FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZANS v MINISTER FOR IMMIGRATION *[2004] FMCA 445*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in Bangladesh as a homosexual – whether the RRT erred by finding no Convention nexus to the harm feared by the applicant and whether the RRT failed to consider an element of the applicant's claim – the RRT failed to consider whether the applicant would succumb to pressure to marry and thereby suffer persecution – the RRT incorrectly found no Convention nexus to pressure to marry – these were jurisdictional errors.

Migration Act 1958 (Cth), ss.430, 474, 476, 477
Rome Statute of the International Criminal Court 1998

Abebe v Commonwealth (1999) 197 CLR 510
Adan v Secretary of State for the Home Department [1999] AC 293
Appellant S395/2002 and S396/2002 v Minister for Immigration (2003) 203 ALR 112
Buljeta v Minister for Immigration (Federal Court of Australia, Katz J, 4 December 1998)
Calado v Minister for Immigration (Federal Court of Australia, Moore, Mansfield and Emmett JJ, 2 December 1998)
Canada (Attorney-General) v Ward [1993] 2 SCR 689
Chen Shi Hai v Minister for Immigration (2000) 201 CLR 293
Fang Wang v Minister for Immigration [2003] FCA 1044
MMM v Minister for Immigration (2000) 170 ALR 411
Minister for Immigration v Abdi (1999) 87 FCR 280
Minister for Immigration v Haji Ibrahim (2000) 204 CLR 1
Minister for Immigration v Khawar (2002) 210 CLR 1
Minister for Immigration v Respondents S152/2003 (2004) 205 ALR 487
Minister for Immigration v Sameh [2000] FCA 578
Minister for Immigration v Yusuf (2001) 206 CLR 323
NAEB v Minister for Immigration [2004] FCAFC 79
Plaintiff S157/2002 v Commonwealth (2003) 195 ALR 24
Re Minister for Immigration; Ex parte S134/2002 (2003) 195 ALR 1
SDAV v Minister for Immigration [2003] FCAFC 129
Sellamuthu v Minister for Immigration [1999] FCA 247
SZALM v Minister for Immigration [2004] FMCA 262
SZAOD v Minister for Immigration [2004] FMCA 89
Thevendram v Minister for Immigration [1999] FCA 182

Applicant:	SZANS
Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
File No:	SZ768 of 2003
Delivered on:	13 August 2004
Delivered at:	Sydney
Hearing date:	14 July 2004
Judgment of:	Driver FM

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Solicitors for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondent:	Mr G Johnson
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) A writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 7 August 2002 and handed down on 29 August 2002.

(2) A writ of mandamus issue requiring the Minister to cause the Refugee Review Tribunal to rehear and redetermine the applicant's application for review according to law.

(3) The respondent is to pay the applicant's costs and disbursements of and incidental to the application, fixed in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SZ768 of 2003

SZANS
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the RRT") made on 7 August 2002 and handed down on 29 August 2002. The RRT affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from Bangladesh and made claims of persecution by reason of his homosexuality. He arrived in Australia on 23 January 1997. On 21 February 1997 he lodged a protection visa application with the Minister's Department. That application was rejected on 5 December 1997. An application to the RRT, made on 5 January 1998 was rejected as indicated above. He now proceeds on the basis of an amended application filed on 9 July 2004. The Minister objects to the competency of the application by notice given on 1 August 2003. In that notice the Minister asserts that the original application for judicial review was not filed within the time prescribed pursuant to s.477(1) of the *Migration Act 1958* (Cth) ("the Migration Act"), which applies

because the decision of the RRT is a privative clause decision. That, of course, is the issue for me to decide.

2. If the decision of the RRT is a privative clause decision then it follows that the present application is incompetent because the judicial review proceedings were not instituted within the 28 day time period prescribed under the Migration Act. The delay by the applicant instituting his judicial review proceedings is not otherwise a material consideration. Following the decision of the RRT, the applicant instituted proceedings challenging the validity of s.474 of the Migration Act on 26 September 2002. He discontinued those proceedings as a result of the judgment of the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24 and instituted these present proceedings reasonably promptly thereafter.

3. The applicant's written submissions contain the following additional background, which I adopt:

> In brief, the applicant claimed to be a homosexual who feared persecution in Bangladesh because of his homosexuality. Specifically, he claimed to fear exposure of his homosexuality – that he would be physically assaulted and abused if it became generally known that he was homosexual. He also feared being made a social outcast, and the intense societial pressure for him to marry and have children.
>
> The RRT found significant problems with the applicant's evidence. In particular it found that he was not in a homosexual relationship [in Australia] with another Bangladeshi as he had claimed. It thus rejected the claim of persecution because of his relationship with this person.
>
> The RRT found, nevertheless, that the applicant is indeed homosexual although inclined by nature to be discreet. It rejected the claims of fear of physical harm.
>
> In discussing the claim of "Social Pressure to Marry", the RRT opined,
>
> > *"I … accept that in [Bangladeshi] society it is the social norm that all people marry and that this is expected by families.*
> >
> > *I also accept that this would be difficult for a Gay person.*
> >
> > *However, what is of relevance in the current matter is whether or not the pressure to marry would amount to persecution and whether it would be motivated by a Convention reason.*

The material before me, which I accept, advises that the expectation that offspring will marry is universal and non discriminatory. It is the expectation of all males and all females and is not selective.

