FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNWC v MINISTER FOR IMMIGRATION & ANOR *[2010] FMCA 266*

MIGRATION – RRT decision – Bangladeshi ship deserter fearing harsh penalties under Bangladeshi law – Tribunal found membership of particular social group of 'ship deserters' – not open to Tribunal to find harms unrelated to Convention reason – failure to consider whether law appropriate and adapted to a legitimate object – two jurisdictional errors found – matter remitted.

Federal Court Rules (Cth), O.62
Federal Magistrates Court Rules 2001 (Cth), r.21.02(2)(c)
Migration Act 1958 (Cth), ss.36(2), 91R

Applicant A v Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225
Applicant S v Minister for Immigration & Multicultural Affairs (2004) 217 CLR 387
Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (2003) 216 CLR 473
Chen Shi Hai v Minister for Immigration & Multicultural Affairs (2000) 201 CLR 293
Minister for Immigration & Citizenship v SZNVW [2010] FCAFC 41
Morato v Minister for Immigration, Local Government & Ethnic Affairs (1992) 39 FCR 401
MZQAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 85 ALD 41
SZNVW v Minister for Immigration & Anor [2009] FMCA 1299

Applicant:	SZNWC
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2062 of 2009
Judgment of:	Smith FM
Hearing date:	1 April 2010
Delivered at:	Sydney
Delivered on:	13 May 2010

REPRESENTATION

Counsel for the Applicant:	Mr P Reynolds
Solicitors for the Applicant:	Fragomen
Counsel for the Respondents:	Mr T Reilly
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) A writ of certiorari issue directed to the second respondent, to quash the decision of the second respondent made on 5 August 2009 in matter 0903000.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 27 March 2009.

(3) The first respondent pay the applicant's costs as agreed or taxed under r.21.02(2)(c) and O.62 of the Federal Court Rules.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2062 of 2009

SZNWC
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant entered Australia as a member of a ship's crew, and deserted his ship while it was in Fremantle in September 2008. Aided by a Sydney migration agent, he lodged an application for a protection visa on 10 September 2008. This was refused by a delegate on 27 March 2009, and the delegate's decision was affirmed by the Tribunal on 5 August 2009. The applicant now applies for orders which would remit the matter to the Tribunal for further consideration. I have power to make those orders only if the Tribunal's decision was affected by jurisdictional error.

2. The applicant was represented by counsel, who relied upon five grounds contained in a further amended application. The first ground raised factual and legal issues, arising from a claim that the applicant's presentation of his evidence to the Tribunal's hearing was affected by impairments from a mental illness. The applicant contended that the Tribunal did not adequately appreciate the applicant's impairments, and

that its decision was materially influenced by this error. Medical evidence and a transcript were tendered relevant to this ground.

3. The Minister's counsel pointed out that the line of cases upon which the applicant relied, was the subject of an appeal from my decision in *SZNVW v Minister for Immigration & Anor* [2009] FMCA 1299 in which the Full Court had reserved its judgment, and I was invited to defer my consideration of the first ground until delivery of that judgment. However, as I shall explain, I have decided that the applicant's second and third grounds, as refined in the course of oral submissions, should be upheld. This means that I have not found it necessary to examine the evidence relevant to the first ground, nor address that ground in the light of the Full Court's very recent judgment in *Minister for Immigration & Citizenship v SZNVW* [2010] FCAFC 41. For the same reason, it is unnecessary for me to address the applicant's fourth and fifth grounds.

4. Essentially, the applicant's second and third grounds identify jurisdictional errors of law in two passages in the Tribunal's reasons. In these, the Tribunal explained why it was not satisfied that the applicant faced a real chance of persecution by reason of his membership of a particular social group.

5. The Tribunal accepted that the applicant belonged to *"a particular social group of Bangladeshi ship deserters, or similar"*. It also accepted that he faced a real chance of serious harm if he returned to Bangladesh, under laws which impose on Bangladeshi ship deserters significant criminal and civil liabilities. However, the Tribunal said that these harms would not result from his *"identity as a ship deserter as such"*, and his refugee claim therefore lacked the claimed Convention reason for the persecution feared. Alternatively, the Tribunal found that the penalties feared by the applicant would not be 'persecution' within the Convention concept, because *"the Bangladeshi legislation appears to have the legitimate objective of securing Bangladesh's reputation as a source of merchant seamen"*.

