HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

APPLICANT NABD OF 2002 APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS
AFFAIRS & ANOR RESPONDENTS

Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] HCA 29
26 May 2005
S70/2004

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

M I Bozic SC with J D Smith for the appellant (instructed by Ebsworth & Ebsworth)

J Basten QC with S B Lloyd for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

CATCHWORDS

Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs

Administrative law – Judicial review – Immigration – Refugees – Appellant, an Iranian, sought a protection visa on the basis that he had converted to Christianity after leaving Iran – Refugee Review Tribunal twice affirmed decision to refuse the appellant a protection visa – Relying on information contained in a country profile, the Tribunal distinguished between Christians in Iran who quietly go about their devotions and those who actively or conspicuously proselytise, and considered that only the latter group would encounter a real chance of persecution – Whether Tribunal asked itself a wrong question by seeking to categorise the way in which the appellant expressed his beliefs – Whether Tribunal addressed whether appellant had a well-founded fear of persecution on the ground of religion – Whether Tribunal had committed jurisdictional error similar to the error identified in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*.

International human rights law – Refugees – Refugees Convention – Ground of religion – Freedom of religion as a basic human right.

Migration Act 1958 (Cth), s 36(2).
Convention relating to the Status of Refugees as amended by Protocol relating to the Status of Refugees.

1 GLEESON CJ. This appeal should be dismissed with costs. The decisions of Emmett J at first instance in the Federal Court, and the Full Court of the Federal Court on appeal, were correct.

2 As in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[1], the present appellant argues that the Refugee Review Tribunal, by attaching significance to a supposed difference between discreet and confrontational behaviour, fell into jurisdictional error, and, in particular, failed to address the question that arose for decision. As in *Appellant S395/2002*, on my reading of the reasons of the Tribunal, the references to different kinds of behaviour were made in the course of a legitimate process of reasoning on an issue thrown up by the facts of the particular case, and involved no jurisdictional error.

3 The basic facts and issues are set out in the reasons of Hayne and Heydon JJ.

4 The appellant claimed that he had a well-founded fear that if he returned to Iran he would be persecuted on the ground of religion. In many, perhaps most, cases, the primary basis for what is said to be a well-founded fear of future persecution is an account of past persecution, usually given as the reason for leaving a country of nationality. So it was in this case. The appellant gave an account of flight from Iran into Turkey, with the assistance of a people smuggler, after the Iranian authorities had carried out a raid on the house of a friend who was encouraging the appellant to become a Christian. In elaboration of that case, the appellant said that he travelled to Indonesia, where he studied Christianity further, and became a member of the Uniting Church. He then came to Australia.

5 The appellant's primary case was disbelieved. The story of the raid by the authorities was considered to be fabricated. The Tribunal found that the appellant, who frequently travelled on business, had left Iran legally on his own passport.

6 However, while expressing "serious reservations" about the appellant's motivation, the Tribunal was prepared to accept that he had joined the Uniting Church while in Indonesia. It also accepted that he had undertaken a bible study course of correspondence, and had attended Christian religious gatherings in Indonesia and in a detention centre in Australia. The Tribunal found that he had engaged in activities including "the distribution of pamphlets, speaking to others privately about his faith and encouraging interested persons to attend church services."

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1 (2003) 216 CLR 473.

7 Having thus rejected the appellant's evidence of actual persecution in Iran, but having accepted that the appellant had become a Christian after leaving Iran, the Tribunal addressed the question of what was likely to happen to the appellant on account of his religion if he returned to Iran. It was in that context that the Tribunal examined country information concerning the treatment of Christians in Iran.

8 The effect of the country information, from a number of sources, including the Department of Foreign Affairs and Trade, the United States State Department, a professor at the California State University, and newspaper reports, was that there is no simple answer to the question whether Christians are persecuted in Iran. The ultimate concern of the Tribunal, of course, was with the appellant, not with Christians as a class, but it was factually relevant to that concern to consider the country information, and it was legitimate to endeavour to relate generalisations about the treatment of Christians to the position, or likely position, of the appellant. It is not clear what else the Tribunal could do. It did not believe that the appellant had been persecuted in the past because of his interest in Christianity. It was prepared to accept that he had become a Christian after leaving Iran. It was reasonable, and necessary, to inquire about how Christians are treated in Iran. It was not suggested, and it could not reasonably be suggested, that the information considered by the Tribunal was irrelevant. No such ground of appeal is advanced. Naturally, the country information was not related specifically to the case of the appellant, and it was necessary for the Tribunal to deal with it as best it could or, alternatively, dismiss it as entirely unhelpful. That was a choice to be made by the Tribunal in its role as a finder of fact.

9 The country information on the subject of the treatment of Christians in Iran distinguished between "converts to Christianity who go about their devotions quietly and maintain a low profile [who] are generally not disturbed" and persons involved in the "aggressive outreach through proselytising by adherents of some more fundamental faiths". The distinction thus drawn is far from clear-cut, but it is not meaningless. It was open to the Tribunal, as a matter of factual judgment, to accept the distinction offered by the information, and to regard it as useful in considering the position of the appellant. The Tribunal noted that the Uniting Church was not one of the "fundamental faiths" that require proselytising by their adherents, and it did not regard the conduct of the appellant since he had converted to Christianity as involving "aggressive outreach". It made the following findings:

> "The Tribunal finds that the applicant is able to practise his faith in Iran as he has done outside that country and without facing a real chance of persecution. It is not satisfied that there are any essential aspects of his faith he would be constrained in practising in Iran due to any well-founded fear of persecution.

> In weighing all the evidence, including the applicant's practice of his faith to date and the tenets of that faith, the Tribunal finds that any decision to avoid proselytizing in Iran or of actively seeking attention on matters of religion is not inconsistent with his beliefs and practices. It finds that the present applicant is not constrained in the practice of his avowed faith, nor would he be in Iran, due to a perception that to behave more openly or aggressively would leave him at risk of persecution."