I find that any efforts on the part of the Applicant's family to get him to marry would be for this universal societal expectation and for no other reason.

By his own account no one in the country is aware that he is Gay and this includes all members of his own family.

As discussed above I find he would not at any time in the reasonably foreseeable future either act in a manner which would identify him as being Gay, nor would he open up to his family and tell them that he is.

This being the case, I find that the expectation or pressure for him to marry is not an act of harm or detriment based on any Convention reason, nor is there any discriminatory element to it."

The application

4. The application raises two grounds:

1.The RRT failed to ask itself the following questions, which in the context of the case before it, were necessary for it to complete the exercise of its jurisdiction:

a) Would societal pressure to marry impact differentially on the applicant as a homosexual?

b) Would the applicant be able to resist societal pressure to marry?

c) If the answer to b) is "yes", would the consequences of such resistance be persecutory?

d) If the answer to b) above is "no" then:

i) Would it be persecutory for a homosexual man to be forced to have sex with a woman? And

ii) Would it be possible to maintain discretion as to his sexual identity whilst appearing to be in a heterosexual relationship, and if not would the consequences of such societal "outing" be persecutory?

2.The RRT failed to take into account relevant considerations, those being:

a) Whether societal pressure to marry impacted differentially on the applicant as a homosexual.

b) Whether the applicant would be able to resist societal pressure to marry.

c) Whether resistance to societal pressure to marry would lead to consequences which may themselves be persecutory.

d) Whether compliance with societal pressure to marry would as a consequence lead to the applicant suffering persecution by being compelled to engage in heterosexual sex.

e) Whether it would be possible for the applicant to remain discreet as to his sexual orientation in the context of his marriage to a woman.

Submissions

5. Both parties filed written submissions and also made oral submissions when the matter was heard on 14 July 2004. Mr Karp, for the applicant, submits that the paragraph quoted above from the decision of the RRT appears to involve two findings in the context of being a homosexual man:

f) pressure to marry is not persecution; and

g) being pressured to marry is not persecution for a Convention reason.

6. He further submits as follows:

> In the applicant's submission the RRT has missed every relevant point. In legal terms it has failed to ask itself several fundamental questions stemming from its findings that the applicant is homosexual and that he

will be under intense societal pressure to marry. He submits that the RRT is under an obligation to consider and address the issues, relevant to whether the applicant has a well founded fear of persecution, stemming from its own findings.

The Full Court of the Federal Court summarised the position in *Minister for Immigration v Sameh* [2000] FCA 578 by reference to the Court's jurisprudence:

> *In* Thevendram v Minister for Immigration and Multicultural Affairs *[1999] FCA 182 (Spender, North and Merkel JJ, 9 March 1999) the Full Court observed that:*
>
> > *"... the inquisitorial and non-adversarial function of the RRT and the combined effect of the provisions governing the exercise of its inquisitorial powers (ss 414(1), 420, 425, 426, 427, 428 and 430) are such that the RRT is required to determine the merits of the case and in doing so each of the material issues raised by the material and evidence before it. That duty, in our view, is a fundamental incident of the statutory function of the RRT. In determining those issues the RRT must make findings on the questions which are central to the case raised on the material and evidence before it: see also* Calado v Minister for Immigration and Multicultural Affairs *(Federal Court of Australia, Moore, Mansfield and Emmett JJ, 2 December 1998) at 21-22;* Buljeta v Minister for Immigration and Multicultural Affairs *(Federal Court of Australia, Katz J, 4 December 1998) at 13-14; and* Logenthiran *at 13 per Wilcox and Lindgren JJ and 1-2 per Merkel J. The cumulative effect of the statutory provisions to which we have referred is that the RRT is under a duty to review the decision of the delegate on the merits and in doing so must have regard to all of the material and evidence before it and make findings on all of the material questions of fact raised by that material and evidence.*
> >
> > *42 Similar views were expressed in* Sellamuthu v Minister for Immigration & Multicultural Affairs *[1999] FCA 247 (Wilcox, Hill and Madgwick JJ, 19 March 1999) and the cases discussed at pars 21-23 of their Honours' reasons. As that consideration indicates, the failure to address all the substantial matters which might bear on whether an applicant for a protection visa meets the Convention requirements of a refugee amounts to a constructive failure to exercise its jurisdiction. Such a decision will be one "not authorised by the Act" within the meaning of s 476(1)(c) of the Act, and may involve an error of law involving an incorrect interpretation*

> *of the applicable law or an incorrect application of the law to the facts as found within the meaning of s 476(1)(e) of the Act.*

That case was of course decided under the now repealed Part 8 of the Migration Act, and the finding of error in failing to comply with the requirements of s 430 Migration Act was itself erroneous in law (see *Minister for Immigration v Yusuf* (2001) 206 CLR 323). Nonetheless, the failure to "review" a decision by failing "…to address all the substantial matters which might bear on whether an applicant … meets the Convention requirements of a refugee amounts to a constructive failure to exercise its jurisdiction.

As to the question of whether being pressured to marry is discriminatory for a Convention reason, the RRT failed to consider whether societal expectations could have a differential impact on homosexuals as a particular social group, because of their sexual orientation. In *SZAOD v Minister for Immigration* [2004] FMCA 89, the Court said at [16]:

> *"I accept that a failure to consider the differential impact of a law of general application may constitute persecution:* Chen Shi Hai v Minister for Immigration *(2000) 201 CLR 293 at 301 at [21]. By analogy of reasoning it may be a jurisdictional error to fail to consider the differential impact of social pressure upon a particular social group."*

Here, unlike *SZAOD*, there was such a failure. The RRT contented itself with a finding that pressure to marry and have children is a result of universal societal pressure. It made no finding as to whether the applicant could or would resist that pressure, or indeed what the impact upon him might be. This was a necessary question that the RRT avoided.

