the Administrative Appeals Tribunal ("the AAT") to review the decision of the delegate. Although an application to review a decision to refuse to grant a protection visa is required to be made to the Refugee Review Tribunal (see s 411 of the Migration Act 1958 (Cth) ("the Act")), there is an exception, inter alia, in respect of the review of a decision to refuse to grant a protection visa in reliance on Art 1F. Pursuant to ss 500(1)(c) and (4)(c) of the Act applications may be made to the AAT, and not to the Refugee Review Tribunal, for the review of a decision to cancel a protection visa in reliance on Art 1F: see Daher v Minister for Immigration and Ethnic Affairs (1997) 77 FCR 107.
9 The AAT concluded that the appellant's involvement in drug trafficking in Indonesia was a "serious non-political crime…
…
12 The primary Judge (Hely J) concluded that the AAT did not err in law as claimed by the appellant and dismissed the appeal. His Honour's decision is reported as NADB v Minister for Immigration and Multicultural Affairs (2002) 189 ALR 293. His Honour stated (at 300):

> "28. Article 1F(a) and (c) do not contain any geographic or temporal limitations. Article 1F(b) refers to a serious non-political crime committed outside the country

of refuge and before the person's admission to the country of refuge as a refugee. These expressions impose temporal and geographical limitations on the crimes which are within Article 1F(b), without any implication that there must first be a determination of whether the person in question is a refugee before the application of Article 1F can be considered.

29. Whether issues arising under Article 1F are determined before considering whether the applicant is a refugee in terms of Article 1A is purely a procedural matter, without substantive significance, unless the fact that the applicant is a refugee within Article 1A has some bearing upon what might otherwise be the operation of Article 1F. Thus whether the application of the Article 1F exclusion can be determined without reference to whether the applicant is or is assumed to be a refugee, is related to the question of whether consideration needs to be given in the application of Article 1F to whether the applicant would be persecuted if returned to his country of origin."

13 After reviewing the authorities the primary Judge concluded that Art 1A did not have any bearing on Art 1F(b) and, in particular, Art 1F(b) did not require a balancing test. Accordingly, his Honour concluded that Art 1F did not require that there be a determination that the appellant was a refugee within the meaning of Art 1A of the Refugees Convention prior to a determination as to whether Art 1F applied to the appellant. His Honour stated (at 302):

"38. The Minister's delegate determined the application of Article 1F in the present case without first determining whether the applicant was a refugee within the meaning of Article 1A of the Convention. AAT confined its consideration of the matter to Article 1F. It follows from the authorities to which I have referred that AAT was entitled to proceed in that way. The terms of the Act also indicate that the jurisdiction of the AAT was confined to a consideration of the matters arising under Article 1F, rather than Article 1A."

14 The primary Judge also concluded that there was no substance in the appellant's submissions concerning Art 7 of the Convention, stating (at 303):

"46. Article 7(1) of the Convention provides that except where the Convention contains more favourable provisions, a contracting State shall accord to refugees the same treatment as is accorded to aliens generally. Section 501 of the Act enables the Minister to refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. The character test is defined in s 501(6). In the applicant's contention it is the character test which should have been applied to the applicant, rather than the provisions of Article 1F.

47. There is no substance to this contention. Section 36(2) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Convention as amended by the Refugees Protocol. The application of that criterion necessarily requires that the provisions of Article 1F be taken into account. The general provisions of Article 7 do not override the specific provisions of Article 1F."

15 Finally, the primary Judge concluded that the AAT did not err in law in arriving at the conclusion that the drug trafficking crimes in Indonesia, to which the appellant admitted, were properly regarded as serious non-political crimes. His Honour found that the matters

taken into account by the AAT were matters that it was entitled to take into account, stating (at 302):

> "41. AAT proceeded on the basis of the applicant's admission that he was involved in drug trafficking in Indonesia and thereby committed a crime in Indonesia prior to his coming to Australia. In determining whether the crime should be characterised as 'serious', AAT took into account the fact that the Australian community regards crimes involving trafficking in drugs, particularly heroin, as serious. AAT was entitled to proceed upon the basis that whether a particular crime should be characterised as serious may be answered by reference to notions of serious criminality accepted within the receiving State: Ovcharuk v Minister for Immigration & Multicultural Affairs (supra) at 185 per Branson J. It was legitimate for AAT to take into account the fact that had the conduct in question occurred in this country, then the quantities of drugs with which the applicant was involved, both as a 'middle man' and as a 'courier', would be regarded as trafficable quantities or commercial quantities under domestic legislation, as this bore upon the seriousness with which such a crime would be viewed in this country."

…

21 The present case is concerned with the operation of Art 1F(b). The primary Judge, in construing Art 1F(b), concluded that there was no implication that "there must first be a determination of whether the person in question is a refugee before the application of Art 1F can be considered". While his Honour went on to consider whether such an implication might arise if it was a requirement of Art 1F that there be a balancing test, his Honour's construction of Art 1F(b) is supported by the judgments of all members of the High Court in Minister for Immigration and Multicultural Affairs v Singh (2002) 186 ALR 393 ("Singh") which, as his Honour noted, was handed down after the preparation of his reasons but was consistent with his conclusions.

22 Although Singh was concerned with the content of the "non-political" aspect of a "serious non-political crime" in Art 1F(b), the appellant raised an argument for the first time before the High Court that the Article only operated in respect of a person who, prior to his admission, was "a refugee". If the argument were accepted that would have the consequence that Art 1F(b) could not apply prior to a determination that the person in question was a refugee. The argument, however, was rejected by all members of the Court. Gleeson CJ said (at 395):

> "5. To give Art 1F(b) a strictly literal interpretation, so that it could only be considered and applied after the Australian authorities had made a decision that the respondent was a person to whom protection was owed under the Convention, would involve an internal inconsistency in the Convention as it applies by force of Australian law. Article 1F is expressed as an exception. If it is satisfied, the provisions of the Convention are said not to apply to the person in question. If the provisions of the Convention do not apply to the person, the person cannot be entitled to protection under the Convention. Whatever the operation of the expression 'admission ... as a refugee' in other systems of municipal law, in Australia there would be nothing to which the language could apply. It would be necessary to read the words 'prior to his admission to that country as a refugee' as meaning no more than 'prior to his entry into that country'. The preferable solution is to read the reference to 'admission ... as a refugee' as a reference to putative admission as a refugee. Although the point was not adverted to before the Tribunal or the Full Court, that, in practical effect, was how the case proceeded. It was regarded, on both sides of the record, as convenient, and appropriate, to consider the

application of Art 1F before addressing any other issues that might have arisen concerning the respondent's refugee status. The respondent has been legally represented at all stages, and it has not been suggested that this involves any unfairness to him. There may be cases in which it would be inappropriate to decide an issue arising under Art 1F as a preliminary question, but this is not one. There is no difficulty in assuming, without deciding, that the respondent has a well-founded fear of persecution on Convention grounds if he were returned to India, and deciding whether, on his own account to the delegate of his role in the KLF, there are serious reasons for considering that he has committed a serious non-political crime outside Australia before he entered Australia and applied for a protection visa."

23 Gaudron J said (at 402):

"30. Before turning to the facts, it is convenient to refer to an argument made on behalf of Mr Singh for the first time in this Court. The argument concerns the phrase 'outside the country of refuge prior to his admission to that country as a refugee' in Art 1F(b). It was argued on behalf of Mr Singh, by reference to that phrase, 'that Article 1F(b) could have [no application to him] in the absence of a finding that he was a 'refugee' in terms of Article 1A.'

31. The composite phrase 'outside the country of refuge prior to his admission to that country as a refugee' describes both where and when a serious non-political crime must be committed before Art 1F(b) operates to exclude a person from the benefit of the Convention. The crime in question must have been committed outside 'the country of refuge', a phrase which is apt to include a country in which the person concerned seeks refuge. And the crime must have been committed 'prior to ... admission to that country as a refugee'. The fact that the person has not, at the relevant time been admitted as a refugee is not to the point if the crime in question was committed before he or she could be so admitted. In such circumstances, the crime was necessarily committed 'prior to ... admission ... as a refugee'."

24 And at 409:

"61. I agree with other members of the Court that the Court should reject Mr Singh's attempt to raise a new ground concerning the concluding words of Art 1F(b). As the Chief Justice points out in his reasons, the 'preferable solution is to read the reference to 'admission ... as a refugee' as a reference to putative admission as a refugee'."

25 Kirby J said (at 414-415):

"87. ...the definition of 'refugee' in Art 1A and the exclusions from it in Art 1F are not necessarily intended to be applied sequentially. Ordinarily, they will be decided, as necessary, in the one proceeding. However, there is nothing in the Convention or the Act that forbids the decision-maker saying to the applicant, as the delegate and the Tribunal said, in effect, to the respondent: 'For the moment we will assume that you would be admitted as a refugee. We will approach your case on that footing, without finally deciding it. But we want first to determine whether you have 'committed a serious non-political crime outside' Australia.' The Convention is expected to operate in the real world of speedy, economical and efficient decision-making. Where there is a choice between a construction of the Convention that would further decision-making of that character and one that would frustrate those objectives, the former construction should be preferred."

…
27 A similar view of Art 1F has been taken in Canada. In Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982 at 984 the majority observed that the general purpose of Art 1F is "to exclude ab initio those who are not bona fide refugees at the time of their claim for refugee status".
28 It follows that the contention of the appellant that Art 1F(b) can have no application in the absence of a finding that the appellant was a refugee must be rejected. But, it does not follow from that conclusion that Art 1F(b) does not require a balancing test. As was explained in Singh there is no conceptual difficulty in conducting the Art 1F(b) inquiry by assuming in a person's favour that his or her claim to refugee status will succeed.
29 The difficulty confronting the appellant's "balancing test" argument is that, as was observed by the primary Judge, the text of Art 1F(b) and the authorities concerning its meaning in Australia, the United Kingdom, the United States, New Zealand and Canada do not support the appellant's contention that a balancing test is required by the Article. The appellant relied primarily on observations in the UNHCR Handbook and in other extraneous material relating to Art 1F(b) to support his contention that a balancing test was required. In response to that submission the primary Judge stated (at 300):

> "31. Zagor, 'Persecutor or Persecuted: Exclusion under Article 1(A) and (B) of the Refugees Convention' (2000) 23 UNSWLJ 164 at 186 notes that the balancing test (ie the balance between the nature of the offence presumed to have been committed and the degree of persecution feared) is advocated by all eminent writers in the field and is 'clearly consistent with the object and purpose of the clauses, and overarching human rights purpose of the Convention. However, it has been explicitly abandoned in the common law jurisdictions of the United Kingdom, Australia, Canada, New Zealand and the United States. In other words, once a non-political crime is characterised as 'serious', no assessment of the feared persecution is required'."

30 Zagor's observations are supported by the Summary Conclusions on Legal Aspects of the 1951 Convention relating to the Status of Refugees made by the Lisbon Expert Roundtable as part of the Global Consultations on International Protection, 3-4 May 2001. The participants included 32 experts from 25 countries drawn from Governments, NGOS, academia, the judiciary and the legal profession. By consensus, it was agreed that on the question of balancing:

> "(i) State practice indicates that the balancing test is no longer being used in common law and in some civil law jurisdictions.
>
> (ii) In these jurisdictions other protection against return is, however, available under human rights law."

31 The conclusions of the primary judge are also amply supported by the authorities referred to by him when arriving at the conclusion that a balancing test is not required by Art 1F(b). In Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556 at 563-564 French J observed:

> " It has been said that the operation of Art 1F confers upon the potential State of refuge a discretion to determine whether the criminal character of the applicant for refugee status in fact outweighs his or her character as a bona fide refugee and so constitutes a threat to its internal order: G S Goodwin-Gill, The Refugee in International Law (1983), p 160. The adjective 'serious' in Art 1F(b) involves an evaluative judgment about the nature of the allegedly disqualifying crime. A broad concept of discretion may encompass such evaluative judgment. But once the non-political crime committed outside the country of refuge is properly characterised as

'serious' the provisions of the Convention do not apply. There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant if returned to the state of origin. In par 156 of the Handbook on Procedure and Criteria for Determining Refugee Status (Office of the United Nations High Commissioner for Refugees, 1992), it is said of Art 1F(b):

'156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, eg persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.'

In T v Secretary of State for Home Department [1995] 1 WLR 545 at 554-555; [1995] 2 All ER 1042 at 1050- 1051, the Court of Appeal held that there is nothing in the Convention to support the view that in deciding whether a non-political crime is 'serious' the relevant Minister or appeal tribunal is obliged to weigh the threat of persecution if asylum be refused against the [gravity] of the crime. It is not necessary for present purposes to decide whether the evaluative characterisation of an offence as serious attracts elements of a balancing exercise. For on any view, a conspiracy to import into Australia trafficable quantities of heroin must be regarded as a serious offence."

32 French J considered the policy underlying Art 1F(b) at 564-565:

" A policy basis for Art 1F(b) is set out in the 1992 UNHCR Handbook. It is said at par 148 of the Handbook that at the time the Convention was drafted there was a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order. At par 151 it is said:

'The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.'

It is also said in the Handbook that only a crime committed by the applicant outside the country of refuge prior to admission to that country as a refugee is a ground for exclusion (par 153). A refugee committing a serious crime inside the country of refuge is subject to due process of law in that country (par 154). Article 33 permits a refugee's expulsion or return to his home country if, having been convicted of a particularly serious common crime, he constitutes a danger to his country of refuge. It is to be noted that the Handbook is not a document which purports to interpret the Convention. In Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 392, Mason CJ (as he then was) said that he had not found the Handbook especially useful in the interpretation of the definition of 'refugee'. His Honour went on to observe:

'Without wishing to deny the usefulness or the admissibility of extrinsic materials of this kind in deciding questions as to the content of concepts of customary

international law and as to the meaning of provisions of treaties ... I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention.'

See also Todea v Minister for Immigration and Ethnic Affairs (1994) 20 AAR 470 at 484, per Sackville J.

...

The provisions of the Convention are beneficial and are not to be given a narrow construction. The exemption in Art 1F(b), however, is protective of the order and safety of the receiving State. It is not, in my opinion, to be construed so narrowly as to undercut its evident policy. The fact that a crime committed outside the receiving State is an offence against the laws of that State does not take it out of the ordinary meaning of the words of Art 1F(b). Nor does the fact that the crime has subsequently been punished under the law of the receiving State. The operation of the exemption is not punitive. There can be no question of twice punishing a person for the same offence. Rather it is protective of the interests of the receiving State. The protective function is not limited according to whether or not the punishment has been inflicted in Australia or elsewhere. Nor, on the language of the Article or its evident policy, is it necessary that the disqualifying crime have any connection to the reason for seeking refuge. A person who would otherwise qualify for admission as a refugee may be disqualified by the operation of Art 1F(b) if it were shown that such a person had a record of serious non-political criminal offences whether in the country of origin or elsewhere. In my opinion also it makes no difference that the offence, in this case a continuing offence, was committed both outside and within Australia."

33 In Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 88 FCR 173 ("Ovcharuk") a Full Court agreed with the observation of French J in Dhayakpa that Art 1F(b) is intended to be protective of the order and safety of the receiving State and, as a consequence, the question of whether there are serious reasons for considering that a person "has committed a serious political crime outside the country of refuge prior to his admission to that country as a refugee" may be answered by reference to the notions of serious criminality accepted within the receiving State: see 179 per Whitlam J, 185 per Branson J and 191 per Sackville J. While the issue in Ovcharuk related to whether the phrase "a serious non-political crime" should be qualified in respects that are not presently relevant there is nothing in any of the judgments in that case that affords any support to the appellant's argument in the present case. However, while the courts in Australia might not have finally determined that there is no requirement for a balancing test the courts in the United Kingdom, the United States and New Zealand have specifically rejected the balancing test proposed by the appellant. In T v Secretary of State for the Home Department (1995) 1 WLR 545 at 554-555 the Court of Appeal stated:

"Such a balancing exercise is suggested in paragraph 156 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 (1979), published by the Office of the United Nations High Commissioner for Refugees. This reads in part:

'it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of the persecution feared. If

a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him.'

We do not accept that the analogy with Chahal's case is sufficiently close to require us to follow that decision on the question whether the balancing exercise suggested in paragraph 156 of the handbook is necessary. The paragraphs of the Immigration Rules upon which the judgments in Chahal's case were based (paragraphs 164 and 167 of Statement of Changes in Immigration Rules (1990) (H.C. 251)) do not apply to the removal of illegal entrants such as this applicant. By paragraphs 161 and 173 of those Rules, the Secretary of State is required not to act contrary to the Convention. If a person has committed a serious non-political crime outside the United Kingdom prior to his arrival here, the provisions of the Convention do not apply to him. We can find nothing in the Convention which supports the view that, in deciding whether a non-political crime is 'serious' and therefore within article 1F, the Secretary of State or the appeal tribunal is obliged to weight the threat of persecution if asylum be refused against the gravity of the crime."

…

38 In S v Refugee Status Appeals Authority [1998] 2 NZLR 291 at 297-300 the Court of Appeal considered the relevant United Kingdom, Canadian and Australian authorities and concluded (at 300):

"Having taken into account all the matters urged by counsel, we have reached the conclusion that the words of art 1F(b) being clear and unambiguous, should not be given some special meaning, requiring the addition of qualifying words which are not easily capable of insertion, and are unnecessary to give an acceptable meaning in context to the paragraph. Whether a crime is to be categorised as serious is to be determined by reference to the nature and details of the particular offending, and its likely penal consequences. It does not depend upon, nor does it involve, a comparative assessment of its own gravity with the gravity of the perceived persecution if return to the homeland eventuates."

39 The appellant argued that the statement that the words of Art 1F(b) are "clear and unambiguous" cannot be accepted in the light of the observations to the contrary in Singh. Those observations, however, were directed at the difficulties involved in determining whether certain crimes are "non-political" crimes, and not at whether non-political crimes are to be regarded as "serious" crimes. As was explained by French J in Dayapakh at 563-564 the seriousness of a crime involves an "evaluative judgment about the nature of the allegedly disqualifying crime".

40 In Canada the courts have been less definitive about whether a balancing test is required by Art 1F(b). In Gonzalez v Canada (Minister of Employment and Immigration (1994) 115 DLR (4th) 403 at 410, Mahoney J suggested that "[p]erhaps the modifier" serious in Art 1F(b) would make possible [a] balancing [test]. Subsequently, in Gill v Canada (Minister of Employment and Immigration) (1994) 119 DLR (4th) 497 at 517 Hugessen JA, delivering the judgment of the Federal Court of Appeal, doubted that Art 1F(b) requires a "kind of proportionality test which would weigh the persecution likely to be suffered by the refugee claimant against the gravity of the crime".

41 The courts in the common law jurisdictions have rejected the views expressed in the UNHCR Handbook and by eminent writers that Art 1F(b) requires a balancing test. Those views appear to be based upon a policy allegedly underlying Art 1F(b) that a person should not be denied the protection of the Refugees Convention unless the seriousness of the crime

outweighs the risk of the persecution the person is likely to suffer if he or she is refouled to his or her country of nationality. The difficulty with that view is that the policy underlying Art 1F(b) is to be found in the Article's specification of the criterion for exclusion to be the commission of a "serious non-political crime" prior to the person's admission into the intended country of refuge. Thus, the Article provides that the commission of such a crime, of itself, is sufficient to exclude the person in question from the protection of the Refugees Convention. In the context of the limited manner in which the Refugees Convention has been incorporated into municipal law in Australia (see Khawar v Minister for Immigration and Multicultural Affairs (2002) 187 ALR 574 at 584) the purpose of Art 1F(b) is clear; if a person has committed a serious non-political crime prior to the person's admission into the intended country of refuge he or she is not a person to whom Australia has protection obligations under the Refugees Convention. In determining whether the disqualifying crime is "serious" it is appropriate to have regard to the fact that it must be of such a nature as to result in Australia not having protection obligations to persons who commit such crimes. However, there is no textual or contextual basis for reading into Art 1F(b) an additional requirement of a balancing test nor would such a requirement be justified on the basis that it is giving effect to a purpose or object of Art 1F(b) of the Refugees Convention.

The Full Court in SHCB v MIMIA [2003] FCAFC 308 (2003) 133 FCR 561 (Mansfield Emmett and Bennett JJ.) approved the approach of the AAT when it found that there was evidence of war crimes and crimes against humanity and made a finding that the appellant took steps as an intelligence officer knowing that such acts would be a consquence of his steps. The Court held that it was open to find the appellant aided, abetted or otherwise assIsted the commission or attempted commission of such acts. The Court said:

3….The AAT was satisfied that there is strong evidence that the appellant has committed either war crimes or crimes against humanity within the meaning of an international convention and that the appellant therefore falls within Art 1F(a).
…
9….The AAT concluded that the material before it pointed to KHAD's being involved in acts of torture and attacks against the civil population or individual civilians who were not taking a direct part in hostilities. It considered that the material also pointed to KHAD's having been engaged in violence to life and person, including cruel treatment and murder.
10 The AAT considered that there was strong evidence that acts of atrocity, torture, cruelty and violence to the person, as well as arrest and detention for indefinite periods, were perpetrated by KHAD. KHAD's activities were not confined to Kabul and there was evidence that the atrocities it committed were worse in the regions other than Kabul. …It was satisfied that those activities involved the commission of crimes against humanity or war crimes or both within the meaning of international conventions.
…
12…The AAT was also satisfied that there was strong evidence that the appellant did not play a peripheral or menial role in KHAD….
13 The AAT characterised the focus of the case before it as being whether the appellant had any part to play, whether directly or indirectly, in acts of atrocity committed by KHAD and,

if so, whether his part leads to the conclusion that he had committed a war crime or a crime against humanity. The AAT stated the relevant legal principle as follows:

> 'In order to bear criminal responsibility for an act under the Rome Statute, a person need not have directly committed that act him or herself. He or she must, however, have aided, abetted or otherwise assisted in its commission or attempted commission or have contributed to its commission or attempted commission by persons acting with a common purpose. The person must act intentionally and must have knowledge of the intention of the group to commit the crime.'

There has been no suggestion that that statement of principle is wrong.

14 The AAT found that the appellant was an officer of KHAD at the time war crimes and crimes against humanity were committed by KHAD. However, the appellant denied that he knew about atrocities, torture and interrogation carried out by KHAD and denied that he played any part in them….

15 Many of the cases of atrocity referred to in the material before the AAT related to the period when the appellant was an officer in KHAD. The AAT was satisfied that there was strong evidence that the appellant would have been well aware of the activities in which KHAD engaged, even if he were not himself engaged in acts of torture, violence and detention of the sort just described. The AAT was also satisfied that there was strong evidence that the appellant would have been well aware that reporting information to his superiors would be likely to lead to such acts being perpetrated against those about whom he reported.

16 The AAT referred to two incidents in that regard….

….

18…There was evidence before the AAT that sending the security forces would mean that anyone who might have been an opponent of the regime would be arrested and exposed to interrogation, intimidation and threats by KHAD.

19 That material led the AAT to conclude that the appellant was aware that merely reporting information had consequences for those to whom the information related and that those consequences were directed to ending the activities of those whom he reported. Given the appellant's position in KHAD, the knowledge of KHAD's activities in the community and the appellant's knowledge of the action that KHAD would take when he reported his information, the AAT was satisfied that there was strong evidence that the appellant reported information 'with the knowledge that KHAD would take action to end the security threat in one area or the destructive activities alleged to have been undertaken by Azad Beg in another'. The AAT found that the appellant did so in the knowledge that KHAD was likely to engage in activities that amounted to war crimes or crimes against humanity.

….

ABSENCE OF SPECIFIC FINDINGS

21 The AAT found that the appellant:

- knew of the activities of KHAD involving crimes against humanity or war crimes, by reason of his being an officer of KHAD who had received extensive training;
- was responsible for passing on information to his superiors knowing the consequences in relation to the steps that would be taken to end the activities reported by him.

During the period that the appellant passed on that information, the KHAD perpetrated numerous acts of atrocity, torture, cruelty and violence to the person. However, the AAT

did not make a finding that a specific act of atrocity, torture, cruelty or violence to the person occurred as a consequence of the passing on of the information.
22 The AAT found that many such acts were committed by the KHAD while the appellant was an officer, in circumstances where he knew such acts were being committed. He passed on information in the two specific incidents mentioned, knowing that atrocity, torture, cruelty or violence to the person was a likely consequence.
23 It is not necessary, for a finding that the appellant committed a war crime or a crime against humanity, that there be a finding with respect to a specific incident, if there are findings of many such incidents and a finding that the appellant took steps as an officer of KHAD knowing that such acts would be the consequence of his steps. It was open to the AAT, on the material before it, to conclude that the appellant aided, abetted or otherwise assisted the commission or attempted commission of such acts. The AAT made findings that KHAD was involved in crimes against humanity and war crimes at a time when the appellant, in the course of his duties as a reasonably high ranking officer, passed on information that was likely to lead to the commission of such acts.
24 The AAT observed that the two incidents described led the AAT to conclude that the appellant was aware that his merely reporting information had consequences for those whom he reported and that those consequences were directed to ending the activities of those whom he reported….
25 The appellant contended that, in the light of that observation, in order to determine complicity of the appellant in the commission of a relevant crime, the AAT was required to find that:

- there was strong evidence that the appellant had knowledge of the illegality of the processes of government departments other than KHAD, namely the Ministry of Justice and the Special Revolutionary Tribunal; and

- the appellant was intentionally and knowingly complicit in a common criminal purpose with the combined forces as well as the Ministry of Justice and the Special Revolutionary Tribunal.

26 It is clear enough that, in the passage set out above (at [24]), the AAT was citing the assertions made by the appellant. The AAT then went on to refer to evidence given by Dr William Maley on behalf of the Minister. Dr Maley is Associate Professor of Politics, University College, University of New South Wales, Australian Defence Force Academy and a research associate of the Centre for Arab and Islamic studies at the Australian National University. Dr Maley referred to a paper prepared by the Netherlands' Ministry of Foreign Affairs, Asylum and Migration Division ('the Netherlands' Paper'), which stated that persons arrested by KHAD were first taken to interrogation centres operated by it. Detainees were questioned and, if thought to be withholding information, were threatened with force. If the person was still thought to be withholding information, torture was used. Dr Maley also said that the Special Revolutionary Tribunal was routinely involved in interrogation itself. The Netherlands' Paper states that it and the Revolutionary Public Prosecutor were controlled by KHAD and that many were sentenced to imprisonment or death on the basis of information obtained under torture…..
27 The appellant further submitted that neither of the reports made by him could constitute a crime against humanity because the reports were directed against insurgents engaged in guerrilla warfare against the regime and not against civilians.
…
29 The characterisation of Azad Beg in terms of civilian or military activity is a question of fact for the AAT. No such finding of fact was made, which is understandable in the absence of a case being made that there was such a distinction to be drawn. There was no error on

the part of the AAT in that regard. The AAT's finding was based on KHAD's acts against the civilian population.

DURESS

30 The AAT noted that the departure of the appellant from the KHAD would be branded disloyalty and would be visited with dire consequences. Thus, it might be concluded that there was duress brought to bear on the appellant to ensure his continued membership of KHAD. However, the AAT did not find that merely being an officer of the KHAD constituted complicity in its acts. The finding was to the effect that the appellant, in his capacity as an officer, engaged in conduct knowing that that conduct was likely to lead to the commission of relevant acts. …

31 The defence of obedience to higher orders will normally apply only where there are imminent real and inevitable threats to a subordinate's life. There is an element of moral choice in relation to the defence: see Re W97/164 and Minister for Immigration and Multicultural Affairs (1998) 51 ALD 432 at 449 [80]-[83]. As the primary judge observed (at [15]), the question ultimately was whether the appellant had been in a position to make the relevant moral choice. There is simply no finding by the AAT to support the contention that the appellant was in a position to make the relevant moral choice. The explanation for the absence of such a finding is that there was no evidence adduced on behalf of the appellant to that effect. The only evidence to which the appellant could point was equivocal. Indeed, the basis of his case was that he had no knowledge of any act that required him to make a moral choice.

…

34 In the application to the AAT, the specified ground of review was that the appellant had been wrongly accused of being involved in human rights abuses by KHAD of which he had no knowledge. He did not claim the delegate of the Minister had failed to address the claim that he had remained in KHAD, and performed his duties as an officer of KHAD, due to fear of the consequences of other action on his part….. When the issue arose about his role in KHAD and the applicability of Art 1F(a) of the Convention to his circumstances, his response was not that he remained in KHAD because he had no choice. It was that he was unaware of KHAD's more inhumane activities….

….

37….there was no material before the AAT on which to base a conclusion that his involvement in the activities of KHAD was the consequence of duress or coercion.

38 Further, it is difficult to see how there can be jurisdictional error on the part of the AAT in failing to embark on a consideration of a question that it was not asked to consider. That is all the more so in circumstances where such a question was inconsistent with the claims made by the appellant to the AAT. The appellant claimed that he did not know of, and was not involved in, any atrocities on the part of KHAD. The claim of duress is necessarily inconsistent with such a claim…..

….

In SRYYY v MIMIA [2003] FCA 1588 Lindgren J. found no error in the Tribunal's consideration whether there were serious reasons for considering that applicant had committed a war crime or a crime against humanity and its treatment of the "defence" of duress – i.e obedience to superior orders. His Honour said:

3 The Delegate and the AAT were not satisfied that Australia owed protection obligations to the applicant under the Convention relating to the Status of Refugees of 1951 as 'amended' by the Protocol Relating to the Status of Refugees of 1967 (compendiously, 'the

Refugees Convention'). The reason is that they accepted that there were serious grounds for considering that the applicant had committed 'a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes': see Article 1F of the Refugees Convention.

…

8…the Department wrote to the applicant advising him that he appeared to be excluded from the protection offered by the Refugees Convention because he had been an 'accomplice' in the commission of war crimes and crimes against humanity. The letter invited his comments.

9 In response, the applicant provided to the Department a statutory declaration dated 20 August 2001 in which he stated that he was following orders when 'asked to interrogate and torture or assault' detainees, and that he had a 'moral conscientious objection' to 'severe torturing against innocent citizens in Jaffna'. He also stated:

> 'I was never able to fulfil the entirety of torture that was asked. At maximum I would push or shove them or pull their ears and used my voice to shout at them. I was always conscientious to not cause bodily harm or cruelty to anyone.'

10…The Delegate did not accept the applicant's 'Defence of duress/acting under orders'. Accordingly, the Delegate found that the applicant was excluded by Art 1F of the Refugees Convention from the protection of that Convention.

…

13 In its reasons for decision dated 19 September 2003, the AAT reviewed relevant provisions of the Migration Act 1958 (Cth) ('the Act') and of the Migration Regulations 1994 (Cth), as well as the relevant terms of the Refugees Convention, including Art 1F, …

…

critical circumstances concerned what occurred when the applicant was stationed at Jaffna in connection with the questioning by the Sri Lankan Army of Tamil civilians in that area.

16 The applicant said he was assigned with four other soldiers to duties as part of a unit responsible for questioning suspects. Questioning of suspects took place on most days, usually two or three suspects a day.

17 The questioning took place in a room, with one person being questioned at a time. The interrogators usually worked in pairs.

18 The applicant's immediate superior was a sergeant and the officer in charge was a second lieutenant.

19 If the sergeant was present in the interrogation room, he would often ask the questions himself. At times, the second lieutenant would be present.

20 If the sergeant thought a person was lying or was holding back information, he would instruct the applicant and his fellow soldiers to intimidate the person. He said that he and other soldiers did this by kicking or beating the individual with a baton, mostly about the legs. The baton was made of wood and was about 18 inches long. The applicant said that he at first refused to participate, but his sergeant ordered him to 'just do it'.

21 According to the applicant, if the sergeant believed a person was telling the truth, and was innocent or knew nothing, the person would be taken elsewhere and probably released. If, on the other hand, the sergeant thought the person was not telling the truth after questioning, which could last for three to five hours, the person would be taken to another part of the camp for further interrogation. The applicant said he did not know what happened at that stage, although he had heard rumours of more severe action. If the person was actually a member of the LTTE, the person would be detained and questioned

repeatedly. The applicant said he suspected that such a person would be subjected to assaults and torture elsewhere in the camp.
22 The applicant said he complained to the sergeant many times that he did not wish to do this work and asked to be transferred, but the sergeant replied that he could not be transferred immediately and had to remain in the camp at Jaffna for some time. The applicant said he was scared that if he did not comply with orders from his superior officer, he would face severe punishment or be court martialled…..
….
25 The AAT summarised the submissions which were made to it by counsel for the applicant and the solicitor for the Minister. Counsel for the applicant referred the AAT to the Rome Statute of the International Criminal Court ('the Rome Statute') of 17 July 1998 which the AAT considered to be the relevant 'international instrument' for the purposes of the definitions of 'war crime' and 'crime against humanity' as those expressions are used in Art 1F of the Refugees Convention. It was not suggested on the hearing before me that this was an error.
26 The AAT referred to the forms of interrogation of both children and older individuals in which the applicant had engaged. The applicant was required to interrogate children brought to the camp. On at least the first two days, he was involved in questioning children between the ages of 12 and 14. He said his job was to make the children frightened and excited. He said that he would threaten the children with death if they did not cooperate. He said sometimes small children, when they were threatened, urinated in fear. These children were aged 12 or 13 or 14 according to the evidence the applicant gave before the AAT. He also said that the children were assaulted by being slapped about the face. He said this was the main way of assaulting the children, but teenagers of 16 or 17 were also 'assaulted and kicked'. There was also the evidence of the assaults with batons referred to earlier.
27 The AAT was satisfied on the basis of the evidence given by the applicant himself that there were serious reasons for considering that he had been involved in acts which could be characterised, in the AAT's words, as 'lower level torture or cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering' within the Rome Statute.
CONSIDERATION OF THE ISSUES BEFORE THIS COURT
28 The two issues raised on the application before this Court are whether the level of harm inflicted was sufficiently serious to amount to a war crime or a crime against humanity and whether the fact that the applicant was 'obeying superior orders' rendered the decision of the AAT erroneous. The applicant was unrepresented before me and handed up a short written submission which raised, but did not elaborate greatly upon, those two issues.
War crime or crime against humanity
29 The Rome Statute entered into force on 1 July 2002. Australia signed it on 9 December 1998 and ratified it on 1 July 2002.
30 Article 7 of the Rome Statute defines 'crimes against humanity' as follows:

> '1. For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> ...
> (f) Torture;
>
> ...
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

Paragraph 2 of Art 7 provides that for the purposes of par 1 of that Article:

> '(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack; ...
>
> (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; ...'.

The AAT also noted the definition of 'crimes against humanity' in the Charter of the International Military Tribunal (the 'Nuremberg Charter') which I will not set out here.
31 Article 8 of the Rome Statute defines 'war crimes' relevantly as follows:

> '2. For the purpose of this Statute, "war crimes" means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (i) ...
> (ii) Torture or inhuman treatment, including biological experiments;
> (iii) Wilfully causing great suffering, or serious injury to body or health;
>
> ...
> (b) ...
>
> (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
>
> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; ...'.

32 The AAT was satisfied, on the basis of the country information before it, that 'the Sri Lankan Army was involved in systematic persecution of a civilian group, namely the Tamil population' (at [63])…..
33…. The AAT set out the following passage from the interview on 14 May 2001 (Ms Watson was an officer of the Department):
….

> WATSON: Okay, and were the people injured by these assaults?
> INTERPRETER: Sometimes there were injuries, sometimes when the cheeks are slapped in a particular manner the lips break and injuries are got. Sometimes when a baton is used to beat, or kick by boots some parts of the body get numbed.
> WATSON: When you say get numbed, what do you mean?

INTERPRETER: If the attack or assault was so serious that particular place of the body, I mean powerless, something like numb.
WATSON: Do you mean they won't be able to move it again?
INTERPRETER: Yes, it's something like it slipped from the grip.
WATSON: Slipped from the grip?
INTERPRETER: Slipped from the grip, what that word means, it slipped from the grip of the bone.
WATSON: Oh, so it becomes detached, the bone becomes detached?
INTERPRETER: Yes, not severely but in a little manner, little slippery, some sort of slippery.' (my emphasis)

34 Turning to the applicant's evidence that he was required to interrogate children, the AAT noted that according to the applicant, on at least the first two days, he was involved in questioning children between 12 and 14 years of age. The AAT set out the following passage from the record of the interview of the applicant on 7 May 2001:

'WATSON: ... Now in your statement you mentioned the torture of children. Can you explain what you meant by this?
INTERPRETER: The suspects of my age or similar age are assaulted but at times even the children are made frightened and made excited. Sometimes we'd threaten the children – sorry, that if you do not come with the truth we will kill you. Sometimes small children when we threaten even they urinate in fear. These children age 14 or 13 or 12.
WATSON: So was this the extent of torture of children?
INTERPRETER: The children are assaulted by slapping in their face. That was the main way of assaulting the children but teenagers of 16 or 17 are assaulted and also kicked.

….

35 In the hearing before the AAT, the applicant said he had questioned children under 16 only during his first two days at the camp, but that in his subsequent questioning of older children, it was sometimes necessary to threaten or hit them.

36 In my opinion, the AAT was entitled on the evidence before it to reach the conclusion which it expressed at [60] of its reasons for decision as follows:

'On the basis of the above evidence, the Tribunal is satisfied that there are serious reasons for considering that the Applicant was involved in acts which could be characterised as lower level torture or cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering. Even if the physical pain was not always severe, the mere physical threats and lower level violence could have led to more severe mental suffering, especially in the case of children.'

Obedience to superior orders

37 In relation to the second issue, the AAT was of the view that the evidence of the threat of repercussions adverse to the applicant was not so clear that he should be regarded as having, in effect, been relieved of moral responsibility for what he did: cf Re W97/164 and Minister for Immigration and Multicultural Affairs (1998) 51 ALD 432 at [80]–[83].

38 The applicant said that if he had not complied there was a likelihood that he would be transferred to a front line unit. The Deputy President observed that although the applicant might not have liked this, he had served in the past in such units in both Trincomalee and Elephant Pass. He was, after all, a soldier!

39 The AAT accepted that the applicant was acting in accordance with the orders of his superior officer and that he protested over the interrogation techniques he was told to use. The AAT also accepted that although the 'defence of obedience to superior orders' is not mentioned in the Rome Statute, Arts 7 and 8 of the Rome Statute 'suggest that there should be an element of intention or wilfulness in the conduct' (at [53]).
40 The AAT was simply not satisfied, however, on the evidence before it that the applicant was subjected to such pressure or threat as removed that element of 'intention' and 'wilfulness' on his part which made him morally responsible for the torture which he inflicted.

….