10 Once the Tribunal accepted, as it was entitled to do on the basis of the country information, that not all Christians in Iran suffer persecution, or a real chance of persecution, then it was required to consider the individual circumstances of the appellant in the light of the available information. It could hardly be contended that, whether they realise it or not, all Christians in Iran are being persecuted by reason of the fact that, if they were ever to turn to "aggressive outreach through proselytising" (even though they may have no intention of doing so), they would suffer retribution. That would be to debase the currency of the language which the Tribunal was bound to apply. Nor could it be contended that any Iranian who becomes a Christian of any denomination suffers a real chance of persecution if he or she ever returns to Iran. That would be tantamount to saying that the country information was completely misleading, and was based on a misunderstanding of what amounts to persecution. No such case was argued.

11 The Tribunal gave proper consideration to the particular circumstances of the appellant. In considering what might happen if he were to return to Iran, it applied a distinction which was neither meaningless nor irrelevant. Its process of factual reasoning was open on the evidence. No jurisdictional error has been shown.

12 McHUGH J. The issue in this appeal is whether, in assessing the appellant's entitlement to a protection visa under the *Migration Act* 1958 (Cth), the Refugee Review Tribunal made a jurisdictional error as a result of categorising Iranian Christians as aggressive proselytisers – who would be persecuted for religious beliefs – and quiet evangelists – who would not be persecuted for their beliefs.

13 In my opinion, the Tribunal erred in so categorising Iranian Christians. As a result, the Tribunal failed to direct its mind to, or at all events diverted itself from, the critical issue in the case. That was whether the appellant had a well-founded fear of persecution by reason of his religious beliefs. The duty of the Tribunal was to consider the claims of the appellant by reference to his characteristics and circumstances. This was not a case where determination of a claim for refugee status was advanced or assisted by categorising an applicant as falling within or without a particular sub-group. The evidence failed to show that Christians in Iran are subdivided into "proselytising Christians" and "quietly evangelising Christians". Even more importantly it failed to show that the Iranian authorities recognised any such distinction. Because that was so, classification of Christians was not an appropriate method of assessing the appellant's claim for refugee status. The issue of whether Australia owed a protection obligation to the appellant was not to be answered by dividing Christians into two categories and then asking whether the appellant was a member of the category that was likely to be persecuted. Even if the appellant did not fall into that category, it did not follow that he would not be persecuted. By relying on a bipartite category approach, the Tribunal prevented itself from determining the real question in the case and fell into jurisdictional error.

The material facts

14 The appellant is an Iranian national, aged 36. He arrived in Australia on 9 November 2000 and lodged an application for a protection (Class XA) visa on 24 November 2000, claiming that he feared persecution by reason of his religious beliefs.

15 The appellant claimed that he had come to the attention of authorities in Iran because of an interest in Christianity and that he fled Iran secretly without a passport. He then spent about seven months in Indonesia during which time he claimed he further explored Christianity resulting in his baptism in West Timor. He claimed that evidence of the baptism was transmitted back to Iran resulting in inquiries by the authorities that had affected his family and that his father had disowned him. Additionally, he claimed he was subjected to some harassment and threats while in Indonesia as a result of his Christian faith and activities connected with it. They included distributing pamphlets about Christianity.

16 The Refugee Review Tribunal accepted that the appellant had befriended a Christian in Iran with whom he discussed Christianity, but it did not accept the

appellant's account that his departure from Iran was precipitated by the attention of the authorities. Nor did it accept that he failed to seek asylum in Indonesia because of a fear of persecution in that country and ignorance of the relevant procedures. The Tribunal found that the appellant was not a witness of truth in respect of these matters and in fact left Iran on his own passport. Because of these findings, matters that happened prior to the appellant's arrival in Australia have no part in this appeal. The matters on which the Tribunal did accept the appellant's account relate to the period after his arrival in Australia when he was detained in the Immigration Detention Centre at Curtin.

17 The Tribunal accepted that over time the appellant might genuinely have embraced Christianity. The Tribunal accepted that certain actions and activities by the appellant manifested the adoption of that religion. These were: his baptism in Indonesia, a Bible study course by correspondence and attendance at religious gatherings in the detention centre that were organised by a minister of the Uniting Church. The Tribunal further accepted that the appellant had engaged in the religious activities he described at his hearing. These included: distribution of pamphlets about Christianity, speaking to others privately about his faith and encouraging interested persons to attend church services. In his approach to others, the appellant talked about the ills of Islam and told them about the Bible and Christianity.

Manner of sharing faith

18 The issue between the parties is the categorisation undertaken by the Tribunal in assessing the appellant's claim. That categorisation focused particularly on the appellant's method of expressing and conveying his Christian faith to others. The Tribunal adopted this categorisation approach based on "country information" to the effect that certain expressions of Christianity would attract the adverse attention of authorities and lead to persecution.

19 No criticism can be made of the Tribunal's reliance on the sources of "country information". In an application such as the present, where the Tribunal has rejected the applicant's claims of past persecution, the Tribunal has only two bases for assessing the likelihood of future persecution. The first is the applicant's conduct in detention. The second is information concerning whether that conduct and any claimed intended conduct would raise a real chance of persecution if the applicant was returned to the country of nationality.

20 Likewise, no criticism can be made of the Tribunal's discussion of the test for a "well-founded fear of persecution". The Tribunal described a well-founded fear as one based on a "real chance", "one that is not remote or insubstantial or a far-fetched possibility". The Tribunal rightly noted that "[a] person can have a

well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent"[2].

Country information

21 In reaching its conclusion that the appellant did not have a well-founded fear of persecution, the Tribunal relied on a number of passages in the "country information" before the Tribunal on which it relied. It is necessary to set them out in order to understand the reasoning process it employed and the error in that process. The United States State Department reported[3]:

> "The Christian community is estimated at approximately 117,000 persons according to government figures. Of these the majority consists of ethnic Armenians and Assyro-Chaldeans. Protestant denominations and evangelical churches also are active; although non-ethnically based faith groups report a greater degree of restriction imposed by authorities on their activities."