6. In my opinion, both of these conclusions reflect jurisdictional errors, and the errors provide grounds for quashing the Tribunal's decision. Since they concern reasoning which substantially accepted the relevant parts of the applicant's claims and evidence, it is unnecessary for me to

do more than outline the relevant evidence which was accepted by the Tribunal, and to locate the errors in the relevant parts of the Tribunal's statement of reasons.

The applicant's refugee claim

7. The applicant explained why he deserted ship in Australia and feared returning to Bangladesh in his visa application:

> *I left Bangladesh as a Seaman being employed by a shipping company which also operates in a partnership with the Bangladesh Government. I did not have any fear of persecution at the time of departing the country. I however, was a subject to inhumane and degrading treatment in the ship in which I have been working as a seaman. I claim that those treatments (false detention, forced labor in violation of the ILO Convention, severe physical and psychological harm, threat, reduction of wages, cancellation of overtime payment, poor quality food etc) amounted to persecution.*
>
> *I tried to remain calm and stay in the ship continuing my duties. I travelled several countries including Australia multiple times without any attempt to desert during the course of the current engagement as a Seaman. This however was not possible as I could not take the pain of being unjustly treated, tortured and humiliated by the ship management. I disagreed with the way they wanted to operate me as a labor and the only way I could express such disagreement was by desertion in Australia. It is because a) I was away from Bangladesh and it was not possible for me to desert in that country, b) under Bangladesh law it is a criminal offence to desert a ship and I would be subject to criminal charge and imprisonment and fines without bail, c) I would never secure another employment again in Bangladesh, d) I would have been deported back to Bangladesh if I deserted in any other countries where I visited during the course of the present engagement.*
>
> …
>
> *Now that I have deserted a ship, I have broken the law of Bangladesh. I would be subject to criminal charges, fines and imprisonments. I also would be banned from undertaking any further employment as a seaman, or in any other government or multinational companies.*

8. The applicant's agent submitted that *"the client falls within the meaning of 'Particular Social Group', meaning 'Bangladeshi Seamen who deserted a ship'"*. He later presented to the Tribunal, and it accepted, evidence that sections of the Bangladesh Merchant Shipping Ordinance 1983, with later amendments, made a person guilty of *"desertion and absence without leave"* from Bangladeshi or foreign ships liable for summary trial and punishment by imprisonment for five years plus a fine of ten lac taka, and forfeiture of wages. In addition, a deserted seaman's book was required to be cancelled, he was banned *"from entering into seafaring profession"* and *"any government service in Bangladesh"*, and *"the state may forfeit the properties of deserted seamen excluding the inherited properties"*.

9. The applicant later presented a document, with translation, purporting to be a notice from the *"Office of the Govt. Ocean Transportation"*, calling upon him to show cause why *"punishable actions shall not take against him by law"* for *"escaping illegally from the ship"*. The Tribunal had some doubt about the authenticity of this document, but it accepted that the applicant's family had received a similar notice, and *"that there is a real chance of further enforcement action if the applicant returns to Bangladesh"*.

10. The applicant and his agents also presented evidence and submissions in support of other claims to satisfy the definition of 'refugee' under the Convention as adopted by the *Migration Act 1958* (Cth), ss.36(2) and 91R. These included claims that he was at particular risk of discriminatory prosecution as a member of subgroups of *"mistreated seamen"*, or deserters who had complained about their treatment on ships, or had cause to desert. It was also claimed that the events which had caused the applicant to desert would lead to persecution for his actual or imputed political opinions, including by the withholding of appropriate state protection. However, these claims were not accepted by the Tribunal, and it is unnecessary to examine how they were presented and to explore the Tribunal's reasoning in relation to them.