There was no finding in this case, as there was *in SZAOD*, that the applicant could or would be able to resist pressure to marry. In those circumstances it needed to ask itself what would be the possible consequences of (a) succumbing to pressure to marry, and (b) resisting such pressure.

I submit that it would be persecutory to force a homosexual man to have sex with a woman. One would think that if the position were slightly different – i.e. if a heterosexual man were forced to have homosexual sex then it certainly would be persecutory. The question of whether being forced into a heterosexual relationship by societal pressure is persecution is in itself a fundamental issue and one that the RRT failed to address.

> Similarly, the RRT failed to ask itself whether the applicant could remain discreet about his sexual orientation should he be forced into a heterosexual relationship. There is no inkling as to the consequences of discovery of the applicant's homosexuality in the course of the marriage. This was another necessary question that the RRT did not ask.
>
> The RRT also failed to consider whether the consequences of resistance to marriage would be persecutory. The applicant claimed that this would bring disgrace on his family and social ostracism upon him. The social and financial consequence of this may or may not be persecutory. There was evidence that the RRT cited that goes to the serious results of societal outing.
>
> It was necessarily for the RRT to decide on these issues. Its failure to do so indicates that it failed to complete the exercise of its jurisdiction.

7. Mr Karp expanded on these submissions orally. He began with the proposition that the RRT must decide the application on the claims made by the applicant and must make findings upon each of those claims. He drew my attention to the claims made by the applicant, in particular those set out in the court book on pages 21, 37, 38, 39, 63 and 64. He also drew my attention to the opinions given by Mr S Khan, in particular the following statement at page 77 of the court book:

> *A man must get married. If he doesn't then there is something wrong with him, he shames his family and community, he is sick. The issue here then is not so much the sexual behaviour, but marriage and children. Sexual behaviour must be kept invisible. To make it visible is to bring shame.*

At page 82 of the court book Mr Khan says:

> *Marriage is the central issue. It is a compulsory duty, both family and community and is part of the definition of "adult". It is a liaison between two families and to go against family decisions for whatever reason is to bring shame to the families. To remain unmarried also reflects upon the honour of the family.*

8. As Mr Karp notes, the presiding member had no difficulty in accepting that homosexuals constitute a particular social group in Bangladesh (court book, page 286). The presiding member was also clearly

influenced by the opinions advanced by Mr Khan. However, the presiding member found no Convention nexus with the pressure upon the applicant to marry. The presiding member found that the pressure on the applicant to marry was a universal and non-discriminatory societal expectation. The presiding member found that there was no real chance of the applicant coming to harm for other reasons because of his homosexuality.

9. In Mr Karp's submission, the presiding member fell into error by overlooking an element of the applicant's claims, namely that he faced a serious risk of harm not simply from the pressure upon him to marry but from the consequences for him of a heterosexual marriage. Secondly, Mr Karp submits that the presiding member fell into error in determining that the pressure to marry carried no Convetion nexus. He submits that the RRT failed to consider the differential impact of pressure to marry upon homosexuals, as compared to heterosexuals.

10. Mr Johnson, for the Minister, makes the following written submissions:

> The RRT did not fail to deal with the applicant's claims.
>
> The applicant alleges in paragraph 11 that the RRT failed to consider whether social expectations (particularly the expectation to marry) could have a differential impact on homosexuals as a particular social group, because of their sexual orientation. That is not so. Contrary to the applicant's submissions, there was no failure to consider whether the universal social pressure to marry in Bangladesh had a differential impact on gays (c.f. *SZAOD v Minister for Immigration* [2004] FMCA 89). The RRT accepted that there was an expectation in Bangladesh that all persons would marry (court book, pages 289.1- 289.4) and that "this would be difficult for a gay person" (court book, page 289.2), but it expressly raised (at court book, page 289.25) the issue of whether the pressure to marry would amount to persecution (as well as whether it would be for a Convention reason) and proceeded to find at (court book, page 290.25) that that expectation of people who were gay was not such as to amount to persecution (and also was not for a Convention reason) and that there was no real chance that the applicant "could face harm or deprivation amounting to persecution for a Convention reason". These were findings of fact within the domain of the RRT.
>
> The applicant then alleges in paragraph 13 that there was here, unlike the case of *SZAOD*, no finding that he could or would be able to resist pressure to marry. At page 288.4 of the court book, the RRT noted that

the applicant was currently 40 years of age (court book, page 288.4) and found "no basis… to consider that his pattern of behaviour would change in the reasonably foreseeable future". At pages 289.5-289.8 of the court book, the RRT found that "he would not at any time in the reasonably foreseeable future either act in a manner that would identify him as being gay, nor would he be open to his family and tell him he is…". It also found that "the expectation for him to marry is not an act of harm or detriment…." (court book, page 289.7). There is accordingly an acceptance, or at least an implied finding, that the applicant will continue to remain unmarried.