The Commonwealth Department of Foreign Affairs and Trade observed[4]:

> "Iranians who had based their asylum applications on their conversion from Islam to Christianity would, in almost all cases not suffer particular problems if returned, unless they declared to the authorities on return their new religious affiliation. Apostasy is widely reported as carrying a nominal death sentence. However there are only one or two cases (high profile Christian clergy) where this sentence has ever been imposed. … The evidence is that those converts who go about their devotions quietly are generally not disturbed (it is either those who actively seek attention, or who are engaged in conspicuous proselytization, who have run into difficulties, usually with the local mosque rather than the State authorities. …
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> Death sentences for apostasy have traditionally been issued to Baha'is and occasionally Christian converts who have been active in proselytising. However, the death sentence has rarely been carried out for

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2 See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 per Mason CJ; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

3 *Annual Report on International Religious Freedom for 1999: Iran* (1999).

4 *Country Profile for Use in Refugee Determination: Islamic Republic of Iran* (1996).

> apostasy alone. The majority of religious judges appear reluctant to deliver an execution order for this 'offence' alone. People who do publicly convert away from Islam would however be harassed, possibly imprisoned and threatened with death, if they had been found to be active in proselytising among Muslims. …
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> While the traditional Christian communities (Armenian and Assyrian) do not proselytise and even discourage those Muslims who may express an interest in conversion, the Catholic, Protestant and Evangelical missionary churches have tended to face greater problems with the authorities on account of their links with the West and the greater importance placed on proselytising. Any action interpreted as manifesting an intent to 'influence a Muslim to convert faith' is a serious criminal offence both for the priest and the Muslim concerned. Definition of this provision in the criminal code is moreover arbitrary and ambiguous. Its application is intended to harass. Converts are generally tolerated as long as they maintain a very low profile."

22 The Tribunal also gave weight to information provided to the Canadian Refugee and Immigration Board in 1999 by two different university professors that:

- "it was not a crime to convert from Islam to Christianity in Iran, although people were strongly discouraged from doing so"
- "a 'simple person' who converted to Christianity would not have serious problems"
- "it was very unlikely the Iranian authorities would take notice of the conversion of an individual outside Iran, although if converts had previous problems with the authorities or were actively converting others from Islam, they could be of interest to the authorities".

23 Finally, the Tribunal relied on a newspaper article in which minority religious leaders said that there was no reason for non-Muslim people to leave Iran and the trend to flee the country came at a time of increased religious and social tolerance.

The Tribunal's reasoning

24 In its reasons, the Tribunal identified a dichotomy from the "country information" on which it relied and assessed the appellant's claim for a protection visa based on that dichotomy. The Tribunal distinguished between "conspicuous", "aggressive" or "active" proselytising and a "quiet sharing of faith" or spreading of the word "as an evangelist". The dichotomy is demonstrated in the following passages from the Tribunal's reasons:

- "[c]onverts who go about their devotions quietly are not bothered; it is only those who actively seek public attention through conspicuous proselytizing who encounter a real chance of persecution."

- "[c]onverts to Christianity who go about their devotions quietly and maintain a low profile are generally not disturbed … the authorities are not really concerned about ordinary people who convert to Christianity, provided they do not seek to convert others or engage in high profile religious activities."

- "A distinction can be drawn between the quiet sharing of one's faith as an evangelist and the aggressive outreach through proselytizing by adherents of some more fundamental[ist] faiths."

25 The Tribunal clearly proceeded to assess the appellant on the basis of its two categories.

- "Although he claims that he feels it his duty to *tell others about his faith* the evidence is that he is able to do so without facing any serious repercussions *providing he does not proselytize*."

- "[t]he applicant would not choose to generally broadcast his practice of Christianity or *conspicuously proselytize in Iran*. If he were to choose to practise Christianity in Iran and *to quietly spread the word* the Tribunal concludes there is not a real chance that he would face persecution as a consequence."

- "The Tribunal accepts that he has discussed Christianity with other detainees, but not that his activities since leaving Iran constitute *active attempts to convert others through proselytism as distinct from quiet sharing of his faith*."

- "[t]he applicant is not a member of a denomination that *exhorts its adherents to proselytize*."

- "[t]he actual capacity of the applicant to practise his faith in Iran without a well-founded fear of persecution for a Convention reason is consistent both with his Christian teachings in Australia and, similarly, in Indonesia. A *requirement to proselytize is not a core component of his faith* nor, indeed, at all essential to it." (emphasis added)

26 The appellant submits that the primary error that is revealed in this reasoning process is the failure to assess the appellant according to his individual characteristics and circumstances, that is, a failure to consider whether *this appellant* faced a real chance of persecution if he was returned to Iran. The error came about, the appellant says, because the Tribunal began by first wrongly positing two categories of Christian – quiet evangelist and aggressive

proselytiser. Only the latter, according to the Tribunal, were attended by a risk of persecution; the former were not at risk. It then considered only whether the appellant belonged to one or other category, concluding that the appellant either faced a chance of persecution or he did not depending on the category assigned. Consequently, the appellant was assessed not according to his individual features and claims but according to an arbitrary classification.

The problem with the categorisation approach

27 Dividing applicants for refugee status who fall into social groups, religious sects, nationality or races into sub-categories is a dangerous course. It is dangerous because it has a tendency to assess the applicant's claim by reference to stereotypes instead of the applicant's characteristics and circumstances. The mischief of classification and categorisation in assessing claims for refugee status was discussed in the majority judgments of this Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[5]. That appeal concerned two Bangladeshi homosexuals who had been refused protection visas by the Tribunal on the basis that, if they lived a discreet life in Bangladesh, they would not be subjected to persecution for their sexuality. Justice Kirby and I identified two errors in the reasoning of the Tribunal.