SRYYY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 42 ((Merkel Finkelstein Weinberg JJ.) allowed the appeal from SRYYY v MIMIA [2003] FCA 1588 (Lindgren J.) concerning Article 1F (a) of Refugees Convention . The appellant was a soldier in Sri Lankan army involved in action against LTTE - disclosure by him that during army service he was required to interrogate Tamil civilians, including children, detained on suspicion of links with or information about LTTE - during those interrogations he was required to engage in violent acts against detainees and to make threats, including death threats to the children, in order to extract information . His PV was refused on the ground that there were serious reasons for considering that the applicant had committed war crimes and crimes against humanity . The question was whether Tribunal fell into jurisdictional error by applying the definitions of war crimes and crimes against humanity set out in the Rome Statute of the International Criminal Court . It was held on appeal - implicit in the phrase "there must be serious reasons for considering" that person in question has "committed" a relevant international crime, that the conduct in question constituted a crime at the time that conduct was engaged in - it does not follow that the instrument defining the crime must be in existence at the time crime is allegedly committed. Art 1F(a) does not purport to apply to persons who have committed a crime under or pursuant to an international instrument -rather, the international instrument is merely the source of the definition according to which a person's exclusion from the Refugees Convention is to be tested ; it must follow that any international instrument drawn up to provide for, and which contains a definition of, "a crime against peace, a war crime, or a crime against humanity" is an instrument that is potentially relevant to an Art 1F(a) decision - view of the Court that Rome Statute was drawn up to provide for the

crimes it defined and it purported to define those crimes as crimes that had crystallised into crimes in international law as at the date of the Statute – this was so notwithstanding that the Statute was to come into force at a later date - definitions of crimes against humanity and war crimes contained in Arts 7 and 8(2)(c) of the Rome Statute respectively were appropriate definitions for AAT to apply - Article 33 of the Rome Statute dealing with defence of superior orders albeit not for genocide or crimes against humanity stands in a similar position .

The question whether the AAT failed correctly to apply the definitions in the Rome Statute of "crimes against humanity", as set out in Art 7, and "war crimes", as set out in Art 8 . The AAT correctly appeared to accept that relevant criterion was that it be satisfied that there was clear and convincing evidence that the appellant had committed such crimes. The appellant contended that Tribunal did not address questions (1) whether his acts were committed as part of a widespread or systematic attack directed against the civilian population pursuant to or in furtherance of a State or organisational policy to commit such an attack (2) whether appellant had knowledge that his acts were committed as part of a widespread or systematic attack committed against a civilian population pursuant to or in furtherance of a State or organisational policy to commit such an attack . The Court upheld the appellant's submissions. In determining whether Art 1F(a) precluded appellant from claiming protection the AAT was required to give specific and careful consideration to each of the elements of "crimes against humanity" set out in Art 7 - it failed to do so. The AAT did not consider whether the appellant's conduct took place "as part of a widespread or systematic attack directed against any civilian population". The issue not addressed was whether the appellant's conduct in relation to interrogating civilian detainees, in order to obtain information they had about LTTE members, was conduct that was "part of a widespread and systematic attack directed against any civilian population" - additionally AAT failed to address the question whether appellant had "knowledge" of the existence of any such widespread or systematic attack .

The next contention by appellant was that the Tribunal did not address the question whether defence of superior orders available under Art 33 of the Rome Statute in respect of a war crime was applicable and, if so, whether there were

serious reasons for considering that defence had been made out for the purposes of Art 1F(a) in respect of the war crimes allegedly committed by appellant . Neither the AAT nor the primary judge referred to Art 33 . The Rome Statute makes express provision for a defence of duress that is both separate and distinct from the defence of superior orders – a defence of superior orders can be maintained in answer to a charge of war crimes under Art 8 without any evidence of duress. The conditions under which such a defence can relieve a person of criminal responsibility are those set out in Art 33(1) - namely the person was under a legal obligation to obey orders of the superior, that that person did not know that the particular order was unlawful, and that the order was not "manifestly unlawful" . The Court held that it was not open when considering whether there are "serious reasons" for thinking that a person has committed a particular crime under the Rome Statute to ignore the availability of a defence under that Statute if it is relied upon by that person. Article 8 cannot be read in isolation . Art 30 for example defines the requisite mental elements for all offences unless otherwise provided. It was held that it would be antithetical to the purpose of Art 1F(a) to attempt to answer the question posed by Art 1F(a) without having regard to Art 30 - a view which accords entirely with the approach in SHCB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 308 . The AAT simply did not address this issue and made no finding whatsoever concerning illegality of the orders of appellant's superiors – not futile to remit matter because AAT would be bound to find that the orders that appellant carried out were "manifestly unlawful" - before any conclusion could be reached that the orders to engage in conduct constituting the serious violations were "manifestly unlawful" there would have to be a clear definition of the conduct constituting the war crime and consideration of the terms of the "superior orders" and the circumstances under which they were given. The AAT had constructively failed to exercise its jurisdiction.

The Court said:

2 During the course of his application for a protection visa the appellant disclosed that during his service he was required to interrogate Tamil civilians, including children, who had been detained on suspicion that they may have links with or information about the LTTE. The appellant also disclosed that during those interrogations he was required to engage in violent acts against the detainees and to make threats, including death threats to the children, in order to extract information from them.

….

7 In the proceeding before the AAT the parties proceeded on the basis that the Rome Statute of the International Criminal Court ("the Rome Statute") was a relevant international instrument that defined war crimes and crimes against humanity for the purposes of Art 1F(a). The AAT determined to apply the definitions contained in the Rome Statute on the basis that it was the "most recent authoritative statement on this matter".
8 The AAT was satisfied on the basis of the country information before it that "the Sri Lankan Army was involved in systematic persecution of a civilian group, namely the Tamil population". The AAT considered the appellant's various accounts of the nature and level of his involvement in the interrogation of Tamils at the Sri Lankan Army camp at Jaffna and was satisfied on the basis of that evidence that there were "serious reasons for considering that the [appellant] was involved in acts which could be characterised as lower level torture or cruel and inhuman treatment involving the intentional infliction of both physical and mental pain and suffering". The AAT said that, even if the physical pain inflicted by the appellant was not always severe, the physical threats and lower level violence could have led to more severe mental suffering, especially in the case of children.
9 The AAT accepted that the appellant had been acting in accordance with the orders of his superior officer and that he protested over the interrogation techniques which he was instructed to use. It did not refer to the defence of obedience to superior orders in Art 33 of the Rome Statute but stated that although the defence of acting in obedience to superior orders and under compulsion "is not specifically referred to in Articles 7 and 8 of the Rome Statute, the relevant provisions suggest that there should be an element of intention or wilfulness in the conduct". The AAT, however, found that the appellant had not been subjected to such pressure or threat as removed that element of intention and wilfulness on his part. In the result, the AAT was satisfied that there were serious reasons for considering that the appellant had committed crimes against humanity and war crimes as defined in Arts 7 and 8 of the Rome Statute.
….

The issues on the appeal

13 The appellant contended that, because the Rome Statute only entered into force on 1 July 2002 and only has effect from that date, the Rome Statute could not be relied upon by the AAT as defining the crimes against humanity and war crimes allegedly committed by the appellant prior to that date. The appellant also submitted that, even if the Rome Statute were the appropriate international instrument for the purposes of defining crimes against humanity or war crimes, the AAT had constructively failed to exercise its jurisdiction by not addressing the questions required to be addressed in determining whether there are serious reasons for considering whether the appellant had committed crimes against humanity or war crimes as defined in the Rome Statute. In particular, it was contended that the AAT did not address the following questions:
(1) whether the appellant's acts were committed as part of a widespread or systematic attack directed against the civilian population pursuant to or in furtherance of a State or organisational policy to commit such an attack;
(2) whether the appellant had knowledge that his acts were committed as part of a widespread or systematic attack committed against a civilian population pursuant to or in furtherance of a State or organisational policy to commit such an attack;
(3) whether the acts of the appellant were committed in the course of an armed conflict;
(4) whether the defence of superior orders, which is available under Art 33 of the Rome Statute in respect of a war crime, but which was not considered by the AAT or the primary Judge, was applicable and, if so, whether there were serious reasons for considering that the

defence had been made out for the purposes of Art 1F(a) of the Refugees Convention in respect of the war crimes allegedly committed by the appellant.

….

17 The contentions of the parties raise the following questions:

(1) Did the AAT fall into jurisdictional error by applying the definitions of crimes against humanity and war crimes in the Rome Statute?

(2) Did the AAT fall into jurisdictional error by failing to apply the defence of "superior orders" set out in Art 33 of the Rome Statute?

(3) Are there any discretionary factors relevant to the disposition of the appeal?

The background to Article 1F of the Refugees Convention

18 Article 1F(a) is to be interpreted in accordance with the rules of treaty interpretation under international law, principally those contained in the Vienna Convention on the Law of Treaties…

19 The development of international criminal law following the Second World War provided an important part of the context in which Art 1F was to operate…..

19 The development of international criminal law following the Second World War provided an

20 The concept of individual criminal responsibility under international law was not clearly established until the aftermath of the Second World War. By 1951, when the Refugees Convention was drafted, a number of instruments dealing with international crimes had come into existence. The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, (82 UNTS 280, entered into force 8 August 1945) ("the London Charter"), drafted and entered into by the four victorious powers (although it was also acceded to by a number of other states, including Australia) provided for trial of war criminals by an "international military tribunal" ("the Nuremberg IMT") and in Art VI defined the offences to be tried:

> "...The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated."

...

Article VIII of the London Charter provided:

> "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

21 The Nuremberg IMT had as its purpose the trial of the highest level war criminals. Lower ranking persons were to be tried pursuant to Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace (signed in Berlin, 20 December 1945, published in (1946) 3 Official Gazette Control Council for Germany at 50-55) ("Control Council Law 10"), which provided similar, but not identical, definitions of crimes against peace, war crimes and crimes against humanity. Article II(4)(b) of the Control Council Law 10 contained a similar provision to Art VIII of the London Charter. Suspected Japanese war criminals were tried by the International Military Tribunal for the Far East ("the Tokyo IMT"), which was required to apply definitions of crimes against peace, war crimes and crimes against humanity that were similar, but not identical, to the counterpart provisions in the London Charter.

22 On 11 December 1946 the General Assembly of the United Nations passed Resolution 95(I) affirming the principles of law recognised by the London Charter and the judgment of the Nuremberg IMT. In Resolution 177(II) of 21 November 1947 the General Assembly directed the newly created International Law Commission ("the ILC") to formulate the principles of international law recognised in the London Charter and the Nuremberg IMT judgment. At the same time the ILC was directed to "[p]repare a draft code of offences against the peace and security of mankind". The ILC completed the first of these tasks in 1950 with its Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (adopted by the Commission at its second session, in 1950, and submitted to the UN General Assembly) ("ILC Principles"). Principle VI provided definitions of war crimes and crimes against humanity similar to those in the London Charter. Principle IV stated:

> "The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

The ILC also commenced work on the proposed draft code of crimes against the peace and security of mankind, and it was envisaged at the time that this document would eventually represent an international criminal code.

23 Two other relevant developments preceded the drafting of the Refugees Convention. First, in 1948 the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, New York, 78 UNTS 277, entered into force 12 January 1951) ("the Genocide Convention"). The Genocide Convention defined the crime of genocide, a particular species of crime against humanity.

24 Secondly, in 1949, under the auspices of the International Committee of the Red Cross, the four Geneva Conventions were adopted: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 ("the First Convention"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 ("the Second Convention"); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 ("the Third Convention"); and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 ("the Fourth Convention") (all of which were opened for signature on 12 August 1949 and entered into force on 21 October 1951) ("the Geneva Conventions"). Each included (in Art 50 of the First Convention, Art 51 of the Second Convention, Art 130 of the Third Convention, and Art 147 of the Fourth

Convention) definitions of a variety of war crimes, which are referred to as "grave breaches" of the Conventions. The definitions of war crimes, as well as those contained in all the instruments referred to above, were considered only to be applicable to an international armed conflict (see Prosecutor v Tadic, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995 ("Tadic") at [71] and [81] – [84]). Common Article 3 of the Geneva Conventions set down standards of conduct applicable in armed conflicts not of an international character, however the standards relate only to state responsibility and do not create individual criminal responsibility.

25 Another part of the context for the interpretation of Art 1F is provided by Art 14 of the Universal Declaration of Human Rights (UN Doc A/810 at 71, adopted by the UN General Assembly in Resolution 217A (III) on 10 December 1948) ("the UDHR"). Article 14 provides:

> "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> 2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

26 The article seeks to balance the need to provide refuge outside of the countries of those whose human rights are at risk of violation, against the need to hold individuals accountable for their own crimes or violations of the human rights of others.

….

29 The clear purpose of Art 1F is to ensure that the protection obligations arising under the Refugees Convention are not extended to persons who were undeserving of the protection by reason of their past criminal misconduct and, if given protection, could escape prosecution for that conduct. In Pushpanathan v Canada (1998) 160 DLR (4th) 193 at 228 Bastarache J described the rationale of Art 1F as being that "those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees". However, it is also clear that the purpose of the resort in Art 1F(a) to the definition of a crime against peace, a war crime and a crime against humanity in international instruments was premised on an important feature of international law, namely the uncertain and imprecise content of that law at any particular time. As was stated by Cardozo J in New Jersey v Delaware (1934) 291 US 361 at 383:

> "International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality."

30 However, the imprimatur of a court to a rule or doctrine of international law requires a determination that the rule or doctrine in question has attained the position of general acceptance by, or assent of, the community of nations "as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions": see Compania Naviera Vascongado v SS Cristina [1938] AC 485 at 497 per Lord Macmillan.

31 Further, the rules of international law are dynamic and their content inevitably turns on the future evolution of international law: see, for example, New South Wales v The Commonwealth (1975) 135 CLR 337 at 466 per Mason J. Thus, a precise definition of the crimes the subject of Art 1F(a) can be a vexed and difficult question. The drafters of the

final form of the article avoided that difficulty by enabling the decision-maker to draw upon the definitions of such crimes by reference to unspecified international instruments drawn up to provide for the crimes in question, rather than by reference to any specific international instruments or to customary international law.

32 It is also significant that the criterion employed in Art 1F(a) is that the definition of the relevant international crimes is to be derived from "the international instruments drawn up to make provision in respect of such crimes". As was pointed out in North Seas Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (1969) ICJ Reports 3 at [60] – [74], an international instrument such as a treaty may reflect or codify pre-existing customary law; it may "crystallise" a new rule of customary law; or subsequent state practice in accordance with the treaty may lead to the creation of a new rule of customary law after the adoption of the treaty provision.

International Instruments since 1959

33 Since 1959 a number of international instruments have been drawn up to make provision in respect of international crimes. First, though least significantly for the purposes of the present case, instruments have been created which deal with specific types of crimes. For example, Art I of the International Convention on the Suppression and Punishment of the Crime of Apartheid (opened for signature 30 November 1973, New York, 1015 UNTS 243, entered into force on 18 July 1976) ("the Apartheid Convention") declares that apartheid is a crime against humanity for which an individual may be criminally responsible, and Art II sets out a detailed definition of the crime of apartheid. In 1977 the Geneva Conventions were supplemented by two Protocols, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, ("Geneva Protocol I"), and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, ("Geneva Protocol II"), both of which entered into force on 7 December 1978. The first of these, Geneva Protocol I sets out (in Art 85) further acts constituting the crimes of "grave breaches" of the Protocol. Geneva Protocol II specifically addressed issues arising in armed conflicts not of an international character, namely internal armed conflicts. However, the Protocol does not provide for the existence of any individual criminal responsibility arising from internal armed conflicts.

34 Subsequently, the United Nations Security Council established ad hoc criminal tribunals to try crimes occurring during the conflicts in the former Yugoslavia and Rwanda. In 1993, by Resolutions 808 and 827, the Security Council established the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). The Statute of the ICTY sets out the following definitions :

> "Article 2: Grave breaches of the Geneva Conventions of 1949
> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3: Violations of the laws or customs of war
The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cites, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and words of art and science;
(e) plunder of public or private property.

Article 4: Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5: Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

The Statute also provides in Art 7(4) that:

> "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

35 In 1994, under Resolution 995, the Security Council established the International Criminal Tribunal for Rwanda ("the ICTR"). The Statute of the ICTR contains similar provisions to the Statute of the ICTY but, significantly, it also provides for individual criminal responsibility in respect of war crimes occurring in the context of the internal armed conflict in Rwanda:

> "Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II
>
> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
> (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) Collective punishments;
> (c) Taking of hostages;
> (d) Acts of terrorism;
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) Pillage;
> (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
> (h) Threats to commit any of the foregoing acts."

36 The extension of individual criminal responsibility for war crimes to internal armed conflicts under international customary law, as well as under international conventional law, was recognised in 1995 by the decision of the ICTY Appeals Chamber in Tadic. The Chamber held (at [71]-[95]) that although grave breaches of the 1949 Geneva Conventions could occur only in the context of an international armed conflict, Art 3 of the ICTY Statute (violations of the laws and customs of war) incorporates customary international law, which includes a concept of individual criminal responsibility for war crimes even when committed in the context of an internal armed conflict (see [94]).

37 Alongside these developments in relation to the substantive content of international criminal law, as recorded in international instruments, attempts were once again made to establish a permanent international criminal court

….

38 The Rome Statute was adopted on 17 July 1998 (with 120 votes in favour, 7 against and 21 abstentions). According to Professor Cassese in "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court" in A Cassese, P Gaeta

and JRWD Jones (eds) The Rome Statute of the International Criminal Court: A Commentary (2002) vol 1 ("The Rome Statute: A Commentary") at 3-4:

> "For all its imperfections, the Statute of the International Criminal Court, adopted on 17 July 1998 by the Rome Diplomatic Conference, was a major breakthrough in the effective enforcement of international criminal law. It marks the culmination of a process started at Nuremberg and Tokyo and further developed through the establishment of the ad hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The Statute crystallizes the whole body of law that has gradually emerged over the past fifty years in the international community in this particularly problematic area. Insofar as it departs from existing trends and the practices of ad hoc criminal tribunals, the Rome Statute also breaks new ground and points to the path likely to be taken by international criminal justice in the current millennium."

And at 18:

> "With the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda, the enforcement of international humanitarian law moved into a new and more effective phase. Nevertheless, it is the enactment of the ICC Statute which represents the pinnacle of the institutionalization and universalization of measures for the enforcement of international humanitarian law."

39 The Preamble to the Rome Statute states, inter alia, that the States Parties to the Statute are:

> "DETERMINED ... to establish an independent permanent International Criminal Court ... with jurisdiction over the most serious crimes of concern to the international community as a whole."

40 Part 1 of the Rome Statute provides for the establishment of an International Criminal Court ("the ICC"). Part 2, inter alia, defines the crimes within the jurisdiction of the ICC being the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

41 Relevantly, for present purposes "crimes against humanity" are defined in Art 7:

"Article 7

> 1. For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> ...
>
> (f) Torture;
>
> ...
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
>
> 2. ...
>
> > (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
>
> ...

(e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;"

42 War crimes are, relevantly, defined in Art 8(2):

"Article 8

2. For the purpose of this Statute, ‘war crimes’ means:

...

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

...

(d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

43 Part 3, which was not referred to either by the AAT or the primary judge, sets out "General Principles of Criminal Law". It contains the following provisions:

"Article 22

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

...

Article 24

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

...

Article 30

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

...

Article 31

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
...
(a) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
(i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person's control.
...

...

Article 33

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

44 The Special Court for Sierra Leone was established by an agreement between the United Nations and Sierra Leone pursuant to Security Council Resolution 1315 of 14 August 2000. The Statute establishing the Special Court for Sierra Leone provides for the prosecution of crimes against humanity and war crimes, which were defined in a manner that closely resembled the definitions for the ICTR. The Statute also provided for other serious violations of international humanitarian law, which were defined as follows:

"Article 4: Other serious violations of international humanitarian law
The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."

45 Article 6(4) of the Statute provides:

> "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires."

46 The development of international criminal law, as recorded in various international instruments made since the Second World War, demonstrates some of the difficulties involved in applying Art 1F(a) of the Refugees Convention. Identifying what constitutes a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes may not be a straightforward or simple task. A number of international instruments have defined war crimes and crimes against humanity and have also made specific provision for "superior orders". Although there is a substantial overlap in the various definitions there are disparities which may, in some cases, have a determinative impact on the outcome of a particular case. In some instances the disparities may be explained by the fact that the statute in question has been drawn up to deal with the specific international crimes such as those committed in the former Yugoslavia, Rwanda and Sierra Leone.

47 Nonetheless, the various instruments to which we have referred were intended to reflect the development and evolution of the customary international criminal law that was applicable to the situation provided for by the instrument. With respect to crimes against humanity, the definition contained in the Art VI(c) of the London Charter and Art V(c) of the Charter of the Tokyo IMT defined crimes against humanity in a manner that required the existence of an armed conflict in the sense that the crime must have been committed "before and during the war". However, this requirement has not been included in many later instruments (see for example Control Council Law 10 Art II(1)(c), Apartheid Convention Art 2, Statute of the ICTR Art 3, Rome Statute Art 7, Draft Code of Offences against the Peace and Security of Mankind 1954 ("Draft Code of Offences") Art 2(10), and Draft Code of Crimes Art 18). On the other hand, Art 2 of the Statute of the Special Court for Sierra Leone requires that the crime involve "a widespread and systematic attack against a civilian population". Also, notwithstanding the express inclusion of a nexus with an armed conflict in the definition of crimes against humanity contained in Art 5 of the ICTY Statute, the Appeals Chamber of the ICTY observed in Tadic (at [141]) that that definition is a departure from customary international law, which no longer requires a connection with an armed conflict for a crime against humanity.

48 Further, the conduct which may form the basis of a crime against humanity has been expanded beyond the conduct enumerated in the London Charter. For example, imprisonment, torture and rape were included in the Control Council Law 10, the Statutes of the ICTY and the ICTR, in Art 18 of the Draft Code of Crimes and in Art 7(1) of the Rome Statute, which also included forms of sexual violence and enforced disappearances. A number of other differences between the various instruments defining crimes against humanity are also apparent. These include, for example, a requirement in Art 3 of the Statute of the ICTR that the crime be committed "on national, political, ethnic, racial or religious grounds"; and the omission from Art 5 of the Statute of the ICTY of a requirement that the crimes be part of a widespread or systematic attack. The definition set out in Art 7 of the Rome Statute introduces further changes, including an expansion of the "persecution" form of the crime to include persecution based on national, ethnic, cultural, or gender grounds or any other grounds that are universally recognised as impermissible under international law; an explicit reference to the mens rea requirement that the accused

must have knowledge of the attack; and a requirement that the attack must be committed pursuant to or in furtherance of a State or organisational policy.

49 Perhaps the most significant change in terms of scope and content of individual criminal responsibility since the Second World War has been the recent acceptance that war crimes for which an individual may be criminally responsible may be committed in situations of internal armed conflict. As recently as 1994, the Commission of Experts established pursuant to Security Council Resolution 780 to report on questions relating to breaches of humanitarian law in the former Yugoslavia concluded that "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes" and, consequently, "the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal are offences when committed in international, but not in internal armed conflicts" (Annexure to the Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 at [52] and [54]). The situation under customary law was also reflected in the international instruments which dealt with war crimes up to and including the Statute of the ICTY. That changed in 1994 with the Statute of the ICTR and in 1995 with the ICTY's decision in Tadic. In Tadic the ICTY held at [94] that customary international law did contain an offence of war crimes committed during internal armed conflict, and imported such an offence into Art 3 of the ICTY Statute. However, war crimes are defined so as to include conduct occurring in an internal armed conflict under the Statutes of the ICTY and the ICTR, the Draft Code of Crimes and the Rome Statute, but were not so defined in the earlier instruments.

50 It is clear from the foregoing analysis that the choice of instrument against which the appellant's acts are to be assessed can have a significant impact on whether or not those acts constitute the commission of a crime against humanity and, more particularly, a "war crime". In respect of war crimes, under the earlier instruments such as the London Charter (favoured by counsel for the appellant) or even under the Geneva Conventions and Protocols, there may not be a "serious reason for considering" that the appellant had committed a war crime if the conflict in Sri Lanka was determined to be an internal armed conflict.

51 Finally, the choice of instrument will impact on the availability and content of the defence of superior orders that is sought to be relied upon by the appellant. The earlier international instruments that have touched upon the subject, such as Art VIII of the London Charter, stated that there is no defence of superior orders for crimes under international law, although superior orders may be relied upon in mitigation of the punishment. On that issue the Nuremberg IMT (in International Military Tribunal (Nuremberg) Judgement and Sentences (1947) 41 AJIL 172 at 221) observed that:

> "The provisions of [Art VIII of the London Charter] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

52 The reference to a defence based on the absence of any possibility for a moral choice tied the factual question of obedience to an order to what might normally be referred to as raising a defence of duress. That approach was later reflected in Principle IV of the ILC Principles and in a slightly varied form in Art IV of the 1954 Draft Code of Offences (although the original London Charter formulation was readopted in the 1996 Draft Code

of Crimes). It was also applied by the Supreme Court of Canada in R v Finta (1994) 112 DLR (4th) 513 ("Finta") and appears to have been adopted by the AAT in the present case. However, by providing in Art 33 that a defence of superior orders (as distinct from the defence of duress contained in Art 31(1)(d)) can relieve a person from criminal responsibility in certain circumstances, the Rome Statute diverged from the earlier international instruments on this point.

53 The question of the state of customary international law in relation to the defence of superior orders when the Rome Statute was adopted is a vexed one. By about 1998 two conflicting approaches were prevalent. The first was that the existence of superior orders can never constitute a defence relevant to liability although it can be relevant to mitigation and to a defence of duress or compulsion. This approach appears to be supported by provisions in numerous international instruments: see the London Charter Art VIII; Control Council Law 10 Art II(4)(b); Charter of the Tokyo IMT Art VI; Statute of the ICTY Art 7(4); Statute of the ICTR Art 6(4); and Draft Code of Crimes Art 5. Indeed, it has continued to be adopted in some international instruments since the Rome Statute: see Statute of the Special Court for Sierra Leone Art 6(4) and s 21 of Regulation No 2000/15 (UNTAET/REG/2000/15, 6 June 2000) on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. However, in practice, tribunal decisions made in the context of some of those instruments have treated superior orders as relevant to a defence of duress or compulsion, which is a different question to whether superior orders per se can give rise to a defence: see Prosecutor v Erdemovic ICTY Appeals Chamber, IT-96-22, 7 October 1997 ("Erdemovic"), per Judge McDonald and Judge Vohrah at [34]; per Judge Cassese (dissenting) at [15]; see also the approach in Finta per La Forest J at 532.

54 The other approach was that superior orders can be a defence, but only where the orders were reasonably thought to be lawful. That approach, which is reflected in part in Art 33 of the Rome Statute, has also been the approach taken by courts in various jurisdictions: see McCall v McDowell (1867) 15 F.Cas. 1235 at 1240 (USA); United States v Keenan (1969) 18 USCMA 108 at 116-117; United States v Calley (1973) 22 USCMA 534 per Quinn and Duncan JJ; United States of America v Yunis (1991) 924 F2d 1086 at 1097; Finta per La Forest J (L'Heureux-Dubé and McLachlin JJ concurring) at 566-567 and per Cory J (Lamer CJC, Gonthier and Major JJ concurring) at 607-610 and 617; In re List (Hostages Trial) (1948) Annual Digest 632 (under Control Council Law 10); Erdemovic, per Judge Cassese (dissenting) at [15]. And by several eminent commentators, including ID Brownlee, "Superior Orders – Time for a New Realism?" (1989) Criminal Law Review 396.

55 There is disagreement among commentators as to whether customary law provides that superior orders can never constitute a defence in respect of responsibility: (LC Green "The Defence of Superior Orders in the Modern Law of Armed Conflict" (1993) 31 Alberta Law Review 320 at 333; P Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law" (1999) 10 EJIL 172 at 183-188; "The Defence of Superior Orders") or whether it allows an accused to rely on superior orders where the orders are not manifestly unlawful (A Zimmermann "Superior Orders" in The Rome Statute: A Commentary, at 957, 965-966; "Superior Orders in The Rome Statute: A Commentary"). States have also been unable to agree on that question. Proposed provisions dealing with superior orders were the subject of disagreement at the 1949 Conference that produced the Geneva Conventions and again at the 1977 Conference that produced the Protocols. The 1977 proposal would have permitted the defence under Protocol I, except where the accused knew or should have known that the order was unlawful. Although the proposal secured majority support at the conference, it did not reach the two-thirds majority support required for inclusion in the Protocol.

56 The drafting of the Rome Statute raised the difficulty again, with the participants split as to the appropriate approach. Gaeta, in The Defence of Superior Orders at 188-189, refers to the question as "one of the major stumbling blocks in the negotiations on Part Three of the Rome Statute", although the ultimate compromise reached was in the form of Art 33.
57 It is therefore difficult to discern a clear rule of customary international law with regard to the defence of superior orders. The status of superior orders as a defence in international law was considered in Superior Orders in The Rome Statute: A Commentary by Professor Zimmermann at 965-966:

> "It is not easy to ascertain the current status of customary law with regard to the relevance of superior orders as a defence in international criminal proceedings. In particular, the absolute liability standard, i.e. that the obedience to superior orders shall under no circumstances serve as a defence but might only be considered as a reason for mitigation of the sentence, as developed by the Nuremberg precedent, seems so far--apart from specific statutory provisions--not to have ripened into a generally applicable rule of customary international law. This is confirmed by the fact that the leading scholars in the field themselves cannot agree as to what the standard should be de lege ferenda and even less what it is de lege lata.
>
> As a very minimum, one might, however, be justified in asserting that where either the superior order was manifestly unlawful or where the subordinate was in a position to recognize the illegality of the order, the defence of superior order can no longer be relied upon. On the other hand, one might doubt whether there is currently an absolute barrier to superior order as a defence when the subordinate did not realize that the order was illegal and where the order was not blatantly unlawful. In that regard, it remains doubtful whether the necessary requirements for the formation of a rule of customary law are fulfilled, in particular whether there is both sufficient and uniform State practice and opinio juris supporting such a thesis. One should in that regard take into account the fact that even the Nuremberg Trials taking place under Control Council Law No. 10 did not under all circumstances rule out the possibility of relying on superior orders as a defence. Besides, it is quite telling that on two occasions, i.e. during the drafting of the four Geneva Conventions in 1949 and during the Diplomatic Conference leading to the adoption of Additional Protocol I, no consensus could be reached with regard to the different proposals of the ICRC which would have generally excluded an offender from pleading the defence of superior order.
>
> Thus, to summarize, one is tempted to argue that under current customary law, an offender might not be barred from claiming the defence of superior order unless he or she was aware of the illegality of the order or the order was manifestly illegal."

And at 972-973:

> "The codification of the principle of superior order as now contained in Article 33 of the Statute has, as outlined above, significant shortcomings. In particular, one might have preferred a clear confirmation of the absolute liability principle as contained in the Nuremberg Charter and affirmed in the ICTY and ICTR Statutes, i.e. that superior order is no defence, but may be considered in mitigation of punishment if justice so requires. The ICC Statute could have thus paved the way towards a clear customary international standard. This is even more true since the United Nations Transitory Authority on Eastern Timor has now adopted Regulation No. 2000/15 of 6 June 2000 on the establishment of specific courts with exclusive

jurisdiction over acts of genocide, crimes against humanity, and war crimes, largely reproducing the Rome Statute, but which in contrast to Article 33 of the Rome Statute provides, following the Nuremberg formula in its section 21, that indeed superior orders shall under no circumstances serve as a valid defence. The same is true with regard to Article 6, para. 4, of the Statute of the Special Court for Sierra Leone, set up by virtue of a treaty concluded between the UN and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000. In contrast thereto, Article 33 tries to find a delicate balance between the need to punish those committing terrible crimes on behalf of their governments or under order, on the one hand, and the need to protect persons who unknowingly commit war crimes, on the other. Notwithstanding this severe limitation, several merits of Article 33 should not be underestimated.

First, it is important to note that after the failures mentioned above, an agreement could finally be reached. It is to be estimated that, notwithstanding the entry into force of the Statute, this codification will by itself influence the future development of international customary law in the matter.

Secondly, Article 33 of the Statute confirms that, whatever the circumstances, a superior order can under no circumstances justify the commission of the most serious crimes under international law, i.e. an act of genocide or a crime against humanity.

Besides, the principle that superior orders cannot--as a rule--serve as a defence has been strengthened since any justification under Article 33 is now perceived as an exception to the general rule.

On the other hand, it has been argued that Article 33 has departed from pre-existing rules of customary international law in that it does not abide by the absolute liability principle. The analysis undertaken has proven, however, that the existence of such a rule was, to say the least doubtful. It seems, that when it comes to their own soldiers, many States tend to be more cautious than when they provide for a system under which only nationals of the adversary are to be judged. Thus, one might say that Article 33 is just an expression of a rule of international law that is universally acceptable and which therefore, notwithstanding its imperfections, constitutes a step forward."

58 It is in the above context that we now turn to consider the construction of Art 1F(a).

Construction of Art 1F(a) at the Refugees Convention

59 The primary issue in dispute between the parties is whether the AAT erred in relying upon the Statute of Rome for the definitions of crimes against humanity and war crimes. In order to resolve that dispute it is necessary first to resolve the dispute concerning the construction of Art 1F(a).

60 The Minister contended that Art 1F(a) permits recourse to any relevant definition found in an international instrument in existence at the time of the Art 1F(a) decision, even if it was not in existence at the time of the alleged criminal conduct. It was claimed that in order to give effect to the purpose of Art 1F(a) of preventing undeserving persons from gaining protection under the Refugees Convention, the question of exclusion of such persons is to be gauged by reference to the standards that apply at the date the decision is made, rather than the date of the conduct in question. It was argued that this approach does not impinge on the well established principle of nullum crimen sine lege (no crime without law making it so) because Art 1F(a) does not create, nor is it concerned with, criminal liability as such.

Thus, so it was said, it is not a requirement that the conduct in question constitute an international crime when it is engaged in.

61 There is a textual difficulty with the Minister's construction. It is implicit in the phrase "there must be serious reasons for considering" that the person in question has "committed" a relevant international crime, that the conduct in question constituted a crime at the time that conduct was engaged in. In Ovcharuk Sackville J considered an analogous question concerning Art 1F(b) of the Refugees Convention. In considering the scope of that article his Honour held at the time the conduct was engaged in it must have constituted a crime under the local law where it occurred or under an Australian law having extraterritorial application to the place where it occurred. He stated (at 190-191):

> "This conclusion is supported by the language of Art 1F(b). It refers to the person having 'committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. This is not language which suggests that a notional exercise is to be carried out; the language requires a crime to have been committed. Furthermore, unless the conduct relied on to invoke Art 1F(b) was criminal under the law of the country where it occurred, a person who acted quite lawfully under that law, and committed no offence under the law of the receiving country, could be found to have committed a 'crime', thereby excluding him or her from the protection of the Refugees Convention. ... It is hardly a beneficial construction of the Refugees Convention to exclude a person who has never engaged in conduct for which he or she is liable to prosecution on the ground that he or she has committed a serious crime." (emphasis original)

62 Similar reasoning is applicable to Art 1F(a), save that the language of Art 1F(b) requires a relevant international crime to have been committed.

63 It does not follow, however, that an instrument defining the crime must be in existence at the time the crime is allegedly committed. As was observed by the Nuremberg IMT (in International Military Tribunal (Nuremberg) Judgement and Sentences (1947) 41 AJIL 172 at 219):

> "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

64 Furthermore, the circumstances of the drafting of Art 1F(a) suggest that it was not intended to impose a requirement that the instrument relied on must exist at the time of the conduct in question. The Conference debates make it clear that Art 1F(a) was intended to exclude persons involved in crimes under international law during the Second World War from the protection offered by the Refugees Convention, notwithstanding that the "international instrument" defining such crimes, namely the London Charter, was drawn up after the commission of the crimes in question.

65 As is evident from the historical overview set out above, an international instrument was drawn up after the crimes with which it is concerned not only in the case of the London Charter and the Charter of the Tokyo IMT, but more recently in the case of the Statutes of the ICTY, the ICTR and the Special Court for Sierra Leone, each of which was purportedly based upon the relevant and applicable rules of international criminal law existing at the time of the conflict in question. Thus, there is no reason in principle or practice for requiring the relevant international instruments to be in existence when the crime in question is committed. Further, the criterion employed by Art 1F(a) for the relevant

international instrument is not a temporal criterion. Rather, the criterion requires only that the international instrument defining the crimes in question has been "drawn up to make provision in respect of such crimes".

66 In any event, although the Rome Statute was not "in force" during late 1999 and early 2000 when the appellant was stationed at Jaffna, the Statute had been "drawn up" and adopted by a substantial majority in attendance at the UN Diplomatic Conference of Plenipotentiaries on 17 July 1998, which pre-dates the conduct in question. We consider that the reference in Art 1F(a) to "international instruments drawn up..." clearly embraces the Rome Statute. In the context of international law the term "instrument" is commonly used to refer to non-binding documents such as general assembly resolutions, draft instruments prepared by the International Law Commission, or non-binding declarations made by groups of states (such as the UDHR) and treaties not yet in force. Recourse to such non-binding instruments by international writers and courts in the context of public international law disputes is common and there is no reason to assume that Art 1F(a) intended to exclude such instruments. This approach is supported by guidelines published by the UNHCR, which have made reference to a number of non-binding instruments as being relevant to Art 1F(a) determinations, including: General Assembly Resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946, the Draft Code of Crimes, the ILC Principles, and the draft form of the Rome Statute prior to its adoption in 1998 (see UNHCR Handbook Annex VI; UNHCR Standing Committee, Note on the Exclusion Clauses, EC/47/SC/CRP.29 at [8] and [9]; and UNHCR, The Exclusion Clauses: Guidelines on their Application, December 1995, at [19]-[21] which refers at [20] to "non-binding but authoritative sources"). The writings of leading commentators in the area of refugee law take a similar approach: see for example JC Hathaway, The Law of Refugee Status (1991), at 217 ("The Law of Refugee Status"). Accordingly, we are satisfied that the fact that the Rome Statute was not in force when the crimes in question were allegedly committed did not preclude the AAT from having recourse to it.

67 The appellant contended that the words "such crimes" in Art 1F(a) indicates that the instrument is one that provides for the criminal conduct in question, rather than an instrument that provides generally for the category of crimes in question. Accordingly, so it was argued, the Rome Statute was not a relevant instrument in the present case as it is not an international instrument drawn up to make provision in respect of international crimes of the kind allegedly committed by the appellant in Sri Lanka in 1999-2000 but, rather, was drawn up to provide for criminal responsibility for conduct after the date on which the Rome Statute came into force which, in the events that occurred, was 1 July 2002: see Art 24(1). An immediate difficulty confronting the appellant's argument is that Art 1F(a) does not purport to apply to persons who have committed a crime under or pursuant to an international instrument. Rather, the international instrument is merely the source of the definition according to which a person's exclusion from the Refugees Convention is to be tested. As we have explained, the source of the criminal responsibility may come from an international instrument, but it may also arise under customary international law. It is clear that the reference in Art 1F(a) to "such crimes" is a reference to the crimes earlier mentioned, namely "a crime against peace, a war crime, or a crime against humanity". Thus, the criterion in Art 1F(a) is that the definition of "such crimes" be in an international instrument drawn up to make provision for the crimes earlier mentioned, irrespective of whether the instrument was drawn up to make specific provision for the crimes allegedly committed by the person in question. It must follow that any international instrument drawn up to provide for, and which contains a definition of, "a crime against peace, a war crime, or a crime against humanity" is an instrument that is potentially relevant to an Art 1F(a) decision. Plainly, the Rome Statute is such an instrument.