The applicant then argues, also in paragraph 13, that there was then a failure by the RRT to ask what would be the possible consequences of either succumbing to the pressure, or resisting the pressure. The first of those questions did not arise, because, on a fair and beneficial overall reading of the RRT's reasons, it is at least implied that the RRT saw the applicant remaining unmarried and as continuing, through choice, to live discreetly as a homosexual in Bangladesh. The RRT referred to the claim that the applicant's family may force marriage on him (at 288.9). The expectation to marry was not found to be any more than the expectation or norm acknowledged at court book, pages 289.1 and 290.1. It follows that the issue raised by the applicant's counsel, in paragraph 14, of whether being forced to marry a woman would be persecution for a gay man, did not arise. So too the questions raised by the applicant's counsel in paragraph 15 of whether the applicant could remain discreet within a heterosexual marriage did not arise. A RRT is not obliged to deal with hypotheses that are not raised[1], or are excluded by its other findings[2]. Also, even if the applicant did (contrary to the RRT's findings – court book, page 288) come to be known as gay to his family or more widely, on the RRT's findings, he would face no harm if he continued to practise his sexuality privately and not in public places (court book, pages 286.7-287.6; 288.4; 289.9-290.3), as he would because that is his nature and choice (court book, page 288) – independently of whether he was in Bangladesh (court book, pages 288.1- 288.4).

The second question raised by the applicant's counsel in paragraph 13, of the consequences of resisting the pressure to marry, further addressed by him in paragraph 16, was answered by the RRT. Again, a fair and beneficial overall reading of the RRT's reasons is required. Such a reading shows that the RRT was of the view that continuing to resist the pressure to marry would not amount to "persecution" of the applicant, even though it would be "difficult" for a gay person (see

[1] *Re Minister for Immigration; Ex parte S134/2002* (2003) 195 ALR 1 at [31]-[32] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ
[2] e.g. *Abebe v Commonwealth* (1999) 197 CLR 510 at [59] per Gleeson CJ and McHugh J

especially court book, pages 289-290). The RRT found no basis to see this 40 year old behaving any less discreetly in the future than he had in the past (court book, page 288.4), which was to be by "nature" (court book, page 288) and by "choice" (court book, page 288.3) discreet (top court book, pages 288; 289.9) unknown to be gay by anyone in Bangladesh including his family (court book, pages 289.5-289.8).

Further and in the alternative, even if (contrary to the respondent's submissions) it is assumed in the applicant's favour that the RRT had a duty to make a finding as to whether the applicant faced a real chance of harm sufficiently serious to amount to "persecution", either as a result of continuing to resist social pressure to marry or as a result of bowing to that pressure, and that the RRT did not fulfil that obligation, the applicant could still not succeed in the present application. This is because the RRT's decision could not have been affected by the error, as the same decision would still have resulted from RRT's finding that there was no "Convention reason". The RRT found that the expectation was "universal and non-discriminatory", applicable "to all males and all females" (court book, page 289.3), "not selective" (court book, page 289.3) and not based on a Convention reason (court book, pages 289.7; 290.2). The RRT further found that any pressure from the applicant's parents would be "for the universal societal expectation and no other reason" (court book, page 289.4). These also were findings of fact within the domain of the RRT.

Understandably, no error of the kind discussed in *Appellant S395/2002 and S396/2002 v Minister for Immigration* (2003) 203 ALR 112 is alleged. The way in which that case is to be applied is illustrated by the decision of the Full Court of the Federal Court of Australia in *NAEB v Minister for Immigration* [2004] FCAFC 79 (30 March 2004). In *NAEB* at [23]-[26], North and Lander JJ, dealing a Falun Gong practitioner who claimed a fear of persecution in China based upon restrictions there operative upon the practice of Falun Gong, held:

> *"23. Resolution of this appeal depends upon the proper reading of the Tribunal's reasons. If the Tribunal accepted that the appellant would modify his conduct, but failed to ask whether that would have occurred as a result of the threats of serious harm to the followers of Falun Gong, the case would fall within the reasoning of the majority judgments in* S395/2002.
>
> *24 But in our view, the Tribunal did not follow such a path of reasoning. The Tribunal introduced its reasoning by acknowledging that some Falun Gong practitioners face serious human rights abuses. It then embarked on an examination of the commitment to Falun Gong which the appellant had established. The Tribunal generally formed an adverse view of the appellant's*

reliability. Then, it examined the extent of the appellant's practice of Falun Gong in Australia. It found that he had exaggerated his attendances at Falun Gong exercise sessions. It also found that the appellant's explanations of Falun Gong beliefs were vague, although it discounted his responses on the subject because of the difficulty which he faced in explaining abstract concepts through an interpreter. The Tribunal also found that the appellant had not been arrested in the PRC for practising Falun Gong, and had not been asked by the PSB to attend a police station in relation to his practice of Falun Gong. Nor, the Tribunal found, were his difficulties in obtaining a passport to do with his practice of Falun Gong.

25 All of these considerations led the Tribunal to the view that the appellant was not a committed follower of Falun Gong. The Tribunal found that he was not very familiar with Falun Gong, and his practice was limited. It found only that he had "some involvement".