28 First, the Tribunal constructively failed to exercise its jurisdiction because it erroneously assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws and social expectations of Bangladeshi society and practice their homosexuality discreetly. The assumption led the Tribunal to fail to consider, in assessing whether the applicants had a well founded fear of persecution, why they had in the past acted discreetly and what consequences might attach to their living openly as homosexuals in that society[6]. Justices Gummow and Hayne also held that this approach involved jurisdictional error by the Tribunal[7].

29 The second jurisdictional error occurred when the Tribunal failed to consider the applicants by reference to the correct "particular social group". By classifying the applicants as discreet homosexuals and analysing the level of persecution that may be expected by that group, the Tribunal failed to assess the applicants as individuals. We said[8]:

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5 (2003) 216 CLR 473.

6 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 490 [43], 492 [50], 493 [51].

7 *Appellant S395/2002* (2003) 216 CLR 473 at 501-502 [83].

8 *Appellant S395/2002* (2003) 216 CLR 473 at 494-495 [55]-[58].

> "[B]y declaring that there is no reason to suppose that the appellants would not continue to act discreetly in the future, the tribunal has effectively broken the genus of 'homosexual males in Bangladesh' into two groups – discreet and non-discreet homosexual males in Bangladesh.
>
> … consciously or unconsciously, the Tribunal directed its mind principally to the consequences of the sexual behaviour of the non-discreet members of the particular social group. Certainly, it made only passing reference to other forms of harm to members of the social group generally. And it failed to consider whether the appellants might suffer harm if for one reason or another police, hustlers, employers or other persons became aware of their homosexual identity. The perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise.
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> If the Tribunal had placed the appellants in the non-discreet group, it appears that it would have found that they were likely to be persecuted by reason of their membership of that group. Conversely, by placing the appellants in the discreet group, the Tribunal automatically assumed that they would not suffer persecution. But to attempt to resolve the case by this kind of classification was erroneous. It diverted the tribunal from examining and answering the factual questions that were central to the persecution issues.
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> … Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. … But neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. … It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether *this individual applicant* has a 'well-founded fear of being persecuted for reasons of … membership of a particular social group'." (emphasis in original, footnote omitted)

30 Justices Gummow and Hayne in their judgment also pointed to the danger of classification of applicants[9]:

> "There are dangers in creating and applying a scheme for classifying claims to protection. Those dangers are greatest if the classes are few and rigidly defined. But whatever scheme is devised, classification carries the

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9 *Appellant S395/2002* (2003) 216 CLR 473 at 499-500 [76]-[77].

> risk that the individual and distinctive features of a claim are put aside in favour of other, more general features which define the chosen class.
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> Further, there is a serious risk of inverting the proper order of inquiry by arguing from an a priori classification given to the applicant, or the applicant's claim, to a conclusion about what may happen to the applicant if he or she returns to the country of nationality, without giving proper attention to the accuracy or applicability of the class chosen. That is, there is a real risk of assuming (wrongly) that a particular applicant will be treated in the same way as others of that race, religion, social class or political view are treated in that country. It would, for example, be wrong to argue from a premise like 'homosexuality is generally ignored in Bangladesh' to a conclusion that 'this applicant (a homosexual) will not be persecuted on account of his sexuality', without paying close attention to the effect of the qualification of the premise provided by the word 'generally'".

31 Their Honours went on to agree with Kirby J and me that the Tribunal had employed a false dichotomy in assessing the appellants which amounted to a further error[10].

32 Although the appellant raised in his notice of appeal the first error identified in *Appellant S395/2002* – the failure to consider whether the anticipated behaviour of the appellant was a response to the fear of persecution or a voluntary choice – that ground must fail. The Tribunal clearly turned its mind to the reason for the appellant's particular practice of Christianity:

> "[T]he Tribunal finds that any decision to avoid proselytizing in Iran or of actively seeking attention on matters of religion is not inconsistent with his beliefs and practices. It finds that the present applicant is not constrained in the practice of his avowed faith, nor would he be in Iran, due to a perception that to behave more openly or aggressively would leave him at risk of persecution."

33 Whether or not the Tribunal was right about the appellant's beliefs, or had any evidence for its conclusion (a matter I will consider later), it did consider whether the appellant would refrain from certain forms of practice of Christianity out of a fear of persecution. Having rejected the appellant's claims of past persecution, the Tribunal was entitled to proceed on the basis of its acceptance or rejection of the appellant's claims about his current and intended practice of Christianity.

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10 *Appellant S395/2002* (2003) 216 CLR 473 at 503 [90].

When does classification lead to error?

34 Not all classification in refugee cases automatically leads to error. In some cases, classification may be an appropriate method for assessing claims for refugee status. One appropriate case is the classification of the applicant for the purpose of identifying the Refugees Convention reason for which he or she may face persecution. Such cases often raise the question: of which "particular social group" is this applicant a member? The identification of the group may be very broad, such as "Jehovah's Witnesses in Ukraine"[11] or it may be refined according to additional circumstances giving rise to the exposure to persecution, such as "married Pakistani women without a close male relative"[12] or "young, able-bodied Afghan men"[13]. The refinement of the category may occur according to place of residence, age, family circumstance, a confessional sub-group within a religion (such as Shi'a or Sunni Muslim), a recognised status within a group and so on. Where such classifications occur, they will aid rather than misdirect the process of assessment. To take an example closer to this case, if there was evidence that, among Christians in Iran, only priests and other ordained persons were ever the subject of mistreatment by the authorities, the only question for the Tribunal would be whether the appellant had such a status within the Christian population, or may be perceived to have that status by those known to persecute.

