FEDERAL COURT OF AUSTRALIA

NBFP v Minister of Immigration & Multicultural & Indigenous Affairs [2005] FCA 287

MIGRATION – application for review of decision of the Refugee Review Tribunal affirming the decision of a delegate of the Minister of Immigration Multicultural and Indigenous Affairs not to grant a protection visa –whether Tribunal was in jurisdictional error in failing to ask the correct question – whether the Tribunal made jurisdictional error by basing its decision on a jurisdictional fact that did not exist or was not reasonably open – whether the Tribunal made jurisdictional error in failing to consider a critical claim made by the applicant and material in support of that claim – whether the Tribunal made jurisdictional error by misapplying the definition of persecution in the Refugees Convention by misconstruing s 91R(2) of the Act – privative clause - whether s 91R(2) of the Act is an exhaustive definition of 'serious harm' - whether cancellation of ho khau (household registration) amounts to 'serious harm' for the purposes of s91R(1)(b) of the Act.

Migration Act 1958 (Cth), ss 91R(1), 91R(2), 474(1)

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2 (cited)
Applicant A v Minister for Immigration and Ethnic Affairs & Anor (1997) 190 CLR 225 (cited)

NBFP v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

NSD 732 OF 2004

EMMETT J
23 MARCH 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD732 OF 2004**

BETWEEN:	**NBFP** **APPLICANT**
AND:	**MINISTER OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**EMMETT J**
DATE OF ORDER:	**7 FEBRUARY 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The Applicant pay the First Respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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NEW SOUTH WALES DISTRICT REGISTRY **NSD732 OF 2004**

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JUDGE:	**EMMETT J**
DATE:	**23 MARCH 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The applicant is a citizen of Vietnam. He arrived in Australia on 1 July 2003 and on 15 July 2003 lodged an application for a protection (class XA) visa under the *Migration Act 1958* (Cth) ('the Act'). On 22 October 2003, a delegate of the first respondent, the Minister for Immigration & Multicultural & Indigenous Affairs ('the Minister'), informed the Applicant of the decision to refuse to grant a protection visa. On 5 November 2003, the applicant applied to the second respondent, the Refugee Review Tribunal ('the Tribunal'), for review of the delegate's decision. On 2 April 2004, the Tribunal affirmed the decision not to grant a protection visa.

2 The applicant travelled to Australia by boat with over 50 other individuals, including many members of the applicant's family. Twenty-five separate applications for protection visas, including the applicant's, were lodged in respect of those individuals. All of the applications were refused and applications for review were made to the Tribunal by all of the unsuccessful applicants. The applications were dealt with by three different members of the Tribunal, being Members Jacovides, Griffin and Lincoln. Nine applications, including the present applicant's application, came before the Tribunal constituted by Member Jacovides.

Applications for review by the other passengers on the boat came before the Tribunal constituted by Members Griffin and Lincoln.

3 Similar written claims regarding family background, circumstances in Vietnam, political views, involvement with a group known as the Resistance Force ('RF'), the journey to Australia and activities in Australia were made on behalf of all applicants. The applicants were all represented by the same solicitors, who provided essentially generic submissions, indicating that each of the applicants faced much the same risk of harm in Vietnam for much the same reasons. However, after discussing the claims with each of the applicants before him, and obtaining information from each of them concerning their individual circumstances, Member Jacovides concluded that significant differences existed among the applicants, particularly with regard to political opinion.

4 Member Jacovides concluded that two of the nine applicants before him were committed political activists and were at risk of harm by the authorities in Vietnam. Decisions were made that those applicants should be granted protection visas. However, Member Jacovides concluded that the other seven applicants, including the present applicant, are neither committed political activists nor persons at risk of harm by the authorities in Vietnam. Accordingly, the decisions of the Minister's delegate in those matters were affirmed. The Tribunal, differently constituted, also affirmed most of the other decisions not to grant protection visas.

5 Some 22 separate proceedings, seeking Constitutional writ relief in relation to the decisions of the Tribunal, were subsequently commenced in the Federal Court of Australia by unsuccessful applicants, including the present proceeding. Having regard to the similarity in the factual and procedural background to those 22 separate proceedings, all matters came before me for directions as list judge. Each of the applicants was represented by the same solicitors and counsel. The Minister was represented in each case by the Australian Government Solicitor. By consent, directions were given for three of the applications to be heard on 7 and 8 February 2005. The other proceedings were concurrently listed for directions, since it was thought that the decisions in those three matters might give some guidance as to the further conduct of the other proceedings.

6 However, on 7 February 2005 the Court was informed that 15 of the proceedings, including two of those fixed for hearing, had been resolved. None of those proceedings had been dealt with by Member Jacovides. By consent, the Court made orders quashing the decisions of the Tribunal in each of those 15 proceedings and remitting the matters to the Tribunal for further consideration according to law. Another proceeding was adjourned, by consent, to enable an application to be made under s 417 of the Act for a more favourable decision to be substituted by the Minister.

7 Thus, there remained only one proceeding before me for hearing. The parties agreed that the remaining six proceedings determined by Member Jacovides be adjourned pending determination of the present proceeding.