68 The more difficult question raised by the contentions of the parties concerns the criterion to be applied where instruments that fall within the meaning of Art 1F(a) contain inconsistent definitions of the relevant crimes. The issue is of some importance as the UNHCR and many commentators commonly refer to a number of relevant instruments, without indicating how differences between them should be reconciled.
69 Previous decisions of the Court and the AAT do not appear to have specifically addressed this question. Reported AAT decisions have tended to refer primarily to the London Charter definitions without providing an indication of why that instrument is preferred over others (see Re W97/164 and Minister for Immigration and Multicultural Affairs (1998) 51 ALD 432 at [49] and [51] ("Re W97/164"); Re N96/1441 and Minister for Immigration and Multicultural Affairs (1998) 51 ALD 459 at [49], [51]-[52] ("Re N96/144"); Re SRLLL and Minister for Immigration, Multicultural and Indigenous Affairs (2002) 35 AAR 523 at [33]). In SHCB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 229 the Court noted that the AAT had relied upon the Rome Statute, however the appropriateness of that reliance was not considered by the primary judge or the Full Court (see SHCB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 308 ("SHCB")). See also SBAR v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1502.
70 Decisions from other common law jurisdictions are of a similar nature. The Canadian courts have usually relied upon the London Charter (see eg Ramirez v Canada (Minister of Employment and Immigration) [1992] 2 FC 306 at 315 ("Ramirez"); and Sivakumar v Canada (Minister of Employment and Immigration) [1994] 1 FC 433 at 441 and 442), but more recently have also relied upon the Rome Statute (see, for example, M v Canada (Minister of Citizenship and Immigration) 115 ACWS (3d) 1040), but without expressly considering how inconsistent instruments are to be reconciled or which instrument should be preferred where an inconsistency exists. In The Minister of Citizenship and Immigration v Nagra (unreported decision of the Federal Court of Canada, Ottawa, 27 October 1999) the applicant argued that the Immigration and Refugee Board had erred by failing to consider the Rome Statute, which the applicant described as "the most recent international instrument with respect to the definition of crimes against humanity" (at [9]-[10]). Rouleau J disposed of the application by reference to the facts and it was therefore not necessary for that question to be considered.
71 In the present case the crimes were allegedly committed against civilians (including children) on the command of a superior in the context of an internal armed conflict. In those circumstances the choice of instrument could have a significant bearing on the outcome.
72 The drafting history and ultimate form of Art 1F(a) recognises the fact that international criminal law will continue to develop over time. It is therefore consistent with the purpose of Art 1F(a) that resort be made to a definition in an instrument that is contemporary in the sense that it reflects international developments up to the date of the alleged crime, rather than to definitions in earlier instruments that may have become antiquated or are otherwise inappropriate.
73 Nonetheless, if the instrument in question satisfies the criterion in Art 1F(a) it will be open to a decision-maker to select the instrument that is appropriate to the circumstances of the case. In some instances the selection may be obvious. For example, the London Charter would plainly be an appropriate instrument for international crimes committed in Europe during the Second World War. Also, the Statutes for the ICTY and ICTR would plainly be appropriate instruments for international crimes committed in the course of the conflicts the subject of those Statutes. However, as explained above, even if the crimes of the kind alleged (for example, international crimes in the internal armed conflict in Sri Lanka) have

not been the subject of a specific instrument the general criterion in Art 1F(a) can nonetheless apply.
74 The question for the AAT was whether the Rome Statute is an international instrument drawn up to make provision in respect of crimes of the kind alleged to have been committed to the appellant. In determining that question it is not for the Court or the decision-maker to enquire whether the Rome Statute accurately reflects the state of customary international law at the date of the alleged crime. As has been explained that is a vexed question upon which views will differ. Moreover, to engage in such an enquiry is to defeat one purpose of Art 1F(a) which, as has also been explained, was to avoid the making of such an enquiry. Of course, the relevant rules of international customary law at the time the relevant international crimes were allegedly committed can be relevant to the question whether the instrument has been drawn up to make provision in respect of "such crimes". But they are not relevant to the quite different question whether the definitions accurately reflect international law at the relevant time.
75 In our view the Rome Statute was drawn up to provide for the crimes it defined and purported to define those crimes as crimes that had crystallised into crimes in international law as at the date of the Statute, notwithstanding that the Statute was to come into force, and the ICC was to be established, at a later date.
76 For the above reasons we are of the view that the definitions of crimes against humanity and war crimes contained in Arts 7 and 8(2)(c) of the Rome Statute respectively were appropriate definitions for the AAT to apply and that the AAT did not err in law in applying those definitions…..
77 Article 33 of the Rome Statute dealing with the defence of superior orders stands in a similar position. In providing for that defence in certain circumstances, albeit not for genocide or crimes against humanity, the article departs from the provisions made in previous instruments. While it may be an open question whether Art 33 accurately reflects customary international law, what is indisputable is that it reflects an international consensus in an international instrument that there is to be such a defence.
Jurisdictional error
78 Having held that the AAT did not err in accepting that the Rome Statute was an "international instrument" that satisfied the criterion set out in Art 1F(a), the next question is whether the AAT failed correctly to apply the definitions in the Rome Statute of "crimes against humanity", as set out in Art 7, and "war crimes", as set out in Art 8.
79 In order to understand the way in which the appellant's case is now put, it is necessary to set out the AAT's findings in more detail. The AAT first dealt with the meaning of the expression in Art 1F(a), "serious reasons for considering that ...". It accepted, in our view correctly, that there was no requirement that the appellant be formally charged with, or convicted, of war crimes or crimes against humanity. Nor was there any requirement that it be satisfied that the appellant had committed any offence "beyond reasonable doubt", or "on the balance of probabilities". The AAT appeared to accept that the relevant criterion was that it be satisfied that there was clear and convincing evidence that the appellant had committed such crimes.
80 In dealing with the issue in that way the AAT's approach was consistent with the approach taken in such cases as Ramirez; Cardenas v Canada ("Minister of Employment and Immigration) (1994) 23 Imm LR (2d) 244 at 252; Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556 at 563 per French J; Arquita v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 465 at 478 per Weinberg J; and WAKN v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 211 ALR 398 at 410 at [51] and [52] per French J. That approach accords with the views of leading commentators, including Hathaway in The Law of Refugee Status at 215 where the

learned author quotes from N Robinson, Convention relating to the Status of Refugees (1953) at 67 that "it is enough that the determination authority, have 'sufficient proof warranting the assumption of [the claimant's] guilt of such a crime'". See also GS Goodwin-Gill in The Refugee in International Law 2nd ed (1996, Clarendon Press, Oxford) at 97.

81 With regard to "crimes against humanity" the AAT regarded the definition in Art 7 of the Rome Statute as the "most recent authoritative statement" on the subject. Nevertheless it also had regard to other definitions of such crimes. For example, it noted the definition in the London Charter adopted by the Nuremberg IMT. It also considered the observations of Deane J in Polyukhovich v Commonwealth (1991) 172 CLR 501 ("Polyukhovich") at 596, where his Honour said:

> "The phrase 'crime against humanity' has, in the last half-century, also become a commonly used one in international treaties and the writing of publicists. There is little real difficulty about its meaning. It is a convenient general phrase for referring to heinous conduct in the course of a persecution of civilian groups of a kind which is now outlawed by international law but which may not involve a war crime in the strict sense by reason of lack of connexion with actual hostilities."

82 Next, the AAT considered the decision of the Supreme Court of Canada in Finta. In that case, the accused was charged under the Canadian Criminal Code with various offences, including unlawful confinement, robbery, kidnapping and manslaughter as a result of his activities in Hungary during the Second World War. He was tried in Canada for these offences under a provision of the Code, which conferred jurisdiction in relation to acts or omissions committed outside Canada if the conduct in question constituted a war crime, or a crime against humanity. The Code defined "crime against humanity" as meaning "murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population ...".

83 Cory J, with whom Lamer CJC, Gonthier and Major JJ agreed, observed that the stigma attaching to crimes against humanity or war crimes was overwhelming and, before a person could be convicted of such crimes, elements in addition to the underlying offence had to be proved. With respect to crimes against humanity, the relevant additional element was that the inhumane acts were based on discrimination against, or the persecution of, an identifiable group of people. The test was subjective. The accused had to be aware of the conditions which rendered his actions more blameworthy than the domestic offence. While it was not necessary to prove that he knew that his actions were inhumane, it was essential to prove that he was aware of the facts or circumstances that would bring his acts within the definition of a crime against humanity.

84 Importantly, Cory J recognised (at 602) that an accused charged with crimes against humanity could avail himself of all defences and excuses under domestic and international law. These were stated to include the defence of obedience to superior orders. However, that defence was stated (at 617) not to be available where the orders in question were "manifestly unlawful", unless the accused "had no moral choice as to whether to follow the order". A person might have no moral choice as to whether to follow an order if he was coerced into doing so. In such a case, his Lordship stated (at 611-612) that the threat would have to be so "imminent, real and inevitable" as to deprive the person of any real moral choice. Cory J also observed (at 609) that an order from a superior was "manifestly unlawful" if it offended the conscience of any reasonable, right-thinking person that is, it was an order that was obviously and flagrantly wrong.

85 The AAT acknowledged that Finta was concerned with the interpretation of the Canadian Criminal Code, and not directly with the elements of a war crime, or a crime

against humanity, under international law. It also recognised that Finta predated the Rome Statute. Nonetheless, it regarded the analysis in the case as helpful.
86 Finally, the AAT referred to two decisions of Matthews J, in each of which her Honour relied heavily upon Finta. The decisions were Re W97/164 and Re N96/1441. Once again, both cases predated the Rome Statute.
87 Having discussed the elements of "crimes against humanity" in the light of these authorities, the AAT concluded that according to the High Court in Polyukhovich, crimes against humanity involved "the most grave and cruel criminal acts committed in the course of the persecution of any civilian group" and that, according to Matthews J in Re N96/1441, the deliberate infliction of torture on detainees as described by the applicant in that case was "barbarous".
88 The AAT noted that the delegate had found that the appellant's treatment of children and young persons amounted to "torture" and that the delegate had concluded that the appellant had engaged in conduct that was part of a "systematic pattern of persecution" by the Sri Lankan army aimed at members of the Tamil civilian population. The AAT also noted that the delegate had considered whether the appellant might be able to rely upon the defences of "superior orders" and "compulsion". The AAT observed that although those defences were not expressly referred to in either Art 7, or Art 8 of the Rome Statute, the relevant provisions suggested "that there should be an element of intention or wilfulness in the conduct".
89 The AAT then considered whether the appellant's acts fell within the definition of "crimes against humanity" in Art 7. It noted that he had served as an ordinary soldier in the Sri Lankan army from May 1997 until March 2000 and that, for approximately the last six months of that period, he had served at an army camp at Jaffna. There he was responsible for interrogating detainees who were thought to have information about members of the LTTE.
90 The AAT stated:

> "There is no dispute that the Sri Lankan Army was involved in a protracted civil war against the LTTE, also known as the Tamil Tigers."

91 The AAT found that the appellant was one of a group of five soldiers who were part of an interrogation unit. It stated:

> "56. If a detainee was thought to be lying or to have relevant information, but was not co-operating in providing this information, members of the unit were instructed to slap the faces of the suspects, and to kick them and beat them with wooden batons of about 18 inches in length. The [appellant] said he protested against this but was told to 'just do it'. He also asked for a transfer but was told that he had joined the Army and had to do such work.
>
> 57. The [appellant] said most of the beating was on the legs as part of a process of intimidating detainees so that they would provide information. The [appellant] could not recall having caused any permanent injuries. However, during the interview on 14 May 2001, his answers to questions suggested more serious assaults involving dislocation of bones ..." (emphasis added)

92 The AAT also found that the appellant had been required to interrogate children who were brought to the camp. It noted that he had told the delegate that, on occasion, he had questioned children aged between 12 and 14. He said that his aim had been to coerce them into providing information.
….
96 This is how the AAT expressed its conclusion:

"61. The Tribunal accepts the [appellant's] evidence that, as an ordinary soldier, he was acting in accordance with the orders of his superior officer and that he protested at the interrogation techniques he was told to use. However, the Tribunal is not satisfied that the level of compulsion on the [appellant] was great. On his evidence, when he protested he was told to 'just do it' because this was expected of him in the Army, and it was too soon to transfer him elsewhere. There does not appear to be any evidence of specific threats made to him if he did not comply. The [appellant] also, presumably, had the option of asking to be transferred to a frontline unit. Even though he might not have liked this, he had served in such units in both Trincomalee and Elephant Pass.

62. The Tribunal has referred to various reports on the situation in Sri Lanka contained in the Tribunal documents. These attest to policemen and soldiers 'who flagrantly violate the rights of innocent civilians' (T p200). Clearly, Tamil civilians were targeted (T pp227, 232). It should also be noted that the LTTE have been guilty of gross violations of human rights and 'reportedly used torture on a regular basis' (T p267). The LTTE was fighting to establish a separate state in the north and east of Sri Lanka for the Tamil minority (T p287), and engaged in assassinations, hostage-takings, hi-jackings and bombing of civilian targets (T p302).

63. Nevertheless, the Tribunal is satisfied that the Sri Lankan Army was involved in systematic persecution of a civilian group, namely the Tamil population. The Tribunal therefore finds that there are serious reasons for considering that the [appellant] was involved in committing war crimes namely of torture or inhuman treatment against Tamil civilians.

64. In conclusion, the Tribunal finds that there are serious reasons for considering that the [appellant] committed crimes against humanity and war crimes. Pursuant to Article 1F(a) of the Refugees Convention, he is not therefore a person to whom Australia has protection obligations under the Convention. The decision under review is affirmed." (emphasis added)

97 The appellant submitted that the definition of "crimes against humanity" in Art 7 of the Rome Statute required the AAT to conclude that any particular act on his part was "committed as part of a widespread or systematic attack directed against any civilian population"; and was done with "knowledge of the attack". He submitted that the AAT had failed to make either of these findings. The closest that it had come to doing so was at [62] of its reasons where it noted that various reports showed that policemen and soldiers had flagrantly violated the rights of innocent Tamil civilians and targeted them. The appellant complained that the AAT did not specify the passages in support of that conclusion. He submitted that the bulk of the country information upon which the AAT relied pre-dated his period of service at the Jaffna camp.

98 This submission has its difficulties. In [63] of its reasons the AAT noted that the Sri Lankan Army had been "... involved in systematic persecution of a civilian group, namely the Tamil population" (emphasis added). On one view, this conclusion represents a close approximation of a finding that the appellant's acts were committed "as part of a widespread or systematic attack directed against any civilian population", in accordance with the requirements of Art 7. The appellant sought to overcome this difficulty by noting that the conclusion that immediately followed this finding was that there were serious reasons for considering that the appellant had committed "war crimes", and not that such reasons existed for considering that he had committed "crimes against humanity". It was

submitted that this demonstrated that the AAT must have been confused about the elements of "crimes against humanity".

99 The appellant then submitted that even if the AAT had made the requisite finding of "widespread or systematic attack directed against [a] civilian population", there was no evidence to support that finding. He referred to the definition of "attack directed against any civilian population" in Art 7(2)(a), and submitted that his conduct could not be regarded as involving the multiple commission of acts against a civilian population "pursuant to or in furtherance of a State or organizational policy to commit such [an] attack". On that analysis, his actions might conceivably amount to "war crimes", but could not, on any view, constitute "crimes against humanity". Moreover, the appellant submitted that members of the LTTE, and those who aided and abetted them, could not properly be regarded as members of a "civilian population".

100 The appellant then submitted that, even if the AAT had considered whether his acts were part of a "widespread or systematic attack directed against [a] civilian population", and even if there was evidence to support that conclusion, the AAT had made no finding that the appellant had "knowledge" of such an attack, and there was no evidence to support any such finding. It was submitted that the "knowledge" limb of Art 7 required evidence that the appellant was aware of the facts and circumstances that brought the Army's actions within the ambit of "a State or organizational policy to commit such [an] attack".

101…He submitted that even if the Army were responsible for the various atrocities described in the reports upon which the AAT relied, and even if that conduct could be described as "widespread or systematic" persecution of Tamils, there was no evidence that he had knowingly engaged in that enterprise…

…

106 In our opinion, the appellant's submissions regarding this issue should be accepted. In order to carry out its statutory obligation in determining whether Art 1F(a) precluded the appellant from claiming protection, the AAT was required to give specific and careful consideration to each of the elements of "crimes against humanity" set out in Art 7. It is clear that it failed to do so.

107 The AAT did not consider whether the appellant's conduct took place "as part of a widespread or systematic attack directed against any civilian population". Its finding that "the Sri Lankan Army was involved in systematic persecution of a civilian group" was made as a prelude to its conclusion that there were serious reasons for considering that the appellant was involved in committing "war crimes". Yet, the definition of a war crime in Art 8 contains no requirement that there be evidence of a "widespread or systematic attack", whether directed against a civilian population, or otherwise. Manifestly, this is a critical and distinguishing feature of "crimes against humanity", as defined in Art 7.

108 It is possible that the AAT's reference to "systematic persecution of a civilian group" in [63] of its reasons was intended merely as a shorthand method of stating that it rejected any suggestion that what was happening in Sri Lanka may have been nothing more than a series of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". Articles 8(2)(d) and 8(2)(f) of the Rome Statute both employ that language in endeavouring to identify those acts of violence that occur in the course of armed conflicts not of an international character that are incapable, of themselves, of amounting to war crimes. These provisions, however, have nothing whatsoever to do with crimes against humanity.

109 The AAT appears not to have appreciated that there is a fundamental difference between the requisite elements of these two offences. Finta made that difference clear, but it has existed for far longer than that. These matters cannot be treated in a loose manner. When considering whether there is evidence which suggests that a person has committed a

particular offence, it is essential that the elements of that offence are correctly identified and that each of them is properly addressed. Plainly, a serious issue was raised by the evidence as to whether the appellant's conduct in relation to interrogating civilian detainees, in order to obtain information they had about LTTE members, was conduct that was "part of a widespread and systematic attack directed against any civilian population". In our view that issue was required to be, but was not, addressed by the AAT.

….

It is altogether another thing to ignore a complete failure on the part of an administrative decision-maker to turn his or her mind to an essential aspect of the question that must be determined.

111 In addition, we consider that the AAT failed to address the question whether the appellant had "knowledge" of the existence of any such widespread or systematic attack. The fact that there is evidence from which such knowledge might be inferred does not overcome this failure.

112 It follows that the AAT erred in its analysis of whether the appellant's acts might constitute a "crime against humanity" because it failed to address the essential elements of that offence. It thereby applied the wrong legal test. Its decision was vitiated by jurisdictional error and, in the normal course, would be set aside.

113 However, the fact that the AAT's decision was flawed in relation to its consideration of "crimes against humanity" will be of no avail to the appellant unless he can demonstrate that its decision in relation to "war crimes" was also flawed. That is because a finding that there were serious reasons for considering that the appellant had committed war crimes would, on its own, be sufficient to exclude him from any claim to protection. It is necessary therefore to consider the AAT's treatment of the aspect of Art 1F(a) that concerns "war crimes".

114 The appellant next submitted that the AAT had apparently relied upon the definition of "war crimes" in Art 8(2)(a) ("grave breaches of the Geneva Conventions of 12 August 1949 ...") including "torture or inhuman treatment ..." (8(2)(a)(ii)) and "wilfully causing great suffering, or serious injury to body or health" (8(2)(a)(iii)). It had apparently also relied upon Art 8(2)(c) ("in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 ... include "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (8(2)(c)(i)) and "committing outrages upon personal dignity, in particular humiliating and degrading treatment" (8(2)(c)(ii)).

….

117 The appellant also submitted that the AAT had failed to consider whether he was "relieved" of criminal responsibility for conduct that might otherwise amount to a war crime by Art 33 of the Rome Statute.

118 Neither the AAT nor the primary judge referred to Art 33. The fact that the Rome Statute provided for the defence of superior orders to a charge of war crimes appears to have been overlooked, most likely because no party referred to it. It is true that the AAT, in its reasons for decision, referred to a "defence" that might possibly be available to the appellant if "he acted in obedience to superior orders and under compulsion". However, that was not a reference to the defence under Art 33. It arose solely in the context of the discussion about Finta where Cory J had linked the defences of "superior orders" and "duress" when considering their availability in answer to a charge of crimes against humanity, or war crimes.

119 As previously indicated, the AAT rejected the defence of superior orders because there was no evidence that the appellant had been subjected to significant compulsion. In approaching the matter in that way, it may have acted in accordance with the principles

articulated in Finta. However, the appellant submitted that that was not its task. Rather, so it was argued, once the AAT had determined to apply the Rome Statute as the international instrument upon which it intended to rely for the purposes of Art 1F(a) it was not open to it to disregard Art 33.

120 In SHCB the Full Court considered the operation of Art 1F(a) in relation to a claim that the appellant had acted under duress. The appellant had been a high-ranking officer in a military unit in Afghanistan that was responsible for acts of torture and attacks against the civilian population. The AAT had concluded that there was strong evidence that the appellant had aided or abetted the commission of war crimes, or crimes against humanity. In arriving at that conclusion, it adopted the definitions of those crimes contained in the Rome Statute. It recognised that in order to be criminally responsible for an act under the terms of that instrument, "the person must act intentionally" and "must have knowledge of the intention of the group to commit the crime". That interpretation of the Rome Statute was endorsed by the Full Court (at [13]).

121 One of the grounds upon which the appellant challenged the AAT's finding was that it had failed to consider the danger that he and his family would have faced if he had left his military unit. The Full Court characterised this as a claim of duress, but rejected that ground of appeal upon the basis that no such claim had been advanced before the AAT. Nonetheless, the Full Court stated at [31]:

> "The defence of obedience to higher orders will normally apply only where there are imminent real and inevitable threats to a subordinate's life. There is an element of moral choice in relation to the defence: see Re W97/164 and Minister for Immigration and Multicultural Affairs (1998) 51 ALD 432 at 449 [80]-[83]. As the primary judge observed (at [15]), the question ultimately was whether the appellant had been in a position to make the relevant moral choice. ..."

122 The Full Court did not refer to Art 33. The case upon which it relied in formulating the test for superior orders in the passage set out above predated the Rome Statute. Moreover, whatever may have been the position at the time Finta was decided, the effect of Art 33(2) is that superior orders cannot constitute a defence to a charge of committing crimes against humanity. That accords with the position taken by the Nuremberg IMT, and implicitly also by the Israeli Supreme Court in the case of Attorney-General of Israel v Eichmann (1968) 36 ILR 277, though it must be said that the primary basis upon which the Court rejected that defence was that it had not been made out on the facts. In the words of the Court (at 339), Eichmann "did not receive orders 'from above' at all; he was the high and mighty one, the commander of all that pertained to Jewish affairs". It was Finta that appeared to extend the scope of the defence to include crimes against humanity but, not surprisingly, imposed additional limitations upon it. Matthews J simply followed Finta. The Full Court in SHCB (at [31]) relied upon the decision of Matthews J in Re W97/164, although apparently without considering either the structure of the Rome Statute or the text of Art 33.

123 The Rome Statute makes express provision for a defence of duress that is both separate and distinct from the defence of superior orders. Article 31(1)(d) provides that a person shall not be criminally responsible if, at the time of that person's conduct, that conduct is caused "by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person". An additional requirement is that the person act "necessarily and reasonably" to avoid the threat, and that the person "not intend to cause a greater harm than the one sought to be avoided".

124 Under the Rome Statute a defence of superior orders can be maintained in answer to a charge of war crimes under Art 8 without any evidence of duress. The conditions under

which such a defence can relieve a person of criminal responsibility are those set out in Art 33(1), namely that the person was under a legal obligation to obey orders of the superior, that that person did not know that the particular order was unlawful, and that the order was not "manifestly unlawful".

125 Normally, the failure of the AAT to even consider the possibility that Art 33 might relieve the appellant of criminal responsibility for any war crimes would be seen as giving rise to jurisdictional error. Yet, the Minister submitted that the AAT's failure to consider Art 33 did not vitiate its decision. That argument was put in two ways. First, it was submitted that when determining whether the appellant fell within the ambit of Art 1F(a) any possible defences that he might have in relation to his involvement in war crimes were to be ignored. Alternatively, it was submitted that the appellant's conduct, even on his own version of what he had done, was "manifestly unlawful". It could not therefore give rise to a successful defence under Art 33.

126 In support of the first argument the Minister submitted that Art 1F(a) looked to international instruments for definitions of war crimes and crimes against humanity. It did not, in terms, require any finding of guilt, or any liability to criminal sanction, under those instruments. That suggested that possible defences were to be ignored when considering whether there were serious reasons for thinking that the appellant had committed any of those crimes.

127 The submission should be rejected. Article 1F(a) refers to serious reasons for considering that the relevant person "has committed a crime". We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve that person from criminal responsibility. Professor Cassese, in "Justifications and Excuses in International Criminal Law" in The Rome Statute: A Commentary at 951 discusses the distinction between defences described as justifications and those described as excuses in most national law systems, and observes (at 954) that it is indisputable that "until now no practical distinction has been made between the two classes of defences" in respect of criminal responsibility for the acts in question. The learned author then refers specifically to the Rome Statute and explains (at 954-955) why the defences in Articles 31-33 exclude criminal responsibility. We do not accept that it is open to a decision-maker when considering whether there are "serious reasons" for thinking that a person has committed a particular crime under the Rome Statute to ignore the availability of a defence under that Statute if it is relied upon by that person. Contrary to the respondent's submission, Art 8 cannot be read in isolation. There are many provisions in the Rome Statute that bear directly upon whether a person's conduct amounts to the commission of a war crime. For example, Art 30 defines the requisite mental elements for all offences unless otherwise provided. It would be antithetical to the purpose of Art 1F(a), and contrary to principle, to attempt to answer the question posed by Art 1F(a) without having regard to Art 30. This view accords entirely with the approach taken by the Full Court in SHCB at [13].

128 The same is obviously true of other defences that might be available, including those set out in Art 31. That provision contains a series of grounds for excluding criminal responsibility. It can hardly be said of a person whose criminal responsibility has been "excluded" that he or she has nonetheless "committed" an offence: see generally Eastman v Director of Public Prosecutions (ACT) (2003) 214 CLR 318. A similar observation applies in relation to Art 32, which excludes criminal responsibility where there is a mistake of fact or mistake of law. The same can be said of Art 33, notwithstanding the fact that it speaks of "relieving" a person of criminal responsibility rather than "excluding" criminal responsibility. That may be no more than a reflection of the distinction referred to above between justifying and excusing conditions.

129 Another reason for rejecting the respondent's first submission is that any offence can be defined equally as well by including within its elements a negation of relevant defences as by leaving those defences to be considered separately. The point is well illustrated by a passage from a celebrated article written by Professor Julius Stone, "Burden of Proof and the Judicial Process" (1944) 60 LQR 262. The learned author observed at 279:

> "The doctrinal basis of the rules as to the burden of proof here involved is a supposed distinction between, on the one hand, a rule defined so as to exclude a given situation, and on the other hand, a rule defined without reference to that situation which is then made subject to an exception for that situation. It is the distinction between a rule containing its qualification within itself, and a rule the qualification upon which proceeds from a proposition outside the rule."

Professor Stone went on to say at 280:

> "The difficulties in which this distinction has caused the Courts to labour suggests that a preliminary consultation with the logicians may be appropriate. What is the difference in logic between a quality of a class as contained in the definition of the class, and a quality of a class as contained in an exception to the class? The answer appears to be – none at all. Every qualification of a class can equally be stated without any change of meaning as an exception to a class not so qualified. Thus the proposition 'All animals have four legs except gorillas', and the proposition 'All animals which are not gorillas have four legs', are, so far as their meanings are concerned, identical." (footnotes omitted)

130 Similar difficulties are encountered when one considers the definition of certain common law offences including, in particular, murder. In The Third Part of the Institutes of the Laws of England, Sir Edward Coke described murder (at 47) as:

> "when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."

Later institutional writers adopted this description, and it is still widely accepted in common law jurisdictions.

131 It is obvious that almost any offence can equally well be defined by including within its elements a negation of relevant defences, achieved in the case of murder by the use of the term "unlawful", as by providing for separate and externally defined defences. In our view, there is no reason in principle for ignoring the possible availability of a defence of obedience to superior orders when determining whether there are serious reasons for believing that the person seeking refugee status has committed war crimes.

132 That takes us to the final question. The respondent submitted that it would be futile to remit this matter to the AAT because the only possible conclusion that it could reach, on the evidence, would be that the appellant's acts, even if in response to superior orders, were "manifestly unlawful".

133 The first point to note is that under Art 33 it is not the appellant's acts that must be "manifestly unlawful", but rather the superior order. To describe an order from a superior as "manifestly unlawful" requires the conclusion that it is obviously so. For example, it has been said in cases where it is contended that a sentence is "manifestly excessive" that this proposition does not admit of much argument. Either the sentence is obviously excessive, or it is not.

134 A major difficulty in the present case is that the AAT simply did not address this issue and made no finding whatsoever concerning the illegality of the orders of the appellant's superiors. In those circumstances it is inappropriate for the Court to stand in the shoes of the AAT and make its own findings on that matter, which can involve mixed questions of fact and law.
135 Accordingly, we are unable to accept the Minister's contention that it would be futile to remit this matter to the AAT because it would be bound to find that the orders that the appellant carried out were "manifestly unlawful". It might do so. On the other hand, it might not.
136 It must be remembered that the AAT is required to consider whether there are serious reasons for considering that the appellant committed war crimes. Relevantly, war crimes include, as Art 8(2)(c) of the Rome Statute states, the "serious violations" of Common Art 3 of the 1949 Geneva Conventions identified in Art 8(2)(c)(i) and (ii). Before any conclusion could be reached that the orders to engage in conduct constituting the serious violations were "manifestly unlawful", there would have to be a clear definition of the conduct constituting the war crime and consideration of the terms of the "superior orders" and the circumstances under which they were given. The AAT failed to apply itself to the real questions to be decided in relation to the latter two matters.
….

In ***WAKN v MIMIA*** **[2004] FCA 1245 (2004) 211 ALR 398 (2004) 138 FCR 579** French J.):emphasised that the absence of a requirement for a positive finding of the commission of conduct of the kind contemplated by Art 1F is not inconsistent with the need for 'meticulous investigation and solid grounds' in order to meet the standard of 'serious reasons for considering that' the conduct has been engaged in. It would be a matter for concern if the Tribunal, in an Art 1F case, merely extrapolated from the criminality of an organisation to that of an individual within it without undertaking any clear analysis of purpose or complicity

French J. said:

1 A former senior member of the Wahdat Army in Afghanistan fled to Australia from the Taliban in 1999. He was granted a temporary protection visa in 2000. However, his application for a permanent protection visa was refused by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs in November 2003. The delegate found that the Refugees Convention (the Convention) did not apply to the applicant. That finding was made on the basis that there were serious reasons for considering that, as a senior officer of the Wahdat Army, the applicant had committed war crimes and crimes against humanity in Afghanistan and that Article 1F of the Convention therefore excluded him from its protection.
…

3 The Tribunal ruled, at a preliminary hearing, that it would deal with the application for review on the basis that it had to determine whether Art 1F applied to the applicant. The applicant has applied to this Court for certiorari, mandamus and prohibition in respect of the Tribunal's ruling. He has done so on the basis that the Tribunal is precluded from considering Art 1F in its proceedings because it was found not to apply to him when he was granted a temporary protection visa.

4 In my opinion, the application for relief in this Court cannot succeed. The proceedings before the Tribunal must take their course which will necessarily involve a consideration of the application of Art 1F in this case.

Factual and Procedural History

5 The applicant, who presently resides in Albany, was born in Afghanistan in 1963. He is a member of the Hazara ethnic group and is a Shi'a Muslim. He describes himself as having been, while in Afghanistan,'... a soldier in the Hezb-i-Wahdat'. The Hezb-i-Wahdat is a political and military movement in Afghanistan formed by a coalition of Shiite groups in 1989.

….

7 On 11 December 1999, the applicant applied for a protection visa. He claimed to be at risk of persecution by the Taliban if returned to Afghanistan. On 7 February 2000, a delegate of the Minister for Immigration and Multicultural Affairs found that he had a well-founded fear of persecution by the Taliban and that he was a person to whom Australia had protection obligations under the 1951 Convention. The delegate accepted that the applicant had been 'a high ranking military officer of the Wahdat Party Army' before his departure from Afghanistan. He had been a colonel in 1993 and had been appointed Chief of Staff of an artillery regiment. His task had been to supervise the regiment in protecting the west side of Kabul from the Taliban. He feared that he would face death at the hands of the Taliban because of his military service. The delegate found that the applicant was not excluded from the application of the Convention by Articles 1D, 1E or 1F.

8 On 21 March 2000, the delegate granted the applicant a subclass 785 (Temporary Protection) visa which permitted him to remain in Australia for a period of three years or until an application for a protection visa was finally determined, whichever occurred sooner.

9 On 24 March 2000, the applicant applied for a permanent protection visa. Receipt of his application was acknowledged on 27 March 2000…..

10…On 7 March 2003, he was granted a subclass 785 (Temporary Protection) visa valid until the final determination of his subclass 866 (Protection) visa application. A further interview took place in Albany on 14 May 2003.

11 On 11 September 2003, a delegate of the Minister wrote to the applicant referring to his statement in support of his application in which he said that he had held senior positions in the Hezb-i-Wahdat Military. The delegate said he was in possession of a Report on Afghanistan from the Council of European Union in Brussels entitled 'Hezb-I-Wahdat Human Rights Violations (1992-1999)'. A copy of the report was enclosed with the letter. The delegate pointed out that the report identified senior officers of Hezb-i-Wahdat in a list of those that were probably responsible for human rights violations in Afghanistan between 1992 and 1999.

12 On 27 September 2003, CASE for Refugees wrote to the Department pointing out four issues which, it submitted, conclusively demonstrated why Art 1F did not apply to the applicant. It submitted that the allegations contained in the Report were insufficiently specific about men in the position that the applicant had held. The applicant had a reputation for assisting non-government organisations and operating in a humane way. CASE pointed out that the applicant had already been found to be a refugee, having been granted a protection visa in March 2000. Reference was also made to the recognition of a more senior officer in Hezb-i-Wahdat as a refugee in Denmark. The letter attached a statement by the applicant denying any involvement in the conduct the subject of the Report from the Council of European Union.

13 On 20 November 2003, an officer of the Department wrote to the applicant care of CASE for Refugees advising that he had been refused a protection visa because he was not a person to whom Australia had protection obligations under the Convention…..
14 In assessing whether the criteria for the grant of a protection visa had been met the delegate recorded that he was satisfied that the applicant was not a person to whom Australia had protection obligations under the Convention. The reasons for this were set out in an attachment to the decision record entitled 'Assessment of Protection Obligations'. Various tests for the existence of protection obligations were identified, the first of which was expressed thus:

> '1. Does a cessation or exclusion clause apply (Articles 1C, 1D, 1E or 1F of the Refugees Convention)?'

The delegate reviewed the applicant's statements about his involvement with Hezb-i-Wahdat and the Report of the Council of European Union. He said:

> 'On the basis of the country information before me which confirms that human rights abuses occurred in Kabul at the time the applicant claimed he was commanding forces in Kabul, I am satisfied that there are serious reasons for considering that the applicant has committed a "war crime" and a "crime against humanity".'

The delegate was satisfied that acts carried out by the members of the Hezb-i-Wahdat militia at a time when the applicant held high rank in that organisation 'involved inhumane acts of such gravity, that they intentionally caused great suffering or serious injury to a person's body or to person's mental or physical health and that these acts were carried out in wide spread and systematic manner'. The delegate found that the practices by the Hezb-i-Wahdat militia came within the meaning of 'war crimes' and 'crime against humanity' as defined by international instruments to which it had referred. He said that independent country information clearly demonstrated that the conflict in and around Kabul in which the applicant served as a commander involved serious and widespread systematic human rights abuses.
15 After referring to a Tribunal decision, SAL v Minister for Immigration and Multicultural and Indigenous Affairs [2002] AATA 1164 and the Federal Court decision SHCB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 229, the delegate said:

> 'The applicant held a position of authority within Hezb-I-Wahdat and as reported in the Council of European Union Report, he would as a result have been expressly involved in decision making and security questions and as a consequence would have had specific knowledge of human rights violations, in this case war crimes, that were committed.
>
> This makes him complicit in war crimes and crimes against humanity.
>
> I find the circumstances of this case therefore constitute serious reasons for considering that the applicant has committed war crimes and crime against humanity outside the country of refuge, namely Australia.'

The delegate concluded that Art 1F(a) and (b) of the Convention applied to the applicant and that there was therefore no need to consider other matters relevant to the existence of protection obligations. They were not assessed.

…
17 On 11 March 2004, counsel for the applicant filed a special case with the Tribunal pursuant to s 45 of the AAT Act. The special case identified questions of law which the applicant asked the Tribunal to refer to the Full Court of the Federal Court. The questions of law so identified were:

> '(a) Is the Applicant, who has been granted by the Minister a Sub Class 785 (Temporary Protection) visa and to whom Article 1F at the time of grant had been held to have no application, required to satisfy the Minister, at the time when he seeks a grant of a Sub Class 866 (Protection) Visa, that Article 1F does not exclude him from protection under the Refugee Convention?
>
> (b) Where an applicant for a subclass 866 visa is a current Temporary Protection Visa holder, ought the decision maker, once satisfied that the applicant has not ceased to be a refugee pursuant to Article 1C of the Refugee Convention, then to proceed to consider for a second time whether the applicant is owed protection obligations by Australia as a refugee pursuant to Article 1A(2) and the other articles of the Refugee Convention?' (sic)

The application for referral of a special case to the Federal Court was heard by Deputy President Hotop in the Tribunal on 7 May 2004. It was refused.
18 The applicant next sought to have the questions of law, raised in the proposed special case, heard by the Tribunal as part of a preliminary determination. On 19 May 2004, the Tribunal directed that:

> 'A preliminary hearing be held on 30 June 2004 for the purpose of determining the abovementioned preliminary questions of law.'

After argument on 30 June 2004, the Tribunal decided that in considering the application for a subclass 866 (Protection) visa the delegate had not been precluded, by reason of the earlier decision on the temporary protection visa, from determining whether the applicant was a person to whom Australia owed protection obligations under the Convention. Moreover the delegate was legally obliged to revisit the question whether Australia owed protection obligations to the applicant and that involved a consideration of Art 1F of the Convention. The Tribunal concluded that the application should proceed 'as an Article 1F case'. The real issue of relevance was whether the Tribunal was precluded, not whether the delegate was so constrained. However, given that the Tribunal on review exercises all the powers conferred on the delegate, the reference to his powers did not affect the correctness of the practical outcome in this case.
19 On 27 July 2004, the applicant filed an application in this Court seeking orders by way of certiorari to quash the Tribunal's decision, prohibition to prevent it from proceeding to determine whether the applicant should be excluded from protection under Art 1F and mandamus directing it to set aside the decision of the delegate and to remit the matter to the Minister or her delegate.
…
The Statutory Framework – The Migration Act 1958 (Cth) and the Migration Regulations

26 This case concerns the grant of a visa which is a permission to a person to travel to and enter Australia and/or remain in Australia (s 29(1)). There are prescribed classes of visas (s 31). One of them is the class known as 'protection visas' (s 36(1)). The Regulations may prescribe criteria for the grant of visas of a specific class (s 31(3)). In the case of protection

visas one of the criteria is set out directly by the Act namely that the applicant for the visa is:

> 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.' s 36(2)(a))

A limitation on the scope of Australian protection obligations is set out in s 36(3) and qualified to some extent by s 36(4) and (5). Neither the limitation nor the qualifications are material for present purposes.