The Tribunal's reasoning

11. In the *"Relevant Law"* section of its statement of reasons, the Tribunal said:

> *15. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in* Applicant A's *case and also in* Applicant S. *In* Applicant S *Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:*
>
> > *… 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". …*
>
> *16. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.*

12. The Tribunal's description of its hearing included reference to the Bangladeshi laws which had been cited to it:

> *45. The Tribunal noted that the applicant's fears concerned the enforcement of the Bangladesh Merchant Shipping Ordinance, 1983, which provided that ship desertion would be punishable by imprisonment and financial penalties. This appeared, at face value, to be a law of general application, to punish and deter ship desertion. The Tribunal noted that, even if the law contained harsh penalties, this might reflect the importance to Bangladesh of being a reliable provider of ship's crews, for employment*

> *and future remittances. The available material did not suggest that the law, by way of its design, enforcement or its impact, discriminated on any Convention-related grounds.*

13. In its *"Findings and Reasons"*, the Tribunal made a clear finding as to the existence of a *"particular social group"*, and implicitly accepted that the applicant was a member of this group:

> *61. The Tribunal accepts that there is a particular social group of Bangladeshi ship deserters, or similar. These people share many characteristics – their nationality, their employment on ships, the particular circumstances in which they are employed (often in menial tasks, through recruitment agencies, with their families relying on remittances and the community expecting that they maintain the reputation of Bangladeshi seamen), and their subsequent decision to abandon their vessels and their contracts. The Tribunal is satisfied that all members of the group share these characteristics, that they distinguish the group from Bangladeshi society at large, and that the common characteristic is not any shared fear of persecution:* Applicant S v MIMA *(2004) 217 CLR 387 at [36]*.

14. The Tribunal did not explain how it arrived at the findings of fact in this paragraph. However, no challenge was made by either counsel before me that there was no evidence to support the findings, nor that they reflected a misunderstanding of the principles summarised by the High Court in *Applicant S*, which the Tribunal had quoted.

15. I consider that the Tribunal's finding that *"all members of the group"* shared a characteristic that they had made a *"decision to abandon their vessels and their contracts"*, necessarily carried with it an acceptance by the Tribunal that all members of the group were liable to suffer under the draconic Bangladeshi penalties applicable to all ship deserters. I also consider that the Tribunal must have accepted that all members of the group probably had suffered under those penalties in the past, or feared that they would suffer them in the future. This would appear to be obvious, and I doubt that a contrary finding would have been open to the Tribunal, in the face of the evidence which it accepted and the express findings which it made.

16. I also consider that the Tribunal's conclusion that *"the common characteristic is not any shared fear of persecution"*, so as to run foul

of the 'second' proposition in *Applicant S*, must have understood that proposition as not excluding the possibility that members of a *"particular social group"* under the Convention definition could share a common fear of persecution, provided that other shared characteristics allowed the identification of a *"particular social group"*. All that the Tribunal was saying in this sentence, was, therefore, that it was satisfied that a particular social group of Bangladeshi ship deserters existed in Bangladeshi society independently of their fears concerning the draconic desertion penalties.

17. In my opinion, this would reflect a correct understanding of the majority judgments in *Applicant A*, and the subsequent cases which have considered them. Certainly, in my opinion, the Tribunal would have been in error, if it thought that a claim for refugee status by reason of membership of a particular social group, independently characterised, could not be accepted if some or all members of the group shared a common fear of persecution directed only at members of the group (compare *Applicant S* (above) at [42], extracted below).

18. After making its favourable finding as to the existence of the broadest group to which the applicant claimed to belong, the Tribunal considered the applicant's reasons for deserting. These were relevant to his other claims. The Tribunal made findings about this, which it is unnecessary for me to consider.

19. The Tribunal then made a finding which accepted the existence of the applicant's subjective fear that he would suffer from the penalties provided under the Bangladeshi desertion laws, and found that it was well-founded. It said:

> *65. The Tribunal accepts that the applicant faces a real chance of criminal and/or civil prosecution for having violated the Bangladesh Marine Shipping Ordinance, and his contractual obligations, and that he is very concerned about the consequences. As the Tribunal flagged at the hearing, it has some doubts about the provenance and authenticity of the 'show cause' memorandum that the applicant presented to the Tribunal, particularly given its lack of official insignia, and therefore places little weight on it. However, it accepts that the applicant's family either has received this or*

a similar document, and that there is a real chance of further enforcement action if the applicant returns to Bangladesh.

20. However, the Tribunal affirmed the delegate's decision because it found that *"the feared harm is not for the essential and significant reason of one or more of the Convention grounds"*. To explain this conclusion, it made a series of numbered points, addressing various submissions and claims made by the applicant and agent. Its 'first' and 'fourth' points contained its reasoning which is challenged under Grounds 2 and 3 of the further amended application. Its other points addressed the applicant's alternative refugee claims and submissions, and do not need to be discussed.