LEGISLATIVE FRAMEWORK

8 Section 29(1) of the Act provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:

- travel to and enter Australia;
- remain in Australia.

Under s 31(1) of the Act, there are to be prescribed classes of visas. Under s 31(2), as well as the prescribed classes, there are the classes provided for in the succeeding sections of the Act, including s 36. Section 36(1) provides that there is to be a class of visas to be known as protection visas. Under s 36(2), a criterion for a protection visa is that the application is a non-citizen in Australia, to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees protocol (as both terms are defined in the Act), or is a non-citizen in Australia who is the spouse or a dependant of such a person, who holds a protection visa.

9 The Refugees Convention provides, in effect, that Australia, as a Contracting Party, has protection obligations to a person if that person is a **refugee**, as that term is defined in Article 1A(2) of the Refugees Convention. Relevantly, that means a person who, owing to a well-founded fear of being persecuted **for reasons of race, religion, nationality, membership of a particular social group or political opinion**, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

10 However, s 91R(1) of the Act provides that, for the purposes of the application of the Act to a particular person, Article 1A(2) of the Refugees Convention does not apply in relation to persecution for one or more of the reasons mentioned in Article 1A unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
(b) the persecution involves **serious harm** to the person; and
(c) the persecution involves systematic and discriminatory conduct.

Section 91R(2) then provides that, without limiting what is **serious harm** for the purposes of s 91R(1)(b), the following are instances of **serious harm** for the purposes of that provision:

(a) a threat to the person's life or liberty;
(b) significant physical harassment of the person;
(c) significant physical ill-treatment of the person;
(d) significant economic hardship that threatens the person's capacity to subsist;
(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

THE APPLICANT'S CLAIMS AND THE TRIBUNAL'S DECISION

11 The applicant claimed that, due to his involvement with the RF, his association with and support of, the former government of South Vietnam, his family background, the illegal departure from Vietnam in 2003, his activities in Australia, as well as widespread publicity in Australia regarding the circumstances and activities of persons on the boat, he would be considered a dissident by the government of Vietnam and subjected to harm amounting to persecution, including imprisonment, harassment, and denial of *ho khau*, or household registration. He also claimed that his family are known anti-communists and that he would be subject to circumstances amounting to persecution because he is a known anti-communist.

12 The solicitors said that the family backgrounds of the various applicants are generally classed as '*bad*', according to Communist Party of Vietnam classifications, and that the Vietnamese government has a history of stigmatising and blacklisting families over generations for political and religious expression, as well as for class affiliations. The applicant claimed, in particular, that, because his family were known to be extreme anti-communists, the government did not give him a licence for a bigger fishing boat, or financial assistance to get one. He claimed that, because of his family background, he was of interest and concern to the authorities and was not able to attend school.

13 The applicant and his solicitors referred on a number of occasions to the cancellation of *ho khau*, or household registration. The Tribunal cited the following '*overview*' of the *ho khau* system in Vietnam:

> *'To buy a house or land, to get married, to be employed, to register for a training course, to borrow from a bank, to register your child's birth, to get a motorbike licence, to go abroad, or to install a phone line if you are Vietnamese, you need a residential book. The book also contains a person's ho. Under Vietnamese laws, ho is official certification that defines the residential place of a citizen – a crucial component of citizenship. Residential registration has other ramifications. In Hanoi, for example, employment by a city agency usually requires candidates to have a city ho khau.'*

14 The solicitors' submissions asserted that mistreatment included denial of *ho khau*. The solicitors asserted that denial of *ho khau* seriously affects livelihood and welfare, and that, without *ho khau*, a person would not be able to get legal employment, apply for a business licence, file for a legal marriage certificate or send his children to regular schools. The submissions emphasised the disabilities that flowed from lack of *ho khau*. Both the applicant and his solicitors characterised the loss of *ho khau* as the loss of citizenship rights. The applicant claimed that his *ho khau* was cancelled by the authorities on 18 September 2003, after he had departed Vietnam.

15 The Tribunal accepted a number of the applicant's claims as follows:

- the applicant is a citizen of Vietnam and his father, who is associated with the former government of South Vietnam, was killed in 1977;
- the applicant was discriminated against by the government due to his family background and he did not receive the same level of government financial assistance

as other citizens of Vietnam;

- the RF is an anti-government organisation led by Nguyen Van Hoa and the applicant was one of six group leaders in the RF;
- Nguyen Van Hoa and the applicant's sister encouraged the applicant to participate in the distribution of anti-government leaflets on 30 April 2003 as a member of the RF;
- the applicant left Vietnam illegally by boat and on 18 September 2003 the applicant's *ho khau* was cancelled by the authorities;
- the government of Vietnam targets political and religious activists.