27 A non-citizen who wants a visa must apply for a visa of a particular class (s 45). Requirements for valid visa applications are specified (s 46). The Minister is required to consider valid visa applications (s 47). After considering a valid visa application the Minister, if satisfied that the various criteria for its grant are met and that the grant is not prevented by the operation of other specified provisions of the Act, is to grant the visa (s 65(1)).

28 The provisions of ss 91A to 91G and 91N to 91Q of the Act set limits on the circumstances in which protection visas may be granted. These relate to the availability of sanctuary in other countries. The provisions of ss 91R to 91U prescribe the ways in which the criteria for determining whether someone is a refugee are to be construed with respect to persecution (s 91R) and membership of a particular social group (s 91S).

29 The application of Art 1F is affected by s 91T which provides:

> '(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime were a reference to a crime where the person's motives for committing the crime were wholly or mainly non-political in nature.
>
> (2) Subsection (1) has effect subject to subsection (3).
>
> (3) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime included a reference to an offence that, under paragraph (a), (b), (c) or (d) of the definition of political offence in section 5 of the Extradition Act 1988, is not a political offence in relation to a country for the purposes of that Act.'

This latter section was inserted in 2001 and took effect on 1 October 2001.

30 The Migration Regulations 1994 prescribe criteria attaching to the grant of various classes of visa – Reg 2.02 and 2.03.

31 Item 1401 of Pt 4 of Schedule 1 of the Migration Regulations refers to the class of protection visas established by s 36(1) of the Act which are designated Class XA. Sub-item 1401(4) designates two subclasses of protection visas, namely '785 (Temporary Protection)' and '866 (Protection)'. Item 1403 provides for an additional class of protection visas, namely 'Protection (Class XC)' which has one subclass '785 (Temporary Protection)'.

32 Regulation 2.08F applies to persons who are the holders of subclass 785 (Temporary Protection) visas which were granted prior to 19 September 2001. Holders of that class of visa who, within 36 months after the date of its grant, have made application for a Protection (Class XA) visa are taken also to have applied for a Protection (Class XC) visa.

33 Item 785.511 in the Second Schedule provides that a subclass 785 (Temporary Protection) (Class XA) visa expires after 36 months or when an application for a Protection (Class XA) visa, made within the 36 months is determined or withdrawn.
34 The visa for which the applicant applied in this case was a subclass 866 Protection (Class XA) visa. A criterion for its grant is that the Minister be satisfied that the applicant is a person to whom Australia has protection obligations under the Convention – Item 866.221.
35 Section 500(1)(c) of the Act provides that applications may be made to the Tribunal for review of a decision to refuse to grant a protection visa relying on one or more of Art 1F, 32 and 33(2) of the Convention. Such a decision is not reviewable by the Refugee Review Tribunal (s 500(4)(c)).
….
41 There is no specific power for the Tribunal to hear and determine preliminary questions. However, s 33(1)(a) of the AAT Act provides that the procedures of the Tribunal are 'subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal'. The Tribunal is empowered by s 33(2) to give directions 'as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal...'. These powers appear to be sufficient to support the hearing of particular issues separately from the main body of the hearing. It is nevertheless a power to be exercised with caution because, as the experience of the courts has shown, it can lead to fragmentation of what should be a relatively informal and expeditious process. In so saying, I recognise that the question whether Art 1F applies to an applicant for review in the Tribunal may be, but does not have to be, determined as a theoretical question upon the provisional assumption that the applicant would fall within the definition of a refugee in Art 1A – Minister for Immigration and Multicultural Affairs v Singh (2002) 209 CLR 533 at [5] per Gleeson CJ, [86] per Kirby J. There is a related issue which has been the subject of academic debate and varying international practice namely whether inclusion under Art 1A should be considered before exclusion under Art 1F. There appears to be no such requirement in the Australian jurisprudence. In any event, at a practical level, the two questions may be inextricably factually intertwined – see generally M Bliss, 'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of Article 1F Exclusion Clauses (2000) 12 IJRL 92 (at 106-108).
The Refugees Convention 1951
…
43 Article 1B is not relevant for present purposes. Article 1C provides that the Convention shall cease to apply to any person falling under the terms of Art 1A if one of a number of events occur, namely if:

> '(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
> (2) Having lost his nationality, he has voluntarily reacquired it; or
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;'

There are provisoes to that Article which it is not necessary to set out here…
44 Article 1F, which is in issue in the present case, provides:

> 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

The Purpose of Article 1F and its Operation upon the Grant of Protection Visas

45 As a matter of form Art 1F limits the application of the Convention ab initio so that it does not apply to persons with respect to whom there are serious reasons for considering, inter alia, that they have committed a war crime or a crime against humanity. It is because it sets a limit on the application of the Convention that Art 1F is referred to as an exclusion clause. It is to be contrasted with Art 1C which sets out circumstances under which Convention protection may cease. That Article is commonly referred to as a cessation clause.

46 The drafting history of the Convention discloses that the United States proposed that Art 1F should begin:

> 'The High Contracting Parties shall be under no obligation to apply the terms of this Convention to a person ...'

Because this might have allowed a State to regard a war criminal as a refugee France proposed the words 'shall not apply' which were ultimately adopted – Nehemiah Robinson, Convention Relating to the Status of Refugees – Its History, Contents and Interpretation, New York June 1953 (at 68). According to Robinson's commentary which was written very shortly after the making of the Refugees Convention, the categorical language of Art 1F as finally drafted means that (at 67):

> '... once a determination is made that there are sufficient reasons to consider a certain person as coming under this section, the country making the determination is barred from according him the status of a refugee.'

47 The purpose of Art 1F was discussed by the Supreme Court of Canada in Pushpanathan v Canada (Minister of Citizenship and Immigration) (1998) 160 DLR (4th) 193 (at 225):

> 'The purpose of Article 1 is to define who is a refugee. Article 1F then establishes categories of persons who are specifically excluded from that definition.'

Bastarache J, who delivered the majority judgment of the Court, distinguished the function of Art 1F from the refoulement provisions of Art 33, which allows for the refoulement of a bona fide refugee to his or her native country where he or she poses a danger to the security of the country of refuge or to the safety of the community. He said:

> 'Thus, the general purpose of Article 1F is not the protection of the society or refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude ab initio those who are not bona fide refugees at the time of their claim for refugee status. Although all of the acts described in Article 1F could presumably fall within the grounds of refoulement described in Article 33, the two are distinct.'

He went on to describe the rationale of Art 1F related to the purpose of the Convention as a whole, the rationale being that those responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees (at 228). Seen from this perspective and from its drafting history, Art 1F does not provide a discretionary basis for the refusal of Convention protection. It is a bar to its application.

48 The taxonomy of the exclusion Articles and the circumstances in which they may be applied is usefully explained in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status – UNHCR (1979; Re-edited 1992):

> '140. The 1951 Convention, in Sections D, E and F of Article 1, contains provisions whereby persons otherwise having the characteristics of refugees, as defined in Article 1, Section A, are excluded from refugee status. Such persons fall into three groups. The first group (Article 1D) consists of persons already receiving United Nations protection or assistance; the second group (Article 1E) deals with persons who are not considered to be in need of international protection; and the third group (Article 1F) enumerates the categories of persons who are not considered to be deserving of international protection.
>
> 141. Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.

49 The more recent statement of Joint Position defined by the Council of the European Union on 4 March 1996 on the basis of Art K.3 of the Treaty of the European Union observed (at 1.3) that:

> 'The clauses in Article 1F of the Geneva Convention are designed to exclude from protection under that Convention persons who cannot enjoy international protection because of the seriousness of the crimes which they have committed.
>
> They may also be applied where the Acts become known after the grant of refugee status (see point 11)
>
> In view of the serious consequences of such a decision for the asylum seeker, Article 1F must be used with care and after thorough consideration, and in accordance with the procedures laid down in national law.' Reproduced in van Krieken (ed) Refugee Law in Context: The Exclusion Clause T.M.C. Asser Press (1999)

50 The Netherlands' State Secretary for Justice wrote a memorandum in 1997 to the Netherlands Parliament on the policy relating to the application of Art 1F:

> 'It should be noted here that the Common Position of 4 March 1996 indicates that Article 1F of the Convention on Refugees can also be applied where the offences come to light after refugee status has been granted. It seems to me that, in these cases, the legal grounds for withdrawal do not so much lie in Article 1F of the Convention on Refugees as in the law of the country.' Reproduced in van Krieken op cit

The Netherlands' State Secretary also said that Art 1F would be restrictively interpreted in view of the consequences of exclusion for the person concerned. That principle was established in the UNHCR Handbook and in the permanent case law of the Council of State. The State Secretary went on:

> 'I therefore consider that it places me an under an obligation to ensure that exclusion under Article 1F is based upon meticulous investigation and solid grounds. I expect this to be provided for, in principle, by the introduction of a number of procedural guarantees.'
>
> Van Krieken op cit at 301

51 The Australian jurisprudence presently supports the proposition that the use of the words 'serious reasons for considering that ...' does not mandate a positive finding by the receiving State that the applicant for protection has engaged in conduct of the kind contemplated in Art 1F. No question of proof on the civil or criminal standard arises in that context – Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556 at 563 per French J; Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 153 ALR 385 at 388 per Marshal J and on appeal Minister for Immigration and Multicultural Affairs v Ovcharuk (1998) 88 FCR 173 at 179 per Whitlam J. See also Arquita v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 465 at 476 where Weinberg J reviewed the authorities. A contrary view in relation to standard of proof was expressed by Mathews J sitting as President of the Tribunal in Re W97/164 and Minister for Immigration and Multicultural Affairs (1998) 27 AAR 482 at 491. In Canada the Federal Court of Appeals has held that the words require something less than proof on the balance of probabilities – Ramirez v Canada (1992) 89 DLR (4th) 173. But see also Cardenas v Canada (1994) 23 Imm.L.R. 92d, 244 where a requirement for 'clear and convincing evidence' was posited by Jerome ACJ (at 252).

52 It should be emphasised however that the absence of a requirement for a positive finding of the commission of conduct of the kind contemplated by Art 1F is not inconsistent with the need for 'meticulous investigation and solid grounds' in order to meet the standard of 'serious reasons for considering that' the conduct has been engaged in. It would be a matter for concern if the Tribunal, in an Art 1F case, merely extrapolated from the criminality of an organisation to that of an individual within it without undertaking any clear analysis of purpose or complicity – SHCB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 229 at [17] per Selway J. See also the helpful discussion of this question in Zagor, Persecutor or Persecuted: Exclusion under Article 1F(A) and (B) of the Refugees Convention (2000) 23 UNSW Law Journal 164 (at 168-170). The observation of Jerome ACJ in Cardenas is apposite (at 252):

> 'the Board must be extremely cautious in its application of the exclusion clause particularly in situations ... where it has concluded that the claimant has a well founded fear of persecution in his country of origin. In light of the potential danger faced by such a claimant, the Board must base its decision to exclude only on clear and convincing evidence, not simply on suspicion and speculation.'

53 It may be debatable whether the approach taken in this case by the delegate, relying upon the contents of a general report about human rights violations by the Wahdat Army and extending the contents of that report by inference to the applicant, meets the standard of inquiry to be expected where Art 1F is to be applied. The exclusion of a person from Convention protection on the basis of Art 1F may be literally a matter of life and death. Ultimately however that says nothing about the elusive merits of the legal arguments advanced on behalf of the applicant in this case.

54 Counsel for the applicant submitted that, in construing sub-clause 866.221 of Schedule 2 of the Regulations, ministerial satisfaction, in the case of a current protection visa holder, was to be conditioned by the Articles of the Convention which only allow for cessation of protection in limited and defined circumstances. So in construing municipal provisions it

might be considered that such provisions had been enacted 'pursuant to, or in contemplation of, the assumption of international obligations...' – Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476 (at 492).

55 In my opinion, municipal law may provide more than one mechanism for giving effect to the limits upon the scope of the protection conferred by the Refugees Convention by reason of Art 1F. Protection under the Convention may be refused by refusal of an initial application for a protection visa on the basis of Art 1F. If the facts attracting the operation of Art 1F are discovered after the initial grant then the visa may be cancelled as is the case under existing provisions of the Act. And when a temporary visa has been granted, a permanent visa may be refused on the basis of the intervening discovery of facts establishing the application of Art 1F. None of these mechanisms is inconsistent with the approach to Art 1F indicated by its own language, by the UNHCR Handbook, by the European Union Joint Position or by the Netherlands' statement. There is nothing which requires the Court to import into the concept of 'protection obligations' in the visa grant criteria the limited occasions for the invocation of Art 1F for which the applicant seems to contend.

56 The grant of a permanent protection visa requires satisfaction of the criterion that Australia owes protection obligations to the applicant. If, on the facts as found at the time of the decision on the application for such a visa, the Convention does not apply then the protection obligations will not arise and the visa will have to be refused.

57 In my opinion there is no basis for attributing any error to the approach taken by the Tribunal in this case…

…

19. CESSATION OF REFUGEE STATUS

In Rezaei v MIMA [2001] FCA 1294 the principles regarding voluntary re-availment of protection and voluntary re-establishment in a country of persecution so as to lead to cessation of status were exhausively canvassed and applied to deprive applicants of protection visas held by them (see [2]-[6] [24]-[32] [35] [48]-[53])

The Full Court in ***QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 136** by a majority (Wilcox Madgwick and Lander (diss) JJ.) allowed an appeal from QAAH of 2004 v MIMIA [2004] FCA 1448 (Dowsett J.) and rejected the approach exemplified by ***NBGM v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2004] FCA 1373.** The applicant had been granted a TPV (class XA)and then a deemed grant of TPV (class XC) 3 years later . His current application was for a Permanent Protection Visa (PPV) – his original claim was that the Taliban would kill him because of his Hazara ethnicity . The RRT applied Article 1C(5) in relation to the circumstances in connection with which he was recognised as a refugee; it also held there had been no well-founded fear - per Wilcox J (Madgwick J agreeing) it was common ground on appeal that a condition precedent to the grant of a protection visa that Minister (or her delegate) be satisfied that the relevant person is a 'refugee' within the meaning of the Convention. The appellant's first argument that the starting point was the time of grant of Class XC visa was rejected. It was held that that the decision had not been based upon an assessment of the circumstances existing in Afghanistan then - it was not possible to regard those circumstances as the 'circumstances in connection with which he has been recognised as a refugee'. On the issue of the correct test to apply it was noted that while the Taliban no longer formed the central government which was an important change of circumstance the appellant's original claim did not depend upon the fact that the Taliban was in government when he fled – at RRT he continued to express his original claim.

The majority referred to *Regina (Hoxha) v Special Adjudicator* [2005] UKLR 19; [2005] 1 WLR 1063 which concerned the operation of Article 1C(5) of the Convention in relation to people who had not been recognised as refugees. Although the relationship between Article 1A(2) and Article 1C(5) was not an issue

in *Hoxha* stated per Lord Brown that " the
1C (5), a cessation clause, simply has no application …at any stage unless and until it is invoked by the State against the refugee in order to deprive him of the refugee status previously accorded to him" - 'emphasis in UNHCR Handbook that recognised that refugee status will not be taken from someone save upon a fundamental change of circumstances in his home country' . It was held in the present case that the comment in *Hoxha* about a recognised refugee not being stripped of that status 'save for demonstrably good and sufficient reason' echoes the insistence of UNHCR upon the need for the State arguing cessation to establish fundamental and durable changes in the refugee's country of nationality. The majority also referred to *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* **[2005] HCA 6** – the adjectival phrase in the subsection "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention' . It was held in the present case the correct principle is if a person has previously been recognised as a refugee in Australia it has a protection obligation to that person, by force of the Convention itself, unless and until Article 1C(5) has caused cessation of that obligation. A person's continuing status as a refugee was emphasised by the majority. It was held on the appeal that the fact that the appellant had previously applied for and received temporary (XA) and temporary (XC) visas' was of critical importance: the circumstance that the appellant had previously been recognised as a refugee was the starting point for consideration of his permanent visa application . *Chan v Minister for Immigration and Ethnic Affairs* (1989) **169 CLR 379** furnished no support for position of the primary judge in the present case - *Chan* arose under Article 1A(2) of the Convention, not Article 1C(5). The court in that case was saying nothing about the operation of Article 1C(5) in circumstances where, not only was the test satisfied, but recognition had been granted. The proposition that changes in the refugee's country must be substantial, effective and durable or profound and durable' was supported.

On the facts of the present case it was held that the RRT's focus was upon the Taliban's position as the government of Afghanistan, or at least that part of Afghanistan in which the appellant had resided - however the circumstances that

underlay the original recognition of the appellant as a refugee were not dependent upon the Taliban's status as a governing authority. For a case under Article 1C(5) to be made out the RRT would need to be satisfied of much more than the fact that there was no real chance of the Taliban re-emerging as a governing authority or exercising the same type of control as it did before; it would need to investigate, and make findings about, the extent of Taliban activity in the Afghan countryside, especially in the appellant's home district and consider the durability of the present situation - it was necessary to address the appellant's claims of instability and lack of protection before it could reach a conclusion that Article 1C(5) applied – if it was found that these claims were unjustified, under present conditions, the Tribunal would have needed to consider the durability of those conditions - it did not do so . There was a need for positive information demonstrating a settled and durable situation in appellant's home district that was incompatible with a real chance of future Taliban persecution of him. The majority held that the failure properly to address the cessation issue constituted a jurisdictional error .

Wilcox J. said:

3 In her record of decision, the delegate noted the appellant's claim 'that if he returns to Afghanistan he fears that the Taliban will kill him because he is of Hazara ethnicity'.
4 In setting out her reasons for decision, the delegate noted country information referring to persecution of Shi'a Hazaras by the Taliban. She commented: 'Due to the current situation in Afghanistan, there is no effective government to protect the applicant'. After elaborating that statement, she concluded:

> *'I accept that the applicant is a male from the Hazara ethnic group in Afghanistan, I also accept that if he returns to Afghanistan he has a real chance of being captured by the Taliban and forced to fight or be killed by them. I accept that the Taliban control large areas in Afghanistan, and there are no areas that the applicant could be safe in Afghanistan, as he is readily identifiable as an ethnic Hazara from his physical appearance and his language.'*

5 The relevance of the delegate's determination that the appellant was a person to whom Australia has protection obligations under the Convention is that this enabled the grant to him of a protection visa: see s 36(2) of the *Migration Act 1958* (Cth) ('the Act'). The delegate went on to grant the appellant a Protection (Class XA) temporary visa. Under the *Migration Regulations 1994* (Cth), at that time, such a visa continued until the end of 36 months from the grant of the visa or earlier determination of the holder's application for a permanent visa. In other words, as the primary judge said, 'the maximum life of the visa was 36 months'.

The March 2003 decision

6 Apparently, the Department of Immigration and Multicultural and Indigenous Affairs ('the Department') experienced delays in processing applications for permanent protection visas. Accordingly, in 2001, the relevant regulation was amended to provide, in effect, that,

if the holder of a temporary (Class XA) visa applied for a permanent protection visa within the 36 month period, the temporary protection visa would continue in force until that application was finally determined.
7 The drafter of the amendment apparently thought the new rule, as framed, would not apply to persons who, at the date of the amendment, had already applied for a permanent visa. For reasons that are not apparent to me, rather than take the seemingly simple course of adding the necessary few words to the amending regulation concerning temporary (Class XA) visas, the drafter created a new species of visa: a Protection (Class XC) visa.
8 A Protection (Class XC) visa is also a temporary visa. It applies only to persons to whom a temporary visa had been granted before 19 September 2001, which had not been cancelled, and who made, or had already made, an application for a permanent protection visa that had not been finally determined.
9 The effect of the decision to create a new type of visa, rather than to extend the operation of the temporary Class XA visa already held by the appellant, was that it was necessary to grant him a fresh visa, if he was to remain lawfully in Australia after 28 March 2003 (the third anniversary of the grant of the temporary Class XA visa).
…
11 The delegate signed a Decision Record in relation to his decision to grant the temporary Class XC visa…
12 On 21 November 2003, another delegate of the Minister refused the appellant's application for a permanent protection visa. The appellant sought review of that decision by the Tribunal. On 3 May 2004, the Tribunal made a decision affirming the delegate's decision.
…
15 The Tribunal commented:

> *'The central issue presented by Article 1C(5) is whether an individual can no longer refuse to avail him or herself of the protection of his or her country because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist. Commentators have expressed the view that for the purposes of the cessation clauses, changes in the refugee's country must be substantial, effective and durable, or profound and durable: see, for example, UNHCR,* Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), *10 February 2003, JC Hathaway,* The Law of Refugee Status, *Butterworths, Canada, 1991 at 200-203, G Goodwin-Gill,* The Refugee in International Law, *2nd edition, Clarendon Press, Oxford 1996, at 84. However, these expressions do not constitute legal tests. As the High Court has cautioned, it is important to return to the language of the Convention.'*

16 The Tribunal added:

> *'Where an applicant makes claims to be a refugee for reasons unrelated to the circumstances in connection with which he or she was recognised as a refugee, those claims will fall to be assessed under Article 1A(2) of the Convention.'*

…
18 The Tribunal noted submissions put to it by a migration agent/solicitor acting on behalf of the appellant. The Tribunal then set out its conclusions regarding the possible application of Article 1C(5) of the Convention:
…
The circumstances in connection with which the applicant was originally recognised as a refugee in 2000 was that he would be persecuted in Afghanistan by the Taliban authorities

because he is a Hazara and a Shi'a Muslim [the Taliban had issued a warrant for his arrest and his property had been confiscated].

However, independent evidence indicates that the Taliban were removed from power in Afghanistan by late 2001. ...

…

19 The Tribunal realised its finding about Article 1C(5) did not necessarily mean the appellant was 'no longer a refugee under the Convention, because he may still be a refugee for other reasons'. The Tribunal member said the appellant's subsequent claims raised further issues that 'I am satisfied are sufficiently unrelated to the circumstances in connection with which protection obligations were initially determined, and as such they are to be assessed under Article 1A(2) of the Convention'…

..

22….the Tribunal said it was not satisfied that the appellant 'would have a prospective real chance [should he return] of being persecuted for a Convention reason by any of the above-named groups, nor anyone else, merely for reasons of being Hazara and Shi'a in his home district'. The Tribunal revealed that a major factor in its readiness to reach that conclusion was the absence of country information indicating the existence of a security problem in that district. The Tribunal member thought it significant that the relevant province had been proposed for entry of a Provincial Reconstruction Team sponsored by a foreign government. Some non-government organisations had been active in the appellant's home district.

…

The decision of the primary judge

24 At [15] – [20] of his reasons for judgment, the primary judge identified the issues argued before him:

> *'In the Tribunal and before me, the matter has proceeded upon the basis that the Tribunal had to determine whether or not, in the present case, the cessation clause had been engaged so as to terminate Australia's protection obligations to the applicant. This problem arises in the following way. The applicant's protection (XA) visa was granted in 2000 upon the basis that he had a well-founded fear of persecution for a Convention reason in Afghanistan at the hands of Taliban, which organization was then in* de facto *control of much of the country. However, by the time at which he was granted the temporary (XC) visa, (27 March 2003), the American-led invasion had removed Taliban from that position. Nonetheless it remained active in some areas. This appears to be the factual basis upon which the Tribunal and the parties have proceeded to date.*
>
> *The applicant did not actually apply for a temporary (XC) visa; he was deemed to have done so. He therefore did not put any information before the Minister to demonstrate any relevant well-founded fear as at March 2003. Nevertheless, he was granted a temporary (XC) visa, apparently without any actual consideration of the changes in Afghanistan since 2000 or whether the current circumstances justified a different, well-founded fear, sufficient to entitle him to a protection visa. The applicant submits that, as s 36 and the regulations prescribing the criteria for a temporary (XC) visa require that Australia owe him protection obligations as a condition precedent to the grant of such a visa, it must be conclusively assumed that the Minister was satisfied as to the existence of such status at the time of granting the temporary (XC) visa. He alternatively submits that the Minister may not now deny that such obligations existed at that time. The applicant submits that in either*

case, it must also be accepted that the circumstances as at March 2003 were sufficient to justify the grant of a protection visa and that he continues to be a person to whom Australia owes protection obligations until those circumstances change in the way contemplated by the cessation clause. It is said that s 36 recognizes that protection obligations continue until the cessation clause is engaged. Thus a protection visa may, and should, be granted upon the basis of a prior determination that the applicant was a refugee and without further enquiry, provided that there has been no change of circumstances sufficient to engage the cessation clause. The effect of the submission must be either that a temporary (XC) visa continues until the cessation clause is engaged, despite the statutory limit on its life, or that there is some obligation to grant a new visa without reference to current circumstances.

The applicant then submits that the Tribunal found that circumstances had changed since the grant of the temporary (XA) visa in 2000 but did not consider whether the circumstances which existed in March 2003 (when the temporary (XC) visa was granted), had changed. This is said to involve an error of law going to jurisdiction and is the first ground of review.

The second ground is that the Tribunal failed to consider whether the applicant presently holds a well-founded fear of persecution for a Convention reason from Taliban or any other group, against which the government of Afghanistan could not, or would not defend him.

Thirdly, it is submitted that the Tribunal failed to consider the consequences for the applicant, were he to return to an area of Afghanistan other than Parwan province from which he came.

*Fourthly, it is submitted that the Tribunal's decision was based on no evidence and/or was "*Wednesbury *unreasonable".'*

25 At [21] to [25], his Honour discussed Article 1C(5) of the Convention, in the context of Australia's protection obligations and the Australian system of protection visas. He referred to decisions of the High Court which establish that, for the purposes of the Act, refugee status is to be determined having regard to the position at the date at which the determination is made: *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 *('Chan')* and *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 *('Thiyagarajah')*. His Honour commented:

'This suggests that notwithstanding the determination in March 2000 that the applicant was a person to whom Australia owed protection obligations, the Minister was obliged to re-address that question before granting the temporary (XC) visa and in considering the application for a permanent visa. Obviously, that inference is inconsistent with the applicant's argument.'

26 It is not easy, with respect, to understand his Honour's reference to inconsistency. The proposition expressed in the first sentence of this passage was advanced on behalf of the appellant himself, in support of his submission concerning the significance of the March 2003 decision.

27 At [22] his Honour said:

'It is arguable that the requirement that Australia owe protection obligations to an applicant as mandated by s 36 may be satisfied by a prior determination to that effect in the course of considering an earlier application for a protection visa, including a temporary protection visa. There are passages in Chan *which suggest that refugee status, once established, continues until the cessation clause is engaged. If so then the s 36 test will be satisfied where there is such a prior determination, and the cessation clause has not been engaged. However other passages in* Chan *suggest that the question for determination is always whether the applicant satisfies the definition of "refugee". In my view, those latter passages reflect the true intention of the majority in that case.'*

28 His Honour thought the majority in *Thiyagarajah* accepted that propositions expressed in *Chan* continue to represent the correct approach, notwithstanding the post-*Chan* insertion of a new s 36 into the Act. Also, he thought that, although *Chan* was concerned with the meaning of the Convention rather than the Act, it was not surprising that the same approach should prevail 'given that the existence of protection obligations continues to be determined by reference to the Convention'.

29 At [23] to [25] his Honour said:

'In my view, it follows that the question for the Tribunal in the present case was whether or not, at the time of the decision, the applicant had a well-founded fear of persecution for a Convention reason. It was not strictly relevant that he had previously applied for and received temporary (XA) and temporary (XC) visas. In other words it was not necessary to decide whether or not the cessation clause had been engaged as a result of changed circumstances in Afghanistan. The applicant's argument to the contrary is that identified by Dawson J in Chan *at 398, which argument was, in my view, rejected by the High Court.*

It is clear that the Minister, in granting the temporary (XC) visa, did not consider the then current circumstances. If, in failing so to do, the Minister failed to act in accordance with the relevant legislative provisions and regulations, it may be that the grant of that visa was legally defective. Even so, that would offer no justification for the grant of a further visa contrary to the relevant legislative provisions and regulations. I do not wish to be taken as asserting that such grant was in breach of the Migration Act or the Migration Regulations. Clearly, the temporary (XC) visa was intended to be a solution to a temporary and specific problem. It was not intended to be, and could not become, a permanent visa. The decision to grant the temporary (XC) visa was consistent with that intention.

In my view, the applicant's entitlement to a permanent visa depended upon the circumstances as they were at the time of the Tribunal's decision, meaning that it was necessary that he then hold a well-founded fear of persecution for a Convention reason. His argument to the contrary is without merit. If I am wrong in my understanding of the decision in Chan*, nonetheless, the applicant's argument would still fail. The cessation clause will be engaged if* 'the circumstances in connexion with which *[the applicant]* has been recognized as a refugee have ceased to exist'. *It cannot be sensibly argued that Australia has ever recognized the applicant as a refugee other than in connection with circumstances as they existed in March 2000. As I understand it, the applicant accepts that those circumstances have ceased to exist. No recognizable legal basis has been advanced on behalf of the applicant to support the assertion that the grant of the temporary (XC) visa in 2003 raises a conclusive presumption that he was entitled to a visa on the basis of*

circumstances which then existed. Those circumstances were never identified or relied upon by the applicant and never considered by the Minister. The applicant's argument is without merit.

…

The effect of the March 2003 decision

32 Counsel for the appellant, Mr G Hiley QC and Mr M Plunkett, argued the Tribunal failed to take into account the effect of the March 2003 delegate's decision to grant the appellant a temporary Class XC visa. They said this failure constituted a jurisdictional error that vitiated the Tribunal's decision. They took the Court through the statutory and regulatory provisions that together mean it is a condition precedent to the grant of a protection visa (even a temporary protection visa) that the Minister (or her delegate) be satisfied that the relevant person is a 'refugee' within the meaning of the Convention. Counsel for the respondent Minister (Mr S Gageler QC and Mr P Bickford) did not dispute counsel's proposition. The issue between the parties is what flows from it. It will be recalled that the primary judge remarked in effect that, if the proposition is correct, 'it may be that the grant of the [temporary (XC) visa] was legally defective' but this would have no bearing on the delegate's (and Tribunal's) decision in respect of the permanent visa application.

33 In answer to a question from the Bench, counsel for the appellant made clear that they did not argue the March 2003 decision operated as some form of estoppel. Any such argument would have encountered several difficulties. Counsel's argument was that, if the Tribunal had considered the fact that the Minister was satisfied in March 2003 that the appellant was a 'refugee', it would have realised that the issue for its consideration was whether there had been any change in relevant circumstances between March 2003 and the date of its own decision; it would not have made a comparison between the circumstances of March 2000 and those at the date of its decision. Counsel asserted there was no evidence supporting the primary judge's conclusions that, in March 2003, the Minister 'did not consider the then current circumstances' and, consequently, that the March 2003 visa was issued without consideration of changes in Afghanistan between March 2000 and March 2003. Counsel said the then Minister (or his delegate) was bound to consider the position as at March 2003; in the absence of evidence to the contrary, it must be assumed this was done.

34 Counsel for the respondent submitted the evidence shows the circumstances considered in March 2003 were the same as those underlying the March 2000 decision. This is demonstrated by the March 2003 delegate's reference in his Decision Record to the evidence he had considered in making his decision.

35 The respondent's submission on this issue must be accepted. Whether or not the March 2003 decision was legally valid, it clearly was not based upon an assessment of the circumstances existing in Afghanistan in March 2003. Accordingly, it is not possible to regard those circumstances as the 'circumstances in connexion with which he has been recognized as a refugee', within the meaning of Article 1C(5) of the Convention. In the absence of some form of estoppel, it is difficult to see that the March 2003 decision had any bearing on the proper permanent visa decision.

Article 1C(5) of the Convention

(i) The UNHCR material

36 Counsel for the appellant drew attention to some guidelines adopted by the United Nations High Commissioner for Refugees ('UNHCR') on 10 February 2003 and entitled:

'GUIDELINES ON INTERNATIONAL PROTECTION:
Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees'

37 At para 6, under the heading 'General Considerations', the document stated these principles:

> *'When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the 1951 Convention and principles of refugee protection look to durable solutions for refugees. Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status. It should not result either in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation, thus risking future refugee flows. Acknowledging these considerations ensures refugees do not face involuntary return to situations that might again produce flight and a need for refugee status. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied.'*

38 Under the heading 'Assessment of Change of Circumstances in the Country of Origin' the document said:

> *'For cessation to apply, the changes need to be of a fundamental nature, such that the refugee "can no longer ... continue to refuse to avail himself of the protection of the country of his nationality" (Article 1C(5)) or, if he has no nationality, is "able to return to the country of his former habitual residence" (Article 1C(6)). Cessation based on "ceased circumstances" therefore only comes into play when changes have taken place which address the causes of displacement which led to the recognition of refugee status.*
>
> *Where indeed a "particular cause of fear of persecution" has been identified, the elimination of that cause carries more weight than a change in other factors. Often, however, circumstances in a country are inter-linked, be these armed conflict, serious violations of human rights, severe discrimination against minorities, or the absence of good governance, with the result that resolution of the one will tend to lead to an improvement in others. All relevant factors must therefore be taken into consideration. An end to hostilities, a complete political change and return to a situation of peace and stability remain the most typical situation in which Article 1C(5) or (6) applies.*
>
> *Large-scale spontaneous repatriation of refugees may be an indicator of changes that are occurring or have occurred in the country of origin. Where the return of former refugees would be likely to generate fresh tension in the country of origin, however, this itself could signal an absence of effective, fundamental change. Similarly, where the particular circumstances leading to flight or to non-return have changed, only to be replaced by different circumstances which may also give rise to refugee status, Article 1C(5) or (6) cannot be invoked.*
>
> *Developments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made. Occasionally, an evaluation as to whether fundamental changes have taken place on a durable basis can be made after a relatively short time has elapsed. This is so in situations where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change of*

government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country.

A longer period of time will need to have elapsed before the durability of change can be tested where the changes have taken place violently, for instance, through the overthrow of a regime. Under the latter circumstances, the human rights situation needs to be especially carefully assessed. The process of national reconstruction must be given sufficient time to take hold and any peace arrangements with opposing militant groups must be carefully monitored. This is particularly relevant after conflicts involving different ethnic groups, since progress towards genuine reconciliation has often proven difficult in such cases. Unless national reconciliation clearly starts to take root and real peace is restored, political changes which have occurred may not be firmly established.

In determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6), another crucial question is whether the refugee can effectively re-avail him- or herself of the protection of his or her own country. Such protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.

An important indicator in this respect is the general human rights situation in the country. Factors which have special weight for its assessment are the level of democratic development in the country, including the holding of free and fair elections, adherence to international human rights instruments, and access for independent national or international organisations freely to verify respect for human rights. There is no requirement that the standards of human rights achieved must be exemplary. What matters is that significant improvements have been made, as illustrated at least by respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts: as well as protection amongst others of the fundamental rights to freedom of expression, association and religion. Important, more specific indicators include declarations of amnesties, the repeal of oppressive laws, and the dismantling of former security services.' (subheadings and footnotes omitted)

39 Counsel for the respondent referred to another UNHCR publication, published slightly earlier, in April 2001: a 'note' entitled *The International Protection of Refugees: Interpreting Article 1 of the [Convention]'*. The purpose of the note was said to be 'to elucidate contemporary issues in the interpretation of the terms of Article 1' of the Convention. Paragraph 7 made a point emphasised by counsel for the respondent:

'The Article 1 definition can, and for purposes of analysis should, be broken down into its constituent elements. Nevertheless, it comprises only ***one*** *holistic test. This has been recognised and reflected in various formulations of the "test" for refugee status. The key to the characterisation of a person as a refugee is risk of persecution for a Convention reason.'* (Footnotes omitted, original emphasis)

40 In para 10, dealing with the burden and standard of proof, the following passage appears:

'in accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion – in the case of refugee claims, on the asylum-seeker. This burden is discharged by providing a truthful account of relevant facts so that, based on the facts, a proper decision may be reached. The asylum-seeker must also be provided an adequate opportunity to present evidence to support his or her claim. However, because of the particularly vulnerable situation of asylum-seekers and refugees, the responsibility to ascertain and evaluate the evidence is shared also by the decision-maker. In the context of exclusion and cessation, it is the authorities who assert the applicability of these clauses, therefore the onus is on them to establish the reasons justifying exclusion or cessation.' (Footnotes omitted)

41 Counsel referred us to a section of the note devoted to cessation of status. This section includes the following material:

'... refugee status, which affords its beneficiaries international protection in the absence of national protection, is foreseen to last only as long as that surrogate protection is needed. Article 1C of the Convention sets out in some detail the circumstances under which refugee status ceases. As with all provisions which take away rights or status, the cessation clauses must be carefully applied, after a thorough assessment, to ensure that in fact refugee protection is no longer necessary.

...

With respect to the grounds which arise as a result of actions by the refugee him or herself, these actions must be truly ***voluntary*** *on the part of the refugee, and must result in him or her in fact being able to benefit from effective and durable national protection. Unless this is so, refugee status does not cease.*

Relatively more difficult interpretation issues arise, however, with respect to the cessation ground which relates to changes in circumstances in the country of origin such that the reasons for which refugee protection was required no longer exist. In interpreting this clause there has been some question about the nature and degree of change necessary. UNHCR's Executive Committee has stated that the changes must be fundamental, stable, durable and relevant to the refugees' fear of persecution. Cessation of refugee status may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of Article 1A(2). When those reasons disappear, in most cases so too will the need for international protection. Recognising this link, and exploiting it to understand whether the changes in circumstance are relevant and fundamental to the causes of flight, will serve to elucidate circumstances which should lead to cessation of status. This is particularly important with respect to individual cessation.' (Footnotes omitted, original emphasis)

42 A question arises as to the use of this type of material. Counsel for the appellant argued that the Tribunal was bound to have regard to UNHCR publications in determining whether Article 1C(5) of the Convention applied to the appellant. They pointed out that, in *Chan*, some members of the High Court relied, *inter alia*, on a UNHCR Handbook for guidance as to the date at which refugee status is to be determined: see Dawson J at 397, Toohey J at 405 and Gaudron J at 414.

43 The other two members of the *Chan* High Court do not appear to have used the Handbook for this purpose, but both accepted that this would be a permissible course of action. At 392, Mason CJ said:

'Without wishing to deny the usefulness or the admissibility of extrinsic materials of this kind in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties ... I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention.'

44 McHugh J described the Handbook, at 424, as a work published 'to assist member States to carry out their obligations under the Protocol'. He referred to it at some length.

45 The Tribunal referred to the 2003 Guidelines (see para 15 above) but stated the opinions expressed in them 'do not constitute legal tests ... it is important to return to the language of the Convention'.