35 The inquiry in such "sub-group" cases focuses on a quality of the applicant that is susceptible of distinction. The categorisation is according to a feature of the applicant that makes him or her *distinguishable* from other persons. Subject to the evidence, the classification is one that can readily be affirmed or denied. And, of course, such classification will only be relevant and appropriate if there is evidence that *the potential persecutors also make that distinction*. If persecution of Christians is *generally* focused on priests, however, it is of no assistance in determining whether *this* appellant faces a real chance of persecution to know that he is not a priest. The issue will be whether there is anything in the circumstances of *this* appellant to take him outside the "general" situation.

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11 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678; 205 ALR 487.

12 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

13 *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854; 206 ALR 242.

36 The difference between appropriate sub-group classifications and those employed in *Appellant S395/2002* and this case is that the latter classifications turn on the applicant's behaviour or the expression of the aspect of the applicant's life which is said to attract persecution for a Convention reason. Gradations of behaviour are inherently difficult to classify, and virtually impossible to divide into two categories. Where the persecution is triggered by awareness or conspicuousness of the conduct claimed to be within the Convention, the Tribunal must take even more care to consider how factors other than the applicant's behaviour may lead to attention from authorities or other citizens.

37 The correct approach involves a careful assessment of the kinds of behaviour that trigger the persecution and the kinds of behaviour in which the applicant has engaged or is likely to engage. And then the Tribunal must consider what other risks of attracting persecution the applicant faces. For example, there may be past persecution or past involvement with authorities for other reasons. Or there may be oppositional family members and neighbours who may inform on an applicant regardless of his or her inconspicuous lifestyle.

38 Where, as in this case, the "country information" is in summary form at a medium level of generality – as may be expected in departmental reports – and there is no past persecution relied on or accepted by the Tribunal, it will be necessary to make a judgment as to whether the anticipated behaviour of the applicant is enough to raise a real chance of persecution. This assessment may involve consideration of a spectra of the practice, conduct or outward display that might attract persecution for a Convention reason. But the assessment must be grounded in the actual situation of the applicant and the evidence he or she presents to the Tribunal. And, as Gummow and Hayne JJ noted in *Appellant S395/2002*, the fewer the categories of kinds of behaviour employed for making this assessment, the greater the likelihood of falling into the error of merely classifying the applicant according to a false dichotomy and ignoring the gradations within both the evidence of country conditions and the applicant's behaviour[14].

39 Gradations in the evidence of country conditions may include qualifications that must not be discounted in the use of categories to assess an applicant's claims. In *Appellant S395/2002*, Gummow and Hayne JJ pointed to the danger of failing to pay attention to the qualification implicit in a term like "generally"[15]. In the present case, the country information relied on referred to:

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14 *Appellant S395/2002* (2003) 216 CLR 473 at 499 [76].

15 *Appellant S395/2002* (2003) 216 CLR 473 at 499-500 [77].

- no particular problems for asylum seekers who had based their application on a conversion to Christianity *unless they declared to the authorities on return their new religious affiliation*;

- those converts who go about their devotions quietly are *generally* not disturbed;

- Converts are *generally* tolerated *as long as they maintain a very low profile*.

These qualifications alone indicate that this was an inappropriate case for the application of a bipartite classification. There are no recognised sub-groups in Iran of "proselytising Christians" and "quietly evangelising Christians". And even if the evidence supported the proposition that those who could be categorised as "actively proselytising Christians" faced a serious risk of persecution, the finding that this appellant was not such a Christian did not complete the Tribunal's inquiry into his chance of facing persecution.

The error in this case

40 As I have explained, the error involved in categorisation and classification occurs only where that process of assessment is inapt to the application. The respondent argued in this Court that the appellant was bound to identify an express or implied statutory prohibition on the method employed by the Tribunal before he could succeed. The Tribunal is obliged to review a reviewable decision in respect of which an application is made for review[16]. A "decision to refuse to grant a protection visa" is a reviewable decision[17]. Under s 36(2) of the *Migration Act* an applicant for a protection visa must be a non-citizen to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol. Any error that causes the Tribunal to fail to consider whether the applicant is owed protection obligations is an error going to jurisdiction.

41 The process of categorisation and classification is not what renders the decision in excess of jurisdiction. It is the use of that process to direct the focus of the Tribunal's assessment to something other than the issue of protection obligations owed to the applicant. The task of the Tribunal is mandated by the *Migration Act*. If the method adopted by the Tribunal prevents the carrying out

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16 *Migration Act* 1958 (Cth), s 414.

17 *Migration Act* 1958 (Cth), s 411.

of that task, the Tribunal's decision will be attended by error. As Gummow and Hayne JJ said in *Appellant S395/2002*[18]:

> "The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made."

42 The first part of the error was the wrong identification of sub-groups of Iranian society. The evidence on which the Tribunal relied did not suggest that the authorities in Iran recognise a sub-group division of active proselytising and quietly evangelising Christians. At most the evidence supported the proposition that those who engaged in aggressive proselytising and conspicuous practice of Christianity faced a greater chance of persecution than other Christians. That conclusion did not support the sub-classification of Christians in Iran generally. The presence of qualifications in the country information about the position of those who behaved less conspicuously or did not proselytise actively and the variety of ways in which that kind of Christian was described indicates that there was no basis for the Tribunal to draw a distinction between the two supposed categories of Christians.

43 Furthermore, the Tribunal employed categorisation in the absence of any evidence that Iranian authorities tolerate any form of faith sharing. The Tribunal's key step in its reasoning process, that a "distinction can be drawn between the quiet sharing of one's faith as an evangelist and the aggressive outreach through proselytizing by adherents of some more fundamental[ist] faiths" has no support in the information on which the Tribunal relied. The only evidence of activities with lower risk was in relation to "converts who go about *their devotions* quietly" and who "maintain a *low profile*". The idea of some lesser form of *evangelism* not amounting to proselytisation in the eyes of Iranian authorities was an assumption by the Tribunal.

44 The Tribunal's distinction was directly in conflict with the evidence on which it relied that:

> "Any action interpreted as manifesting an intent to 'influence a Muslim to convert faith' is a serious criminal offence both for the priest and the Muslim concerned. Definition of this provision in the criminal code is moreover arbitrary and ambiguous. Its application is intended to harass."