16 The Tribunal found that individuals who seek to confront the authorities and who are considered to be a threat to the government are at risk of being subjected to serious human rights violations, including imprisonment, if they actively oppose the government of Vietnam. However, the Tribunal was satisfied that it is only committed, persistent and outspoken activists who attract the adverse interest of the authorities in Vietnam. The Tribunal was satisfied that, in a population of almost 80 million citizens, few are considered sufficiently menacing to attract the adverse interest of the authorities and only key dissidents are targeted. The Tribunal was satisfied that being related to an activist will not in itself attract the adverse interest of the Vietnamese authorities, unless the individual concerned is also politically active. However, the Tribunal was not satisfied that the applicant is, or ever has been, a committed political activist. The Tribunal found that his evidence indicated that he had limited involvement in political activities. The Tribunal found that the applicant is not politically active, is not a committed activist and does not have the profile of a political dissident. The Tribunal was satisfied that the applicant will not be of interest to the authorities of Vietnam for reasons of political opinion in the reasonably foreseeable future.

17 The Tribunal accepted the applicant's claim that on 30 April 2003 he participated in the distribution of anti government leaflets organised by the RF. However, the Tribunal found that the RF was a minor political group, with a limited life span, resources and output, and was satisfied that the RF did not pose a threat to the government of Vietnam. The applicant's involvement with the RF amounted to only one political act, on the night of 30 April 2003, when he distributed pamphlets while members of his family kept watch. The Tribunal found that this had no significant or ongoing impact on the government of Vietnam. The Tribunal found that the applicant's fear that he will be subjected to persecution by the government in Vietnam because he was involved with the RF is not well founded.

18 The Tribunal repeated that it was satisfied that only committed and outspoken activists risk harm by the authorities in Vietnam, that the applicant is not such an activist and that the authorities in Vietnam will not consider him such an activist. The Tribunal found that the authorities in Vietnam did not demonstrate any particular interest in the applicant due to his family background and was satisfied that similar conditions would continue in the reasonably foreseeable future.

19 The Tribunal was satisfied that the applicant would be able to support himself and his family as he did previously, if he returns to Vietnam and that, in time, the applicant's ho khau would be reinstated. The Tribunal also found that the applicant is not at risk of persecution by the authorities in Vietnam due to his activities in Australia. The Tribunal was also satisfied that the applicant does not have a well-founded fear of persecution in Vietnam for reasons of religion. The Tribunal was not satisfied that the applicant would be subjected to serious harm amounting to persecution because he left Vietnam illegally. The Tribunal was not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Accordingly, the Tribunal concluded that the applicant does not satisfy the criterion set out in s 36(2) of the Act. For that reason, the Tribunal affirmed the decision of the Minister's delegate not to grant a protection visa to the applicant.

THE APPLICANT'S CLAIMS IN THE FEDERAL COURT

20 In this proceeding, the applicant claims a writ of *certiorari* removing the Tribunal's decision of 2 April 2004 into the Court to be quashed, an order quashing the Tribunal's decision and a writ of *mandamus* directing the Tribunal to reconsider and redetermine the application for a protection visa according to law. The applicant also claims an order restraining the Minister from acting upon or giving effect to the Tribunal's decision.

21 Section 474(1) of the Act provides that a **privative clause decision**:

- is final and conclusive;
- must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- is not subject to prohibition, *mandamus*, injunction, declaration or *certiorari* in any court on any account.

The term '*privative clause decision*' is defined in s 474(2) as meaning, relevantly, a decision

of an administrative character **made under** the Act. The Minister contends that the decision of the Tribunal is a privative clause decision within the meaning of s 474(2). However, a decision of the Tribunal affected by jurisdictional error is not a decision made under the Act (see ***Plaintiff S157/2002 v Commonwealth of Australia*** [2003] HCA 2). The applicant, by his further amended application, filed with consent on 7 February 2005, raises four grounds upon which he contends that the Tribunal's decision was affected by jurisdictional error, as follows:

1. The Tribunal based its decision upon a jurisdictional fact that did not exist or was not reasonably open.
2. The Tribunal failed to consider a critical claim by the applicant and material submitted in support of that claim.
3. The Tribunal failed to ask itself the correct question.
4. The Tribunal misapplied the definition of persecution in the Refugees Convention by misconstruing s 91R(2) of the Act.

22 The first two grounds are closely related and it is convenient to deal with those two grounds together. I shall deal separately with each of the third and fourth grounds.

1. THE TRIBUNAL BASED ITS DECISION UPON A JURISDICTIONAL FACT THAT DID NOT EXIST OR WAS NOT REASONABLY OPEN.

2. THE TRIBUNAL FAILED TO CONSIDER A CRITICAL CLAIM BY THE APPLICANT AND MATERIAL SUBMITTED IN SUPPORT OF THAT CLAIM

23 Both grounds arise out of the following passage in the Tribunal's reasons:

> *'The Tribunal accepts the applicant's claim that his household registration was cancelled after he left the country.* ***The Tribunal is satisfied that it is a normal administrative procedure in Vietnam to cancel household registration when a resident leaves his or her registered address without informing the authorities.'*** [Emphasis added]

24 The applicant says that the Tribunal had no evidence upon which it could reasonably be satisfied as to the statement that is emphasised. Alternatively, he asserts that he made a claim that the revocation of his *ho khau*, prior to the time at which it would normally be cancelled suggested that he had come to the adverse attention of the Vietnamese authorities for reasons of his political opinion and that the Tribunal failed to consider that claim.