26 In the underlined sentence in the passage in bold at [14] relied upon by the appellant, the Tribunal incorporated all its previous reasoning to support the conclusion that the requirement of the authorities of the PRC of the appellant to renounce Falun Gong would not constitute persecution. The previous reasons explained why the Tribunal did not regard this requirement as persecution of the particular appellant. The substance of these reasons were that he so lacked commitment to Falun Gong that it would not trouble him to renounce his belief. Similarly, his limited commitment to Falun Gong meant that if he were confined to the practice of Falun Gong in private, his beliefs and practices would not be compromised in a significant way. Viewed in this way, the Tribunal did ask why the appellant would renounce Falun Gong, or practice Falun Gong in private if returned to the PRC. Whilst he may not have done so if the authorities in the PRC did not impose the requirements, the Tribunal found that his compliance with those requirements resulted from his lack of commitment to Falun Gong, not from a fear of the consequences threatened by the authorities. Thus understood, the reasoning in this case does not exhibit the error identified in the majority judgment in S395/2002.*"*

Here, the RRT did not fail to ask why the applicant would be discreet, or whether being discreet would be, in his case, "persecution". The RRT found that:

h) the applicant would be discreet anyway "by choice, regardless of whether it is Bangladesh or abroad" (court book, page 288.3) – and therefore regardless of the existence of any attitudes in Bangladesh;

i) his discreet pattern of behaviour would not change in the reasonably foreseeable future (court book, page 288.4);

j) he would not attract adverse attention in Bangladesh (court book, pages 288.4-288.5);

k) the pressure to marry would not itself amount to persecution (court book, page 290.3), or be persecutory for him (court book, page 289.7), even though "this [pressure to marry] may be difficult for a gay person" (court book, page 289.3).

As there is no jurisdictional error, the application to the Court is out of time and the respondent's Notice of Objection to Competency should be upheld. The application should be dismissed, with costs.

11. In his oral submissions Mr Johnson drew my attention to the observations of His Honour Madgwick J on the question of differential impact in *MMM v Minister for Immigration* (2000) 170 ALR 411 at 414. He also drew my attention to the caution issued by the High Court, concerning the distraction from the real test of persecution that tends follow from resort to the notion of differential impact, in *Minister for Immigration v Haji Ibrahim* (2000) 204 CLR 1 at 51 per Gummow J.

12. Mr Johnson submits that the distinction between the pressure to marry and the consequences of marriage advanced on behalf of the applicant is artificial. He submits that the presiding member, on page 289 of the court book, dealt not only with the existence of a Convention nexus, but also with the issue of whether, in any event, the applicant would suffer persecution by reason of being pressured to marry. He submits that the applicant did not claim that he would succumb to that pressure. He was 40 years of age at the time of the RRT decision and the RRT found that the pattern of behaviour he had followed to that point was unlikely to change. In Mr Johnson's submission, what the applicant feared was the familial expectation that he would marry. Mr Johnson conceded that there was no express finding by the presiding member that the applicant would not succumb to pressure to marry but submits

that there was an implied acceptance by the presiding member that the applicant would not succumb. Further, Mr Johnson submits that an assumption that marriage would lead to the applicant's homosexuality being revealed is not reasonably open on the facts. Based upon the advice of Mr Khan, the presiding member found (court book, page 287) that those gay men who are at risk are those who frequent public areas for sexual contacts and that the type of problems they face are harassment, possible rape and extortion.

13. In response to questions from me, Mr Johnson conceded that there was no factual assumption made by the presiding member that marriage would not cause the applicant's homosexuality to be revealed, however, he disputed a further suggestion from me that the presiding member's reasoning assumes that if the applicant married the concealment of his sexual orientation depended upon him obtaining a discreet partner.

14. Mr Johnson does not dispute that a legal error by the presiding member in determining the non existence of a Convention nexus and a legal error by the presiding member in overlooking an element or integer of the applicant's claims would both be jurisdictional errors invalidating the decision of the RRT. He submits, however, that no such errors occurred in this case. He submits that the RRT properly considered the question of whether a Convention nexus existed and secondly considered properly whether the applicant faced a serious risk of harm in any event.

15. In reply, Mr Karp directed my attention to the decision of His Honour Allsop J in *Fang Wang v Minister for Immigration* [2003] FCA 1044 at [16]. Mr Karp pointed out that the presiding member's statement on page 288 of the court book concerning the age and pattern of behaviour of the applicant was directed to whether he would be discreet, rather than whether he would marry. He directed my attention once again to the claims of the applicant at pages 38 and 39 of the court book where the applicant raised the issue of marriage. He submits that the presiding member failed to consider that element of the applicant's claims.

16. Mr Karp also sought to query the authority of *MMM v Minister for Immigration*, noting that the decision was made before the decision of

the High Court in *Chen Shi Hai v Minister for Immigration* (2000) 201 CLR 293. He submits, in any event, that Madgwick J in *MMM* dealt only with the question of pressure to marry, not the consequences of marriage.

Reasoning

17. The issues arising in this case are similar to the issues arising in *SZAOD v Minister for Immigration* [2004] FMCA 89 that I decided on 19 March 2004. Mr Karp seeks to distinguish this case from *SZAOD*. Mr Karp submits that the differences between *SZAOD* and this case are that the presiding member in this case did not determine whether or not the applicant would be able to resist the pressure upon him to marry and further erred in determining the claim, insofar as it rested upon pressure to marry, by finding that there was no Convention nexus. Mr Johnson demurs but submits that one distinction between *SZAOD* and this case is that the decision of the High Court in *Appellant S395 v Minister for Immigration* [2003] 78 ALJR 180 has no application to this case, because the RRT in this case clearly did not divide homosexual men into discreet and non-discreet categories. Neither did the RRT proceed on any assumption as to the way in which the applicant could be expected to behave, except by noting that the applicant would be likely to continue to behave as he did in the past. I accept that submission. The issues for determination are those raised in the amended application and submissions, namely whether the RRT erred in finding that there was no Convention nexus with the pressure upon the applicant to marry, by failing to consider the differential impact of that pressure upon the applicant and, secondly, whether the RRT erred by failing to take into account a relevant consideration, namely the applicant's claim that he would suffer serious harm amounting to persecution if he were forced to marry.