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18 *Appellant S395/2002* (2003) 216 CLR 473 at 500 [78].

45 It is difficult, even linguistically, to distinguish between evangelism and proselytising. *The Macquarie Dictionary* defines "proselyte" as "one who has come over or changed from one opinion, religious belief, sect, or the like to another; a convert" and "proselytise" is the verb "to make a proselyte of; convert"[19]. To "evangelise" is, according to the same source, "to preach the gospel to" or "to convert to Christianity". "Evangelist", "evangelism" and other related words derive from the word "evangel" that refers to the teachings of and about Jesus Christ, primarily contained in the four gospels of the New Testament in the Christian Bible. So, any activity related to "evangel" is the preaching, sharing, telling or proclaiming of the Christian faith. In the context of a Muslim community, controlled by an Islamic regime and Muslim authorities, it is difficult to imagine how the Tribunal concluded that the appellant could operate as any kind of evangelist without this being perceived as an intention to "influence a Muslim to convert faith". But it is enough that the Tribunal had no basis in the "country information" or any other evidence before it for its assumption that a category of Christians who engaged in "quiet sharing of one's faith as an evangelist" either existed or was recognised by the authorities in Iran.

46 The second part of the error by the Tribunal was in its application of the categorisation to the appellant, that is, the classification of the appellant by reference to the categories presumed. There are two problems with this aspect of the decision. The Tribunal came to unsubstantiated conclusions about the appellant's Christian beliefs and, by classifying the appellant according to its erroneous categories, failed to ask itself important questions about the appellant's chance of facing persecution in Iran.

47 A number of the conclusions of the Tribunal were unsupported by evidence. The Tribunal referred to and relied on the identification of the denomination of Christianity to which the appellant belongs. The Tribunal said that it was not "a denomination that exhorts its adherents to proselytize". The Tribunal referred at this point to a letter from the appellant's spiritual adviser to the effect that the tenets of the Uniting Church were similar to those of the church in West Timor in which the appellant had been baptized. Insofar as Reverend Watts said anything in that letter about the content of the tenets of the faith that the appellant had embraced, he said:

> "As a natural consequence of the joy that he feels as a Christian, [the appellant] likes to be able to tell Muslim people he knows about Christianity particularly if they are showing an interest. He has told me he is doing this at Curtin IRPC. It seems that he cannot resist sharing his faith with others. I do not see this as a bad thing but rather that it is great because [the appellant] is merely living out *the call of Christ to share the*

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19 *The Macquarie Dictionary*, 3rd ed (1997).

good news with others. This is an essential part of being a Christian." (emphasis added)

48 The Tribunal relied on no other evidence of the content of the appellant's faith. As Emmett J noted in his judicial review of the Tribunal's decision[20]:

> "It is true that the Tribunal did not inquire into the doctrines of the Uniting Church and specifically into the doctrines of the Uniting Church concerning evangelism. However, ... it is clear that the Tribunal took into account the Christian denomination that had been embraced by the applicant."

49 The Tribunal also did not relate the appellant's denomination to the information it had extracted regarding Christian denominations in Iran[21]:

> "While the traditional Christian communities (Armenian and Assyrian) do not proselytise and even discourage those Muslims who may express an interest in conversion, the Catholic, Protestant and Evangelical missionary churches have tended to face greater problems with the authorities on account of their links with the West and the greater importance placed on proselytising."

50 In some cases, a denominational distinction might be the kind of sub-category that could validly be employed in a case involving claimed persecution on religious grounds. In this case, however, the evidence before the Tribunal was that sharing the Christian faith with Muslims was an essential part of the kind of Christianity that the appellant had embraced. If any denominational classification were to be employed, the appellant was clearly a member of a church (Protestant) that was described as placing a greater importance on proselytising and for that reason faced greater difficulties from the Iranian authorities. The Tribunal's reliance on the appellant's denominational affiliation and presumed tenets of faith regarding proselytism had no evidentiary basis.

51 The Tribunal also came to unsupportable conclusions about the appellant's level of activity in sharing his faith. Even on the Tribunal's categorisation, the weight of the evidence concerning the appellant suggested that he did engage in active proselytisation. The Tribunal accepted that the appellant might, on return to Iran, engage in "distribution of pamphlets, speaking to others privately about

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20 *NABD v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, 26 March 2002) per Emmett J at [27].

21 Commonwealth Department of Foreign Affairs and Trade, *Country Profile for Use in Refugee Determination: Islamic Republic of Iran* (1996).

his faith and encouraging interested persons to attend church services". Unless the Tribunal, illogically, confined these acts to other Christians and defined proselytisation as conduct taking place only in prominent public places, it is unclear how it concluded that these acts in Iran would not amount to proselytisation. At the least, they proceeded well beyond what authorities might view as "influenc[ing] a Muslim to convert faith". An "interested person" would presumably be a person of another faith interested in Christianity. The evidence from Reverend Watts and the appellant, accepted by the Tribunal, was that the appellant was discussing his faith with Muslims in the detention centre. Although in my view the Tribunal erred in its conclusion on this issue, the error is probably one of fact rather than law. It is not necessary to hold that the Tribunal misdirected itself: I have already found that the Tribunal made a jurisdictional error in its approach to the appellant's application.

Conclusion

52 The focus on classifying the appellant according to his level of proselytisation led the Tribunal to fail to consider the appellant's individual circumstances as they related to the available information about the risk of persecution for Christians in Iran. The Tribunal did not consider whether, irrespective of its own assessment of the appellant's faith tenets, the appellant's anticipated conduct in Iran might give rise to a real chance of persecution even if it did not amount to proselytisation. In particular, the Tribunal did not address the qualifications present in the "country information" and the passage regarding behaviour perceived as influencing a Muslim to convert faith.