46 I agree with the Tribunal that statements made in the 2003 Guidelines (and the 2001 note) should not be regarded as rules of law. To the extent they may be inconsistent with anything said in either the Act or the Convention, they must be put aside. However, subject to that qualification, these statements should be taken into account by anybody who is required to determine whether a particular person should be recognized as a refugee, for the first time, or whether a previously recognized person has ceased to be a refugee. Like the UNHCR Handbook mentioned in *Chan*, these are documents prepared by experts published to assist States (including Australia) to carry out their obligations under the Convention.

(ii) Identification of the circumstances underlying the appellant's recognition as a refugee

47 At para [25] of his reasons, quoted at para 29 above, the primary judge stated that the appellant accepted that the March 2000 circumstances 'have ceased to exist'. With respect, that was too broad a statement. The appellant certainly accepted, both before the Tribunal and before his Honour, that the Taliban no longer formed the central government of Afghanistan. That was an important change of circumstance. However, the claim made by the appellant, at the time of his original application, did not depend upon the fact that the Taliban was in government in late 1999; if that is, in fact, an accurate way of describing the then situation. As noted at para 3 above, the appellant had expressed a fear 'that the Taliban will kill him because he is of Hazara ethnicity'. At the Tribunal hearing, he continued to express that fear, although he accepted that the Taliban were in a less powerful position than in late 1999 or early 2000.

48 As recounted at para 4 above, the delegate who made the March 2000 decision accepted that, if the appellant returned to Afghanistan, 'he has a real chance of being captured by the Taliban and forced to fight or be killed by them'. That was the critical circumstance causing the appellant to be recognised as a refugee. It is against that background that the parties' arguments on this ground of appeal must be evaluated.

(iii) The proper approach to Article 1C(5)

49 Counsel for the appellant argued that the primary judge erred in holding that 'it was not necessary to decide whether or not the cessation clause had been engaged as a result of changed circumstances in Afghanistan': see para 29 above…

50 Mr Gageler referred to a decision of Emmett J: *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373…

…

52 In discussing the relationship between Article 1A(2) and Article 1C(5) of the Convention, Emmett J also mentioned Article 33.1 of the Convention, which prohibits a Contracting State from expelling or returning a refugee to a territory where his or her life or freedom would be threatened for a Convention reason. Emmett J said at [34] to [40]:

'Articles 33.1, 1A(2) and 1C(5) of the Refugees Convention turn upon the same basic notion; protection is afforded to persons in relevant need, who do not have access to protection, apart from the Refugees Convention. A person is relevantly in need of protection if that person has a well-founded fear of being persecuted, for Convention Reasons, in the country, or countries, in respect of which the person has a right or ability to access. On the other hand, the Refugees Convention is not designed to provide protection to those with no such need. In practical terms, the limited places for, and resources available to, refugees are to be given to those in need and not to those who either can access protection elsewhere or are no longer in need of international protection.

A critical object of the Refugees Convention is that Contracting States will not expel or return a person to a country if that person has a well-founded fear of persecution for Convention Reasons. The relationship between Arts 1A(2) and 33.1 is to be understood in that context, having regard to the adoption of similar language in both provisions ...

When Article 33.1 speaks in terms of a territory where the life or freedom of a person would be threatened ***on account of Convention Reasons****, while the language is not identical, the concept is intended to correspond with the concept that underlies Art 1A(2). That is to say, where a person, owing to well founded fear of being persecuted for Convention Reasons is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, a Contracting State must not expel or return that person to another territory where he or she would have a well founded fear of being persecuted for Convention Reasons namely, his or her life or freedom would be threatened on account of any Convention Reasons.*

There is a similar relationship between Arts 1A(2) and 1C(5). Thus, the latter refers to the circumstances in connection with which a person has been recognised as a refugee. That refers back to the concept that the person has a well founded fear of ***being persecuted for Convention Reasons*** *and is therefore unable, or owing to such fear, unwilling, to avail himself of the protection of his own country. The two provisions should be construed as having some symmetry in their effect.*

Thus, the circumstances in connection with which a person who is outside the country of his or her nationality will be recognised as a refugee by a Contracting State are that, owing to well-founded fear of being persecuted for Conventions Reasons, the person is unable or, owing to such fear, is unwilling, to avail himself of the protection of that country. When Art 1C(5) speaks of a person no longer being able to continue to refuse to avail himself of the protection of the country of his nationality, it refers back to the prerequisite of Art 1A(2) that the person be unable or unwilling to avail himself of the protection of that country because of a well-founded fear of persecution for a Convention Reason. There is no reason for construing Art 1C(5) as contemplating anything more or less than the negativing of the circumstances that led to the conclusion that a person was a refugee within the meaning of Art 1A(2).

While there is a certain lack of symmetry in the actual language of the three provisions, there is a rationale underlying the basic object and scheme of the Refugees Convention. That rationale is that, so long as the relevant well-founded

fear exists, such that a person is unable or unwilling to avail himself or herself of the protection of the country of his or her nationality, he or she will be permitted to remain in the Contracting State. However, if circumstances change, such that it can no longer be said that the person is unable to avail himself or herself of the protection of his or her country of nationality owing to well-founded fear of persecution for Convention Reasons, the Contracting State's obligation of protection comes to an end ...

It may be appropriate, when considering the possible application of Art 1C(5), to assess whether a change in circumstances in the country of nationality is such as can properly be characterised as 'substantial, effective and durable'. However, the object of the enquiry is to determine whether the person who has been recognised as a refugee can still claim to have a well-founded fear of being persecuted, for a Convention Reason, in his or her country of nationality such that there is justification for his or her being unable or unwilling to avail himself or herself of the protection of that country.' (Original emphasis)

53 Counsel for the respondent submitted that Emmett J's approach was supported by a recent decision of the House of Lords, *Regina (Hoxha) v Special Adjudicator* [2005] UKLR 19; [2005] 1 WLR 1063 (*'Hoxha'*).

54 Hoxha concerned the operation of Article 1C(5) of the Convention in relation to people who had not been recognised as refugees in the United Kingdom. The prosecutors had failed to make out a case of a well-founded fear of future persecution if they returned to their homes in Kosovo, in the Federal Republic of Serbia. They each established reluctance to return to Kosovo which was thought to be justified by the continuing physical and psychological effects of persecution there suffered by them and family members. However, continuing effect of past persecution is insufficient to satisfy Article 1A(2) of the Convention.

55 Although the relationship between Article 1A(2) and Article 1C(5) of the Convention was not an issue in the appeal, two members of the House referred to it. At [13] Lord Hope of Craigend referred to a passage in the speech of Lord Lloyd of Berwick, in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 306, concerning the relationship between Article 1A(1), Article 1A(2) and Article 1C(5). Lord Lloyd said:

'Article 1A(1) is concerned with historic persecutions. It covers those who qualified as refugees under previous Conventions. They are not affected by article 1C(5) if they can show compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country. It would point the contrast with article 1A(1), and make good sense, to hold that article 1A(2) is concerned, not with previous persecution at all, but with current persecution, in which case article 1C(5) would take effect naturally when, owing to a change of circumstance, the refugee ceases to have a fear of current persecution.'

56 Lord Brown of Eaton-under-Heywood also noted Lord Lloyd's statement which, he said at [56]:

'points to the contrast logically and intentionally struck in 1C (5) between on the one hand 1A (1) refugees, who have already been "considered" refugees (and thus recognised as such) and who, although potentially amenable to the loss of that status under 1C (5), will not in fact lose it if they can show "compelling reasons", and on the other hand 1A (2) refugees who must demonstrate a current well-founded fear of persecution not only when first seeking recognition of their status but also thereafter in order not to lose it.'

57 Lord Brown said:

*'**60.** True it is that 1C (5), no less than 1A (2), appears in the Convention under the heading "Definition of the Term 'Refugee'". True it is, too, as para 28 of the* [UNHCR] *Handbook neatly points out, that someone recognised to be a refugee must by definition have been one before his refugee status has been determined. But it by no means follows that, because someone has been a refugee before his status comes to be determined, any change in circumstances in his home country falls to be considered under 1C (5) rather than under 1A (2). Quite the contrary. As has been seen, the Handbook is replete with references to the "determination" of a person's refugee status and his "recognition" as such. Article 9 of the Convention itself, indeed, allows certain provisional measures to be taken "pending a determination by the Contracting State that that person is in fact a refugee". The whole scheme of the Convention points irresistibly towards a two-stage rather than composite approach to 1A (2) and 1C (5). Stage 1, the formal determination of an asylum-seeker's refugee status, dictates whether a 1A (2) applicant ...is to be recognised as a refugee. 1C (5), a cessation clause, simply has no application at that stage, indeed no application at any stage unless and until it is invoked by the State **against** the refugee in order to deprive him of the refugee status previously accorded to him.*

***61.** Para 112 of the Handbook makes all this perfectly plain. So too, more recently, did the UNHCR Lisbon Roundtable Meeting of Experts held in May 2001 in their Summary Conclusions:*

"26. In principle, refugee status determination and cessation procedures should be seen as separate and distinct processes, and which should not be confused."

***62.** Many other of the documents and writings put before your Lordships point the same way. And so, of course, does the language of 1C (5) itself. The words "the circumstances in connection with which he has been recognised as a refugee" could hardly be clearer. They expressly postulate that the person concerned "has been recognised as a refugee", not that he "became" or "was" a refugee.*

***63.** This provision, it shall be borne in mind, is one calculated, if invoked, to redound to the refugee's disadvantage, not his benefit. Small wonder, therefore, that all the emphasis in paras 112 and 135 of the Handbook is upon the importance of ensuring that his recognised refugee status will not be taken from him save upon a fundamental change of circumstances in his home country. As the Lisbon Conference put it in para 27 of their conclusions: "... the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable".*

***64.** Many other UNHCR publications are to similar effect. A single further instance will suffice, taken from the April 1999 Guidelines on the application of the cessation clauses:*

"2. The cessation clauses set out the only situations in which refugee status properly and legitimately granted comes to an end. This means that once an individual is determined to be a refugee, his/her status is maintained until he/she falls within the terms of one of the cessation clauses. This strict approach is important since refugees should not be subjected to constant review of their refugee status. In addition, since the application of the cessation clauses in effect operates as a formal

loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation."

65. *The reason for applying a "strict" and "restrictive" approach to the cessation clauses in general and 1C (5) in particular is surely plain. Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carried with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration and before it is granted. Logically, therefore, the approach to the grant of refugee status under 1A (2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1C (5).'* (Original emphasis)

58 It will be noted that the person being considered in [60] of this passage is a person who was, in fact, a refugee before his or her status came to be determined, but who has not yet been recognised as a refugee; in other words, a person in the same position as Mr Chan, when his case was before the High Court. When Lord Brown dealt with the case of a person who had already been recognised as a refugee, at [62] and following, he stated that the inquiry should take place under Article 1C(5), rather than Article 1A(2). He also recognised and emphasised the heavy burden resting on a State which contends that a person who has been recognised as a refugee has ceased to have that status. His conclusion was that 'the approach to the grant of refugee status under 1A(2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1C(5)'.

59 I make one other observation about *Hoxha*. All three members of the House who wrote substantial judgments (Lord Hope, Baroness Hale of Richmond and Lord Brown) made extensive use of UNHCR material in guiding their interpretation of the Convention. Their action endorses the approach advocated at para 46 above.

60 Lord Brown's comment, in *Hoxha* at [65], about a recognised refugee not being stripped of that status 'save for demonstrably good and sufficient reason' echoes the insistence of the UNHCR publications upon the need for the State arguing cessation to establish fundamental and durable changes in the refugee's country of nationality. That insistence is consistent with comments in accepted textbooks on refugee law, including *Hathaway* and *Goodwin-Hill*, noted by the Tribunal in this case: see para 15 above. For example, *Hathaway*, at 200-203, identified three requirements that should exist 'before the consideration of cessation is warranted':

> (i) 'the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists';
> (ii) 'there must be reason to believe that the substantial political change is truly effective'; it cannot be said 'there has truly been a fundamental change of circumstances when the police or military establishments have yet fully to comply with the dictates of democracy and respect for human rights'; mere progress towards respect is not enough; and
> (iii) 'the change of circumstances must be shown to be durable'.

(iv) the relationship between the Convention and the Act

61 Section 36(1) of the Act says '[t]here is a class of visas to be known as protection visas'. Section 36(2)(a) provides one 'criterion for a protection visa', namely that the applicant is: 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.'

62 Subsection (2) of s 36 is qualified by subs (3), relating to a person who had the opportunity to obtain protection in another country. It is not suggested this qualification is relevant to the present case.
63 The criterion in s 36(2) of the Act directly reflects Australia's protection obligations under the Convention. The evident intention of Parliament was to facilitate fulfilment of those obligations. A visa of the class under discussion in s 36 (a protection visa) was to be provided, on application, to any non-citizen in Australia to whom Australia had Convention obligations.
64 In *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ discussed the relationship between s 36(2) of the Act and the Convention. They pointed out, at [27], that s 36(2) is 'awkwardly drawn' in that Australia owes obligations under the Convention to the other Contracting States, rather than to individuals. However, after considering the context of s 36(2) and its legislative history, their Honours concluded, at [42], that 'the adjectival phrase in the subsection "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention'.
65 It follows that, although, literally, s 36(2)(a) poses the question to be determined by the Minister (or her delegate) or, on review, the Tribunal as being whether Australia has protection obligations, to the particular applicant, under the Convention, the real question is whether the person falls within the Convention's definition of 'refugee'. As Lord Brown explained, if the person has not previously been recognised as a refugee, the inquiry required by the definition will be whether the person satisfies Article 1A(2) of the Convention; only if the person satisfies Article 1A(2) will Australia have any protection obligation to him or her. If the person has previously been recognised as a refugee in Australia, again as explained by Lord Brown, Australia has a protection obligation to that person, by force of the Convention itself, unless and until Article 1C(5) has caused cessation of that obligation.
66 Interpreted in this way, there is a symmetry between Australia's Convention obligations and the availability of protection visas. That would not be the case if the present issue was resolved in the manner suggested by counsel for the Minister. If an already-recognised refugee was in the same position, in relation to a permanent protection visa application, as a person who had not previously been recognised as a refugee, a person might fail to satisfy the decision-maker of facts bringing his or her case within Article 1A(2), and so be denied a permanent protection visa, yet there had been no cessation of Australia's protection obligations to him or her, Article 1C(5) not having been applied to the case. Once the temporary protection visa expired, the person would be left without protection despite that person's continuing status as a refugee.
67 It seems inherently unlikely that Parliament would have intended to leave such a potentially embarrassing lacuna in Australia's ability to fulfil its international obligations.
(v) My conclusion about the approach of the primary judge
68 The decision of Emmett J in *NBGM* predated the House of Lords' decision in *Hoxha*. His Honour did not have Lord Brown's analysis of the relationship between Article 1A(2) and Article 1C(5). Neither did the primary judge, in deciding the case now before us. I am not sure to what extent either judge had the benefit of considering the UNHCR material to which we were referred. Certainly neither judge dealt with it.
69 With the advantage of considering all that material, I have reached the respectful conclusion that the primary judge was wrong in saying that 'it was not strictly relevant that he had previously applied for and received temporary (XA) and temporary (XC) visas'. On the contrary, that fact was of critical importance. The circumstance that the appellant had

previously been recognised as a refugee was the starting point for consideration of his permanent visa application. The circumstance had considerable practical importance; it affected what might loosely be called the burden of proof. I accept that, in a technical sense, no burden of proof rests on any party in relation to review of an administrative decision: see *McDonald v Director-General of Social Security* (1984) 1 FCR 354; see also Mary Crock *Immigration and Refugee Law in Australia*, The Federation Press, Sydney, 1998 at 138 and 262 and the authorities there cited. However, it matters to the parties which one of them fails if the evidence is inconclusive, as may well happen when (as here) the critical question concerns conditions in a remote part of a foreign country. In an original application for refugee status, relying on Article 1A(2), the Minister (or her delegate or the Tribunal) must be satisfied of facts that support the inference that the applicant has a well-founded fear (including that there is a real chance) of persecution for a Convention reason if returned to his or her country of nationality. If the facts do not go so far, the claim for a protection visa will fail. The situation is different in relation to an inquiry under Article 1C(5) as to possible cessation of refugee status. If the facts are insufficiently elucidated for a confident finding to be made, the claim of cessation will fail and the person will remain recognised as a refugee.

70 The primary judge referred to *Chan*, in rejecting the appellant's argument that it had been necessary for the Tribunal to consider the application to him of Article 1C(5): see para 29 above. However, *Chan* furnishes no support for his Honour's position. *Chan* arose under Article 1A(2) of the Convention, not Article 1C(5). Mr Chan had not previously been recognised as a refugee. At the point of Dawson J's judgment identified by the primary judge, his Honour was dealing with the question whether Article 1A(2) requires refugee status to be determined 'as at the time when the test laid down by the Convention is first satisfied so that it ceases only in accordance with [Article 1C(5)], or whether refugee status is to be determined at the time when it arises for determination'. In common with the remainder of the Court, Dawson J held the latter situation was correct. His Honour was saying nothing about the operation of Article 1C(5) in circumstances where, not only was the test satisfied, but recognition had been granted.

(vi) The Tribunal's treatment of the Article 1C(5) issue

71 In the present case, the Tribunal did advert to Article 1C(5). At para 15 above, I noted the Tribunal's self-direction of law concerning the application of that clause to the case then under consideration. The appellant does not complain about the content of that self-direction. However, his counsel submitted that the Tribunal failed to apply it. It will be recalled the Tribunal said that 'changes in the refugee's country must be substantial, effective and durable or profound and durable'. That statement is supported by the references cited by the Tribunal and also, now, by Lord Brown's observations in *Hoxha*.

72 At para 18 above, I set out the Tribunal's findings and reasons in relation to cessation. It will be noted that the Tribunal described the circumstances in which the appellant was originally recognised (in March 2000) as a refugee as being 'that he would be persecuted in Afghanistan by the Taliban authorities because he is a Hazara and a Shi'a Muslim'. The Tribunal's focus was upon the Taliban's position as the government of Afghanistan, or at least that part of Afghanistan in which the appellant had resided. This focus is reflected in the critical factual finding of the Tribunal that there was not, in May 2004, 'any real chance of the Taliban re-emerging as a governing authority in Afghanistan in the reasonably foreseeable future, or otherwise be in a position to exercise control in the manner it did at the time the applicant left Afghanistan'.

73 However, as appears from paras 3-4 above, the circumstances that underlay the March 2000 recognition of the appellant as a refugee were not dependent upon the Taliban's status as a governing authority in Afghanistan. The appellant had not based his claim on that

status, but merely a fear 'that the Taliban will kill him because he is of Hazara ethnicity'. The March 2000 delegate understood that. She accepted 'that if he returns to Afghanistan he has a real chance of being captured by the Taliban and forced to fight or be killed by them'. The issue for the Tribunal, in relation to the cessation clause, was whether the Tribunal could be satisfied there was now no such chance.

74 It is true that the March 2000 delegate referred to the fact that 'the Taliban control large areas in Afghanistan'. Perhaps that is no longer so, a circumstance that raises the possibility of a cessation case under Article 1C(5) being made out. However, for that to happen, the Tribunal would need to be satisfied of much more than the fact that there is no real chance of the Taliban re-emerging as a governing authority or exercising the same type of control as it did in 1999. The Tribunal would need to investigate, and make findings about, the extent of Taliban activity in the Afghan countryside, especially in the appellant's home district. The Tribunal would also have to consider the durability of the present situation.

75 It is not necessary in the present case to consider whether, and if so how, the relocation doctrine might interact with Article 1C(5). The Tribunal assumed the present appellant would have no option but to return to his home village, if he was removed to Afghanistan. Issues surrounding possible relocation elsewhere in Afghanistan did not arise.

76 In the passage in its reasons quoted at para 18 above, the Tribunal accepted 'that remnants of the Taliban remain active in Afghanistan'. The Tribunal seems also to have accepted the appellant's claims that 'Afghanistan is still unstable' and that 'the interim government is unable to protect [him]'. It noted the appellant's claim of a well-founded fear of persecution, at the hands of the Taliban or factions of the Interim Authority – apparently factions sympathetic to the Taliban - and various warlords and governors. However, all this was put aside because the Tribunal limited the circumstances underlying the March 2000 recognition to the fact that the Taliban was then in government, or at least 'a governing authority'. That limitation was unjustified and it resulted in the Tribunal failing to give proper consideration to the issue it was required to determine.

77 If, as claimed, Afghanistan is still unstable and the interim government would be unable to protect the appellant from the Taliban and Taliban sympathisers, it is impossible sensibly to say there has been a cessation of the circumstances in connection with which the applicant was recognised as a refugee. The details of the picture may have changed since 2000, but the threat would still exist. In my opinion, it was necessary for the Tribunal to address the appellant's claims of instability and lack of protection before it could reach a conclusion that Article 1C(5) applied to this case. If the Tribunal found that these claims were unjustified, under present conditions, the Tribunal would have needed to consider the durability of those conditions. It did not do so.

78 At para 23 above, I noted a statement by the Tribunal that 'the applicant would not have a well-founded fear of persecution for any Convention reason should he return to Afghanistan'. In oral submissions, Mr Gageler argued this furnished a complete answer to the appellant's case, even in relation to Article 1C(5). However, I do not read the statement in that way. The statement is not framed in terms of cessation of earlier circumstances. It appears as a conclusion to that part of the Tribunal's reasons that deals with the appellant's various Article 1A(2) claims. I think the statement should be understood as a summary of the Tribunal's rejection of those claims, not as one referring back to the earlier part of its reasons dealing with cessation. Of course, as the Tribunal explained, its decision in relation to the Article 1A(2) claims was influenced by an absence of information about ongoing problems in the appellant's home district. That may have been a rational approach for the Tribunal to adopt. However, an acceptable Article 1C(5) decision could not be based on an absence of information about problems; there would have to be positive information demonstrating a settled and durable situation in that district that was incompatible with a

real chance of future Taliban persecution of the appellant.

79 In my opinion, the appellant's second point is made good. The Tribunal's failure properly to address the cessation issue constituted a jurisdictional error in relation to which the appellant is entitled to relief.

….

Postscript

82 Since writing the above, I have seen drafts of the judgments prepared by Madgwick and Lander JJ. I wish specifically to adopt what Madgwick J says about the principles that govern interpretation of the Convention. I also agree with a large proportion of what is said by Lander J. The point of difference between myself and Lander J is really quite narrow.

83 It is important to distinguish between recognition of a person as a 'refugee', within the meaning of the Convention, and the grant to that person of protection. Recognition is a function of the Convention; protection is a function of the Act. Recognition is necessarily of indefinite duration; protection may be for a limited period, or until the happening of a particular event. A person may continue to have refugee status (because the person has successfully invoked Article 1A(2) and Article 1C(5) has not yet operated against him or her) notwithstanding the expiration of a temporary protection visa.

84 It seems to me, with great respect, that Lander J, and those who have shared his view, have overlooked the significance of the distinction just made. They interpret the requirement of s 36(2)(a) of the Act (and reg 866.221), that the Minister be 'satisfied Australia has protection obligations' under the Convention, as necessarily requiring the Minister (or her delegate or the Tribunal) to make a *de novo* decision that the particular applicant for a permanent visa then satisfies Article 1A(2) of the Convention; even though that applicant might have obtained such a decision at an earlier point of time, and thus achieved the status of being a 'refugee' within the meaning of the Convention, and that status has not ceased pursuant to Article 1C(5) of the Convention.

85 Although this might have led to failure by Australia to give full effect to its Convention obligations, it would have been constitutionally possible for the Parliament to have enacted such a requirement. However, it chose not to do this. Parliament chose, in s 36(2)(a) of the Act (and reg 866.221), to tie the selected criterion directly to Australia's protection obligations to the person.

86 As a matter of logic, it seems to me, the Minister (or her delegate or the Tribunal) might become satisfied that Australia has protection obligations to a person in either of two ways:

> (i) because the decision-maker is satisfied, as a result of a *de novo* inquiry, that the applicant is a person who falls, at that time, within Article 1A(2) of the Convention; or
>
> (ii) because the decision-maker is satisfied that the person has already been recognised as a refugee under Article 1A(2) of the Convention and is not satisfied that this status has ceased under Article 1C(5).

87 The approach adopted by Lander J (and the other judges to whom he refers) effectively eliminates the second alternative. It recasts the scheme of s 36(2)(a) (and reg 866.221) to make the requirement for grant of a protection visa, not the selected question whether Australia has protection obligations to the person but the narrower question whether the person can bring himself or herself within Article 1A(2) at that time. Despite my great respect for all those who have adopted that approach, it seems to me plainly to be wrong.

Madgwick J. said:

Australia's protection obligation

89 Section 36 and the Regulations establishing protection visa criteria set up, as a criterion for a protection visa, the Minister's satisfaction that 'Australia has protection obligations under the Refugees Convention ...'.

90 The obligations under the Convention are those contained in the Convention read as a whole: *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6; 213 ALR 668, at [31] and [84]. Unquestionably, Article 1 – headed 'Definition of the term "refugee" ' – must be read as a whole. Article 1C(5) applies when a person 'has been recognized as a refugee'. It was common ground that the appellant had been so recognized. The Tribunal therefore had to consider and give proper effect to Article 1C(5). That provision plainly implies that, once a person has been recognized as a refugee he or she 'can ... continue to refuse to avail himself of the protection of his country of nationality' until such time as 'the circumstances in connection with which he has been recognized as a refugee have ceased to exist.' That is, the recognized person should be regarded as having a 'right' (as explained in *NAGV* at [27]) to 'continue to refuse to avail himself of the protection' of his country of nationality. The effect of the Act and the Convention, therefore, on an application for a 'permanent' protection visa, where an applicant has previously been recognized in Australia as a refugee, is to require a decision-maker to consider whether such cessation has occurred.

….

Justification for recognizing a requirement for a State (by its decision-maker) asserting cessation of circumstances to make good the assertion

97 The observations of the expert bodies cited by Wilcox J and by Lord Brown in *Hoxha* are not merely expert as to refugee law and practice but, in my respectful opinion, legally valid as being in accordance with Australian judicial, interpretative norms and other common law conceptions.

(i) Relevance of probable circumstances of persons recognized as refugees

98 Where statutory decisions have direct, personal and familial consequences, those consequences can imply necessary considerations for decision-makers beyond those expressed by the legislative instrument in question. For example, Australian courts at all levels routinely regard personal and familial hardship and potential deprivation of livelihood as relevant factors to be taken into account when considering appeals from the grant, refusal or withdrawal of licences of various kinds, though no such relevance is expressly accorded those factors by the governing legislation.

99 In relation to the *Migration Act* itself, in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 304 – 305, Gaudron J offered, as an alternative to the espousal by Mason CJ and Deane J of a legitimate expectation in a potential deportee, that Australia's international obligations under a treaty, not enacted into domestic law, to treat the interests of a child as a primary consideration, would be taken into account in a decision on whether to deport him for reasons of bad character. (McHugh J's vigorous dissent has been influential – see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 27 ff). Her Honour viewed the reasonable demands of generally accepted standards of humane values and conduct as decisive, regardless of any treaty (at 304):

> *'Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare.*

Further, they would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker. They would make that assumption or have that expectation because of the special vulnerability of children, particularly where the break-up of the family unit is, or may be, involved, and because of their expectation that a civilised society would be alert to its responsibilities to children who are, or may be, in need of protection.'

100 Callinan J observed of this in *Sanders v Snell* (1998) 196 CLR 329, 351 (at fn 65) that, in *Teoh*, the Court was 'dealing ... with a case in which the interests of children were in issue, matters in respect of which any civilised person would hold expectations, whether referable to a United Nations Convention or otherwise'.

101 Any reasonable, civilised person or State party to the Refugees Convention would, in my opinion, understand the contracting States' obligations to refugees in the context of the likely circumstances of refugees. Refugees recognized as such are people who have found themselves outside their country of nationality and have been found rationally to fear persecution if they are returned there. The context includes their probable dislocation and consequent special need to re-establish a degree of stability in their and, often, their families' lives. In interpreting the Convention, the possible burden to the States of providing more than protection for the least possible period strictly necessary must be balanced against the demands of humane treatment of the people concerned and the hardships of returning them to places where, or of which, they have held genuine and serious fear, unless their future safety is reasonably assured.

(ii) Relevance to decision-making process of recognized refugee's circumstances

102 It is also well recognized in Australian law that the matters at stake can and should affect the fact-finding processes of decision-makers. Dixon J's remarks in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361 – 362 and 368 bear revisiting. His Honour said:

'The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. ... But reasonable ***satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved****. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.*

...

Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation.' (Emphasis added.)

103 In 1938, to be labelled an adulterer was a serious matter. Nevertheless, wrongly to be deprived of protection after being recognized as a refugee might be thought rather more serious.
104 In Australia, a decision-maker considering the case of a previously recognized refugee would, as indicated above (at [3]), ordinarily be 'satisfied', within the meaning of s 65 of the Act, that the relevant protection criterion prescribed for a 'permanent' protection visa had itself been satisfied by the mere showing that there had been such recognition and the application in favour of the refugee of his right, granted by Art 1C(5) of the Convention (see [4] above), to rely on that recognition. For that right to be negated, the decision-maker would need to be satisfied that a positive and different state of affairs, namely cessation of the relevant circumstances, now existed. That there is no onus, in the legal sense, on anyone to satisfy the Minister, delegate or Tribunal about that possible state of affairs does not diminish the good sense or justice of interpreting the Convention so as to ascribe to it the effect that, because of the importance and gravity of the question for the person concerned, indefinite evidence in favour of his or her future safety will not be taken as sufficient to deprive the person of the protection and measure of stability he or she presently enjoys.
105 The text of the Convention must nevertheless be amenable to such an approach. In my opinion, it is. Such an approach is entirely conformable with the text, as I proceed to indicate.

(iii) Implications of the Convention's text

106 The Preamble to the Convention in general locates the Convention in the context of international human rights law: the U.N. Charter and the Universal Declaration of Human Rights were considered by the States parties (in the first placitum of the Preamble) to 'have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'. The plight of persons who have become refugees is also stressed: the second placitum speaks of the U.N.'s 'preferred concern' for refugees and its endeavour 'to **assure** refugees the widest possible exercises of [the] fundamental rights and freedoms' referred to in the first placitum (emphasis added). Further, the fifth placitum recognizes that 'the problem of refugees' was of a 'social and humanitarian nature' with the potential for it to become a cause of tension between States. None of this suggests a reading of the Convention apt to require a ready, second uprooting of people who have achieved a measure of asylum on the strength of their recognition as refugees.
107 That impression is, in my opinion, confirmed in the substantive provisions of the Convention.
108 Firstly, the entire concept of a '**well-founded fear of persecution**', which no doubt is the central underlying concept in the Convention (as counsel for the Minister argued), focuses on an objective justification for a fear of very serious consequences. It is inescapable that examining future possibilities over a very short, future time frame is not likely to suffice to dispel the justification for a well-founded fear harboured in the recent past. The requirement (rightly conceded by counsel for the Minister to exist) that the decision-maker should prognosticate the situation into the reasonably foreseeable future carries with it the necessity that the decision-maker bear that in mind. In the present case, for example, it would appear to be necessary to estimate how confidently any non-Taliban settlement can be predicted to endure, on a widespread basis, for a period of some years. The Tribunal did examine that question in a manner that does not attract review by way of the constitutional writs. But that is not the end of the matter.
109 Secondly, there is no warrant to confine the expression '**the circumstances in connection with which he has been recognized as a refugee**' to a narrow conception of those circumstances. 'In connection with' is generally a phrase of wide import: *Brown v*

Rezitis (1970) 127 CLR 157, 165 per Barwick CJ). In *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, 479 Wilcox J said that the expression has 'a wide connotation requiring merely a relation between one thing and another'. In the present case, it might be surprising if the Taliban, their racism, their extremely intolerant and inflexible view of Sunni Islam and their readiness to resort to violence were not a manifestation of deep tendencies present in Afghani society. Any such tendency, if it carried a real risk of persecution, might also be reasonably thought to be included 'in the circumstances in connection with which' the applicant was recognized as a refugee. The question would then logically arise: if it is true that the Taliban genie has been largely put back in its bottle, will no other similarly violent, racist and/or religiously bigoted manifestation soon enough succeed it? The Tribunal appears, however, to have considered the 'circumstances' without sufficiently apprehending that they were able to be understood more broadly.

110 Thirdly, the Convention notion is that the circumstances should have '**ceased to exist**'. The phrase is not 'abated somewhat', or even 'considerably abated'. The implication is that safety from serious harm needs to have been re-established (or, in some instances, established for the first time). In this regard, the Tribunal seems to have considered that the UNHCR and other expert commentators, in insisting on 'durable' or 'profound and durable' changes, had a view not in accordance with 'the language of the Convention'. On the contrary, as I have sought to show, the language of the Convention itself mandates such conclusions.

111 Fourthly, it is now trite, in relation to the Convention, that satisfaction that a fear is '**well-founded**' should be reached if there is a real and substantial possibility that the fear might be realised. As a matter of logic, if there is a real and substantial possibility that the feared, persecutory circumstances have not 'ceased to exist', it is difficult to see how a decision-maker could justifiably consider that they have so ceased.

The contrary views of the other judges of the Court

112 Lander J has catalogued these. It is only proper to re-examine one's approach when a number of other judges have expressed a different view, and I have done so. However, with respect, to my mind nothing said by Lander J or any of the other judges persuasively gainsays the central propositions that:

> (a) the legislative requirement is that before the relevant temporary visa could be granted, the Australian Government through the agency of the Minister or the latter's delegate must have determined substantively that Australia owed the appellant protection obligations under the Convention;
>
> (b) thereafter, Australia's acceptance of the Convention (not in any relevant respect qualified by the Act) means that, having regard to the Act's own criterion of protection obligations being owed, because of that determination the appellant was to be regarded as a refugee and therefore owed protection obligations until such time as there was a positive determination on behalf of the Australian Government that the circumstances in connection with which the appellant had been recognized as a refugee had ceased to exist: Art 1.C.5; and
>
> (c) the potential consequences of depriving a previously recognized refugee of his or her refugee status properly impact upon the meaning to be ascribed to the notion of the cessation of those circumstances and upon the process of determination of whether such cessation has occurred.

…

Lander J.(**dissenting)** said:

212 It is Article 1 that deals with the definition of the term 'refugee'. In considering

whether a person is a refugee regard must be had to the whole of Article 1: *NAGV and NAGW of 2002* per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [32].

…

221 Article 1A(2) is expressed in the present tense.

222 It suggests that the refugee status accorded the person by reason of Article 1A(2) may cease to exist when any of the criteria provided for in Article 1A(2) cease to exist.

223 A person's status as a refugee is not only determined by reference to Article 1A(1) or (2). That status is determined by reference to Article 1A and Articles 1B to 1F.

…

The English Authorities

235 In *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 304, Lord Lloyd of Berwick said that Article 1A(2) includes four categories of persons. He said:

> *' It was also common ground that article 1A(2) covers four categories of refugee: (1) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country; (3) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason and are unable to return to their country, and (4) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to return to their country.'*

236 Later, at 305, he considered the construction of Article 1A(2) and said**:**

> *' I return to the argument on construction. Mr. Pannick points out that we are here concerned with the meaning of an international Convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. I agree. It follows that one is more likely to arrive at the true construction of article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.*
>
> *But having said that, the starting point must be the language itself. The most striking feature is that it is expressed throughout in the present tense: "is outside," "is unable," "is unwilling." Thus in order to bring himself within category (1) Mr. Adan must show that he is (not was) unable to avail himself of the protection of his country. If one asks "protection against what?" the answer must surely be, or at least include, protection against persecution. Since "is unable" can only refer to current inability, one would expect that the persecution against which he needs protection is also current (or future) persecution. If he has no current fear of persecution it is not easy to see why he could need current protection against persecution, or why, indeed, protection is relevant at all.*
>
> *But the point becomes even clearer when one looks at category (2), which includes a person who (a) is outside the country of his nationality owing to a well-founded fear of persecution and (b) is unwilling, owing to such fear, to avail himself of the*

protection of that country. "Owing to such fear" in (b) means owing to well-founded fear of being persecuted for a Convention reason. But "fear" in (b) can only refer to current fear, since that fear must be the cause of the asylum-seeker being unwilling now to avail himself of the protection of his country. If fear in (b) is confined to current fear, it would be odd if "owing to well-founded fear" in (a) were not also confined to current fear. The word must surely bear the same meaning in both halves of the sentence.'

237 Lord Slynn of Hadley, who agreed with Lord Lloyd of Berwick said, at 301:

'The first matter to be established under paragraph (2) of the article is that the claimant is *outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must, as I read it, exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the paragraph that he had such fear when he left his country but no longer had it. Since the second matter to be established, namely that the person "*is *unable or, owing to such fear,* is *unwilling to avail himself of the protection of that country" (emphasis added) clearly refers to an inability or unwillingness at the time his claim for refugee status is to be determined, it seems to me that the coherence of the scheme requires that the well-founded fear, the first matter to be established, is also a current fear. The existence of what has been called a historic fear is not sufficient in itself, though it may constitute important evidence to justify a claim of current well-founded fear.'*

238 I return to Lord Lloyd's speech. In his Lordship's opinion, because of the constant use of the present tense, a person seeking refugee status under Article 1A(2) could only achieve that status by proving a current well-founded fear of persecution. He said at 306:

'I had at first thought that article 1C(5) provided a complete answer to [Mr Adan's] argument. If a present fear of persecution is an essential condition of remaining a refugee, it must also be an essential condition for becoming a refugee. But it was pointed out in the course of argument that article 1C(5) only applies to refugees in category (2). It does not help directly as to refugees in category (1). This is true. But the proviso does shed at least some light on the intended contrast between article 1A(1) and 1A(2). Article 1A(1) is concerned with historic persecution. It covers those who qualified as refugees under previous Conventions. They are not affected by article 1C(5) if they can show compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country. It would point the contrast with article 1A(1), and make good sense, to hold that article 1A(2) is concerned, not with previous persecution at all, but with current persecution, in which case article 1C(5) would take effect naturally when, owing to a change of circumstance, the refugee ceases to have a fear of current persecution.'

239 Later he said at 308:

'I am glad to have reached that conclusion. For a test which required one to look at historic fear, and then ask whether that historic fear which, ex hypothesi, no longer exists is nevertheless the cause of the asylum-seeker being presently outside his country is a test which would not be easy to apply in practice. This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear. But it is the existence, or otherwise, of present fear which is determinative.'