The Tribunal's 'first' point

21. The Tribunal's 'first point' found against the applicant's claim that the harms he feared under the Bangladeshi desertion laws could be characterised as arising *"for reasons of … membership of a particular social group"*, being the group accepted by it of *"Bangladeshi ship deserters"*. The Tribunal said:

> *67.* **First,** *the Tribunal finds that what the applicant fears is punishment for the act of desertion, in violation of Bangladeshi law, rather than his membership of a particular social group such as Bangladeshi ship deserters.*[1] *The Tribunal is mindful of the comment by Dawson J in* Applicant A*, that the distinction in* Morato *between what a person is (a member of a particular social group) and what a person has done or does should not be taken too far,*[2] *but considers the basis for any action against the applicant will be his past acts, and not any identity as a ship deserter as such.*
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> ---
>
> [1] Morato v MILGEA *(1992) 39 FCR 401 at 405.*
>
> [2] Applicant A & Anor v MIEA & Anor *(1997) 190 CLR 225 at 242-243.*
>
> (emphasis in original)

22. Ground 2 challenges this reasoning. It contends:

2. *The Tribunal committed jurisdictional error in that it failed to apply the correct test or otherwise misconstrued and misapplied the applicable law, in respect of its finding that the Applicant's fear of punishment for desertion was not Convention related because the fear was for the act of desertion rather than because he was a member of the particular social group of Bangladeshi ship deserters.*

Particulars

The Tribunal found that the Applicant's fear of punishment for desertion was not Convention related because the fear was for the act of desertion rather than because he was a member of the particular social group of Bangladeshi ship deserters (which the Tribunal accepted existed and which the Applicant was a member of). Such a distinction was a false distinction in the Applicant's circumstances given the close connection between the carrying out of the act and membership of the particular social group.

23. In his written submissions, the applicant's counsel argued:

> *37) As a general proposition of law, it is correct (and virtually circular) to say that in order for persecution to be for reasons of membership of a particular social group, it is necessary to establish that the persecution was for reasons of membership of a particular social group rather than for some other reason (such as what a person does).*
>
> *38) However, the distinction breaks down where it is accepted that a certain particular social group exists and what they do forms a core part of the identity of the group. What a person is and does are not mutually exclusive concepts and the fact that the persecution is for reasons of what they do does not gainsay the proposition that they are being persecuted for reasons of what they are. It is an exercise in semantics to say that a deserter is persecuted for* **deserting** *rather than for be a* **deserter**. *One cannot be a Bangladeshi seaman deserter without deserting.*
>
> (emphasis in original)

24. In effect, counsel argued that it was not legally open to the Tribunal to find that the infliction of the Bangladeshi ship deserter penalties on the applicant would not occur "*for reasons of*" his membership of the particular social group identified by the Tribunal. He submitted that

the Tribunal could only have arrived at its adverse finding, by misunderstanding the effect of the Convention definition.

25. Counsel argued that the Tribunal misunderstood, and misapplied, the passages from *Morato v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 39 FCR 401, and *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, which it cited to explain its distinction between penalties imposed on *"past acts"* rather than *"identity as a ship deserter as such"*.

26. In *Morato*, Black CJ said at 405:

> *It may well be that an act or acts attributed to members of a group that is in truth a particular social group provide the reason for the persecution that members of such a group fear, but there must be a social group sufficiently cognisable as such as to enable it to be said that persecution is feared for reasons of* **membership** *of that group.*
>
> *The need to show that persecution is for reasons of membership of a group, rather than for an act or acts done, tells against the argument that a particular social group may be defined by reference to the sole criterion that its members are all those who have done an act of a particular character. I emphasise "sole" because that is how the particular social group is sought to be defined in this case. The doing of an act or acts of a particular character may, in some circumstances and together with other factors, point to the existence of a particular social group but in this case it is only the common action of turning Queen's evidence that is said to define the group.*
>
> (emphasis in original)