53 The *Migration Act* requires that every applicant for a protection visa be assessed as an individual. Although in some contexts categorisation is an appropriate methodology for assessment, the categories applied in this case were not based on any evidence before the Tribunal and erroneously classified Christians in Iran by reference to behaviour that was not susceptible of categorisation. The Tribunal made a jurisdictional error when it confined its consideration of the appellant's risk of facing persecution in Iran to the determination of whether he was an "active proselytizing" or "quiet evangelising" Christian.

Order

54 The appeal should be allowed. The order of the Full Federal Court should be set aside. In its place, orders should be made allowing the appeal to that Court, granting the application for judicial review in the Federal Court and quashing the decision of the Refugee Review Tribunal, and directing the Tribunal to redetermine the appellant's application for a protection visa according to law. The first respondent should pay the appellant's costs in each Court and the Tribunal.

55 KIRBY J. In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[22], this Court drew attention to the error of dividing applicants claiming protection as refugees[23] into *a priori* categories: those who, if returned to their country of nationality, might avoid persecution by acting "discreetly" and those who might not.

56 The decision in that case concerned a claim for protection on the basis of a well-founded fear of being persecuted for reasons of membership of a particular social group (homosexuals from Bangladesh). The present is a case involving a claim of well-founded fear of persecution for reasons of religion (a Muslim convert to Christianity from Iran).

57 The decision in *Appellant S395* was given after the Full Court of the Federal Court of Australia determined the present case[24]. The central question in this appeal is whether the impermissibility of the taxonomy revealed in *Appellant S395* requires the reversal of the decisions below and a reconsideration by the Refugee Review Tribunal ("the Tribunal"), freed from the postulate of the exercise of "discretion" – in this case identified as "the quiet sharing of one's faith as an evangelist [as distinct from] the aggressive outreach through proselytizing"[25].

58 Consistency with the approach adopted in *Appellant S395* requires the same outcome. The Tribunal made an error of jurisdiction. That error should have been corrected by the Federal Court. This Court should require the reconsideration of the appellant's case, absent the arbitrary classification adopted. There is no postulate in the Refugees' Convention ("the Convention")[26] that, in the exercise of the fundamental freedoms mentioned (including in respect of religion), applicants for protection must act "quietly", "maintain a low profile",

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22 (2003) 216 CLR 473.

23 *Migration Act* 1958 (Cth), s 36.

24 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 249 (decided 22 August 2002). The decision in *Appellant S395* was published on 9 December 2003.

25 Decision of the Refugee Review Tribunal, 19 December 2001 (G Brewer, Tribunal Member) ("Decision of the second Tribunal") at 15.

26 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37 (together described as "the Convention").

avoid proselytising their views or otherwise act "discreetly" in matters so fundamental[27].

59 The Tribunal misdirected itself by imposing this classification on the facts and by failing to consider whether, in Iran, the obligation to act in such a fashion would be the result of the denial of fundamental freedoms, thereby occasioning the "well-founded fear of being persecuted" referred to in the Convention and incorporated in the *Migration Act* 1958 (Cth) ("the Act"). There are further errors which I explain below. The result is that the appeal should be allowed.

The facts and the appellant's case

60 *The background facts*: A general description of the claim brought by NABD (the appellant) appears in the reasons of Hayne and Heydon JJ[28] ("the joint reasons"). Some further elaboration appears in the reasons of Gleeson CJ[29]. However, I will add some more flesh to the bones. An appreciation of the detailed facts, and the applicable law, produce a different outcome.

61 The appellant is a national of Iran who is now aged 36. He arrived in Australia in November 2000 after having spent seven months in Indonesia. He immediately applied for a protection visa. In January 2001 his application was refused by a delegate of the Minister. In April 2001 the Tribunal affirmed the delegate's decision. That decision was set aside by the Federal Court in June 2001. That Court concluded that the first Tribunal had[30]:

> "[F]ailed to interpret correctly the applicable law, in particular the elements implicit in the word 'religion', and its inter-relationship with the likely perceived results in the country of nationality upon return … [and to] apply this understanding of religion and its intersection with persecution to the facts as found."

Specifically, the first Federal Court concluded that[31]:

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27 Quoting from the decision of the second Tribunal at 15.

28 Joint reasons at [152].

29 Reasons of Gleeson CJ at [4]-[6].

30 *[NABD] v Minister for Immigration and Multicultural Affairs* [2001] FCA 795 at [30].

31 *[NABD] v Minister for Immigration and Multicultural Affairs* [2001] FCA 795 at [34].

"[T]he Tribunal has not directed itself to the question as to whether the anticipated limits on the practice of the Christian faith of this applicant and the foresight of any such limitation did or did not amount to persecution or, more accurately, a well-founded fear of persecution."

62 The Federal Court ordered the Tribunal to re-determine the appellant's claim. The Tribunal, differently constituted, reheard the application. In a decision of 19 December 2001, a second tribunal again reached a conclusion adverse to the appellant. It is that decision that is the subject of these proceedings.

63 *The appellant's case*: In the second tribunal, in support of his claim of a well-founded fear of persecution for reasons of religion were he returned to Iran, the appellant relied upon a series of arguments advanced cumulatively and in the alternative:

(1) That he had identified with Christianity in Iran, narrowly escaped arrest before fleeing the country by mountain routes using a false passport, proceeding to Indonesia and ultimately to Australia so as to avoid the risks of persecution in Iran;

(2) That he had deepened his interest in Christianity whilst in Indonesia, had been baptised in West Timor and pursued his new religion on his arrival in Australia. Whilst in detention he had contributed to the conversion of more than twenty fellow detainees from Islam to Christianity[32];

(3) That news of his departure, religious conversion and activities in the detention centre had come to the notice of his father and the authorities in Iran, resulting in his being disowned by the father and becoming of interest to the Iranian authorities; and

(4) That he had converted from Islam, the religion of his birth, to Christianity and, as the child of Muslim parents, was thus an apostate, liable under the Shari'a law applicable in Iran to the sentence of death for renouncing Islam; and otherwise to be subject to repressive and discriminatory controls in that country. Such restrictions extended to his exercise of his new-found religious belief, affecting in particular his entitlement to worship openly and without hindrance. They limited severely his ability to promote knowledge about Christianity amongst others, and to contribute to the conversion to Christianity of those who had not yet heard "the good news".