25 In its reasons, the Tribunal said:

> *'*[The applicant] *stated that he cannot return to Vietnam because the authorities have taken away his citizenship rights. He stated that after he arrived in Australia he contacted his mother and she told him that his household registration was cancelled. He stated that when he departed Vietnam he was still registered at his mother's address. The Tribunal asked the applicant if he applied for his own household registration after he married. He stated that he did not apply. The applicant stated that he and his wife lived with his mother and his wife was living there at the time of the hearing. The Tribunal commented that it was a common administrative procedure to remove a person's name from a household register if that person no longer lived there. The Tribunal commented that he would be placed on that household register if he returns to that address. The applicant stated that he had no citizenship rights.'*

It is common ground that that passage fairly summarises the only mention during the course of the hearing before the Tribunal of the circumstances in which a person's name is removed from the household register.

26 However, there was other material before the Tribunal as to the operation of the *ho khau* system. On 8 January 2004, the applicant's solicitors made a written submission to the Tribunal on behalf of all of the review applications being heard by Members Jacovides, Griffin and Lincoln. The submission responded to a country information report of the Department of Foreign Affairs and Trade. Section 3.3.2 of the submission dealt with '*ho khau*' as follows:

> *'Many of the applicants have noted that they were either never issued with a household registration – ie* ho khau *– or that their* ho khau *has recently been invalidated by the Vietnamese authorities. Such claims are supported by the summonses issued to a number of the applicants (copies and translations of which have been provided to the RRT – see section 3.6.5 below). The summons require the Applicants' attendance at various police stations and warn that failure to attend will, among other things, have their "name removed from the household register".*
>
> *In relation to the ho khau we refer to the report before the* [Tribunal] *entitled* Mistreatment of Vietnamese Returnees and its Impact on US Resettlement Program *('Mistreatment Report'). The Mistreatment report states:*
>
> > *"A 'ho khau' is a family registration card issued by the Vietnamese authorities. It operates as a residence permit and also entitles the bearer to a series of important rights and privileges linked with education, employment business licenses, marriage registration, issues of birth certificates, etc…*

> ***Many returnees have reported denial of ho khau, which in many instances seriously affects the family's livelihood and welfare. Without a household registration certificate, a returnee would not be able to get legal employment, apply for a business licence, file for a legal marriage certificate, or send his children to regular school. The procedural guidance issued by the Immigration and Naturalisation Service (INS)… lists "Denial of Family Registration Certificate, as a form of mistreatment or prejudicial action"***. [Emphasis added]

The US Committee for Refugees, 200 Country Report from Vietnam states in relation to the reintegration of Vietnamese returnees:

> *"…most reintegration problems were related to… obtaining household registration from the local authorities (**under Vietnamese law, a person can be a legal resident only through registration of his or her household)"*** [emphasis added]

A number of the Applicants referred to the loss of one's ho khau *as the loss of one's citizenship rights. In this regard we refer to the following extract from the Vietnam Investment Review article…'*

The submission then cited the extract referred to at paragraph **13** above. (See pp412ff)

27 The reference to '*summonses*' is a reference to copies of summonses provided to the Tribunal by the applicants' solicitors following the hearing. None of the summonses is addressed to the present applicant, but they were furnished as part of the submission made on behalf of all of the applicants. The summonses are, in effect, invitations to attend at an official office to explain absence from a local area without seeking permission. They state that if no reason is advanced, a recommendation for prosecution may be made (pages 192 and 453).

28 Section 3.6.5 of the submission took up the matter of the summonses in the following terms:

> *'..., a number of the Applicants have been issued with summons to attend their "city police" to:*
>
> "inquire about a number of matter[s] relating to [them]"*'*
>
> *We note that we have provided the* [Tribunal] *with copies, including translations, of summons issued to* [several] *applicants.*
> *…*
>
> *The Mistreatment Report discusses the case of a Vietnamese returnee who had been issued with a summons identical to that issued to a number of the Applicants. The Mistreatment Report states:*

> *"Dr. Le Van Trang… was summoned to the security police station. When he showed up, the authorities arrested him and took him away. After much effort, his family later learned that he had been taken away to Prison Camp… His wife, … and two young children have repeatedly appealed for his release to no avail".*

While a number of the summons indicate that the police are investigating the Applicants':

> *"Absen*[ce] *from local area without seeking permission…"*

We would contend that this is a mere excuse to inquire about the Applicants' involvement in the RF. We note that the Vietnamese police are known to use the Vietnamese household registration system as a pervasive means of monitoring suspected dissidents. As the following extract from the US Department of State Bureau of Democracy's 2000 Country Report on Human Rights Practices for Vietnam (released February 2001) indicates, the Vietnamese authorities rarely utilise the household registration system for its intended purpose of monitoring unauthorised movements:

> *"The Government… maintains a system of household registration… to monitor the population, concentrating on those suspected of engaging, or being likely to engage in, unauthorized political activities. However, this system has become less obvious and pervasive in its intrusion into most citizens' Daily lives. Members of the public security forces committed human rights abuses.*
> *…*
>
> ***… The authorities largely focussed on persons whom they regarded as having dissident views or views critical of the Government, or whom they suspected of involvement in unauthorized political or religious activities. Citizens formally required to register with police when they leave home, remain in another location overnight, or when they change their residence… However these requirements are largely unenforced;*** *many citizens move around the country to seek work or to visit family friends without being monitored closely…'* [emphasis added].