18. In *SZAOD v Minister for Immigration* at paragraph 16 I said the following:

> *I accept that a failure to consider the differential impact of a law of general application may constitute persecution:* Chen Shi Hai v Minister for Immigration *(2000) 201 CLR 293 at 301 at [21]. By analogy of reasoning it may be a jurisdictional error to fail to consider the differential impact of social pressure upon a*

> *particular social group. Here, there was no such failure. The RRT found that the social pressure upon the applicant, as a homosexual, would be no more harmful than the social pressure upon a heterosexual man or woman to marry against their will. The applicant had contended before the RRT that marriage would be unthinkable for him (court book, page 73 at [19]) and that he would prefer to commit suicide than marry (court book, page 180). Mr Karp submits that the RRT erred in failing to consider the consequences for the applicant as a homosexual of being forced to marry. In my view, this really boils down to a determination of whether or not the RRT considered whether the applicant might be forced to marry against his will. Either the RRT found that the applicant would be able to resist the pressure upon him or the RRT failed to consider the consequences if the applicant succumbed to the pressure upon him. In my view, the presiding member accepted that the applicant would refuse to marry, based upon the applicant's own evidence that marriage was completely unacceptable to him. It logically followed that what the applicant feared was not marriage (which he rejected) but ongoing pressure to marry in the face of his rejection. On that basis, I find that there was no failure on the part of the RRT to consider the issue.*

19. It was implicit in my reasoning in *SZAOD* that the consequences of successfully resisting pressure to marry would not constitute persecution. I maintain that view. However, the same could not be said of the consequences of succumbing to that pressure. This case can be distinguished on the facts from *SZAOD*. Unlike in *SZAOD*, in this case it was an open question whether or not the applicant would be able to resist the pressure on him to marry. I reject Mr Johnson's submission that there was an implied finding by the RRT that the applicant would be able to resist the pressure. The statement by the presiding member on page 288 of the court book that the applicant was then 40 years of age and that his pattern of behaviour would not change, and that accordingly he would not come to the adverse attention of people in Bangladesh, in my view, is a reference to the discretion exercised by the applicant, rather than his attitude to a heterosexual marriage.

20. Indeed, it is arguable that the reference to the applicant's age and continuance of an attitude of discretion supports a conclusion of an implied finding that the applicant would succumb to pressure to marry. On the applicant's evidence, his age and the fact that his younger

brother remained unmarried and could not marry if the applicant were in Bangladesh increased the pressure. In addition, the discretion shown by the applicant indicated that he was unlikely to voluntarily reveal his homosexuality to his family. The presiding member found (court book, page 289) that the applicant would not "open up" to his family and tell them that he is a homosexual. In the circumstances, he would be unable to explain his reasons for rejecting a heterosexual marriage. It is plausible that the applicant might choose the discreet course of agreeing to enter into a heterosexual marriage in preference to revealing his homosexuality. That is, however, an exercise of reading into the presiding member's reasons a lot of reasoning that is not there. The preferable approach is to consider what is there. There is no finding on the question of whether or not the applicant would be able to resist the pressure upon him to marry, in contrast to the decision of the RRT in *SZAOD*. I accept Mr Karp's submissions that it was part of the applicant's claims, not only that he faced a well-founded fear of persecution by reason of the pressure upon him to marry, but also that he faced persecution by being potentially forced into a heterosexual marriage[3]. The RRT recognised that second element of the applicant's claim at page 288 of the court book where the presiding member said:

> *He has claimed that he does not wish to marry and that the social customs of his country are such that his family could impose this on him.*

21. The presiding member only dealt with the first element of the applicant's claim, not the second. At page 289 of the court book the presiding member said:

> *…what is of relevance in the current matter is whether or not the pressure to marry would amount to persecution and whether it would be motivated by a Convention reason.*

22. At page 289 of the court book the presiding member concluded:

> *I accept the advice from [Mr Khan] who states:*
>
> > *"the real issue for the majority of gay-identified men and some men who have sex with men is the social, cultural, and religious pressure regarding marriage and children".*

[3] see especially court book, pages 38 and 39

As discussed above, I find that this does not constitute persecution for a Convention reason.

23. The error made by the RRT was to re-cast the applicant's claim on a more limited basis than it was put.

24. The failure by the RRT to consider and make a decision on the applicant's claim that he faced persecution by being forced into a heterosexual marriage was a failure to consider an element or integer of the applicant's claims. It was, therefore, a failure to take into account a relevant consideration. It is well settled that such a failure is a jurisdictional error which may invalidate a decision of the RRT: *SDAV v Minister for Immigration* [2003] FCAFC 129. However, Mr Johnson submits that the presiding member's findings on page 289 of the court book mean that, even if there was no consideration of the risk of the applicant being forced into a heterosexual marriage, the absence of any Convention nexus with the pressure to marry means that a heterosexual marriage coming about as a result of social pressure to marry cannot be persecutory under the Convention. As I understand Mr Johnson's submission, it follows that even if the RRT overlooked a relevant consideration, the absence of any Convention nexus means that the outcome of any rehearing before the RRT would be the same and that, accordingly, the application should be dismissed in the exercise of the Court's discretion.