240 As I have said, Article 1C recognises that a person may have been considered a refugee under Article 1A(2) but no longer be entitled to the benefit of the Convention if any of the

matters contained in Article 1C have occurred.
241 In *Hoxha*, Lord Hope of Craighead said at [13]:

> *'... the cessation provision in Article 1C(5) takes effect naturally when the refugee ceases to have a current well-founded fear. This is in symmetry with the definition in Article 1A(2). The words "no longer", which were taken from the cessation provisions in paragraph 6(a) of the Statute, support that interpretation.'*

242 Lord Brown of Eaton-under-Heywood said at [56]:

> *'Plainly, moreover, the argument is irreconcilable with the passage already cited from Lord Lloyd's speech in* Adan *[1999] 1 AC 293, 306, where he points to the contrast logically and intentionally struck in 1C(5) between on the one hand 1A(1) refugees, who have already been "considered" refugees (and thus recognised as such) and who, although potentially amenable to the loss of that status under 1C(5), will not in fact lose it if they can show "compelling reasons", and on the other hand 1A(2) refugees who must demonstrate a current well-founded fear of persecution not only when first seeking recognition of their status but also thereafter in order not to lose it.'*

243 There is a natural symmetry between Article 1A(2) and Article 1C(5). Before one can consider whether Article 1C(5) applies to any person to determine whether the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, one must determine what those circumstances were.
244 It would be pointless, however, to merely determine the circumstances that existed without considering the circumstances as they exist.

The Australian Authorities

245 The time for determining whether an applicant is a person to whom Australia owes protection obligations is at the time when the decision-maker (i.e. the Minister or the Minister's delegate or the RRT) is called upon to make the decision. In *Minister for Immigration and Ethnic Affairs & Another v Singh* (1997) 72 FCR 288, a Full Court consisting of Black CJ, Lee, von Doussa, Sundberg and Mansfield JJ said at 291:

> *' The fact that in many cases there will be an interval between a person's departure from the country of nationality or former habitual residence and arrival in Australia and application for a protection visa, and a further interval, perhaps a lengthy one, between the application and the Minister's determination, does not alter the fact that the definition of "refugee", and thus s 36(2), require the applicant to show a well-founded fear of being persecuted if returned to the country of nationality or former habitual residence. The fear is not a fear in the abstract, but a fear owing to which the applicant is unwilling to return, and thus it must exist at the time the question of return arises, namely at the time the decision is made whether the applicant is a refugee.'*

246 That decision was followed in *Minister for Immigration and Ethnic Affairs & Another v Singh* (1997) 74 FCR 553 at 556 by the same members of the Full Court where Black CJ, von Doussa, Sundberg and Mansfield JJ said:

> *' For the reasons given by the Court in* Minister for Immigration and Ethnic Affairs v Mohinder Singh *(1997) 72 FCR 288 at 290-294 we conclude that the learned primary judge was in error in holding that the critical time for the determination of an applicant's status as a refugee was the time of the application: see now* "Applicant A" v Minister for Immigration and Ethnic Affairs *(1997) 142 ALR 331 at 382. In the present appeal, however, there is an additional issue to be*

determined. It relates to the Tribunal's conclusion that the documents purporting to be warrants for arrest were not authentic.'

247 In a separate judgment, Lee J, at 562, said:

'For the reasons stated by this court in Minister for Immigration and Ethnic Affairs and Refugee Tribunal v Mohinder Singh *(1997) 72 FCR 288, the decision of the learned primary Judge is to be regarded as having been made in error.'*

248 Those decisions are consistent with the decisions of the High Court in considering the application of the treaties to a person's claim for refugee status. In *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 ('*Mayer*'), Mason, Deane and Dawson JJ said at 299-300:

' Each of the Convention and the Protocol refers to the "status" of refugees in its title and in its preambles. So used, the word does not refer merely to the fact that a person is a "refugee" within the meaning of the Convention or the Protocol. Rather, it is a compendious reference to the "rights", "benefits" and "duties" of persons who are "refugees" in the various circumstances to which different Articles of the Convention (and Protocol) refer. In that sense, the "status" of a particular person under the Convention and Protocol is a temporal one depending upon whether or not the person comes within the definition of "refugee" at the relevant time and upon his or her particular past or present circumstances. Thus, for example, Art. 10 of the Convention contains special provisions relating to the "[c]ontinuity of residence" of a refugee who "has been forcibly displaced during the Second World War" and removed to or from the territory of a Contracting State while Art. 11 is restricted to dealing with the case of refugee seamen serving on board a ship flying the flag of a Contracting State. The corollary is that the obligations of a State Party in respect of a person depend upon the particular circumstances in which the person is placed and upon whether or not he or she is a "refugee" within the meaning of the Convention or the Protocol. There is nothing in the Convention or Protocol which expressly or impliedly calls for a general determination by a State Party that a person enjoys the abstract "status of refugee within the meaning of" the Convention or Protocol. The most that the Convention and Protocol do is to require that a State Party determine whether or not a person who is within or is claiming or seeking entry to its territory is a "refugee" at the particular time and, if he or she is, to define what that State's actual obligations are in respect of that particular person in the particular circumstances in which he or she is placed.'

249 It might also be said that *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ('*Chan*') is to the same effect, although more recently in *NAGV and NAGW of 2002* at [45] the High Court considered there was some 'possible ambiguity' in the legislation under consideration. Both *Mayer* and *Chan* were decided under a previous statutory regime but, in my opinion, that previous statutory regime is not so different as to make the decisions distinguishable. The relevant provision was s 6A(1)(c) of the Act which required that an entry permit not be granted to a non-citizen after his entry into Australia unless 'he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967'. Indeed, if anything, the present s 36(2) and the Regulations are even clearer in their terms than s 6A(1)(c) as to their effect. However, in *Chan*, Mason CJ said at 386-387:

‘ For the reasons given by McHugh J., the question whether or not a person has the status of "refugee" within the meaning of Art. 1A(2) of the Convention relating to the Status of Refugees (the Convention) is one for determination upon the facts as they exist when the person concerned seeks recognition as a refugee. Section 6A(1)(c) proceeds upon that view of the Convention. The words "the Minister has determined ... that he has *the status of refugee ..." (my emphasis) make this clear. Moreover, it is a view that accords with that expressed by Mason, Deane and Dawson JJ. in* Mayer *(1985) 157 C.L.R., at p. 302.’*

250 Dawson J said at 398-399:

‘ The other question which arises in the interpretation of the Convention is whether the relevant Article requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination. The Handbook in par. 28 suggests that the former is the correct interpretation, as does Grahl-Madsen, The Status of Refugees in International Law *(1966), vol. 1, p. 157. However, all else points to the latter conclusion. Article 1C(5) of the Convention provides tha the Convention shall cease to apply to a person if he "can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality". Similarly Art. 1C speaks of the circumstances in connexion with which he has been recognized as a refugee having ceased to exist, suggesting that refugee status under the Convention may come and go according to changed conditions in a person’s country of nationality and is to be determined according to existing circumstances whenever a determination is required. This view, which appears to me to be correct, was adopted by the majority in* Minister for Immigration and Ethnic Affairs v. Mayer *(1985) 157 C.L.R., at p. 302, where it is said that the reference in s. 6A(1) of the* Migration Act *to a determination that an applicant for an entry permit "has" the status of a refugee "is a reference to a contemporaneous determination rather than to some past determination that the applicant had the ‘status of refugee’ at the time when that past determination was made". See also* Reg. v Home Secretary; Ex parte Sivakumanaran *[1988] A.C., at p. 992.’*

251 Toohey J followed Mason, Deane and Dawson JJ in *Mayer*. Gaudron J said at 414:

‘Moreover, the definition of "refugee" is couched in the present tense, thus suggesting that an applicant must have a well-founded fear which accounts for unwillingness to avail himself of the protection of the country of his nationality at the time that his application for recognition as a refugee is considered. That interpretation, which accords with the decision in Sivakumaran *and gives due recognition to the humanitarian purpose of the Convention and the Protocol, is, I think, to be preferred in the light of the quite specific operation of Art. 1C(5) with respect to persons whose refugee status has been recognized.’*

252 McHugh J said at 432:

‘ Notwithstanding par. 28 of the Handbook and the opinion of Grahl-Madsen, I think that the better view of the Convention and Protocol is that whether or not a person is a "refugee" within Art. 1A(2) has to be determined upon the facts as they exist as at the date when he seeks recognition by a State party: The speeches of

Lord Keith [1988] A.C., at p. 993 and Lord Goff [1988] A.C., at p. 998 in Sivakumaran *support this conclusion.'*

253 No such possible ambiguity arises under the present legislation.

254 The matter, in my opinion, is now free from doubt. In *NAGV and NAGW of 2002*, the High Court was called upon to consider s 36(2) of the Act which was in slightly different form to the present s 36(2) but not so as to be distinguishable. Section 36(1) and (2), under consideration on that appeal, provided:

' (1) There is a class of visas to be known as protection visas. (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the Convention].'

255 The majority (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) said at [45]-[47]:

'[45] The possible ambiguity present in the previous statutory definition of "refugee" is apparent from this court's decision in Chan v Minister for Immigration and Ethnic Affairs*. A question which arose in* Chan *was whether Art 1 requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination. These distinct conclusions could only be understood to produce different results if s 6A(1)(c) of the Act required regard to be had to only s A of Art 1 of the Convention, and not the cessation provisions in s C. If this was not so, then the distinction held no meaning because an applicant who once fell within the terms of Art 1 would cease to do so by operation of s C of that Article and thus not be entitled to an entry permit under s 6A(1).*

[46] By contrast, in Minister for Immigration and Multicultural Affairs v Singh*, the court, in considering s 36(2) of the Act, proceeded on the footing that a decision-maker does not err in law in considering as a preliminary issue whether the applicant for a protection visa falls within an exception in Art 1F.*

[47] The adoption of the expression "to whom Australia has protection obligations under [the Convention]" removes any ambiguity that it is to s A only that regard is to be had in determining whether a person is a refugee, without going on to consider, or perhaps first considering, whether the Convention does not apply or ceases to apply by reason of one or more of the circumstances described in the other sections in Art 1.' (Footnotes omitted.)

256 The conclusion at which I have arrived is not only consistent with the High Court authority to which I have referred, it is also consistent with a number of decisions of this Court.

257 In *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373, the applicant was granted a temporary protection visa. In doing so, the delegate of the Minister found that the applicant was a person to whom Australia had protection obligations under the Refugees Convention. He lodged a further application for a permanent protection visa. A delegate of the Minister refused to grant a permanent protection visa. The applicant applied to the RRT for a review of that decision but the RRT affirmed the delegate's decision not to grant a further protection visa. In reaching its decision, the RRT said that the first question that arose was whether, in accordance with

Article 1C(5) of the Refugees Convention, the applicant could no longer continue to avail himself of the protection of Afghanistan because the circumstances in connection with which he was recognised by Australia as a refugee had ceased to exist.

258 After concluding that Article 1C(5) applied, the RRT turned to consider whether the applicant had a well-founded fear of persecution. It found that the applicant did not have a well-founded fear of persecution on the basis of the circumstances in connection with which he was originally recognised as a refugee. It found s 36(3) applied and that Australia did not have protection obligations in relation to the circumstances in which he was originally recognised as a refugee. Then it considered whether the applicant was a refugee as a result of any other circumstances. It concluded that the applicant did not have a well-founded fear of persecution for any Convention reason. The applicant applied to this Court for a review of that decision.

259 There is no relevant difference between the facts of that case and the facts on this appeal. Emmett J said at [61]-[64]:

> *'61 To that extent, the possibility of temporary protection that would arise by the grant of a temporary protection visa under the Act is not expressly contemplated by the Refugees Convention. The scheme of the Act in requiring a fresh application following the expiration of a temporary protection visa does not necessarily sit comfortably with the framework of the Refugees Convention. Nevertheless, the scheme of the Act is unambiguous in requiring a fresh application for a protection visa on the part of a person who wishes to remain in Australia after the expiration of a temporary protection visa.*
>
> *62 The Tribunal was not considering the revocation of a protection visa. Nor was the Tribunal considering an application for the extension of a **temporary** protection visa. The Tribunal was considering a fresh application for the grant of a **permanent** protection visa. That required, under s 36(2), that the Tribunal, standing in the shoes of the Minister be satisfied, that the applicant is, at the time of the decision, a person to whom Australia has protection obligations under the Refugees Convention.*
>
> *63 On one view, Article 1C(5) had no part to play in that question. The only question was whether, at the time of the Tribunal's decision, the applicant was a person who, owing to a well-founded fear of being persecuted for Convention Reasons, was unable, or owing to such fear, unwilling to avail himself of the protection of Afghanistan. Even if, as at December 1999 the applicant had been a person to whom the term 'refugee' within the meaning of the Refugee Convention applied, the question before the Tribunal was whether that term applied to the applicant as at April 2004. The Tribunal concluded that the applicant was not, as at that time, a person to whom the term refugee, as defined in the Refugees Convention, applied. There was no error in its reasoning in doing so.*
>
> *64 In reaching its conclusion, it was necessary for the Tribunal to have regard to all of the applicant's claims, whether they were made in connection with his original application or his subsequent application. The Tribunal did so. It is not the Court's function to second guess the Tribunal's conclusion in relation to the assessment of the material before it in that regard.'*

260 However, his Honour concluded that the RRT had not committed jurisdictional error in the way in which it had approached its task.

261 That decision is under appeal. However, it has been followed by other judges of this

Court. In *SWNB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1606, Selway J said at [10]-[16]:

> *'10 The applicant says that the Tribunal has misunderstood the interrelationship of cl 1C(5) of the Convention and ss 36(2) and (3) of the Act. The applicant argues that the Tribunal is obliged to find that an applicant for a permanent visa, who has already been determined to be a refugee in relation to a temporary visa, continues to meet the requirements of s 36(2) of the Act, unless article 1C(5) of the Convention applies.*
>
> *11 The applicant then argues that the Tribunal misapplied article 1C(5) of the Convention. The applicant says that that paragraph requires that a change in circumstances be 'substantial, effective and durable'. The applicant says that the Tribunal did not apply that test.*
>
> *12 These issues were considered by Emmett J in* NBGM v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 1373. His Honour's analysis seems to me to be plainly right and I adopt and apply it. His Honour reached the following conclusions:*
>
> > *1. Where the Tribunal is considering the grant of a fresh visa, including a permanent protection visa, the Tribunal is required to determine at the time of its decision whether the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Article 1C(5) does not necessarily have any role in that decision. I note that Dowsett J reached a similar conclusion in the case of* QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 1448.*
> >
> > *2. In making that decision, the tribunal may start with a position that the Refugees Convention applied to the applicant as at the date he was granted a temporary protection visa and then ascertain whether the circumstances in connection with which the applicant had been recognised as a refugee had ceased to exist.*
> >
> > *3. Even if article 1C(5) of the Refugee Convention was applicable, it did not require that there be a 'sustainable, effective and durable' change; merely that there had been a change such that the applicant no longer had a well-founded fear of persecution if he was returned to his country of origin.*
> >
> > *4. Section 36(3) of the Act should be interpreted in its usual and ordinary meaning. So interpreted, it adds little to the terms of section 36(2) of the Act where the issue involves the return of the applicant to his country of nationality.'*
>
> *13 There are two matters I would wish to add to that analysis. The first is that a person having been previously found to be a refugee would in my view have a legitimate expectation that that status would remain. I say this notwithstanding the fact that status is no longer itself a criterion for eligibility under s 36(2) of the Act. Consequently, the person should be given the opportunity to comment specifically on any issues that may cause the decision-maker to reach a different conclusion. It should also be specifically addressed by the decision-maker in his or her reasons.*

Of course these obligations for a fair hearing may need to be complied with in any event, even apart from whatever extra obligations that might arise from the legitimate expectation based upon a previous finding that the person was a refugee.

14 In any event, as the applicant accepts, the obligation to afford him a fair hearing was met in this case.

15 Secondly, in my view the obligation to consider whether Australia has protection obligations at the time of the grant of a permanent visa flows from par 866.22 of Sch 2 of the Migration Regulations. For my part, I would leave open the question whether s 36(2) of the act itself requires a result that every decision in relation to a protection visa must be a decision de novo. *It seems to me to be at least arguable that a regulation could be made adopting a criterion by which previous decisions made under s 36(2) can be applied without the Minister needing to be satisfied* ab initio. *Indeed, it would seem from the reasons of Emmett J that he accepted that that was a possibility.*

16 In my view, the reasons of Emmett J are a complete answer to the issues raised by the applicant in relation to the interrelationship of the various provisions. They have the effect that the decision of the Tribunal on any of the three bases adopted by it was sufficient to justify the decision reached. In particular, those reasons mean that the de novo *analysis by the Tribunal of whether Australia had protection obligations to the applicant at the time of its decision was a sufficient basis for its decision.'*

262 In SVYB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 15 and in Minister for Immigration & Multicultural & Indigenous Affairs v SWZB [2005] FCA 53, Finn J followed Emmett J's decision.

263 In NBEM v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 161, Jacobsen J said at [25]:

'I note that a number of judges of this court have adopted Emmett J's interpretation of Article 1C(5) in NBGM, *including Dowsett J in* QAAH *and Selway J in* SWNB. *The applicant has failed to convince me that Emmet J, or the other judgments in which* NBGM *has been followed, are plainly wrong. In my opinion, his honour's interpretation is correct, and it accords with the principles of interpretation of the Convention stated in recent years by the High Court.'*

264 In *NBEI v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 171, Branson J said at [9]-[10]:

'9 The Tribunal identified its task on review of the decision of the delegate of the Minister as being to consider whether, in accordance with Article 1C(5) of the Convention, the applicant can no longer continue to refuse to avail himself of the protection of his country of nationality because circumstances in connection with which he was recognised as a refugee have ceased to exist. I am inclined to doubt that this was the task of the Tribunal in the circumstances. In NBGM v Minister for Immigration & Multicultural & Indigenous Affairs *[2004] FCA 1373 (*NBGM v MIMIA*) Emmett J observed:*

> "... The scheme of the Act in requiring a fresh application following the expiration of a temporary protection visa does not necessarily sit comfortably with the framework of the Refugees Convention. Nevertheless, the scheme of the Act is unambiguous in requiring a fresh application for a

protection visa on the part of a person who wishes to remain in Australia after the expiration of a temporary protection visa.

The Tribunal was not considering the revocation of a protection visa. Nor was the Tribunal considering an application for the extension of a **temporary** protection visa. The Tribunal was considering a fresh application for the grant of a **permanent** protection visa. That required, under s 36(2), that the Tribunal, standing in the shoes of the Minister be satisfied, that the applicant is, at the time of the decision, a person to whom Australia has protection obligations under the Refugees Convention."

10 The judgment in NBGM v MIMIA *is the subject of an appeal to the Full Court. As I consider that this application can be determined without resolving whether the Tribunal accurately identified its task, no useful purpose would be served by my considering further whether Emmett J accurately identified the task of a decision-maker when considering an application for a protection visa made by a person who holds a temporary protection visa. Nor, having regard to the view which I have taken of the Tribunal's reasons for decision, have I considered it necessary to defer publishing these reasons for judgment to allow the parties to make submissions with respect to the recently published decision of the High Court in* NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs *[2005] HCA 6.'*

265 Since the judgment in this matter was reserved, Kiefel J has delivered reasons for judgment in *QAAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 968 agreeing with Dowsett J's reasons in this matter and Emmett J's reasons in *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1373. Her Honour said, at [35]:

' I would respectfully agree with their Honours. In my view the cessation clause has application to the situation where a person has been granted refugee status but the circumstances in connexion with that recognition have ceased to exist. Consideration might be given to implementing the cessation clause in relation to a procedure such as revocation. Where a person applies for a protection visa the question whether they are owed protection obligations is addressed on the determination of each application.'

266 Emmett J's decision is under appeal. Nevertheless, five judges of this Court have not found any fault in his Honour's reasons. Branson J left the question open.

267 I agree with Emmett J's reasons. I think, with respect, that his Honour's decision properly recognises the way in which the Act and Regulations govern applications for permanent protection visas.

THE APPLICATION OF THE LEGISLATION AND REGULATIONS

268 The inquiry is whether the applicant is entitled to the grant of a Subclass 866 (Permanent Protection) visa (Class XA) and that will be determined by addressing whether the applicant has satisfied the criteria in subclass 866 of Schedule 2 of the Regulations.

269 The Regulations govern the application. Subclass 866.221 requires the Minister to be satisfied, at the time the Minister makes a decision, that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

270 The inquiry must be as to whether at the time of that decision does the applicant have a well-founded fear of persecution for one of the reasons in Article 1A(2) and is thereby unwilling or unable to return to his or her country of nationality.

271 Section 36(2) and the Regulations require that matter be addressed.
272 In my opinion, the scheme of the Act and Regulations means that each time there is an application for a temporary protection visa (with the exception of a temporary protection visa (Class XC) which is granted by operation of the Regulations) or a permanent protection visa, the applicant must establish afresh that he or she has a well-founded fear of persecution and is thus a person to whom Australia owes protection obligations. Each application is a fresh application. The cessation clause has no operation after the grant of the grant of the Subclass 785 (Temporary Protection) visa (Class XA) and before the determination of the application for the protection visa.
273 The Act and Regulations simply do not contemplate that the Subclass (Temporary Protection) visa (Class XA) will expire because any of the provisions of Section C apply.
274 After the grant of a Subclass (Temporary Protection) visa (Class XC) there is even less reason to think that the cessation clause in the Convention would apply. The Subclass (Temporary Protection) visa (Class XC) was not granted because Australia owed protection obligations to the applicant at the time of the grant but only because the applicant's application for a permanent protection visa had not been granted and the Regulations applied.
275 To conclude that because the applicant had been granted a temporary protection visa, of either class, the inquiry to be conducted by the Minister in considering an application for a Subclass 866 (Permanent Protection) visa (Class XA) and in applying the criteria under subclass 866.222 is as to whether the Convention has ceased to apply to that applicant because the circumstances which applied some years ago no longer apply, is to ignore, in my respectful opinion, the words of s 36(2) and the Regulations.
276 Whether the applicant is to be considered to be a person to whom Australia has protection obligations must be determined on the facts and circumstances as they apply at the time of the decision and, in particular, whether those facts and circumstances establish that the applicant has a well-founded fear of persecution for a Convention reason.
277 If the matters in Article 1A(2) can be established at the time the decision is made in relation to the applicant's application for a permanent protection visa, Article 1C(5) has no part to play because the applicant, by proving a present well-founded fear of persecution for a Convention reason, will, unless the previous circumstances were different, have established that the circumstances giving rise to his previous claims for a well-founded fear of persecution have not ceased to exist. If they were different, they are no longer relevant in any event.
278 Once a person has established that he or she is entitled to a permanent protection visa that person will have established that he or she has the status of a refugee. That status will continue until one of the events in Article 1C occur and the Convention ceases to apply to that person. The circumstances in which the Convention might cease to apply to a person whose status has been recognised at the time of the grant of the permanent protection visa do not need to be explored on this appeal.
…
287 The RRT then discussed the circumstances then prevailing in Afghanistan and concluded:

> *'On the basis of all the material before it concerning the circumstances in connection with which the applicant was recognised as a refugee, the Tribunal finds that he can no longer refuse to avail himself of the protection of Afghanistan because those circumstances have ceased to exist. Therefore, Article 1C(5) of the Convention applies to the applicant.'*

288 Thus it is that the RRT proceeded upon the basis that the appellant was a person whose

refugee status had been recognised at the time that he obtained his Subclass 785 (Temporary Protection) visa (Class XA) on 28 March 2000. It proceeded upon the basis that Australia continued to owe protection obligations to him unless it could be said that Article 1C(5) applied and the Convention had ceased to apply to him.
289 It made a finding on the facts that Article 1C(5) did apply and the appellant was a person to whom the Convention had ceased to apply.
290 In my opinion, for the reasons already given, that approach was wrong. For the reasons already given, the RRT should have considered afresh, at the time of the hearing before it, whether the appellant was a person to whom the Minister 'is satisfied Australia has protection obligations'.
291 For the reasons already given, in my opinion, subclass 866 in Schedule 2 of the Regulations requires the Minister to be satisfied of the matters contained in Article 1A(2) at the time that the Minister makes her or his decision.
292 However, it seems to me that the RRT proceeded in the manner in which the majority have suggested was appropriate. It certainly proceeded in a way which, in my opinion, was too favourable to the appellant. It follows therefore that, even if my construction of the Act and Regulations is wrong and the construction favoured by the majority is right, I would still dismiss the appeal.
293 Having found that the appellant was not a person to whom the Convention applies because of the provision of Article 1C(5), the RRT turned to consider whether the appellant was a refugee for other reasons. In that regard, it addressed Article 1A(2) of the Convention.
294 After discussing the appellant's claims and considering country information it found that, on the circumstances as they prevailed at the time of the hearing, the appellant did not have a well-founded fear of persecution for a Convention reason.
295 For the reasons I have already given, in my opinion, the RRT should have addressed that issue first. If it had and because of the conclusion at which it arrived, it would not have needed to consider the question of Article 1C(5) because it would have found that, at the time of the hearing before the RRT (which is the relevant time), the appellant did not have a well-founded fear of persecution. If the appellant could not bring himself within Article 1A(2) then Article 1C, and in particular Article 1C(5), was irrelevant.
296 In any event, the RRT, in my opinion, addressed the appellant's application in its most favourable light by first having regard to the application of Article 1C(5) upon the assumption that the appellant had previously been granted refugee status at the time of the grant of the Subclass 785 (Temporary Protection) visa (Class XA).
297 In the end result, whatever construction one puts upon Article 1, whether it be the construction arrived at by the majority or by me, the appeal, in my opinion, has to fail.
298 I should just add one further matter.
299 The RRT also addressed a submission that the appellant had been accorded refugee status at the time of the grant of the Subclass 785 (Temporary Protection) visa (Class XC). That was rightly rejected in my opinion. It can also be observed that that is the opinion of the majority.
300 If the decision of the RRT to affirm the decision of the delegate of the Minister was right, and in my opinion the end decision was right, then Dowsett J's conclusion dismissing the application for review cannot be impugned. However, for completeness, I should address his Honour's reasons.

DOWSETT J'S REASONS

301 Dowsett J, after referring to the Act and the Regulations, identified the four issues which were before him. First, the appellant contended that the issue of the Subclass 785 (Temporary Protection) visa (Class XC) on 27 March 2003 was a recognition that Australia

owed him protection obligations at that time. It was contended before Dowsett J that therefore the Tribunal had addressed the wrong point of time in addressing the question as to whether or not the Convention had ceased to apply to the appellant under Article 1C(5). Secondly, the appellant contended that the RRT had failed to consider whether the appellant held a well-founded fear of persecution for a Convention reason from the Taliban or any other group against which the government of Afghanistan could not, or would not, defend him. Thirdly, it was contended that the RRT had failed to consider the consequences for the appellant were he to return to an area of Afghanistan other than the province from which he came. Fourthly, it was submitted that the RRT's decision was based on no evidence and/or was '*Wednesbury* unreasonable'.

302 Dowsett J rejected all four contentions. The first contention was the subject of grounds 6(c) and 6(d). That is the ground which has been rejected by all members of this Court. The other three matters argued before Dowsett J were not advanced on this appeal. Viewed in that light, it is difficult to see where his Honour has erred.

303 In any event, his Honour reasoned in this way. First he said, refugee status is to be determined having regard to the position at the time at which the determination is made. He relied on the decisions of the High Court in *Mayer* at 302; *Chan* at 386 and *Minister for Immigration & Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at [29].

304 In my opinion, that proposition is right. The more recent High Court decision in *NAGV and NAGW of* 2002 also supports that proposition.

305 Next, he said that it was not strictly relevant that the appellant had previously applied for and received a Subclass 785 (Temporary Protection) visa (Class XA) and a Subclass 785 (Temporary Protection) visa (Class XC). He said it was not necessary to decide whether Article 1C(5) had been engaged as a result of any changed circumstance in Afghanistan. He distinguished Dawson J's judgment in *Chan* at 405-406.

306 For the reasons I have already given, in my opinion, Dowsett J was correct.

307 Next, he reasoned that the grant of the Subclass 785 (Temporary Protection) visa (Class XC) was not relevant because, in granting that visa, the Minister did not have regard to the current circumstances and, in particular, to the appellant's status as a refugee.

308 He relevantly concluded, at [25]:

> *'In my view, the applicant's entitlement to a permanent visa depended upon the circumstances as they were at the time of the Tribunal's decision, meaning that it was necessary that he then hold a well-founded fear of persecution for a Convention reason. His argument to the contrary is without merit. If I am wrong in my understanding of the decision in* Chan*, nonetheless, the appellant's argument would still fail. The cessation clause will be engaged if* "the circumstances in connexion with which *[the applicant]* has been recognised as a refugee have ceased to exist"*. It cannot be sensibly argued that Australia has ever recognised the appellant as a refugee other than in connection with circumstances as they existed in March 2000. As I understand it, the applicant accepts that those circumstances have ceased to exist. No recognisable legal basis has been advanced on behalf of the applicant to support the assertion that the grant of the Temporary (XC) visa in 2003 raises a conclusive presumption that he was entitled to a visa on the basis of circumstances which then existed. Those circumstances were never identified or relied upon by the appellant and never considered by the Minister. The applicant's argument is without merit.'*

309 A number of matters arise out of that dicta. First, his Honour repeated that the question before the RRT was whether or not the appellant could bring himself within Article 1A(2) at the time of the hearing before the RRT. Secondly, he found that even if he were wrong

about that and the RRT needed first to consider Article 1C(5), the appellant's case had to fail because 'the applicant accepts that those circumstances have ceased to exist': at [25]. Thirdly, he again concluded that the contention that the grant of the Subclass 785 (Temporary Protection) visa (Class XC) in 2003 was not relevant to a determination of the appellant's right to a permanent protection visa at the time of the hearing before the RRT.
310 His Honour then considered the RRT's finding that the appellant could not bring himself within Article 1A(2) in any event. He dismissed the appellant's contention that there was no evidence to support the RRT's conclusions which were adverse to the appellant.
311 He dismissed the other contentions which are not relevant to this appeal.
312 In my opinion, Dowsett J was correct in concluding that the RRT had to determine for itself, at the time of the hearing before it, whether the appellant was a person to whom Australia owed protection obligations. The RRT therefore had to determine whether or not the appellant was then a person who had a well-founded fear of persecution for a Convention reason.
313 He was also right to conclude that Article 1C(5) never engaged.
314 In my opinion, for those reasons, the appeal from Dowsett J must be dismissed.
315 However, even if Dowsett J erred and the proper approach was to consider whether there had been a change of circumstances of the kind predicated in Article 1C(5) since the recognition of the appellant's status as a refugee on 28 March 2000, the application to Dowsett J had to be dismissed. That follows because that is exactly what the RRT did in considering the application before it. It proceeded in that very manner and decided that Article 1C(5) did operate and the Convention had ceased to apply to the appellant. It also found that the appellant did not have a well-founded fear of persecution for a Convention reason at the time it made its decision.
316 It was not for Dowsett J to inquire into the merits of the case. The merits were for the decision-maker: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-348.
…

Note that judment of a specially constituted Full Court hearin an appeal from ***NBGM v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2004] FCA 1373 (**2004) 84 ALD 40 IS RESERVED

20. MATERIAL CHANGE

In Chan v MIEA (1089) 169 CKR 381 at 391 Mason CJ said:

In the absence of compelling evidence to the contrary the Full Court should not have inferred that the grounds for such fear had dissipated. While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure. Those changes are a matter which, if they were to be relied upon, needed to be established and stated by the delegate in reasons.

As to the need to assess the nature of the change see also Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001)179 ALR 238 ; 75 ALJR 889; [2001] HCA 22 per Gaudron J. at [68]:

Past events are relevant to the question whether the individual has a well-founded fear of persecution in two respects. First, as McHugh J observed in Minister for Immigration and Multicultural Affairs v Ibrahim, past acts of persecution are usually strong evidence that the person concerned will again be persecuted if returned to the country of his or her nationality[20]. (2000) 74 ALJR 1556 at 1570 [83]; 175 ALR 585 at 604. See also Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 391 per Mason CJ, 399 per Dawson J, 415 per Gaudron J; Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 574-575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; Abebe v Commonwealth (1999) 197 CLR 510 at 544 [82] per Gleeson CJ and McHugh J, 578 [192] per Gummow and Hayne JJ; Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, (1979, re-edited 1992), par 45. Certainly, that is so if conditions in that country have not changed. However, past events may be a useful predictor of likely future events even if conditions have changed. Where, for example, a person has been subject to persecution by persons who act independently of government, a change in government or in government policy will not necessarily result in a change in the behaviour or attitudes of those persons. Nor will it necessarily result in a fear that was well-founded ceasing to be so.

(note also Hathaway, the Law of Refugee Status, Butterworths,1991 in the context of cessation of status an analysis applicable to issue of change of circumstances in country of origin since departure pp199-204)

Relevant to the issue of the significance of change of circumstances in the country of origin for the purposes of assessment of the criterion for grant of a protection visa specified in s36(2) of the Act is the reasoning of Mansfield J. in SFLB v MIMIA

[2002] FCA 1610. His Honour rejected an argument that the test to be applied in circumstances where the Tribunal relied upon a change in circumstances in the applicant's country of nationality to refuse the application was that expressed in Article 1C(5) ("cessation") rather than by reference to Article 1A (2). He said:

5 The female appellant also claimed to fear persecution in Afghanistan because of her gender. The Tribunal accepted that her fear of persecution by the Taliban because of her membership of a particular social group, namely, women in Afghanistan - was well-founded at the time they left Afghanistan in July 2001. By reason of the changed circumstances in Afghanistan after that date, however, the Tribunal was satisfied that the Taliban, at the time of its decision, had been effectively eliminated as a political and military force in Afghanistan and so was not satisfied that there was a real chance that the female appellant or the appellants would be persecuted by the Taliban if they were to return to Afghanistan.

…

7 The jurisdictional error which was asserted before the Federal Magistrate, and which was rejected by him, was that the Tribunal had failed to address the criteria specified upon which the grant of a protection visa might be granted in accordance with s 65(1) of the Act, because it had misunderstood the test which should be applied to determining whether, at the time of its determination, the appellants or either of them had a well-founded fear of persecution by reason of their ethnicity or political beliefs or their membership of a particular social group.

8 The Tribunal conventionally applied the criterion for the grant of a protection visa specified in section 36(2) of the Act, in effect as to whether the appellants or either of them were "refugees" as defined in Art 1A(2) of the Refugees Convention.

9 In substance, the argument as I understood it, was that because the appellants left Afghanistan in July 2001 at a time when they had a well-founded fear of being persecuted for a Convention reason, the test of whether they remained with such a fear at the time of the Tribunal's determination should be determined not simply by reference to Art 1A(2) of the Convention, but having regard to the test expressed in Art 1C(5) of the Convention… As can be seen, where Art 1C(5) applies, it contemplates a change of substantial political significance in respect of which there is reason to believe that the change is truly effective and is durable. It is contended that, in determining whether the appellants still had a well-founded fear of persecution at the time of the Tribunal's decision, it did not apply that test but applied a lesser test by reference only to Art 1A(2) of the Convention.

10 The learned Magistrate rejected that argument. After referring to various passages from the decision of the High Court in Chan Yee Kin v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379 (Chan), he said at [12]-[13]:

> "If there are two distinct assessments to be made about refugee status then the suggestion that a test applied to one of those situations ought to be applied to another lacks intellectual rigour. It is perfectly reasonable to ask a Convention country to apply the Hathaway three stage procedure to a decision to deprive someone of a status which has been recognised by that Convention country. But why should those tests be applied when the situation is being looked at originally? Chan is authority for the proposition that although a Tribunal will look at the

> situation on the day the application is made that it will have regard to the situation when the applicant left his country of domicile. If there has been a change in situation the High Court requires firm proof of it. Why is it necessary to import a test that comes out of the different type of procedure, namely the procedure for the removal of refugee status pursuant to Article 1C(5)? The obligations that the Minister has to satisfy himself of the "well-founded fear of persecution" must include a comprehensive assessment of the country conditions at the time the decision is made and in all probability that consideration will include the matters referred to by Hathaway in his three stage test. But the test itself should not be mandated (see also the discussion of Hathaway in SCAM v MIMIA [2002] FCA 964).
>
> I cannot accept the applicant's contentions as to the requirement to satisfy the Hathaway test, applicable to the removal of refugee status, to an applicant for refugee status…
>
> …

12 In my judgment the Magistrate properly determined that the Tribunal applied an appropriate legal test in determining whether the appellants satisfied the criteria for the grant of a protection visa at the time of its decision, by reference to Art 1A(2) of the Convention. I do not accept the argument that it was necessary for the Tribunal in applying Art 1A(2) of the Convention, to impose upon itself the three-stage test discussed by Hathaway in relation to Art 1C(5) of the Convention.

13 I agree in general terms with the reasons for decision of the Federal Magistrate in that regard. In my judgment s 36(2) of the Act makes it plain that the relevant test to be applied when determining whether to grant a protection visa, is for practical purposes whether the appellants were "refugees" as defined in Art 1A(2) of the Convention. In particular, in Chan, Toohey J said at 405:

> "... the appellant submitted that his status as a refugee must be determined in the light of facts existing when he left China. In effect the appellant was saying: 'Once a refugee, always a refugee', subject to the cessation provisions in Art. 1c of the Convention.
>
> There is support for the appellant's submission in the literature: see, for example, the handbook issued by the Office of the United Nations High Commissioner for Refugees under the title Handbook on Procedures and Criteria for Determining Refugee Status (1979), par. 28; Grahl-Madsen, The Status of Refugees in International Law (1966), vol. 1, p. 157. But the language of the Convention itself tells against such a construction. In particular, the cessation provisions in Art. 1c(5) and (6) mention that 'the circumstances in connexion with which he has been recognized as a refugee have ceased to exist'. The emphasis is on recognition as a refugee and that, in context, means recognition by the State party which has accorded protection as a refugee. The structure of Art. 1 implies that status as a refugee is to be determined when recognition by the State party is sought and that, if granted, the status may thereafter be lost because the circumstances giving rises to recognition have ceased to exist."

There are other passages in Chan to the same general effect, including the remarks of Mason J at 386-387 and 391, of Dawson J at 396-397, and of McHugh J at 432.

14 In addition, in my judgment, the criterion imposed by cl 866.221 of Schedule 2 to the Migration Regulations operates to the same effect. Section 31 provides for the prescription

of classes of visas in addition, inter alia, to the protection visa created by s 36(1) of the Act. Section 31(3) then provides that the Regulations may prescribe criteria for a visa of a specified class, including the class specified in s 36(1). Regulation 2.03 provides that for the purposes of s 31(3) of the Act, the prescribed criteria for the grant to a person of a visa of a particular class include the primary criteria set out in the relevant part of Schedule 2 to the Regulations. Schedule 2 to the Regulations includes subclass 866 dealing with protection visas.

15 The primary criteria include criteria to be satisfied at the time of the decision. Clause 866.221 provides that one of the criteria to be satisfied at the time of the decision is that the Minister (and on review the Tribunal) is to be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. In my judgment, consistent with the decision in Chan, that criterion requires the Tribunal inter alia to consider whether the appellants met the definition of "refugee" in Art 1A(2) of the Convention at the time of its decision.