We will be separately providing a further expert report from Dr Hoat in relation to the implications of summons issued to the Applicants as well as the consequences of their non-compliance.'

29 On 20 February 2004, the solicitors made a further submission to the Tribunal in connection with all of the applications. That submission referred to a second expert report from Dr Doan Viet Hoat dated 20 February 2004. It also referred, in the following terms, to a report on Vietnam for October 2003 by the United Kingdom Home Office ('the UK Report'):

> ***'4. Summonses & household registration***

...

Separately we refer to the following information contained in the UK Report:

> ***"Freedom of Movement***
>
> *6.52 The government operates a system of documentation based on residence permits similar to China's hukou system. The basic document, the ho khau, includes a curriculum vitae that contains the individuals' past history, the past history of family members, and is somewhat similar to a police or criminal record. It also notes religious affiliation. This form of control enables the monitoring of both people who have "fallen out of favour" with the government and adherents of groups and organisations not approved of by the Party. The ho khau is necessary for all administrative processes, such as education, work, admission to hospital, etc [6g]*
>
> *6.53* ***The Household Registration (ho khau) is automatically withdrawn by the authorities if the citizen fails to fulfil a year's residency requirements, and therefore emigrants lose their ho khau status very quickly. [6x]***
>
> *6.54 Further to the Ho Khau, adult Vietnamese citizens carry an Identity Card. If the holder is a practitioner of one of the six registered religious faiths, then it is registered on the ID card. "None" on an ID card may indicate participation in practices such as ancestor worship, Daoism, etc. which may be regarded as beliefs rather than as part of the six permitted religions. The source contacted by the Canadian IRB thought that it might be possible for members of dissident groups e.g. the Unified Buddhist Church of Vietnam (UBCV) not to be permitted to be classed as "Buddhist" but given "None" as a designation.* ***[6p]***" [emphasis added]

We note that at the Applicants' hearings the Presiding Members stated that those of the Applicants' [sic] *who have been removed from the household register have likely been so removed because they no longer live in the place noted on their household registration card.*

*In this regard we note that according to the UK Report, with regards to not residing at their recorded address, citizens are only removed from the household register if they '****fail to fulfil a year's residency requirements****'.*

We note that the Applicants left Vietnam on or around 3 June 2003. We further note that, as evidenced by both the summonses issued to a number of the Applicants (copies/translations of which have been provided to the RRT) and by the Applicants' testimonies the Applicants were removed from their household register in or around November 2003. That is, the Applicants were removed from their household register only 5 months (approximately) after they left Vietnam.

> *Again, with regards to not residing at their recorded address, according to the UK Report, Vietnamese citizens are only removed from the household register if they "**fail to fulfil a year's residency requirements**". Accordingly, we submit that the Applicants removal from the household register is not related to a mere absence from their recorded address but more than likely relates to their involvement/association with the RF.*
>
> *Similarly, the summonses issued to a number of the applicants do not merely relate to an absence from a recorded address but more than likely relate to involvement/association with the RF – or as stated in one of the summonses "a number of matters".'*

30 The applicant complains that there was no evidence before the Tribunal to support a finding that it is a normal administrative procedure in Vietnam to cancel household registration when a resident leaves his or her registered address without informing the authorities. However, I consider that the passages from the submission made on behalf of the applicant that are cited above are capable of supporting an inference to that effect. Thus, household registration is automatically withdrawn if a citizen fails to fulfil a year's residency requirements. The summonses indicate that the authorities were requiring some of the applicants to explain why they were working away from home without seeking permission. The indication is given that if the recipient of the summons did not attend to give an explanation, the person's name would be crossed out of the household register: that is, *ho khau* would be cancelled.

31 Alternatively, the applicant complains that the Tribunal failed to deal with what he characterises as '*a critical claim*'. The critical claim is said to be a claim made in the submission of 20 February 2004 that the revocation of the applicant's *ho khau* is indicative of a conclusion by the authorities that he was involved with, or had an association with, the RF. That is not a claim that was made by the applicant at the hearing before the Tribunal. Nor is it a claim that was made specifically with reference to the applicant. It was a general claim made in the terms set out above. Indeed, the date of removal was not correct so far as the present applicant is concerned, since he claimed that his *ho khau* was cancelled on 18 September 2003.

32 Even then, the assertion is simply a basis upon which the Tribunal was being invited to conclude, as a matter of fact, that the applicant was of interest to the Vietnamese authorities. I do not consider that the extract set out above could fairly be said to be a critical claim. It is

part of more than 750 pages of submissions made on behalf of the applicant and all other applicants.