27. In *Applicant A*, Dawson J said at 242-243:

> *The requirement that the feared persecution be by reason of "membership" of a particular social group was taken by Black CJ (with whom French J agreed) in* Morato v Minister for Immigration *to require that the persecution be on account of "what a person* **is** *— a member of a particular social group — rather than upon what a person has done or does". But as Black CJ himself recognised, that statement should not be taken too far. The distinction between what a person is and what a person does may sometimes be an unreal one. For example, the pursuit of an occupation may equally be regarded as what one is*

> *and what one does. At other times, the distinction may be appreciable but not illuminating. For example, the acts of conceiving and bearing a child may be what people do, but the result of those acts — that the persons involved are parents — is quite central to what they are.*
>
> *However, I think that Black CJ's remarks were directed more to the situation of a generally applicable law or practice which persecutes persons who merely engage in certain behaviour or place themselves in a particular situation. For example, a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms. Viewed in that way, Black CJ's distinction between what a person is and what a person does is merely another way of expressing the proposition which I have already stated.*
>
> (emphasis in original) (citations omitted)

28. The discussion of both Black CJ and Dawson J was directed at the point, ultimately settled by the High Court in *Applicant A*, that a shared fear of particular harms cannot alone provide the characterisation of a *"particular social group"*. However, as the first sentence of Black CJ's discussion clearly recognises, once a particular social group is indentified with the assistance of other distinguishing characteristics, the identification of particular acts, which are characteristic of members of the group and which incur the feared harms, would usually lead to a finding that the feared harms result from membership of the group.

29. The passages cited by the Tribunal gave no support for the drawing of a distinction between the characteristic actions of a member of a group and his or her identity as a member, where it is drawn at the stage of analysis reached by the present Tribunal concerning the 'reasons' for persecution of a member of a particular social group. The language of the Convention definition itself does not require persecution to occur by reasons of 'identity' as a member of a particular social group, but only by reasons of 'membership' of the group.

30. In my opinion, properly understood, the discussion of Black CJ and Dawson J supported, rather than the contrary, the acceptance that penalties feared by the applicant resulting from his act of deserting a ship, must amount to the infliction of harm by reason of his membership of the group of 'ship deserters'. This is because the Tribunal's findings in relation to the shared characteristics of the group included a characteristic rendering all members of the group subject to a penalty by reason of that shared characteristic. It was a characteristic which necessarily distinguished all members of the group from all other members of Bangladeshi society. Absent any other reason for the applicant's feared harms, the adverse conclusion about a Convention reason was not open to the Tribunal. On the Tribunal's findings, the applicant's fear of suffering as a result of an action which characterised him as a member of the group found by the Tribunal was necessarily a fear occurring for a Convention reason.

31. I consider that the Tribunal was probably distracted by a distinction taken from a different context, into failing to appreciate that necessarily any penalties inflicted on the applicant under the Bangladeshi ship deserter laws would be the result of his membership of the group which the Tribunal accepted. The laws in their own terms were directed at only members of this group, and for that reason involved a discriminatory infliction of harm on members of that group and not on any other members of Bangladeshi society. Any prosecution of the applicant would, therefore, be the result of his act of ship desertion, which the Tribunal accepted was characteristic of all members of the particular social group, distinguishing the group and its members from Bangladeshi society at large.

32. In the context given by the Tribunal's previous findings, the situation was indistinguishable from that of the potential conscript in *Applicant S*, the homosexual in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, or the 'black child' in *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293. As Gleeson CJ, Gaudron, Gummow and Hayne JJ said in *Chen* at [32]:

> *Once it is accepted that "black children" are a social group for the purposes of the Convention, that they are treated differently from other children and that, in the case of the appellant, the*

> *different treatment he is likely to receive amounts to persecution, there is little scope for concluding that that treatment is for a reason other than his being a "black child". As a matter of common sense, that conclusion could only be reached if the appellant had some additional attribute or characteristic and the treatment he was likely to receive was referable solely to that other characteristic or attribute. However, it has not been suggested that that is the position. Moreover, that is not the basis upon which either the Tribunal or the majority in the Full Court dealt with the matter.*

33. This was said in a context where some of the harms feared by the parents of 'black children' might appear to arise from laws or policies which were not framed overtly to discriminate in respect of a shared characteristic, and where the penal laws or policies might be described as laws of 'general application'. However, as their Honours noted at [19]:

> *Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group — for example, "black children", as distinct from children generally — cannot properly be described in that way. Further and notwithstanding what was said by Dawson J in* Applicant A, *the fact that laws are of general application is more directly relevant to the question of persecution than to the question whether a person is a member of a particular social group.*