16 My reference to the Tribunal's reasons for decision indicates that it addressed that question as at that point in time. Until that point in time, the appellants had not been accepted as refugees under the Convention. That is consistent, in my view, with the terms of Art 1C(5) of the Convention. It provides that the Convention ceases to apply to a person "falling under the terms of section A" if that person can no longer "because the circumstances in connection with which he has been recognised as a refugee have ceased to exist," return to the country of former habitual residence (emphasis added). It specifically refers to the previous recognition of a person as a refugee, rather than to that person potentially having the status of refugee at the time that person left the country of nationality, but not having been so recognised. The conception of recognition involves some external entity, namely the authorised entity in the country of refuge, or the asylum state, having formed an official view that the person in question is a refugee. In Chan, McHugh J at 432 made the point in the following terms:

> "It seems natural to construe the words of Art. 1C(5) as meaning recognition as a refugee by the State party which has given him protection as a refugee. This gives rise to the inference that the Convention applies to a person when a State party recognizes him as a refugee and ceases to apply to him when the circumstances which gave rise to that recognition cease to exist. This view is supported by the use of the present tense in Art. 1A(2) - 'is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself'. It is supported also by the fact that a State party does not have to determine whether it has any obligation to a person until he makes application to it to be recognized as a refugee."
>
> ….

See to same effect SFTB v MIMIA [2003[FCAFC 108 per the Full Court (Weinberg Stone and Jacobson JJ.):

37 The appellant also submitted that the Tribunal had failed to apply the correct test in relation to the appellant having a well-founded fear of persecution in the future in that, when assessing whether his fear of persecution should he be returned to Afghanistan was well-founded, it failed to have regard to the more distant future as opposed to the period shortly after his return. The Tribunal, it was submitted, should have considered the 'durability of the peace' and that, although control of the country had been wrested from the

Taliban, the volatility to which the Tribunal referred left the appellant vulnerable to persecution by them in the future should conditions change. In the appellant's submission, this amounted to a constructive failure to exercise jurisdiction.
38 The task of the Tribunal was to consider whether the appellant had a well-founded fear of persecution should he be returned to Afghanistan. It is for the Tribunal to assess the evidence before it and determine whether the fear is well-founded. As the relevant fear relates to events in the future it is clearly necessary for the Tribunal to consider what might happen in the future. However, to describe that task in terms other than laid down in the Migration Act is an invitation to error similar to that identified by the High Court in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 572. In assessing the prospect of future persecution in Afghanistan, the Tribunal stated that it was necessary to consider the extent and impact of recent political changes in Afghanistan and the circumstances prevailing in the appellant's home province of Ghazni. In doing so the Tribunal said:

> 'The political circumstances in Afghanistan have changed substantially since the applicant left that country. I accept that the Taliban has been effectively eliminated as a political and military force in Afghanistan (see 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions' and reports of The Age dated 6 December 2001 and Xinhua News Agency dated 7 December 2001). Further, I refer to the Reuters reports on the appointment of members to the Cabinet of the Interim Authority and on the support pledged to the Interim Authority by Khalili and accept that Hazaras and Shi'as are fairly represented in the Interim Authority.
>
> I also accept that there is an unprecedented international commitment to the establishment of a representative and effective government in Afghanistan as evidenced by the UN-sponsored talks in Bonn; and by the establishment of the ISAF, and the agenda for the second Afghan Security Assistance Meeting to be held in Geneva on 17 May 2002.'

39 The Tribunal also referred to independent reports that indicated that Hazaras had de facto authority in Ghazni Province and that they formed the majority of the population in the appellant's home district. These passages show that the Tribunal, in forming its opinion, took into account fundamental changes in the power structures in Afghanistan and in the appellant's own district, that could reasonably be assumed to continue into the future….

The Full Court in WAHK v MIMIA [2004] FCAFC 12 (2004) 81 ALD 322 Lee Tamberlin and RD Nicholson J.(dissenting)) per the majority said:

12 Where the RRT has accepted that an applicant had a well-founded risk of persecution at the time of their departure, a question arises concerning the approach that the RRT should take, in view of that finding, at the time it makes its decision concerning whether that applicant would have a well-founded risk of persecution, if they were returned. In Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 ("Chan"), Gaudron J, (at 415), accepted that the correct approach to a submission as to changed circumstances is as follows:

> "If an applicant relied on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the

position of the claimant would be allayed by knowledge of the subsequent changes in the country of nationality."

13 The above view was not shared by Gummow J, who, in Minister for Immigration and Multicultural Afffairs v Eshetu (1999) 197 CLR 611 at 659, said that the view of Gaudron J in Chan (quoted above) did not represent the view of the Court in Chan. Gaudron J accepted that this observation was correct in the case of Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57 at [69]. Her Honour considered that her approach was, nevertheless, correct.

14 The relevant question is whether, as at 29 May 2002, the objective facts establish that the appellant had a well-founded fear of persecution. This is to be assessed on an objective basis, and not on the basis that the fear of a reasonable person in the position of the claimant would not be allayed by knowledge of subsequent changes in the country of nationality. The reference to a "well-founded fear" is a reference to the objective factual position at that time.

21. LEGISLATIVE CHANGES

MIGRATION LEGISLATION AMENDMENT ACT (No. 6) 2001 No.131,2001
Schedule 1—Amendment of the Migration Act 1958

Subdivision AL—Other provisions about protection visas
91R Persecution

(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.

Note that much of sub-s (1) and (2) reflects jurisprudence as stated in Chan v MIEA (1989)169 CLR 379; 87 ALR 412, Chen Shi Hai v MIMA(2000) 200 CLR 293; 170 ALR 553 and MIMA v Haji Ibrahim (2000) 204 CLR 1; 175 ALR 585. Concepts of ‘serious harm’ and ‘systematic and discriminatory conduct’ present in pre-amendment law. Definition of ‘serious harm’ is a non-exhaustive list of examples. Note that statutory position now consistent with pre-amendment law since MIMA v Kord [2002] FCA 334 [2002] FCAFC 77. Mental harm is not necessarily excluded. Reference to capacity to subsist novel concept. Requirement that there be ‘systematic and discriminatory conduct suggest comparative standard. Mc Hugh J. in Haji Ibrahim, referring to the endorsement of the concept in Chan, considered that in the context of persecution, systematic refers to non-random or intended conduct rather than habitual or methodical behaviour (hence

single incidents may constitute persecution). Requirement of essential and significant does not alter the principle that a Convention reason for persecution need not be the sole reason but arguably is a higher standard than before.

See NAOI v MIMIA [2004] FCA 383 . Tanberlin J. said about the meaning of the term systematic:

13 As to the finding regarding the random nature of the persecution, which it is said was not put to the appellant, the transcript indicates that the decision-maker stated that he had not in his research been able to find that there was a "systematic" persecution of Hindus, although he could imagine that Hindus were not happy with the government and quite fearful. The decision-maker asked the appellant why, if it were accepted that it was dangerous for him to return to Comilla, he could not live in Dhaka instead. This concern was not answered to the satisfaction of the RRT member. In my view, the raising by the RRT member of his concern with the appellant's case that he had not been able to find that there was a "systematic" persecution of Hindus was sufficient to alert the appellant to the fact that the RRT member placed importance on the view that the persecution was not "systematic" (i.e. was random), and that this issue needed to be addressed. It is true that the expression "systematic" has been given a particular gloss in the authorities. However, it is an ordinary English word which primarily conveys the notion of a non-random activity.

The Full Court in SLGB v MIMIA [2004] FCAFC 224 (Spender Tamberlin and Bennett JJ.) dismissing the appeal from SLGB v MIMIA [2004] FCA 262 Selway J. affirmed the correctness of the RRT's approach when it found that incidents could not be said to be systematic if activated ad hoc on the spur of the moment.

3…The evidence indicated that leaders of the IFP have established rules of behaviour for their members, which demonstrated to the RRT that the youths abusing the appellant were either not members of the IFP, or were undisciplined members, acting outside party guidelines and abusing him opportunistically. The RRT concluded that the youths did not appear to be systematic political operatives, but rather unemployed youths with anti-social traits. The RRT referred to the fact that the appellant had not been harmed in the past, although a friend of his had suffered a knife wound, and it noted that the appellant had moved away from situations of physical conflict.

…

17 The second submission for the appellant is that the RRT reasons misapplied the definitions of "persecution" and "serious harm". The Reasons for Decision of the RRT correctly set out the requirements of the element of persecution, having regard to the requirements of s 91R(1) and (2) of the Migration Act 1958 (Cth) ("the Act").

18 The RRT notes that for persecution to exist there must be serious harm involved to the person and conduct which can be described as "systematic". There is no reason to suppose that having correctly set out the legal principles concerning persecution, the RRT, when it came to address the claims of the appellant, did not direct attention to these factors. The RRT found that the incidents referred to were opportunistic in character, and that they were carried out by unemployed youths with an anti-social bias that was activated ad hoc, on the spur of the moment. Therefore, the RRT took the view that the harm could not be said to be "systematic", as required by s 91R. Nor did the RRT consider that the incidents asserted amounted to harm of such a serious character as would amount to persecution.

…

The Full Court in SBBA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 90 dismissed the appeal and said:

10 The Tribunal accepted that adherents of the Sabean Mandean religion are discriminated against in many ways, including 'in the way in which the legal system operates' but pointed out that not all discrimination amounts to persecution for the purposes of the Convention. The Tribunal referred to s 91R of the Migration Act which provides that Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution unless it, inter alia, involves 'serious harm' to the relevant person. Section 91R(2) lists six instances of serious harm but states that this does not limit the concept for the purpose of the section. The Tribunal correctly directed itself in its analysis of the concept of persecution and the effect of s 91R. It concluded that it was unable to accept, on the evidence before it, that,

> '... if the Applicant and his wife and their three children return to Iran now or in the reasonably foreseeable future, there is a real chance that they will suffer discrimination... as a result of the way the legal system operates amounting to serious harm for the purposes of subsection 91R(1).'

11 The appellant submitted that, in reaching this conclusion, the Tribunal so comprehensively failed to understand the meaning of 'persecution' as qualified by s 91R of the Act that it committed an error of jurisdiction. The appellant's claim was supported by reference to the Tribunal's handling of his claim to have been persecuted on account of his adherence to the Sabean Mandean religion. In particular the appellant refers to the following statement by the Tribunal:

> 'Also, different rules apply to Sobbis for the payment of 'blood money' in cases of murder, accidental death or bodily injury. (NB. under the Iranian legal system, if a person kills or injures someone accidentally or otherwise, they must pay "blood money" to the victim's family in addition to any other punishment they are liable for. The "blood money" payable for injury or death of Christians or other official religious minorities is less than for Moslems.) Because Sobbis are not a recognised religion, no blood money is payable if one of them is killed or injured.'

12 The appellant likened 'blood money' to what Australians would know as damages from a civil case and submitted that the inability to sue for damages for personal injury is so serious and crushing a restriction that it must amount to persecution.

13 In our view the Tribunal's findings were reasonably open to it. Although s 91R does not provide an exhaustive list of instances of 'serious harm', it does give some guidance as to the extent of the persecutory treatment that is required to fall within that description. All of the instances given involve either substantial physical detriment, a threat to a person's capacity to subsist or a threat to the person's life or liberty. A denial of the right to receive 'blood money' in circumstances in which other members of the community would be entitled to receive it is certainly discriminatory. However, the circumstances in which, absent such discrimination, the applicant would have a right to receive blood money have not arisen for the applicant, and may never arise. That being so we do not believe that the harm arising from the discrimination falls within the concept of 'serious harm' in s 91R. For that reason we find that the appellant's claim, that the Tribunal was in error on this point, has not been made out.

…

Note the holding in NADO vMIMIA [2003] FCAFC 169 that there had been no error in findings by the Tribunal that internalisation of one's homsexuality and a few instances as the Tribunal found of humiliation on this account at one's place of employment in the circumstances of the case were not serious enough to constitute persecution particularly taking into account S91R. The Court (French Sackville and Hely JJ.)also said that any failure to protect the appellant's core human rights would not amount to persecution unless the requirements of s91R were satisfied. It said:

2 The appellant is a national of Russia and a homosexual. He claimed to fear persecution in Russia by reason of his homosexuality. The RRT accepted that, as a Russian homosexual, the appellant was a member of a 'particular social group' for the purpose of the Convention Relating to the Status of Refugees …

….

The grounds of appeal

6 The Notice of Appeal contains three grounds:

> '2. His Honour erred in his rejection or failure to give sufficient consideration to the submission that in the premises, the internalisation of my homosexuality, should be regarded as a condition amounting over time to persecution.
>
> 3. His Honour failed to give sufficient consideration to the likelihood of persecution arising from the probability that if I were to return to my country of origin, and am able to secure employment that I am likely to face repeated termination or demotion of employment, due to employer perceptions of my homosexuality.

…

7 The internalisation of the appellant's homosexuality was referred to by the RRT in the following passage:

> '... it is understandable that a well-founded sense of social stigma might make him prefer to keep his sexuality generally to himself and that this may cause him stress. Still, such stress as might arise from internalisation of this aspect of his identity cannot reasonably be regarded as a condition amounting, even over time, to actual "persecution" by others for reasons of something perceived by them about him.'

8 Before the primary judge, the appellant submitted that the RRT only considered physical harm. The primary judge held, correctly, that the RRT did take into account what might be described as the appellant's claim of non-physical harm, but did not think that it was serious enough to amount relevantly to persecution.

…

12 In a declaration lodged in support of his application for a protection visa, the appellant asserted that his demotion to the position of fitter in 1994 occurred as a result of a vigorous campaign of humiliation targeted at his dismissal, because his secret life as a homosexual became known at his place of work.

13 The RRT, in its discussion of the applicable legislation, adverted to the provisions of s 91R of the Act to the effect that persecution must involve 'serious harm' to the appellant,

and systematic and discriminatory conduct. The RRT noted that the expression 'serious harm' includes, amongst other things, significant economic hardship or denial of capacity to earn a livelihood, where such hardship or denial threatens the appellant's capacity to subsist: s 91R(2) of the Act.

14 In the course of its reasons for decision the RRT noted that the appellant had managed to stay with the same employer for over a decade before coming to Australia … The RRT's findings include the following …

…

Particularly in recent years, the Applicant has enjoyed continuity of domicile and income, living at the same home and working with the same employer for several years. By his own evidence, his sexuality was known to his family, for whom it is not a serious issue, his neighbours, his employers and his colleagues, and, all the while, the instances of actual harm towards him that are attributable by him to knowledge of his sexuality have been few in number, isolated over time, and highly individualised. …

…

17…It is true that in his declaration accompanying his application for a protection visa, the appellant asserted that his demotion to fitter in 1994 was by reason of his homosexuality. But it is clear that the RRT considered the appellant's economic circumstances referable to his employment. It is also clear from the passage which we have quoted above that the RRT did not regard those circumstances as amounting to persecution, particularly having regard to the provisions of s 91R. The appellant, on his own claims, was employed by the one employer for the decade preceding his departure from Russia.

…

26 In the appellant's outline of submissions, other matters are referred to which fall outside the grounds of appeal. Nonetheless we shall deal with them or some of them, albeit briefly. The appellant submits that the RRT failed to apply itself to 'the real question on the issue of what is the persecution in my case'. The essence of this claim is said to be that the appellant's core human rights described in the International Covenant on Civil and Political Rights have not been protected. The rights which the appellant asserts include:

- a right to equal protection;
- a protection of personal privacy and integrity;
- the right to internal movement and choice of residence. Whilst this is not being restricted on the basis of the appellant's sexuality his contention is that because of the situation in Vladivostok pertaining to homosexuals, it compounds the persecution and closes off an escape; and
- liberty of expression, assembly and association.

This appears to be the second of the issues identified in the barrister's advice referred to above. There are at least two answers to the appellant's submission in this respect. First, the appellant did not rely upon this matter before the RRT. The persecution which the appellant told the RRT he feared was violence at the hands of the police or others against which the State was unwilling to protect him. Second, the appellant did not satisfy the RRT that he had a well-founded fear of persecution involving serious harm and systematic and discriminatory conduct. Any failure to protect the appellant's 'core human rights', assuming it to have occurred, would not amount to persecution unless the requirements of s 91R were satisfied.

The Full Court (Ryan Lindgren and Sundberg JJ.) in VAAW v MIMIA [2003] FCAFC 259 discussed s 91R:

39 The appellant relies on two grounds as establishing jurisdictional error by the Tribunal:
…
(2) that the Tribunal misconstrued and misapplied the terms of s 91R of the Act in relation to the Convention concept of 'persecution'.
…

46 As to the second ground, the Tribunal referred to s 91R of the Act in the following terms very early in its reasons (at 3):

> 'Under s 91R(1) of the Act persecution must involve "serious harm" to the applicant, and systematic and discriminatory conduct. The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s 91R(2) of the Act.'

47 Later, under the heading 'Findings and Reasons', the Tribunal used the expression 'serious harm' three times and 'serious' once, within the one paragraph in which it addressed the question whether the experience the appellant would be likely to have if he were to return to Sri Lanka would amount to 'persecution'. Clearly, the Tribunal had s 91R in mind.
48 Of course a ritual incantation of the statutory formula will not save a decision, but there is no reason to think that this was the process in which the Tribunal was engaged.
49 We think that the Tribunal was entitled:
* to take the view that the abuse (apparently verbal), stone throwing and assault in a mêlée at or following a political rally, in the Kandy region in Sri Lanka, did not amount to 'serious harm' for the purposes of the Convention notion of 'persecution'; and
* not to be satisfied that the appellant would suffer more serious harm than that if he were to return to Sri Lanka.
…

In ***NBFP v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 95** the Full Court (Kiefel Weinberg and Edmunds JJ.) dismissed the appeal from ***NBFP v Minister of Immigration & Multicultural & Indigenous Affairs*** **[2005] FCA 287(**Emmett J.) involving a claim of involvement with an anti-government political group “the Resistance Front” in Vietnam. The appellant’s claims were dealt with along with others 2 of whom successful at RRT because they were considered to be prominent activists with risk of harm due to likelihood of them continuing political activities on return . There was a further claim by the appellant that his name had been removed from the “household register” following his departure. The submission by the appellant at first instance and on appeal was that the RRT misunderstood the terms of s91R by limiting its inquiry to whether the harm suffered fell within the specific examples identified in s91R(2). It was held by the Court on appeal agreeing with the judgment at first instance that the Tribunal

had not proceeded on the basis that S91R(2) defined the instances that could constitute serious harm or was an exhaustive definition of "serious harm" . ***VTAO v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2004] FCA 927 (2004) 81 ALD 332** was noted as supporting the interpretation of s91R that the examples in sub-s (2) were not exhaustive – ***VTAO*** did involve the error alleged in the present case but it was distinguishable – the RRT in that case repeatedly used language that suggested that the examples contained in s 91R(2)(c), (d) and (e) represented the appropriate legislative test. In the present case two passages identified as suggesting error could readily be understood as a response to a specific claim that applicant's case fell within one or more limbs of s 91R(2).Those claims were considered, and rejected, as they had to be, having regard to the findings of fact made by the RRT. The sentences that immediately followed those passages were clearly susceptible to a construction that involves a broader reading of the term "serious harm", and a rejection of the claims made in the context of that interpretation. The decision was not affected by jurisdictional error. The Court said:

3 The appellant claimed that he had been involved with a group known as "the Resistance Force" ("the RF"). Members of that group engaged in political activity in opposition to the Vietnamese government. In a statutory declaration dated 13 July 2003, the appellant said that he had been a fisherman since the age of about 15…

4….In late-April 2003, he participated in the distribution of anti-government leaflets around a cemetery that contained the graves of North Vietnamese soldiers. That occurred on the evening immediately prior to Communist Party of Vietnam Day, which was intended to commemorate the fallen victims of the war. Some three weeks later, his sister rang his niece and told her that the police had discovered his involvement in distributing the leaflets, and that he and the others were in trouble. His sister suggested that they should all leave their village and flee Vietnam as they were now in danger….

…

On 4 August 2003, solicitors acting on behalf of the appellant, and also other members of the group, provided a more elaborate submission in support of their claims for protection ("the August 2003 submission"). …

7 The submission then went on to summarise the applicable law relating to protection obligations under the Refugees Convention. It is important to note that the solicitors specifically addressed the meaning of "persecution". In that context, they referred to s 91R(1) of the Act, and at least by implication, to s 91R(2) as well. Those provisions were introduced by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth), and are in the following terms:

"(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."

8 The solicitors referred to the views of Professor Hathaway, *The Law of Refugee Status* (1991) at pp 104-5, regarding the meaning of "persecution". They then went on to say:

"Under sub-section 91R(1) of the Migration Act *1958 ("the Act") persecution is defined as involving "serious harm" and "systematic and discriminatory conduct". **The expression "serious harm" is defined as including:***
a. threats to life and liberty;
b. significant physical harassment or ill-treatment;
c. significant economic hardship that threatens the person's capacity to subsist;
d. denial of access to basic services, where the denial threatens the person's capacity to subsist; and
e. denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

The Applicants have all lodged statutory declarations outlining their particular fears of persecution. Some of those fears are outlined below." (emphasis added)

9 The solicitors then set out in greater detail the claims made on behalf of their clients. These included persecution by reason of religion, membership of a particular group, and political opinion. They focussed on the leaflet distribution, noting that the applicants feared that they would be arrested, tortured, in some cases raped, and ultimately imprisoned or executed for their actions. They submitted that such consequences would amount to "serious harm" in accordance with s 91R, plainly amounting to "threats to life or liberty" and "significant physical harassment" or "significant physical ill-treatment". These are, of course, all concepts specifically addressed in s 91R(2)(a), (b) and (c), although as can be seen, those paragraphs were not cited in terms.

10 There was then a separate claim made in relation to those with direct or indirect links with the pre-1975 regime. It was submitted that even prior to their involvement in the leaflet distribution, these persons had been the victims of ongoing discrimination and harassment by the Vietnamese authorities. Several forms of discrimination and harassment were identified, including the need to pay bribes for household registration papers, and various discriminatory taxes and charges. There then followed this statement:

"All of these persecutory acts amount to "serious harm" as they include threats to life or liberty; significant physical harassment or ill-treatment; significant economic hardship; denial of access to basic services; and denial of capacity to earn a livelihood."

…

In a submission dated 6 January 2004 that related solely to his own position, the appellant maintained that he had been a sub-group leader within the RF. He also informed the RRT that on 18 September 2003 his name had been removed from the "household register". The

solicitors noted, in a subsequent submission, that in Vietnam a family registration card, known as a "*ho khau*", is issued by the authorities. It operates as a residence permit, and also entitles the bearer to a series of important rights and privileges linked with education, employment, business licences, marriage registration and birth certificates.

14 In a further lengthy submission dated 8 January 2004, filed on behalf of all members of the group, there was a detailed analysis of the leaflet incident, and also a discussion of the effect of having had household registration cancelled. The solicitors observed that many returnees had reported denial of *ho khau* that in some instances had seriously affected their families' livelihood and welfare. In particular, a person without *ho khau* would not be able to obtain lawful employment, apply for a business licence, file for a legal marriage certificate, or send his children to regular schools. The submission contained a summary of what were said to be the relevant legal principles. It is important to note that the submission did not address the meaning of "persecution" for the purposes of the Refugees Convention as expounded under the general law. Nor did it address the effect, if any, that s 91R may have had upon that concept.

….

16 On 2 April 2004, the RRT published its reasons for decision. After summarising the appellant's background, and referring to the definition of "refugee" in art 1A(2) of the Refugees Convention, the RRT noted that ss 91R and 91S of the Act now qualify some aspects of art 1A(2). Having then identified what it described as the four key elements of the Convention definition, the RRT dealt with the requirement that an applicant "fear persecution", *inter alia*, in the following way:

"Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). ***The expression "serious harm" includes, for example,*** *a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act."* (emphasis added)

17 Mr Lloyd, counsel for the appellant, referred to this passage (and those surrounding it) as a "boilerplate summary" of the law. By this pejorative description he meant that it was produced as a "template", without any real appreciation of the meaning to be ascribed to the various concepts discussed. Emmett J seems to have taken a somewhat less pejorative view, although he did refer to the passage as a "nominal acknowledgment" of the effect of s 91R(2) as a non-exhaustive statement of the meaning of "serious harm".

….

19 The RRT found:

…

the Tribunal is not satisfied that the other seven applicants are or ever have been committed political activists."

21 In dealing with the appellant's involvement with the RF, the RRT said:

"The applicant had no previous involvement in political activities before he joined the RF and he has not expressed an interest to participate in similar activities in the future. The Tribunal finds that the applicant is not a committed activist and he does not have the profile of a political dissident. The Tribunal is satisfied that the applicant was only following instructions from the RF leadership and his involvement in political activities is now effectively over. The Tribunal finds that the applicant's fear, that he will be subjected to persecution by the government in Vietnam because he was involved with the RF, is not well-founded. The Tribunal is satisfied that only committed and outspoken activists risk harm by the authorities in Vietnam and it finds that the applicant is not such an activist nor will he be considered to be such an activist by the authorities in Vietnam."

22 The RRT next dealt with the appellant's claim regarding discrimination by reason of his family background. It said:
"The Tribunal finds that the circumstances of Nguyen Van Hoa are indicative of the government's more tolerant attitude towards individuals with strong links to the former regime. Mr. Nguyen was a known political activist convicted of crimes against the state and sentenced to twenty years in prison. He was also a person who escaped from prison and sought asylum overseas. He was however, despite his background, able to return to Vietnam in 2002 and 2003 without apparent interest from the authorities. The Tribunal noted comments at his trial that he was discreet during his visits to Vietnam and that he took steps to disguise himself. However, the Tribunal is satisfied that the authorities in Vietnam, including immigration officers and local government officials, knew he was in Vietnam but had no interest in him. The Tribunal is satisfied that the authorities in Vietnam are only concerned with individuals who are currently involved in political activities and Mr. Nguyen's previous political activities were of no apparent interest to the authorities in Vietnam when he visited in 2002 and 2003.

The Tribunal considered the applicant's associated claim that he was discriminated against by the government of Vietnam because of his family background and his anti-communist views. When the Tribunal asked the applicant to describe the discrimination, he stated that he was not given a license or financial assistance to operate a larger fishing boat. The applicant claims that he suffered economic disadvantage because he was known to be anti-communist. The Tribunal accepts the applicant's claim that he was denied government assistance which would have enabled him to earn more income. However, it finds that ***the discrimination he suffered did not amount to persecution as defined by S91R(2) of the Act****. The Tribunal is satisfied that he was not prevented by the government from earning a living and supporting his family."* (emphasis added)
23 The RRT next considered the claim arising out of cancellation of the appellant's *ho khau*. It said:
"The Tribunal accepts the applicant's claim that his household registration was cancelled after he left the country. The Tribunal is satisfied that it is a normal administrative procedure in Vietnam to cancel household registration when a resident leaves his or her registered address without informing the authorities.
….
….the Tribunal finds that the disadvantage which the applicant will suffer before his household registration is reissued will not constitute serious harm amounting to persecution as defined by S91R (2) of the Act. The Tribunal is satisfied that the applicant will be able to support himself and his family as he did previously. The Tribunal is also satisfied that in time, as with most returnees to Vietnam, the applicant's ho khau will be reinstated." (emphasis added)
….
THE DECISION AT FIRST INSTANCE
…
26…In substance, it was submitted that the RRT had misapplied the definition of persecution in the Refugees Convention by misconstruing s 91R(2) of the Act.
27 The appellant relied upon two passages in the RRT's reasons for decision in support of that contention. They are set out in full at [22] and [23] of these reasons for judgment, with the critical words emphasised, just as Emmett J had done. The appellant contended before his Honour that, in those passages, the RRT misconstrued s 91R by treating s 91R(2) as a definition of "persecution" for the purposes of the application of the Refugees Convention, in circumstances where that subsection clearly did not provide an exhaustive definition of

anything.
28 His Honour noted that the RRT had referred to s 91R in its reasons at several places, and in particular, in the section headed "DEFINITION OF '*REFUGEE*'". He characterised its discussion of that section as "*pro forma*", and as we have already indicated, said that at least at that point in its reasons the RRT "nominally acknowledged the effect of s 91R(2) as a non-exhaustive statement".
29 His Honour went on to say:
"It is clear that s 91R is intended to modify the operation of Article 1A(2) of the Refugees Convention. Section 91R(1) says so in express terms, namely, that Article 1A(2) does not apply in relation to persecution unless each of the three pre-requisites is satisfied. In one sense, that provision is intended to narrow the meaning of persecution as that term might otherwise be understood and as it has been interpreted in successive decisions both by this Court and by the High Court of Australia. However, s 91R(2) does not itself contain a definition of the term ***persecution*** *or, indeed, the term* ***serious harm****. It makes clear in the preamble that it is not intended to be an exhaustive statement of anything. Rather, it simply gives instances of what* ***must*** *be taken to be serious harm but without limiting what is meant by serious harm."* (emphasis in original)
30 His Honour then observed:
"However, there will be instances of persecution involving serious harm other than the instances set out in s 91R(2). It may be that it would be very rare that economic hardship that threatens a person's capacity to subsist, that was not significant, would be an instance of serious harm. However, as a matter of English syntax, s 91R(2) does not say that the ***only*** *instance of economic hardship that threatens a person's capacity to subsist that could constitute an instance of serious harm is a* ***significant*** *economic hardship that threatens the person's capacity to subsist."* (emphasis in original)
….
32 His Honour expressed his conclusions as follows:
"53 It is sufficiently clear that in the submission of 4 August 2003, which was effectively incorporated into the subsequent submissions to the Tribunal, the applicant's solicitors were advancing contentions in support of a conclusion that the requirement of s 91R(1) that persecution must involve serious harm, was satisfied by reason of the matters summarised above. The contention was that those matters satisfied one or other of the paragraphs of s 91R(2).

54 I do not consider, on a fair reading of the Tribunal's reasons, that the Tribunal was proceeding on the basis that s 91R(2) defined the instances that could constitute serious harm. On a fair reading of the two passages cited above, the Tribunal was saying no more than the material before it did not lead to the conclusion that s 91R(2) applied.

55 While the language of the Tribunal in the two passages in question may be infelicitous, I consider that, in context, they should not be construed as a statement by the Tribunal that s 91R(2) contains an exhaustive definition of either serious harm or persecution for the purposes of the Act. In all the circumstances, I am not persuaded that the Tribunal approached the matter on the basis that s 91R(2) defined persecution for the purposes of the Refugees Convention. This ground is not established."
THE APPEAL TO THIS COURT
33 By notice of appeal filed on 31 March 2005, the appellant relies upon the following two grounds:
"1. The learned trial judge erred in failing to conclude that the Second Respondent ("Tribunal") had made a jurisdictional error in misconstruing and misapplying s 91R of the

Migration Act 1958 (Cth) ("the Act") and thereby failing to ask itself the question required by the Act.

2. The learned trial judge should have found that the Tribunal failed to address the correct question and thereby failed to reach a state of satisfaction necessary to dispose of the matter before it."

34 In substance, the appellant contends that Emmett J erred in concluding that the RRT's references to s 91R(2) – as "defining" persecution – should be understood merely as a response to the August 2003 submission when in truth it revealed a fundamental misunderstanding, on the part of the RRT, of the operation of that subsection. In other words, the appellant contends that the RRT erred by evaluating the harm which he claimed would befall him solely by reference to whether that harm would meet the requirements of s 91R(2), and ignoring the broader question of whether it would meet the concept of persecution as traditionally understood in the context of the Refugees Convention.

35 It was common ground before Emmett J, and before this Court, that had the RRT limited its inquiry to whether the harm suffered by the appellant fell within the specific examples identified in s 91R(2), this would have involved a quite fundamental error of law. It was clear that a number of the appellant's claims went beyond any of those examples. A failure on the part of the RRT to deal with those claims, as formulated, would certainly have amounted to a "constructive failure to exercise jurisdiction". See generally *VTAO v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 81 ALD 332 (per Merkel J) ("VTAO").

36 One additional point should be noted. Before Emmett J, counsel for the Minister sought to defend the RRT's decision on the basis that s 91R(2) implicitly limited the scope of "serious harm", notwithstanding the express disclaimer to the contrary embedded in the subsection. Sensibly, that contention was not pursued before this Court. Indeed, Mr Williams SC, who appeared for the Minister, indicated that although it had been advanced below, it was now expressly disavowed.

THE APPELLANT'S SUBMISSIONS

37 Mr Lloyd submitted that it was entirely clear from the two passages in the RRT's decision (which are set out at [22] and [23]), and particularly from the words emphasised by his Honour in those passages, that the RRT had misconstrued s 91R(2). By stating that the particular harm claimed did not amount to persecution "as defined by s 91R(2)" it had plainly treated that subsection as limiting or defining the ambit of that term. That was fundamentally incorrect. Section 91R(2) was not intended to operate in that way.

….

39 In support of that contention, Mr Lloyd began by acknowledging that the process of judicial review should not involve "excessively fine scrutiny of the language of executive bodies and administrative tribunals": *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 211 ALR 660 at [38] and *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. He submitted, however, that where an error was apparent in a tribunal's decision, it would also be wrong to seek to sustain that decision by giving the reasons a "beneficial" interpretation, at least when the context did not support such a reading.

…

41 Mr Lloyd submitted that Emmett J had properly given little weight to the fact that the RRT had correctly noted the non-exhaustive nature of s 91R(2) in its boilerplate summary. A statement of legal principle couched in such terms could offer little assurance that the subsection had been correctly understood, at least in the face of two express statements on the part of the RRT that suggested the very opposite. In addition, it could be inferred that

had the RRT understood the correct operation of s 91R(2), it would almost certainly have gone on to make an additional finding, beyond rejecting the contention that the harm caused fell within s 91R(2), to the effect that it "did not otherwise" constitute serious harm. The RRT had not done so.

…

THE FIRST RESPONDENT'S SUBMISSIONS

…

he submitted that there were three reasons why Emmett J was correct in concluding that, in the two passages relied upon by Mr Lloyd, the RRT had not treated s 91R(2) as containing an exhaustive definition of serious harm.

47 The first was that each of the two passages in question, in which the term persecution was said to be "defined by s 91R(2) of the Act", was immediately followed by a sentence that made it clear that the RRT was addressing the effect of the claimed economic hardship on a wider basis than that set out in s 91R(2). Thus, in the first passage, the reference to the subsection was followed immediately by a statement that the RRT was "satisfied that [the appellant] was not prevented by the government from earning a living and supporting his family". In the second passage, the reference to the subsection was followed immediately by a statement that the RRT was "satisfied that the applicant will be able to support himself and his family as he did previously". In addition, that second passage was followed by a statement that the RRT was satisfied that, as with most returnees, the appellant's *ho khau* would be reinstated.

48 As we have previously observed, s 91R(2) limits consideration of economic hardship to matters that affect a person's "capacity to subsist". However, according to Mr Williams, the fact that the RRT addressed the effect of the claimed hardship on the appellant's ability to support himself and his family meant that the RRT had plainly performed all of the statutory tasks required of it. In other words, in the sentences which used the expression "as defined by s 91R(2) of the Act", the RRT was addressing, and rejecting, the appellant's claim that he faced persecution in the specific, but non-exhaustive, sense of serious harm found in that subsection. In doing so, it was responding to one variant of the appellant's claim, as set out in the August 2003 submission. However, in the next sentence in each of the impugned passages, the RRT addressed and rejected the appellant's wider claim. Accordingly, it was submitted, the RRT had not been shown to have misunderstood the operation of s 91R(2).

49 The second factor upon which Mr Williams relied was that at another part of the RRT's reasons, when dealing with the penalties for illegal departure, it had correctly noted that harm that did not fall within any of the limbs of s 91R(2) could nonetheless amount to "serious harm" for the purpose of s 91R(1).

50 The third factor upon which he relied was the fact that, at the outset of its reasons, the RRT had correctly summarised the effect of ss 91R(1) and (2). Although Mr Lloyd had referred to the relevant passage in dismissive terms, Mr Williams submitted that it provided a powerful indication that the RRT understood full well that s 91R(2) did not provide an exhaustive definition of serious harm. He submitted that, where a benign interpretation of an impugned passage was otherwise available, that interpretation should be preferred, particularly when it accorded with a correct statement of legal principle by the RRT, formulated at the commencement of its reasons for decision.

….

52 The issue raised on the appeal to this Court is, in a sense, a very narrow one. The question is whether the RRT, in its findings, applied s 91R(2) as an exhaustive definition of "serious harm". If it did, it fell into serious error. Given that the appellant relied upon several claims that could not conceivably be brought within any of the limbs of that

subsection, any interpretation that treated it as exhaustive would almost certainly give rise to jurisdictional error.
53….. In the end, however, we are not persuaded that his Honour erred in rejecting Mr Lloyd's contentions below.
…
57 We were told by Mr Lloyd, from the bar table, that the changes to s 91R(2) were brought about by a concern on the part of some members of Parliament that the Bill, in its original form, might be thought to "raise the bar" too greatly when considering whether a person was exposed to the risk of "serious harm". That may indeed have been the intention of the Government when it introduced the Bill in that form. However, that intention was not ultimately realised. The subsection, as amended, made it abundantly clear that the matters set out therein were merely examples of what would constitute serious harm. Of course, they operated "automatically" if the conditions described were satisfied. That was potentially beneficial to a claimant. However, it was not intended, by those examples, to narrow the scope of "harm", whether "serious" or not, as that concept had been developed by the High Court. See generally *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 per Mason CJ, and 430 per McHugh J; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258-9 per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 302-5; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 7 per Gaudron J, and 19-22 per McHugh J; and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 34-40 per Kirby J.
58 Mr Lloyd submitted that the only limiting effect that s 91R was intended to have lay in ss 91R(1)(a) and (c), namely the requirements that one or more of the reasons mentioned in art 1A(2) of the Refugees Convention be "essential and significant reasons" for the persecution, and that the persecution involve "systematic and discriminatory conduct".
59 The revised Explanatory Memorandum dealing with the subsection, as it was finally enacted, supports this view. The relevant passages are as follows:
"23. The purpose of this amendment to proposed subsection 91R(2) is to clarify that it provides a non-exhaustive list of what is "serious harm" for the purposes of proposed paragraph 91R(1)(b). It also makes it clear that proposed paragraphs 91R(2)(a) to 91R(2)(f) do not prevent other things from amounting to "serious harm".