25. This submission is supported by the decision of the Federal Court in *MMM*. In that case, at page 414, His Honour Madgwick J said:

> *It is to be assumed that it would be as deeply hurtful and intrusive for the applicant to submit, if returned to Bangladesh, to Bangladeshi social and familial norms requiring him to marry and procreate as it would be for a heterosexual person to be placed under overwhelming pressure to submit to a homosexual relationship.*
>
> *While the impact of familial pressure to marry would likely fall harder on an unwilling homosexual than an unwilling heterosexual, it seems to me to be correct, as the Tribunal held, that the pressure is nevertheless not exerted "for reasons of" membership of the social group of homosexuals. In Bangladesh, the pressure falls on all single men, and it did not appear that it was applied differentially as between homosexuals and others.*

For that reason, fear of Convention persecution was correctly held not to have been shown.

26. His Honour then went on to consider the possibility that the applicant in that case might have suffered a well-founded fear of persecution as a result of a forcible marriage by reason of membership of some social group other than homosexuals. In my view, it is clear from that decision that Madgwick J was dealing with not just the issue of pressure to marry but the potential outcome of that pressure. He found no Convention nexus for the same reason as the presiding member in this case. The decision in *MMM* is a persuasive authority, although not strictly binding upon me.

27. In contrast, the decision of the High Court in *Minister for Immigration v Haji Ibrahim* is binding authority. In that case, Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ all found that notions of "civil war", "differential operation" and "object" or "motivation" of civil war are distractions from applying the text of the Convention definition of "refugee" and should not be adopted. Gummow J, at pages 50 and 51, said, in relation to the question of "civil war", "differential operation" and "motivation":

> *The criteria accepted and applied by the Full Court of "differential operation" and "motivation" stem from the reasoning of the House of Lords in* Adan v Secretary of State for the Home Department [1999] AC 293. *In turn, that reasoning reflected the terms of the "issue" which had been framed for their Lordships in the terms which I have repeated earlier in these reasons. It asked whether a "state of civil war" could, in certain circumstances, "give rise to [a] well-founded fear of persecution" in the sense of the Convention definition. This assumed that conditions in Somalia answered the description of a state of civil war. The particular legal issue which on that assumption was posed to the House of Lords was the application of the Convention definition to an "individual claimant" who was "at no greater risk of such adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership".*
>
> *The result, with respect, was to invite the House of Lords to proceed upon an hypothesis flawed in several respects and thereby to diminish the strength and utility of conclusions reached on the journey for which this had been the point of departure…*

> *To proceed as was done in* Adan *involves a risk that there will be a blurring of the distinction between the persecutory acts which the asylum seeker must show and the broader circumstances leading to those acts.*
>
> *It does not advance the inquiry called for by the Convention definition to ask of a particular individual whether that person was to be differentiated from other members of the general population who were all at risk so long as the "civil war" continued…*
>
> *The notions of "civil war", "differential operation" and "object" or "motivation" of that "civil war" are distractions from applying the text of the Convention definition. In so far as* Adan *and the decision of the Full Court in* Minister for Immigration v Abdi *(1999) 87 FCR 280 and the present case expound or apply them, those decisions should not be followed.*

28. I see no difference in principle between a civil war affecting all members of society without distinction and a society wide convention resulting in pressure to marry that falls equally on all the members of the society. In either case, on the authority of the decision of the High Court in *Haji Ibrahim*, it is an error to require an applicant to demonstrate a differential impact upon him of the relevant harm. It must follow from that reasoning that there could be no error in the RRT failing to consider the differential impact on the applicant of the society wide social pressure to marry. Indeed, it would seem that it would have been an error if the RRT had considered the matter as a question of differential impact. I accept that this is not consistent with what I said in *SZAOD* at [16]. Neither is it consistent with what the High Court said in *Chen Shi Hai v Minister for Immigration* at [21]. Frankly, I am unable to reconcile those observations in *Chen Shi Hai* about "differential impact" with the reasoning of the High Court in *Haji Ibrahim*. If it is an error for the RRT to require an applicant to demonstrate a differential impact of some generalised harm upon him, why is it an error for the RRT to fail to consider such a differential impact? In my view, the decision in *Chen Shi Hai* is better understood as a case concerning the discriminatory operation of a law of general application rather than an authority on the notion of differential impacts of generalised harms. In other words, the question is not whether the relevant harm has a differential impact upon an individual but whether the individual faces persecution. A law of general

application may be applied against individuals in a persecutory manner: *SZALM v Minister for Immigration* [2004] FMCA 262 at [21]. In any case, one must not be distracted from consideration of the operation of the relevant provisions of the Refugees Convention. The Convention refers to a person having a well-founded fear of being persecuted for reasons of (relevantly) membership of a particular social group. In considering the application of the Convention it is necessary to consider not only whether the applicant has a well-founded fear but also whether the applicant's fear is a fear of being persecuted. This leads inexorably to the question of, what is persecution? The term is not defined in the Refugees Convention.

29. In Australia, statutory guidance is provided in s.91R of the Migration Act. Section 91R(1) relevantly provides that persecution is not to be taken to be persecution for a Convention reason unless the reason is the essential and significant reason for the persecution, and the persecution involves serious harm to the applicant, and the persecution involves systematic and discriminatory conduct. The section identifies a range of physical or economic harms but does not limit the meaning of "serious harm" that it inserted by s.91R(1)(b) as the relevant criterion.