34. In the present case, the Tribunal made no finding that any prosecution of the applicant under Bangladeshi ship deserter laws would occur as a result of any attribute other than his "*decision to abandon [his] vessel*", which was an action which the Tribunal found to characterise all members of the group. The Tribunal made no finding, but indeed appears to have rejected the contention, that these laws would be applied against the applicant differently arising from the particular circumstances of his desertion. The Tribunal's distinction between the applicant's 'acts' which could result in the feared penalties, and his 'identity' as a member of the group found by the Tribunal, was therefore lacking the conceivable justification suggested in *Chen*.

35. In other cases, where a penal law attaches to actions which characterise only members of a particular social group, the High Court has

invariably accepted or assumed that the penalties feared by members of that group are harms which would occur *"for reasons of"* membership of that group. Thus, in *Appellant S395/2002*, McHugh and Kirby JJ said at [45]:

> *If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters. If the first of these questions is answered: Yes, and the second: No, the claim of refugee status must be upheld even if the applicant has conducted him or herself in a way that is likely to attract prosecution.*
>
> (citation omitted)

36. In my opinion, the present Tribunal's findings, in effect, that the applicant feared being targeted by reason of a peculiar characteristic of all members of the particular social group to which the applicant belonged, rendered the distinction drawn by the Tribunal in its 'first point' one which was not open to it without making error of law. The error involved a failure correctly to appreciate the meaning and application of the Convention definition to the preceding findings made by the Tribunal, and was therefore jurisdictional. I would therefore uphold the second ground of the further amended application.

The Tribunal's 'fourth' point

37. The Tribunal's 'fourth point' appears to be an alternative finding, upon the premise that the applicant's fears of penalties under the Bangladeshi ship deserter laws were *"for reasons of"* his membership of the particular social group of Bangladeshi ship deserters. It said:

> *70.* **Fourth**, *as the Tribunal noted at the hearing, the Bangladeshi legislation appears to have the legitimate objective of securing Bangladesh's reputation as a source of merchant seamen, important for the country as a means of*

> *providing employment and for future remittances. It does so by providing penalties, which may be considered harsh. As discussed above, however, the Tribunal is not satisfied that the law is designed, or enforced, or has an impact based on Convention-related discrimination.*
>
> (emphasis in original)

38. Ground 3 of the further amended application is framed with alternative arguments. However, as refined in oral submissions, counsel for the applicant principally contended that the Tribunal erred by accepting the "*legitimacy*" of the object of the Bangladeshi laws, without also examining and making findings on whether the potential penalties were "*appropriate and adapted*" to achieving the object.

39. The requirement of such an assessment was referred to by McHugh and Kirby JJ in the passage from *Appellant S395/2002* which I have quoted above. Subsequent judgments in the High Court have confirmed that an assessment of "*appropriate and adapted*" is required, and that it involves elements additional to considering the "*legitimacy*" of the objectives of the legislation. The added test applies regardless of whether the legislation is described as a law of 'general application' which is being applied in a discriminatory manner, or as a law which necessarily targets members of a particular social group.

40. In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ said:

> *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]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in* Chen. *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.*

…

> *47. Although there was no material before the Tribunal indicating for exactly what purpose young men were being recruited, oral argument before this Court appeared to proceed on the basis that the new recruits were being sent to serve on the front-line of the Taliban's military operations. In other words, 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. 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.*
>
> (citations omitted)

41. As I understand him, counsel for the Minister accepted that the Tribunal was bound to consider whether the Bangladeshi laws were *"appropriate and adapted" "in the sense of proportionate in the means used to achieve"* the legitimate object found by it.

42. Counsel for the Minister was unable to point to any language used by the Tribunal in its statement of reasons, including its general legal analysis, which showed an awareness of this requirement. However, he submitted that the Tribunal implicitly performed the assessment in its paragraph [70]. He argued that the situation was analogous with that in *MZQAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 85 ALD 41.