24. The examples in proposed subsection 91R(2) are not exhaustive and do not prevent other examples of persecution from amounting to serious harm. For instance, "serious harm" may be established where the cumulative effect of persecutory laws is sufficiently serious, such as occurred to the Jewish people in Nazi Germany between 1933 and 1938. The references in proposed paragraphs 91R(2)(d) to 91R(2)(f) to denial of a person's capacity to subsist illustrate the serious nature of the harm but does not mean that "serious harm" cannot be established by showing other serious disadvantage in a particular case."
60 This interpretation of s 91R(2) is further supported by the judgment of Merkel J in VTAO. That case concerned a claim by two applicants that, as a result of their two contraventions of China's family planning laws, they would be subjected to persecution on their return to that country. The persecution allegedly feared included forced sterilisation of the first applicant, liability for payment of a substantial financial penalty, and limitations on the applicants' ability to find employment. In relation to the applicant child, it was claimed that, as a "black child", he would not be able to obtain household registration unless his parents paid the relevant financial penalty and that without registration, he would be unable to access public health and education services. That meant that he would be unable to

obtain work, particularly in the public sector, when older.
61 When dealing with the applicant child's claims, his Honour was confronted with an argument, similar to that advanced by the appellant in the present case, that the RRT had addressed the question whether the harm feared fell within the instances set out in s 91R(2) rather than whether the harm feared constituted "serious harm". That argument ultimately succeeded before his Honour.
62 It is useful to set out, in detail, Merkel J's reasons for arriving at that conclusion:
"57. The more difficult issue the RRT was required to consider was whether the harm fell within s 91R(1). Although s 91R(2) specifies instances of serious harm it does so "[w]ithout limiting what is serious harm for the purposes of paragraph (1)(b)". It follows that s 91R(2) does not lay down the criteria that must be satisfied before conduct can involve serious harm, nor does it provide an exhaustive statement of what amounts to "serious harm" for the purposes of s 91R(1)(b). Yet, the RRT's consideration of that issue was expressed by reference to the instances of serious harm set out in s 91R(2). For example, it stated:
"49. Further, I am not satisfied that for the third named applicant in the future to be excluded from public sector employment amounts to a denial of his capacity to earn a livelihood of any kind such that it threatens his capacity to subsist, as required by subs.91R(2).
...
51. I accept the independent information set out above that there is no social stigma attached to 'black children', and certainly no reports of discrimination or abuse serious enough to amount to persecution within the meaning of the Convention and s.91R(2) of the Act."
58. In its final conclusion at [55] the RRT stated:
"For the reasons I have given above, I am satisfied that the financial burden which the applicant parents have attracted by reason of their family planning choices, although serious, does not amount to persecution within the meaning of the Convention or of s.91R(2) of the Act."
59. Further, in [46] and [48] the RRT expressed its conclusions in terms of harm which was not sufficient to threaten the applicant child's and the applicant family's, "capacity to subsist": cf s 91R(2)(c), (d) and (e).

*60. The RRT's references to s 91R(2) and to instances of harm described in s 91R(2)(c), (d) and (e) suggest that it was addressing the question of whether the harm feared fell within the instances set out in s 91R(2), rather than whether the harm feared constituted "serious harm". That view is reinforced by the following matters. The RRT did not consider how the phrase "serious harm" is to be interpreted. In [49] the RRT referred to what s 91R(2) "*required*" and in [51] it found the harm did not amount to persecution "*within the meaning of s 91R(2)*". In [46], [48] and [49] the RRT applied the language of the examples contained in s 91R(2)(c), (d) and (e) as if those examples represented the appropriate legislative test. Also, in its reasoning the RRT made a number of references to s 91R(2) but it did not refer to s 91(1) or 91R(1)(b).*

*61. Under the earlier section in its reasons headed "Legal Principles" the RRT accurately set out s 91R(1) and accurately stated its relationship to s 91R(2), but it does not appear to have applied s 91R(1) in the reasoning employed by it in reaching its ultimate findings. While the reasons of the RRT are not to be construed minutely and finely with an eye keenly attuned to the perception of error (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang *(1996) 185 CLR 259 at 272) that approach does not authorise a court to read into the reasoning of the RRT the application of a criterion which, on a fair reading of the*

reasons as a whole, does not appear to have been applied by it. In arriving at my conclusion I have taken into account that the RRT referred, in general terms to the seriousness of aspects of the harm (see for example [51], [52], [53] and [55]) but those references are also consistent with it accepting the requirement of serious harm specified in the examples provided as laid out in s 91R(2). Further, those general references are not sufficient to overcome the views I have formed, on the basis of the reasoning of the RRT, that it applied s 91R(2), rather than s 91R(1).

62. There is a further matter that suggests the RRT applied s 91R(2), rather than s 91R(1). To apply s 91R(1) the RRT would have to consider whether the claims of the applicant child, cumulatively, constituted persecution that involved "serious harm". That follows from the duty of the RRT to consider the "totality of the case put forward" (see Khan v Minister for Immigration & Multicultural Affairs *[2000] FCA 1478 at [31]) and in doing so consider each of the integers of the claim: see* Htun v Minister for Immigration and Multicultural Affairs *(2001) 194 ALR 244 at 247-248 [8]-[12] and 259 [41]-[42] and* SCAT v Minister for Immigration and Multicultural and Indigenous Affairs *(2003) 76 ALD 625 at 636-637 [29]*.

63. On the evidence and material before the RRT, which it accepted or did not reject, the following forms of harm were claimed to be feared in respect of the applicant child if he returned to China:
• deprivation of access to China's free education and medical services;
• deprivation of ability to acquire public sector employment in adulthood;
• denial of official registration with its consequential ramifications; and
• imposition of a significant financial penalty on the applicant parents in order to remove or mitigate the above forms of harm.

64. In relation to the last item it can be accepted that the means of the parents "to mitigate the consequences of [their child's] adverse treatment" is relevant to whether "the treatment in question could be viewed as appropriate and adapted to the implementation of China's 'one-child policy' and not as persecution": see Chen *at 305 [36]. Further, it may be that where parents have such means there may be no real chance of the child suffering those consequences. Nonetheless, for so long as the applicant child is unregistered, and therefore a "black child", all four forms of apprehended harm are capable of being relevant to his claim.*

65. The RRT considered the likelihood of the financial penalty being paid. However, it failed to consider the cumulative effect of all *of the forms of harm which on its findings of fact the applicant child might suffer, and then address the question of whether the totality of that treatment met the legislative criterion of persecution involving serious harm. Plainly, if s 91R(1), rather than s 91R(2), was being applied the RRT could have been expected to have addressed that question.*

66. In my view a fair reading of its reasons as a whole establishes that the RRT failed to address the question of whether the conduct feared by the applicant child constituted "serious harm" but, rather, it addressed whether that conduct fell within s 91R(2). Thus, the RRT failed to address the correct issue and question required to be addressed."
63 In our view, VTAO is plainly distinguishable from the present case. In VTAO the RRT made it clear that it rejected the third applicant's claims because they did not threaten his, and his family's, "capacity to subsist", as required by s 91R(2). At no stage did it consider

how the phrase "serious harm" was to be interpreted. It repeatedly used language that suggested that the examples contained in s 91R(2)(c), (d) and (e) represented the appropriate legislative test. In addition, there were other factors present, such as those referred to in [62], [64] and [65] of Merkel J's judgment that led his Honour to conclude that the RRT had failed to address the correct issue.

64 In the present case, there are only two passages that can be called in aid in support of the appellant's primary contention. Each of those passages can readily be understood as a response to a specific claim, on the part of the appellant, that his case fell within one or more limbs of s 91R(2). Those claims were considered, and rejected, as they had to be, having regard to the findings of fact made by the RRT. The sentences that immediately followed those passages are clearly susceptible to a construction that involves a broader reading of the term "serious harm", and a rejection of the claims made in the context of that interpretation.

65 In addition, and specifically in relation to the second passage, the finding by the RRT that the appellant would be able to support himself and his family as he did previously, and that his *ho khau* would be reinstated seems to us to provide a complete answer to any claim that an incorrect interpretation of the expression "serious harm" gave rise to jurisdictional error. It is clear therefore, that any error on the part of the RRT in that passage, was in no way material. The finding of fact meant that there was no harm of any kind sustained by the appellant, still less of serious harm, in relation to the loss of *ho khau*. It goes without saying that an error that is immaterial, having regard to the findings of fact made, cannot form the basis for a successful application for judicial review.

…

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

> This is designed to overcome the effect of MIMA v Mohammed (2000) 98 FCR 405 which held that the Convention contained no requirement of 'good faith' and that the central question was whether or not the applicant had a wll-founded fear of persecution on return. Now it is necessary to examine the motivation of the applicant's activities in Australia and disregard such conduct if it is for the purpose stated in sub-s (b), the burden being on the applicant to satisfy the decision-maker the conduct was engaged in for a purpose other than of advancing his claim to refugee status (quaere; this is the position as it was following Somaghi v MILGEA (1991) 31 FCR 100; 102 ALR 339.) There is now an issue whether a sole purpose test should be aplied pursuant to s91 R(3)(b) which would be consistent with Somaghi and could be implied. Future conduct in a person's country of origin having its genesis in such 'bad faith' conduct may not come within the terms of the amendment.

The Full Court in ***SCAT v MIMIA*** **[2003] FCAFC 80 (2003) 76 ALD 625** By a majority Madgwick Conti JJ. Gyles dissenting) allowed the appeal from ***SCAT v MIMIA*** **[2002] FCA 962** (von Doussa J.) on the grounds of jurisdictional error. It implicitly held that psychological harm may be "serious harm" within the meaning of S91R.

91S Membership of a particular social group
For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:

(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and

(b) disregard any fear of persecution, or any persecution, that:

(i) the first person has ever experienced; or

(ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

A person who fears persecution because he is a relative of another person targeted for a non-Convention reason does not fall within the definition of a particular social group. MIMA v Sarrazola (2001) 107 FCR 184 is no longer good law in circumstances where the particular social group of family is relied upon based

The judgment at first instance in SCAL v MIMIA [2003] FCA 548 of von Doussa J. was affirmed by the Full Court (Carr Finn and Sundberg JJ.) in SCAL v MIMIA [2003] FCAFC 301.

2 In his application for the visa and before the Tribunal the appellant asserted that he feared he would be killed as a result of a blood feud with another family in Albania. He sought to bring himself within the definition of "refugee" in Article 1A(2) of the Refugees Convention by contending that he had a well-founded fear of being persecuted by reason of his membership of a particular social group, namely his family, the male members of which were the target of the blood feud. The appellant claimed that the blood feud arose under customary Albanian law known as the Kanun, otherwise known as the Code of Leke Dukagjini, which was followed in the northern parts of Albania from which the appellant came. The rules of a blood feud require a male member of one family to be killed as a matter of honour where a member of that family has been involved in the killing of a

member of another family. The appellant claimed that on the night of 16 August 1998 his father was sleeping in the family shop in Shkoder, where the family lived. He said crime was rife in Albania. Three people came to the shop and were in the course of breaking in when the father called out. Thereupon the intruders started shooting. The father shot back, injuring two and killing one of the intruders. The father was later arrested, tried and sentenced to thirteen years imprisonment. The appellant claimed his family still owed blood to the deceased's family. Because his father would be in gaol for a long time, the appellant said he was the only person for them to kill. He said that under the rules of a blood feud it did not matter that he was not at the shop when the killing occurred. He said attempts within Shkoder to effect a reconciliation with the deceased's family had failed. After hiding for a time, he fled Albania, ultimately coming to Australia.

Section 91S

3 Section 91S of the Migration Act 1958 (Cth) is central to an assessment of the appellant's claim to fear persecution by reason of his membership of a particular social group.

….

8 The primary judge noted that in oral argument before him the appellant sought to rely on a much wider social group than his family. The contention was that had this group been identified, s 91S would not have required the particular fear he held as member of that wider group to be disregarded….

9 The primary judge recorded the translated contents of parts of a text placed before the Tribunal by the appellant intituled The Code of Leke Dukagjini by Shtjefen Gjecov. He observed that the Code applies generally to regulate the affairs of the community, and is not confined to establishing the rules of a blood feud. It regulates such matters as the boundaries of land, the seasonal movement of stock and the uncompromising protection of a guest. His Honour said the Code is to be treated, at least in the geographical areas from which the appellant comes, as a law or practice of general application. He referred to authorities establishing that whilst a particular social group may be defined in a way that includes numerous members, a law or practice which, although in a sense persecutory, applies to all members of society cannot create a particular social group consisting of all those who bring themselves within its terms. See Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (Applicant A) and Minister for Immigration and Multicultural Affairs v Khawar (2002) 187 ALR 574. Applying that proposition to the Code his Honour said at [19]:

> "Whilst the whole community may be subject to it, it does not render the whole community a particular social group for the purpose of the definition of 'refugee'. To so construe the Refugees Convention would be to include everyone who for one reason or another had a well-founded fear of persecution, regardless of whether that fear had any relationship to the protective purposes of the Refugees Convention. If a shared fear of persecution were sufficient to constitute a particular social group, it would render pointless and unnecessary, the limitation of the definition of refugee to persons who fear persecution 'for reasons of race, religion, nationality ... or political opinion'."

Accordingly the primary judge rejected the submission that the Tribunal erred in not identifying the relevant social group as "citizens of Albania who are subject to the operation of the customary law Code of Leke Dukagjini (the Kanun)". For the same reason his Honour rejected a somewhat narrower social group he formulated himself, consisting of "males in the general population who have become the target of a blood feud because some family member has killed a member of another family".

10 The primary judge went on to say that the proper definition of the relevant social group was that put forward by the appellant in his visa application, namely the particular family group the members of which became subject to the risk of revenge because one of their number killed a member of another family. His Honour held that s 91S required the fear of persecution which the appellant asserted by reason of membership of that group to be disregarded. He rejected a contention that s 91S should be construed so as to cover only the type of case illustrated by Minister for Immigration and Multicultural Affairs v Sarrazola (1999) 166 ALR 641, which was said to have been the reason behind the enactment of s 91S. In this connection his Honour referred to a passage in the relevant Explanatory Memorandum:

> "The above provisions do not prevent a family, per se, being a particular social group for the purpose of establishing a Convention reason for persecution. However, they prevent the family being used as a vehicle to bring with[in] the scope of the Convention persecution motivated for non-Convention reasons."

That, his Honour said, was what the appellant was seeking to do – persecution motivated by the father's shooting of the deceased in the course of the deceased's attempt to break into the shop.

11 The primary judge also rejected the appellant's submission that s 91S did not require his fear of persecution to be disregarded because it was reasonable to conclude that he would fear persecution by reason of the blood law alone, even if the father's fear was the result of his killing of the deceased. His Honour noted that a similar submission had been rejected by Merkel J in SDAR v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1102. There it was argued that the fear of persecution of the applicant's cousin, who had killed a member of another family, was the only fear of persecution that should be disregarded. The applicant contended that his fear of persecution was not based upon or derived from the fear of persecution of the cousin, and accordingly was not to be disregarded. His Honour agreed with Merkel J's rejection of the argument. He concluded this part of his reasons by saying at [25]-[26]:

> "In my opinion, the applicant's claims taken at face value and at the highest cannot, in light of the provisions of s 91S, give rise to a well-founded fear of persecution so as to bring him within the definition of 'refugee'.
>
> For that reason, I think this is one of those rare cases where, even if one of the other grounds of review were made out, it would not be an appropriate exercise of the Court's discretion to set aside the decision of the Tribunal."

….

Re-cast social group

14 The appellant contended that the primary judge erred when he said the claim that the appellant was a member of the re-cast social group had not been made in the visa application or before the Tribunal. He asserted, by reference to par [3] of his Honour's reasons, that the claim he made in his application and before the Tribunal included the following:

- he would be killed as a result of a blood feud with another family in Albania
- he had a well-founded fear of being persecuted for the reason of his membership of a particular social group, namely his family, the male members of which were the target of the blood feud
- the blood feud arose under customary Albanian law known as the Kanun

• with the collapse of the communist regime in Albania and the ensuing lawlessness, the Kanun law re-emerged and was followed in the northern parts of Albania from which the appellant came
• the rules of a blood feud required a male member of one family to be killed as a matter of honour where a member of that family had been involved in the killing of a member of another family.

15 That is a fair summary of what the primary judge said, save that his Honour identified the social group propounded by the appellant as "his family". But there is no substance in the submission that in his visa application the appellant claimed to be a member of the re-cast social group. ..

….

16…It is clear that the primary judge was correct when he said the re-cast social group was not put to the Tribunal. Further, it is to be remembered that after the completion of oral argument before his Honour, the matter had to be stood down so that the recast social group could be formulated. See [8]. That would not have been necessary had that been the way in which the group had been identified throughout.

The appeal from STCB v MIMIA [2004] FCA 276 was dismissed in STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 266 (Spender Stone and Bennett JJ.). It stated that In analysing the motivation of the other family, concerning the possible application of s91S because a relative of the applicant has been targeted for a non-convention reason, there are two elements to consider, first the reason why that family would want to do harm and second the criterion for selecting a victim. The Full Court judgment in SCAL was applied. The Court said:

6 The Tribunal found that there is a tradition of blood feuds in Albania. It held that the Albanian authorities have recognised this problem and have shown that they are willing to address it. The Tribunal accepted the appellant's claim that his family is involved in a blood feud because the appellant's grandfather killed a member of the other family.

7 The Tribunal held, however, that pursuant to s 91S of the Migration Act it must reject the appellant's initial submission that he feared persecution because of membership of a social group consisting of his family. The Tribunal considered that s 91S required it to disregard the appellant's fear because it arose from his being a relative of a person targeted for a non-Convention reason…..

8 In coming to this conclusion the Tribunal relied on a decision of Merkel J in SDAR v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 72 ALD 129 ('SDAR') and a decision of von Doussa J in SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 ('SCAL') in which his Honour agreed with the conclusions of Merkel J in SDAR.

9 In considering the wider social group of which the appellant claimed to be a member, the Tribunal said that the potential social group of Albanian citizens who are subject to the laws of the Kanun could be said to comprise at least one third of the Albanian population, including men, women and children, people who live in rural or urban areas, people who are rich or poor, and people who are well-educated or not. The Tribunal observed:

> 'such a heterogeneous group of people could [not] sensibly be said to be united, cognisable or distinguished from the rest of Albanian society'

and concluded that the appellant did not have a well-founded fear of persecution for a Convention reason.

DECISION OF THE PRIMARY JUDGE

10 After the Tribunal made its decision on 15 September 2003, a Full Federal Court dismissed an appeal from the decision of von Doussa J in SCAL. The decision of the primary judge in this case was that the Full Court decision in SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 301 ('SCAL FC') was determinative of the issues in this matter and he was bound to follow that decision. His Honour noted that this was 'candidly conceded' by the appellant and continued:

> 'The present matter, like SCAL, involves an alleged fear of persecution arising from an Albanian blood feud, in this case, the blood feud resulting from the killing by the applicant's grandfather of a member of the aggrieved family in 1944 or 1945. That family has declared its intention to take revenge.
>
> For present purposes, I am obliged to conclude that if the applicant did not belong to his family or if his grandfather had not killed a member of the aggrieved family he would have no fear of persecution. The particular social group to which he belongs is his family, and s 91S of the Migration Act 1958 (Cth), in the circumstances, precludes reliance upon fear of persecution by reason of his membership of that group for the purposes of an application for a protection visa.'

For those reasons, his Honour dismissed the application.

11 Given the concession made before the primary judge and the course taken by his Honour, the decision in SCAL and SCAL FC warrant further consideration.

The Full Court decision in SCAL FC

12 The case also involved an Albanian citizen who claimed that his family was the target of a blood feud arising under the Kanun; this was as a result of his father shooting and killing an intruder who broke into the family shop in Shkoder. The Full Court noted at [7] that the Tribunal did not accept the applicant's claim to be the victim of a blood feud and for that reason concluded that there was no real chance he would face persecution on account of any blood feud or any other Convention reason if he were to return to his home village. In view of this finding it is surprising that, both at first instance and on appeal, there was detailed discussion of s 91S and its application to claims of persecution based on the existence of a blood feud. Referring to the Tribunal's finding that the applicant was not the victim of a blood feud, the Full Court commented at [19], 'So long as that finding stands the appeal must fail, even if there is an error in the primary judge's treatment of the particular social group'.

13 Despite this, the Full Court considered the primary judge's treatment of the particular social group. Before von Doussa J in SCAL, the applicant had initially relied on his membership of a particular social group consisting of his family group. In oral argument, he relied on a wider social group namely, 'citizens of Albania who are subject to the operation of the customary law Code of Lek[lparentop] Dukagjini' or the Kanun. Von Doussa J said that this broad definition embraced everyone in the areas of Albania where the Kanun applied and held that, in those areas, it was a law of general application that extended to matters such as 'the boundaries of land, the seasonal movement of stock and the uncompromising protection of a guest'; SCAL at [19]. Von Doussa J held that although the whole community might be subject to the law it did not render the whole community a particular social group for the purposes of the definition of a 'refugee'. His Honour

therefore rejected the wider social group referred to in oral argument as well as the narrower group of 'males in the general population who have become the target of a blood feud because some family member has killed a member of another family.' His Honour found that the proper social group was that first put forward by the applicant, that is the family group, and held that s 91S precluded the applicant from relying on that ground.

14 In SCAL FC the Full Court held that the applicant's attempt to outflank s 91S failed for a number of reasons. First, the applicant had not put the wider social group formulated in oral argument before von Doussa J to the Tribunal. Second, their Honours rejected the submission that von Doussa J had erred in concluding that the wider social group 'comprised the whole community and would include everyone who for one reason or another had a well-founded fear of persecution'; SCAL FC at [17]. Their Honours held that this submission was based on a misreading of von Doussa J's reasons. Third, even if, as the applicant suggested, von Doussa J erred in describing the wider social group as one solely united by a fear of persecution. His Honour said, at [19], that it was:

> 'unrealistic to accept that the appellant fears persecution because of his membership of a group which adheres to a system of customary law which regulates many aspects of their lives and has a system of punishment for persecutory acts. Plainly he fears persecution either because of his membership of his family or because of a fear of reprisal because his father killed a member of the Laca family. ...If he did not belong to that family, or if his father had not killed the intruder, he would have no fear of persecution.'
>
> [Emphasis added]

….

17 In relation to the first ground of appeal the appellant admitted that the mere inability of the state to protect its citizens is not enough to support the claim of persecution. This issue was addressed in Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 13 where Gleeson CJ remarked that a State's failure to protect a victim from harm might be relevant to whether the victim's continuing fear of persecution is well-founded irrespective of whether it resulted from the state tolerating or condoning the behaviour or merely being unable to prevent it. The Chief Justice continued,

> 'Persecution may also result from the combined effect of the conduct of private individuals and the state or its agents ...
>
> Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.'

18 The appellant accepted as correct the Tribunal's statement that, under s 91S, where a person's fear arises because he or she has a relative who is or has been targeted for a non-Convention reason, the fear must be disregarded. Obviously this involves a finding that the relative's fear arises from a non-Convention reason. Mr Ower submitted, however, that the Tribunal did not make a finding as to whether the appellant's grandfather's fear was for a non-Convention or a Convention reason and its failure to do so is a jurisdictional error….

19 In analysing the motivation of the other family there are two elements to consider, first the reason why that family would want to do harm and second the criterion for selecting a victim. It cannot be doubted that, irrespective of the identity of the potential victim, the motivation to do harm stemmed from the murder of a member of the other family. In fact this motivation was put to the Tribunal as an element of the appellant's claim. The

Tribunal's finding, quoted at [7] above, shows that it accepted that the other family's motivation is 'revenge' for a murder committed by the appellant's grandfather. Similarly, the Tribunal accepted that the reason the appellant's family was involved in a blood feud was that the appellant's grandfather had killed a member of the other family. Implicit in this is an acceptance of the fact that the appellant might be targeted because of his relationship to his grandfather. Given those findings it beggars belief to suggest that the appellant's grandfather would be vulnerable for any reason other than that he was the killer. No analysis is required; the conclusion is inherent in the appellant's claim. It is obvious that this is a finding made by the Tribunal or perhaps more accurately, this is a fact that the Tribunal accepted as an element of the appellant's account. The argument that the grandfather might be targeted because he is a member of his own family is not only far fetched but also circular….

The Full Court in STYB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 295 (Cooper Marshall and Mansfield JJ.) dismissed the appeal STYB v MIMIA [2004]FCA 705 Selway J.. The Court said approving the reasoning of the primary judge:

9 The RRT was satisfied that the appellant's family was a particular social group under the Convention. However, it found that the motivation of the other family to harm a member of the appellant's family would be revenge for a criminal act. It considered that revenge for a criminal act is not a Convention related reason for harm.
…
12 The RRT found that s 91S prevented the appellant's membership of his family from being used as a basis to bring him within the scope of the Convention, because his fear of persecution is motivated by a non-Convention reason.
…
15 Before the primary judge, the appellant submitted that the particular social group to which he belonged was "persons subject to Kanun (being the relevant customary behaviour practised in northern Albania) or persons subject to a blood feud."
16 His Honour noted that that was not the claim made before the RRT. In response to the submission that the RRT had an obligation to identify the particular social group of relevance to the appellant, his Honour was unable to identify any material before the RRT which showed that "persons subject to the Kanun or persons subject to a blood feud" might make up a particular social group.
17 The primary judge referred to the judgment of the High Court of Australia in Applicant S v Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCA 25; (2004) 206 ALR 242 and in particular to the following passage at [36] in the judgment of Gleeson CJ, Gummow and Kirby JJ.

> 'Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in Applicant A, a group that fulfils

> the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.' (citations omitted)

18 His Honour held that there was no material before the RRT to suggest that persons subject to the Kanun or people subject to blood feuds met the three criteria referred to in Applicant S.

…

23 Counsel for the appellant submitted that the claim before the RRT was capable of being based on the wider social group of "those Albanians who are subject to the Kanun of Lek Dukajini and the subject of a blood feud" and that s 91S does not prevent a claim of persecution being made on account of the membership of that wider social group. Counsel contended that the RRT wrongly assumed that the concept of blood feud was family related when it is not so confined.

….

25…In our view, the primary judge correctly observed that no claim was made to the RRT on the basis of the alleged wider social group. We also consider that he was correct in saying that there was no evidence before the RRT which identified the wider group.

26 Before the delegate, the appellant claimed to fear persecution because of his membership of his family. That claim was again made before the RRT by the appellant's advisor. The only blood feud referred to by the appellant before the RRT was the feud between his family and one other family. There was no claim, or evidence to support a claim, that the appellant was at risk because of being subject to the Kanun and subject to a blood feud.

27… there is no claim made by or on behalf of the appellant in any of the material before the RRT that he was at risk because of the application of the Kanun. On the contrary, the claim related only to the possible activities of one family, which was hostile to his family.

…

To find that, if the event which caused the fear of persecution was an event caused by a family member, then s 91S does not apply seems to be based upon an understanding that s 91S does not apply as a matter of law where the event that gave rise to the fear of persecution was a criminal act by a family member. For the reasons given in STXB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 860 [32]-[[34], this is an erroneous understanding of s 91S of the Act. See SVBB v MIMIA [2004] FCA 960. The applicability of s 91S depends upon the relevant factual findings. In some traditional or customary legal systems which include the concept of family feud it is not appropriate to characterise the relevant 'source' of the feud as a separate and distinct individual responsibility for which the family group is, in effect, vicariously liable. Rather it is the family group, including the individual as a member of that group, which is primarily responsible for the alleged wrong. If it were established as a fact that a family group was a 'particular social group' for the purposes of the Convention and that each member

of the group was persecuted by reason only of their membership of that group then s 91S would not have application even if the reason why the group was being persecuted was in revenge arising out of the act of a member of the family.

Note Minister for Immigration and Multicultural and Indigenous Affairs v SVBB [2005] FCAFC 12 (Spender Heerey and Lander JJ.) allowing the Minister's appeal from SVBB v MIMIA [2004] FCA 960 (Selway J.) and rejecting His Honour's analysis. The claim was based on being a member of a particular social group – family. A blood feud arose between the respondent's family and another family because the respondent's father had shot two members of that family . The father had fear for a reason not mentioned in the Convention. s91S (a) applied and the father 's fear of persecution was to be disregarded. Then s91(b) applied and the respondent's fear must be disregarded because it would not exist if it were assumed the respondent's father's fear never existed as s91S(b) required. On the uncontroverted facts before the RRT the application had to be refused. There was no suggestion on the evidence that the respondent's fear arose because he was a member of a family which was primarily responsible for the alleged wrong (as the primar y judge had reasoned). His fear arose because he committed the offences for which the other family wished to extract revenge. STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 266 was followed .

The Court said:

12 The respondent's father became extremely angry that his wife had been struck. He returned home, seized a gun, returned to family A's business premises and shot two members of that family, as a result of which one died and the other was seriously wounded. His father went into hiding because he was being sought by the government for the offences committed and by family A who were seeking revenge. The respondent has not seen his father since that time.

13 The respondent's case was that Albanian people are subject to the ancient code of the Kanun of Lek Dukagjini which lays down a code of 'laws' governing birth, marriage, inheritance, hospitality and death, and which has 'traditionally served as the foundation of social behaviour and self government for the clans of northern Albania'. The Kanun regulates killings resulting from blood feuds between families.

…

15 The respondent's case was that, as a result of his father shooting the two members of family A and killing one of them, it was inevitable that the surviving members of family A

would seek revenge for the killing. He and his father were the only two male members of the family and therefore both of them are in extreme danger in Albania.
16 He said that the only reason he left Albania was because of the blood feud and that he is much safer in Australia than in Albania. He fears that if he returned to Albania his life would be at risk, because he would be likely to be killed by members of family A and that the Albanian authorities will not protect him as Albania is in chaos and the law of Kanun predominates in the Albanian countryside.
17 The RRT accepted the respondent's account but concluded that the respondent was not entitled to claim the status of a refugee because his fear of persecution was not for a Convention reason.
18 The RRT said:

> 'Although the Tribunal is satisfied that in the Albanian context the applicant's family can be considered to be a particular social group under the Convention, I find that the motivation of family A to harm the applicant or any other member of the applicant's family is revenge for a murder committed by the father of the applicant. Revenge for any criminal act, including murder, is not a reason for harm which comes under the Refugees Convention unless it can be linked to a Convention reason.
>
> The effect of s91S is that I must disregard the fear of persecution of a person such as the applicant whose fear arises because he or she is the relative of a person targeted for a non-Convention reason whose fear of persecution must be disregarded.'

19 There can be no quarrel with the finding in the first sentence of the first paragraph. That finding reflects the respondent's case. The second sentence is undoubtedly correct. The second paragraph contains a further finding which, taken with the finding in the first paragraph to which we have referred, also reflected the respondent's case. The findings of the RRT were that the respondent fears persecution because he is the son of a man who fears persecution for a non-Convention reason.
20 The RRT followed the decision of Merkel J in SDAR v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1102 and the later decision of SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548.
21 The RRT said, in relation to an alternative argument put forward by the respondent:

> 'The applicant's adviser in a submission argued that s.91S of the Act did not apply in the applicant's case as his family was being targeted collectively and that the applicant's father's actions or fears should not be relevant in the applicant's case. I do not accept this line of reasoning because if the applicant's father had not murdered Mr CA the applicant would not be targeted by family A in any way. I find that the essential and significant reason that the applicant fears persecution is because family A are seeking revenge for the murder of their family member by the father of the applicant and therefore s.91S must apply to prevent the applicant from relying on this action by his father to bring him within the scope of the Refugees Convention because the persecution or fear of persecution is motivated by a non-Convention reason.

…

the primary judge did uphold the respondent's application for review on another ground. After referring to the RRT's reasons, he said at [10]-[11]:

‘ It seems to me, with respect, that this analysis is clearly based upon the understanding that, if the event which caused the fear of persecution was an event caused by a family member, then s 91S does not apply. In particular, it seems to be based upon an understanding that s 91S does not apply as a matter of law where the event that gave rise to the fear of persecution was a criminal act by a family member. For the reasons given by me in STXB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 860 at par 32 to 34, this seems to be an erroneous understanding of s 91S of the Act.

In that case, there had been a factual finding by the Tribunal that the reason for persecution of the person who committed the alleged act was that person’s alleged act. In the relevant paragraphs I proceeded to discuss why, in my view, that was a factual finding and not a legal one:

> "This is not to say that the factual finding made by the Tribunal was inevitable. Some care needs to be taken in applying s 91S of the Act in circumstances involving claims based on customary or traditional law. The application of that section is dependent upon a factual finding that the initial or original fear of persecution arises for a reason other than membership of the family group. Obviously there must be someone in the family group who fears persecution for some reason other than that membership. In the cases that have considered the issue in the context of Albanian blood feuds under the Kanun the relevant ‘someone’ is the person whose act caused the blood feud. That person’s fear of persecution is usually expressed as a personal fear of revenge by the family of the person who was injured or (usually) killed: see, for example SDAR v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 72 ALD 129; [2002] FCA 1102 (‘SDAR’) at [24]; SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 (‘SCAL 1’) at [24]; SCAL 2 at [10], [19]. Where such factual findings have been made then s 91S is applicable: see SCAL 2. However, the applicability of s 91S depends upon the relevant factual findings. In some traditional or customary legal systems which include the concept of family feud it is not appropriate to characterise the relevant ‘source’ of the feud as a separate and distinct individual responsibility for which the family group is, in effect, vicariously liable. Rather it is the family group, including the individual as a member of that group, which is primarily responsible for the alleged wrong. The individual who in fact caused the affront in the first place is only subject to persecution because he or she is a member of the family, not because he or she caused the affront.
>
> It would seem to me that if it were established as a fact that a family group was a ‘particular social group’ for the purposes of the Convention and that each member of the group was persecuted by reason only of their membership of that group then s 91S would not have application even if the reason why the group was being persecuted was in revenge arising out of act of a member of the family.
>
> Some of the reasoning of the various Tribunals that have considered claims for refugee status based upon Albanian blood feuds might suggest that if the original cause for the alleged fear of persecution was an unlawful act by someone then this would be sufficient to exclude s 91S. If so I do not think

> that is a correct understanding of the section. For the purposes of s 91S of the Act the 'reasons mentioned in Article 1A(2) of the Refugee Convention' include 'membership of a particular social group' and that, in turn, may include membership of a family. The question is not whether the ultimate cause of the feud was an illegal act by a family member or not, but whether any member of the relevant family feared persecution for a reason other than a Convention reason (including, for this purpose, membership of the relevant family)' see SDAR at [24]."'

26 The primary judge found that the RRT had misunderstood the decisions of the Court in SDAR v Minister for Immigration & Multicultural & Indigenous Affairs and SCAL v Minister for Immigration & Multicultural & Indigenous Affairs. He concluded that those decisions rested upon findings of fact peculiar to the decisions themselves.

27 The primary judge reasoned that, because the RRT had proceeded upon that basis, it had failed to consider whether the respondent's fear of persecution arose out of his membership of the family group and the responsibility of that family group for the alleged wrong.

28 The Minister has argued that the primary judge erred in his analysis of the RRT's reasons and the construction and application of s 91S of the Act. Further, the Minister argued he has erred in failing to consider himself bound by the decisions of the Full Court of this Court in SCAG v Minister for Immigration & Multicultural and Indigenous Affairs [2003] FCAFC 302 and SCAL v Minister for Immigration & Multicultural and Indigenous Affairs [2003] FCAFC 301.

29 There is no dispute that the blood feud which arose between the respondent's family and family A had its origins in the respondent's father shooting two members of that family.

30 In our opinion, the findings made by the RRT to which we have referred in [19] conclude this matter.

31 Section 91S of the Act provides:

> 'For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:
>
> (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and
>
> (b) disregard any fear of persecution, or any persecution, that:
>
> (i) the first person has ever experienced; or
>
> (ii) any other member or former member (whether alive or dead) of the family has ever experienced;
>
> where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.'

32 The respondent's father fears that he will be persecuted because he shot two male members of family A arising out of a dispute involving money and an assault on the respondent's mother.

33 The respondent's father has a fear of persecution for a reason not mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol.
34 In those circumstances, s 91S(a) of the Act applies and the respondent's father's fear of persecution must be disregarded.
35 So also s 91S(b) applies and the respondent's fear of persecution must be disregarded because that fear of persecution would not exist if it were assumed, as s 91S(b) requires, that the respondent's father's fear of persecution had never existed.
36…, on the uncontroverted facts and the RRT's findings which were not challenged on appeal, s 91S meant that the respondent's application for refugee status had to be refused.
37 Indeed, on the RRT's findings, that was, on the proper construction of s 91S, the only conclusion.
38 In STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 266, the Full Court dealt with a similar argument and a claim that the RRT, in that case, failed to make findings that the grandfather, who had committed the murder, feared persecution for a Convention or non-Convention reason. In the Court's reasons, with which we agree, the Court said at [19]:

> 'In analysing the motivation of the other family there are two elements to consider, first the reason why that family would want to do harm and second the criterion for selecting a victim. It cannot be doubted that, irrespective of the identity of the potential victim, the motivation to do harm stemmed from the murder of a member of the other family. In fact this motivation was put to the Tribunal as an element of the appellant's claim. The Tribunal's finding, quoted at [7] above, shows that it accepted that the other family's motivation is "revenge" for a murder committed by the appellant's grandfather. Similarly, the Tribunal accepted that the reason the appellant's family was involved in a blood feud was that the appellant's grandfather had killed a member of the other family. Implicit in this is an acceptance of the fact that the appellant might be targeted because of his relationship to his grandfather. Given those findings it beggars belief to suggest that the appellant's grandfather would be vulnerable for any reason other than that he was the killer. No analysis is required; the conclusion is inherent in the appellant's claim. It is obvious that this is a finding made by the Tribunal or perhaps more accurately, this is a fact that the Tribunal accepted as an element of the appellant's account. The argument that the grandfather might be targeted because he is a member of his own family is not only far fetched but also circular. This ground of appeal must be rejected.'

39 In this case, there was no suggestion on the evidence, or on the findings, that the respondent's father's fear of persecution arose because he was a member of the family which was primarily responsible for the alleged wrong. His fear of persecution arose because he committed the offences for which family A wished to extract revenge.
40 The respondent's fear of persecution arises because he is a member of his father's family.
…

42 In any event, this was a case in which, on the respondent's own account, s 91S meant that the respondent was not entitled to claim refugee status.

91T Non-political crime

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime were a

reference to a crime where the person's motives for committing the crime were wholly or mainly non-political in nature.

(2) Subsection (1) has effect subject to subsection (3).

(3) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime included a reference to an offence that, under paragraph (a), (b), (c) or (d) of the definition of political offence in section 5 of the Extradition Act 1988, is not a political offence in relation to a country for the purposes of that Act.

> The list of offences in s5 demonstrate that the emphasis of the amendment is primarily on the seriousness of the offence rather than on the intention and circumstances of the crime. The threshold for determining the degree of political motivation required for a crimina act to fall outside the article 1F(b) exclusion is raised and widens the class of people excluded from the Convention definition. It appears to modify the effect of the later decided MIMA v Singh (2002) (2002) 209 CLR 533 186 ALR 393 [2002] HCA 7.

91U Particularly serious crime

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 33(2) of the Refugees Convention as amended by the Refugees Protocol has effect as if a reference in that Article to a particularly serious crime included a reference to a crime that consists of the commission of:

(a) a serious Australian offence (as defined by subsection (2)); or

(b) a serious foreign offence (as defined by subsection (3)).

(2) For the purposes of this section, a serious Australian offence is an offence against a law in force in Australia, where:

(a) the offence:

(i) involves violence against a person; or

(ii) is a serious drug offence; or

(iii) involves serious damage to property; or

(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

(b) the offence is punishable by:

(i) imprisonment for life; or

(ii) imprisonment for a fixed term of not less than 3 years; or

(iii) imprisonment for a maximum term of not less than 3 years.

(3) For the purposes of this section, a serious foreign offence is an offence against a law in force in a foreign country, where:

(a) the offence:

(i) involves violence against a person; or

(ii) is a serious drug offence; or

(iii) involves serious damage to property; and

(b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the Territory offence) against a law in force in that Territory, and the Territory offence would have been punishable by:

(i) imprisonment for life; or

(ii) imprisonment for a fixed term of not less than 3 years; or

(iii) imprisonment for a maximum term of not less than 3 years.

This emphasis on definition by the nature of the crime and its penalty goes beyond the more general approach of A v MIMA [199]FCA 227 of consideration of the context and circumstances of the crime, as well as the crime itself.