33 The Tribunal dealt at length with the submissions made on behalf of the applicant. As previously mentioned, the Tribunal found that the applicant is not politically active and is not an activist. It found unequivocally that the applicant was not a person who would be seen as a committed activist by the authorities in Vietnam. It found expressly that he will not be of interest to the authorities in Vietnam for reasons of political opinion in the reasonably foreseeable future. The possible cancellation of his *ho khau* was put forward as one piece of evidence in support of a contrary finding, assuming the evidence bears the character ascribed to it on behalf of the applicant. The relevance of the material was that cancellation out of the ordinary course might give rise to an inference that the applicant was being targeted for his political activism. However, as I have already indicated, the Tribunal reached a firm conclusion on that question. It was under no obligation to deal with every piece of evidence relied upon by the applicant, including that particular piece of evidence.

34 In any event, the evidence does not support the inference that the applicant seeks to draw from it. The 'UK Report' states that *ho khau* is **automatically** withdrawn by the authorities if the citizen fails to fulfil a year's residency requirement. That does not support the assertion that, according to the UK Report, Vietnamese citizens are **only** removed from the household register if they fail to fulfil a year's residency requirements. In any event, as I have said, since the conclusion in question does not relate to a critical claim by the applicant, it cannot be said that the Tribunal has based its conclusion on a fact for which there was no evidence.

35 I do not consider that either of these grounds has been established.

3. THE TRIBUNAL FAILED TO ASK ITSELF THE CORRECT QUESTION

36 The applicant claimed that he would be punished by the authorities in Vietnam because he left Vietnam illegally and because he participated in the illegal departure of others. The Tribunal accepted that some individuals returning to Vietnam have been mistreated by the authorities. However, the Tribunal was satisfied that those individuals were targeted because they were outspoken critics of the government. The Tribunal found that the applicant is not a committed activist and was satisfied that the illegal departure of the applicant would not be seen as a political act by the authorities in Vietnam.

37 The Tribunal accepted that persons who leave Vietnam illegally may be questioned by the authorities on return. The Tribunal also accepted that they may suffer penalties, such as fines, warnings or detention. However, the Tribunal found that the government of Vietnam can legitimately investigate and punish crimes by its citizens. The Tribunal was not satisfied that the applicant would be differently treated by the authorities in that regard or that he would be subjected to serious harm amounting to persecution because he left the country illegally.

38 The applicant says that, having accepted that the applicant may be detained upon his return to Vietnam for having departed Vietnam illegally, the Tribunal was required to ask itself whether the law that imposed that sanction was appropriate and adapted to a legitimate government objective. He says that the Tribunal should have considered whether a law that provides for such a severe sentence was not a law of general application but one directed to those perceived to be political opponents of the government of Vietnam.

39 The applicant contended that it was no answer to an allegation that illegal departure would be seen as a political act to say that the applicant would not be treated differently from others or subjected to persecution. He said that the Tribunal's reasoning involves an assumption that the sanction for illegal departure is appropriate and adapted to achieving a legitimate end. He says that the Tribunal should have investigated how, and to what degree, the applicant could face a sanction for illegal departure. The answer to that question would indicate to the Tribunal whether the terms of the sanction are sufficiently extreme to indicate that they may include an element of punishment for something other than breach of generally applicable criminal law. By failing to ask the correct question, the Tribunal did not lawfully consider whether the applicant's illegal departure would be seen as a political act and, if so, whether the sanction is persecutory.

40 Conduct will not constitute persecution if it is appropriate and adapted to achieve some legitimate object of the country of a putative refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the state and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. While punishment for expressing ordinary political opinions or being a member of a political association is *prima facie* persecution for a Convention reason, governments cannot be expected to tolerate political opinion or conduct

that calls for their violent overthrow. Punishment for expressing such opinions is unlikely to amount to persecution.

41 On the other hand, punishment of the holders of such opinions could amount to persecution where the government in question is so repressive that, by the standards of the civilised world, it has so little legitimacy that its overthrow, even by violent means, is justified (see *Applicant A v Minister for Immigration and Ethnic Affairs & Anor* (1997) 190 CLR 225 at 258-9).

42 The applicant's contention, as I apprehend it, is that the punishment imposed by Vietnam for illegal departure from the country is so severe that it is excessive for the offence in question. This should infer that the punishment was disproportionately imposed as a sanction for a statement of disloyalty and defiance, because the Vietnamese authorities view illegal departure as an implied political statement of disloyalty and defiance. The applicant asserts that the Tribunal should have enquired further as to the penalty that was likely to be imposed upon him for his illegal departure, if he returned to Vietnam.

43 However, there is no suggestion that the penalty for illegal departure from Vietnam imposed particular burdens or sanctions upon persons by reason of race, religion, nationality, or membership of a particular social group or political opinion. In fact, the Tribunal specifically addressed the question of whether the applicant would be treated differently from any other person who committed an offence by leaving Vietnam illegally and determined that he would not.

44 The applicant pointed to material before the Tribunal that indicated that the penalties for illegal departure included warning, fines, probation detention or imprisonment from three months to one year and that sentences were based on the perceived severity of the offence. The applicant said in his submission to the Tribunal:

> *'Given the RF is an anti [Communist Party of Vietnam] political organisation whose anti [Communist Party of Vietnam] acts, views and backgrounds are now public knowledge, it is likely that the Vietnamese authorities will view the applicant's illegal departure as a severe offence.'*

45 I do not consider that the penalties are of such severity that they could be said to be disproportionate to the offence in question. That is the only basis upon which the applicant

contends that the Tribunal failed to address the question of whether the applicant's illegal departure would be seen as a political act. The applicant did not refer to any other material that might give rise to a suspicion that the penalty imposed for illegal departure is imposed because illegal departure is perceived as an implied political statement of disloyalty or defiance. I do not consider that there is any substance in this ground.