43. In that case, the Full Court at [20] approved an opinion of Finn J, that the test of *"appropriate and adapted"* involved *"a matter of judgment"* in which the *"nature and reach of the law itself and the actual manner of its application"* was considered *"for the reason that*

its reach or use in suppressing political opinion may go beyond, or be inconsistent with, what is appropriate to achieve a legitimate government object according to the standards of civil societies". In the matter before the Full Court, the Tribunal's reasoning on this appears to have been minimal. However, their Honours were able to detect a consideration of whether India's anti-terrorism measures directed at supporters of the LTTE were "*appropriate and adapted"*. They said:

> *23 The appellant contended that the learned Federal Magistrate should have found that the Tribunal's decision was affected by jurisdictional error because the Tribunal failed to ask itself two critical questions:*
>
> *(a) whether the enforcement of the POTA was appropriate and adapted to achieve a legitimate objective of the Indian Government?*
>
> *and*
>
> *(b) would the appellant, if prosecuted under the POTA, be exposed to persecutory harm because of his support of the LTTE?*
>
> *24 Question (a) above may be seen to have two aspects. The first aspect involves consideration of whether (a) legislation banning terrorist organisations, and (b) the banning of the LTTE under such legislation, are appropriate and adapted to achieve legitimate government objectives. In our view the Tribunal gave consideration to these two questions when it referred to the fact that the LTTE is a banned organisation not only in India but also in Australia, Canada and the United States of America under the Charter of the United Nations (Anti Terrorism Measures) Regulations 2001. No further consideration of these two questions was, we consider, required.*
>
> *25 The second aspect of question (a) above involves consideration of whether the POTA is being enforced in India in a way that is not appropriate and adapted to achieve a legitimate government objective. The Tribunal expressly found that there was no evidence that the POTA is being selectively enforced for a Convention reason. The appellant accepts that there was no evidence before the Tribunal that the POTA is being selectively enforced, whether for a Convention reason or otherwise. He contended, however, that evidence tending to show that the*

> *POTA is being selectively enforced in India would be able to be placed before the Tribunal if this matter were remitted for rehearing. As the appellant conceded, evidence not placed before the Tribunal does not, in the circumstances of this appeal, assist in establishing that the decision of the Tribunal was affected by jurisdictional error. Its significance, if any, is limited to whether, should jurisdictional error be established, relief that is discretionary in nature should follow.*
>
> *26 We reject the contention that the decision of the Tribunal was affected by jurisdictional error because it failed to ask itself the first of the questions identified in [23] above. We conclude that it did ask itself the appropriate questions concerning the POTA and its enforcement and answered those questions adversely to the appellant.*

44. The Bangladeshi legislation concerning ship deserters has little apparent similarity with anti-terrorism measures, and there was no basis in the evidence before the Tribunal for any assumption that similar legislation is found in other countries. Counsel made no attempt to persuade me that the extraordinary level of penalties facing ship deserters in Bangladesh, including the loss of livelihood and forfeiture of personal property, finds any parallel in the laws of Australia or any other country. Moreover, there is lacking in the present Tribunal's statement of reasons even the oblique consideration of proportionality and accordance with international and human rights standards, which was found in the Tribunal's reasons in *MZQAP*. I therefore do not consider that reference to *MZQAP* assists the Minister in the present case.

45. In my opinion, a fair reading of the Tribunal's statement of reasons suggests that it overlooked the need to assess the proportionality of the means adopted in Bangladesh to discourage ship desertions, and for that reason it did not enter upon that assessment. Its brief reference at the hearing to the *"harsh penalties"* under the legislation (see [45] quoted above), and its description of them as *"may be considered harsh"* in [70], tend to suggest that the Tribunal thought that it was enough to find a 'legitimate object' in Bangladesh's promotion of the country as a source of merchant seamen, notwithstanding an apparent disproportionality. Certainly, it included no discussion of whether the

'harshness' it recognised would be justified by reference to *"the standards of civil societies"* or other recognised comparators.

46. In my opinion, its reasons clearly failed to reveal any assessment of whether the laws had consequences which were not *"appropriate and adapted"*, in accordance with the High Court's jurisprudence. I therefore would uphold the challenge which was the subject of Ground 3 of the further amended application.

47. Counsel for the Minister did not submit that, if I upheld both Grounds 2 and 3, then the applicant would not be entitled to orders for the issue of writs of certiorari and mandamus.

48. For the above reasons, I consider that the applicant should be given that relief. A consequential costs order is agreed.

I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 13 May 2010