30. The *Rome Statute of the International Criminal Court*, 1998: article 7(2)(g) defines persecution in the context of "crime against humanity" as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". The focus of the Refugees Convention is on the victim, not the perpetrator, and the Rome Statue is of no particular use in interpreting the Refugees Convention. Nevertheless, in my view, it should be accepted that a breach of an internationally recognised fundamental human right can establish persecution for the purposes of the Refugees Convention. There is academic support for that approach overseas[4]. There is also judicial support for that approach overseas: *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 at 709 and 733. The position in Australia appears less clear, although some endorsement of that approach can be found in *Minister for Immigration v Khawar* (2002) 210 CLR 1 and in *Minister for Immigration v Respondents S152/2003* (2004) 205 ALR 487 at [19]-[21]. On that

[4] see "The Intersection of Human Rights Law and Refugee Law" by Rodger Haines QC, a paper prepared for the June 2004 meeting of the Australia-New Zealand chapter of the IARLJ.

approach, it is necessary to consider what "right" is being asserted by the refugee claimant. If that right lies within the parameters recognised by international human rights law, a risk of being persecuted for exercising that right would properly be regarded as satisfying the "being persecuted" limb of the Convention:

> *If the relevant right is not a core human right, the persecution standard of the Refugees Convention is simply not engaged. If, however, the right in question is a fundamental human right, the next stage of the enquiry is to determine metes and bounds of that right. If the proposed action in the country of origin falls squarely within the ambit of that right the failure of the state of origin to protect the exercise of that right, coupled with the infliction of serious harm, should lead to the conclusion that the refugee claimant has established a risk of "being persecuted". In those circumstances, there is no duty to avoid the anticipated harm by not exercising the right, or by being "discreet" or "reasonable" as to its exercise.*[5]

31. What right was being asserted by this applicant? On one view, it was the right to follow his sexual orientation of choice. More particularly, however, it was the right to marry a person of his choosing. Paragraph 3 of Article 23 of the *International Covenant on Civil and Political Rights* provides that:

> *No marriage shall be entered into without the free and full consent of the intending spouses.*

32. Article 16, paragraph 2 of the *Universal Declaration of Human Rights* provides that:

> *Marriage shall be entered only with the free and full consent of the intending spouses.*

33. The same provision is made in Article 16(b) of CEDAW[6].

34. I find that the right to refrain from entering into a marriage, except as an act of free choice, is an internationally recognised and fundamental human right. The applicant was asserting before the RRT that a fundamental human right he enjoyed would be impugned should he return to Bangladesh. He was asserting that there was a risk that he

[5] Rodger Haines QC, op cit at [3]

[6] The Convention on the Elimination of Discrimination Against Women.

would be forced into a marriage without his consent. In my view, the consequences of a homosexual being forced to participate in a heterosexual marriage not freely entered into constitutes "serious harm" for the purposes of s.91R.

35. The interference with the fundamental human right asserted by the applicant by or on behalf of the State of Bangladesh would clearly be persecutory. Here, however, the interference threatened would come about not by or on behalf of the State but as a result of general social pressure. The RRT stated (correctly) at page 265 of the court book that persecution for the purposes of the Convention must have an official quality, in the sense that it is official, or officially tolerated, or uncontrollable by the authorities of the country of nationality. It may be enough that the Government has failed or is unable to protect the applicant from persecution. The issue then is whether effective State protection is available in Bangladesh from the general social pressure to marry. In that regard, the proper focus of attention should be on the reasons for the refugee claimant's predicament rather than on the motivation of the persecutor: *Chen Shi Hai v Minister for Immigration* at [33]. There was no consideration of that issue by the RRT. The RRT did not get to that point because the presiding member concluded that there was no Convention nexus with the social pressure to marry. The presiding member proceeded on the basis that because the pressure was non discriminatory, there could be no Convention nexus. That was an error. If the applicant was unable to obtain effective State protection from the pressure because he was a homosexual the necessary discriminatory element would be established. The consequences of a forced heterosexual marriage pointed to serious harm. Further, the Convention nexus arises because the applicant was asserting a risk of the infringement of a fundamental human right. It did not matter that persons outside his particular social group were subject to the same risk.

36. I find that the RRT committed a jurisdictional error in making an error of law concerning the application of the Refugees Convention to the applicant's claims. I have already found that the failure to consider whether the applicant would be persecuted if he succumbed to pressure to marry was a jurisdictional error. It is possible that if this matter were returned to the RRT a different outcome for the applicant might

result. The RRT might find that effective State protection for homosexuals against the general social pressure to marry is not available in Bangladesh and the applicant therefore should be accepted as a refugee. Conversely, it is possible that, in reconsidering the matter, the RRT might conclude that effective State protection is available. The RRT might also find that the applicant would be able to resist the pressure upon him to marry. If so, the applicant would have no need of State protection. However, as matters stand, that is not clear. Accordingly, the provision of relief would not be futile. I will, therefore, grant relief in the form of writs of certiorari and mandamus.

37. On the question of costs, costs should follow the event. Both parties were represented by counsel and fairly extensive preparation was required. In the circumstances of this matter, a costs order fixed in the sum of $5,000 is in my view called for. I will so order.

I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 13 August 2004