4. THE TRIBUNAL MISAPPLIED THE DEFINITION OF PERSECUTION IN THE REFUGEES CONVENTION BY MISCONSTRUING SECTION 91R(2) OF THE ACT

46 In the section of the Tribunal's reasons headed FINDINGS AND REASONS, the following two passages appear:

> *'The Tribunal considered the applicant's associated claim that he was discriminated against by the government of Vietnam because of his family background and his anti-communist views. When the Tribunal asked the applicant to describe the discrimination, he stated that he was not given a license or financial assistance to operate a larger fishing boat. The applicant claims that he suffered economic disadvantage because he was known to be anti-communist. The Tribunal accepts the applicant's claim that he was denied government assistance which would have enabled him to earn more income. However, it finds that* ***the discrimination he suffered did not amount*** *to* ***persecution as defined by S91R(2) of the Act****. The Tribunal is satisfied that he was not prevented by the government from earning a living and supporting his family.*
> *...*
>
> *The Tribunal accepts that the applicant may experience difficulties and delays in regaining his* ho khau *when he returns to Vietnam. However, it does not accept that his life will be very different to the life he had before he left the country. The applicant worked as a fisherman in Vietnam and he will be able to work as a fisherman again with or without a* ho khau*. The Tribunal accepts that if the applicant wants to obtain government employment, seek further education, or establish a business, he will have difficulty doing so without household registration. However, the Tribunal finds that* ***the disadvantage which the applicant will suffer before his household registration is reissued will not constitute serious harm amounting to persecution as defined by S91R(2) of the Act****. The Tribunal is satisfied that the applicant will be able to support himself and his family as he did previously. The Tribunal is also satisfied that in time, as with most returnees to Vietnam, the applicant's* ho khau *will be reinstated.'* [Emphasis added]

The applicant contends that, in those passages, the Tribunal misconstrued s 91R of the Act by treating s 91R(2) as a definition of '*persecution*' for the purposes of the application of the

Refugees Convention, in circumstances where s 91R(2) is clearly not an exhaustive definition of anything.

47 The Tribunal referred to s 91R in its reasons at several places. In the section headed DEFINITION OF '*REFUGEE*', which might fairly be regarded as *pro forma*, since similar material appears in the reasons for many decisions of the Tribunal, the following appears:

> *'Under s 91R(1) of the Act persecution must involve "serious harm" to the applicant (section 91R(1)(b)), and systematic and discriminatory conduct (section 91R(1)(c)). The expression "serious harm"* ***includes****, for example, a threat to life or liberty, significant physical harassment or ill treatment, or significant economic hardship or denial of access to basic services or a denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: section 91R(2) of the Act.'* [Emphasis added]

Thus, the Tribunal nominally acknowledged the effect of s 91R(2) as a non-exhaustive statement.

48 It is clear that s 91R is intended to modify the operation of Article 1A(2) of the Refugees Convention. Section 91R(1) says so in express terms, namely, that Article 1A(2) does not apply in relation to persecution unless each of the three pre-requisites is satisfied. In one sense, that provision is intended to narrow the meaning of persecution as that term might otherwise be understood and as it has been interpreted in successive decisions both by this Court and by the High Court of Australia. However, s 91R(2) does not itself contain a definition of the term **persecution** or, indeed, the term **serious harm**. It makes clear in the preamble that it is not intended to be an exhaustive statement of anything. Rather, it simply gives instances of what **must** be taken to be serious harm but without limiting what is meant by serious harm.

49 Thus, for example, where persecution involves significant economic hardship that threatens a person's capacity to subsist, that will be an instance of serious harm that would satisfy the second prerequisite in s 91R(1)(b). Similarly, where persecution involves denial of access to basic services, or denial of capacity to earn a living of any kind and the denial threatens the person's capacity to subsist, the prerequisite will also be satisfied.

50 However, there will be instances of persecution involving serious harm other than the instances set out in s 91R(2). It may be that it would be very rare that economic hardship that threatens a person's capacity to subsist, that was not significant, would be an instance of

serious harm. However, as a matter of English syntax, s 91R(2) does not say that the **only** instance of economic hardship that threatens a person's capacity to subsist that could constitute an instance of serious harm is a **significant** economic hardship that threatens the person's capacity to subsist.

51 In submissions made by the applicant's solicitors to the Tribunal on behalf of all of the applicants on 8 January 2004 and 20 February 2004, the solicitors made clear that they relied upon their submissions to the Minister's delegate of 4 August 2003. In that submission, the solicitors referred to s 91R in the following terms:

> *'**3.1.2 Fear of persecution***
> *...*
>
> *Under sub-section 91R(1) of the Migration Act 1958 ("the Act") persecution is defined as involving "serious harm" and "systematic and discriminatory conduct". The expression "serious harm" is defined as including:*
>
> *a. threats to life or liberty;*
> *b. significant physical harassment or ill-treatment;*
> *c. significant economic hardship that threatens the person's capacity to subsist;*
> *d. denial of access to basic services, where the denial threatens the person's capacity to subsist; and*
> *e. denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*
>
> *The Applicants have all lodged statutory declarations outlining their particular fears of persecution. Some of these fears are outlined below.*
>
> ***3.1.3 Persecution due to membership of a particular group or political opinion, & religion***
>
> *3.1.2.1 Leaflet Distribution*
>
> *In the weeks following the Leaflet Distribution the Applicants became aware that the Vietnamese authorities were monitoring RF member activities. They believe that such monitoring was directly the result of their membership of the RF and the anti-CPV/pro-democratic political opinions associated with RF membership.*
>
> *The Applicants fear that if they had remained in and/or were forced to return to Vietnam they would be:*
>
> - *Arrested;*
> - *Interrogated and/or tortured;*
> - *In some cases raped;*

- *Face beatings; and ultimately be sentenced either to death or life imprisonment.*

It is submitted that the above acts amount to "serious harm" in accordance with Section 91R of the Act. Such acts constitute "threats to life or liberty" and "significant physical harassment or ill-treatment".

The Applicants state that such punishments are commonly handed out to individuals suspected of anti-CPV activities and/or having anti-CPV political opinions. Many of the applicants have quoted CPV officials as stating:

"We would rather punish on suspicion, than not punish by mistake!"

3.1.2.2 Involvement with the pre-1975 regime

Aside from being RF members, a number of the Applicants are also part of a specific group of individuals, namely, those individuals with direct and/or indirect links with the pre-1975 regime. These Applicants state that prior to their involvement in the Leaflet Distribution they had been the victims of ongoing discrimination and harassment by the Vietnamese authorities.

Such acts of discrimination and harassment included:
- *extrajudicial killings of family members;*
- *refusal of and/or being forced to bribe for Vietnamese specific identification papers (including household registration papers);*
- *refusal of membership to employer/employee associations (eg fisherman's membership cards);*
- *confiscation of fish and fishing equipment;*
- *being subjected to discriminatory taxes; and*
- *being forced to wait longer than average periods and/or pay higher than average fees for medical attention.*

All of these persecutory acts amount to "serious harm" as they include threats to life or liberty; significant physical harassment or ill-treatment; significant economic hardship; denial of access to basic services; and denial of capacity to earn a livelihood.

These Applicants fear that due to their involvement with the pre-1975 regime and the political opinions implicit with such involvement, they will face much more severe punishment/scrutiny for their involvement with the RF.

3.1.2.3 Buddhist and Catholic beliefs

A number of the Applicants are also either practicing Buddhists or practicing Catholics. These Applicants state that religion is generally outlawed by the CPV. As members of religious groups, these Applicants fear that they will face even greater punishment/scrutiny for their involvement with the RF.

Such acts of persecution also amount to "serious harm" as they involve threats to life or liberty and significant physical harassment or ill-treatment.'

52 In so far as the Tribunal was being invited to have regard to those submissions, it is clear enough that the Tribunal's attention was being drawn to s 91R(2). While s 91R(2) is not referred to expressly in the passage as cited, the language employed in that passage clearly reflects the language of s 91R(2). Several references are made to '*serious harm*' and to the language of paragraphs 91R(2)(a) to 91R(2)(f).

53 It is sufficiently clear that in the submission of 4 August 2003, which was effectively incorporated into the subsequent submissions to the Tribunal, the applicant's solicitors were advancing contentions in support of a conclusion that the requirement of s 91R(1) that persecution must involve serious harm, was satisfied by reason of the matters summarised above. The contention was that those matters satisfied one or other of the paragraphs of s 91R(2).

54 I do not consider, on a fair reading of the Tribunal's reasons, that the Tribunal was proceeding on the basis that s 91R(2) defined the instances that could constitute serious harm. On a fair reading of the two passages cited above, the Tribunal was saying no more than the material before it did not lead to the conclusion that s 91R(2) applied.

55 While the language of the Tribunal in the two passages in question may be infelicitous, I consider that, in context, they should not be construed as a statement by the Tribunal that s 91R(2) contains an exhaustive definition of either serious harm or persecution for the purposes of the Act. In all the circumstances, I am not persuaded that the Tribunal approached the matter on the basis that s 91R(2) defined persecution for the purposes of the Refugees Convention. This ground is not established.

CONCLUSION

56 I do not consider that there was any jurisdictional error on the part of the Tribunal. The decision of 2 April 2004 was a privative clause decision within the meaning of s 474 of the Act. It follows that the application should be dismissed with costs.

I certify that the preceding fifty-six (56)

numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 23 March 2005

Counsel for the Applicant:	Stephen Lloyd and Leonard Karp
Solicitor for the Applicant:	Craddock Murray Neumann Solicitors
Counsel for the Respondent:	Neil Williams SC and Robert Beech-Jones
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	7 February 2005
Date of Judgment:	23 March 2005