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32 See *Applicant NABD* [2002] FCAFC 249 at [28].

The decisional history

64 *The Tribunal's adverse findings*: It is proper to reduce this appeal to its essentials by noting determinations made by the second Tribunal that were arguably open to it on the evidence and that have not been substantially contested in this appeal.

65 The second Tribunal disbelieved the appellant's contention that he had narrowly escaped arrest whilst attending a Christian meeting in Iran. It considered that he had "fabricated" this story, as well as the account of his disguised crossing into Turkey[33]. Similarly, the Tribunal rejected a letter, said to have come from the appellant's brother, which reported the antagonism of their father towards the appellant and the interest in him of the Iranian authorities[34]. In such matters, the second Tribunal stated that it had not found the appellant to be a "witness of truth"[35].

66 Whilst it accepted that the appellant had been baptised in Indonesia and had engaged in religious activities whilst in detention in Australia, the Tribunal also rejected his claim that, in Australia, he had caused the conversion to Christianity of twenty Islamic detainees. It reached this view having regard to the "strict limits of his inchoate knowledge of [Christianity]"[36].

67 These conclusions left open the issue of whether the appellant had himself "genuinely" converted to the Christian religion and what consequence upon the state of his "fear" that that act, without more, would have (if any) were he to be returned to Iran. The second Tribunal noted, in country information to which it referred, the provision of the death penalty in Iran, under one view of Shari'a law, for Muslim apostates. However, it appears to have concluded that such a penalty would not be imposed on the appellant or other persons who "worship privately and maintain a low profile"[37]. The second Tribunal suggested that it was "not inconsistent with his beliefs and practices" for the appellant, were he returned to Iran, to avoid proselytising the Christian religion or other active conduct that

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33 Decision of the second Tribunal at 7-8.

34 Decision of the second Tribunal at 10.

35 Decision of the second Tribunal at 10.

36 Decision of the second Tribunal at 13.

37 Decision of the second Tribunal at 12, quoting from Australia, Department of Foreign Affairs and Trade, *Country Profile for Use in Refugee Determination: Islamic Republic of Iran*, (1996).

would bring him to official notice[38]. On this basis, the second Tribunal was "not satisfied that the [appellant] is a person to whom Australia has protection obligations under the Refugees Convention"[39]. It therefore refused the protection visa that he sought.

68 *Decisions of the Federal Court*: For a second time, the appellant brought proceedings in the Federal Court. On this occasion, the proceedings were commenced not under the Act for error of law[40] (as had been done earlier), but under the *Judiciary Act* 1903 (Cth), s 39B.

69 Essentially, the appellant's contention on this occasion was that the second Tribunal had failed properly to consider the application to his case of the essential requirements of s 36(2) of the Act so that the purported exercise of its statutory powers was invalid, and not a lawful exercise at all[41].

70 In so far as the appellant complained about the way in which the second Tribunal had addressed certain factual matters (notably its assumptions about the beliefs and "tenets" of the Uniting Church denomination of Christianity to which the appellant had become attached in Australia[42]), the appellant relied for this complaint on the law governing procedural unfairness[43]. He accepted that it was necessary for him to show jurisdictional error in order to obtain relief from the Federal Court[44]. It is appropriate to decide the appellant's case on that footing. If jurisdictional error is shown, the privative provisions of the Act would be inapplicable for the reasons explained by this Court in *Plaintiff S157/2002 v The Commonwealth*[45]. So much was not contested by the Minister.

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38 Decision of the second Tribunal at 16.

39 Decision of the second Tribunal at 16.

40 See *NABD v Minister for Immigration and Multicultural Affairs* [2002] FCA 384 at [17].

41 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1001 [51]; 207 ALR 12 at 24.

42 Decision of the second Tribunal at 15.

43 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]-[25], 1101 [86]-[88]; 197 ALR 389 at 394, 406-407.

44 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 77 ALJR 786 at 793 [37]; 196 ALR 385 at 394-395.

45 (2003) 211 CLR 476 at 494 [37]-[38], 510-511 [92]-[97].

71 I mean no disrespect to the judges of the Federal Court by not referring in detail to the reasons for their rejection of the appellant's application for relief. Because their decisions were given before the reasons of this Court in *Plaintiff S157* were available, a significant part of the reasons, at first instance, was addressed to the privative provisions of the Act[46]. This is not now relevant.

72 Further, because both decisions below were given before *Appellant S395*, they were not alert to the concerns about the classification relied upon under the Convention in terms of postulates of "discreet" and "non-discreet" conduct, were the appellant returned to his country of nationality. This being the case, it is necessary for this Court to reconsider for itself the decision of the Tribunal in order to decide whether it falls into an error analogous with that identified in *Appellant S395*. In my opinion it does.

The applicable legislation

73 There is nothing controversial about the legislation applicable to this case. Principally, it involves s 36(2) of the Act by which, effectively, the criteria stated in the Convention are accepted as part of Australian municipal law.

74 Section 91R of the Act introduces an elaboration of the meaning of "persecution" in its application to claims by persons asserting that Australia has "protection obligations" under the Convention. Relevantly, it is necessary that the "persecution" involve "serious harm to the person" and "systematic and discriminatory conduct". In most circumstances, conduct engaged in by the person after arrival in Australia is to be disregarded[47]. It was common ground that s 91R was in force in relation to the appellant's claim. But it was equally agreed that it had no material application to his case. If the appellant could show that the Iranian legal and social sanctions against converts from Islam to Christianity would or might apply to him, there is no doubt that the harm to which he would or might be exposed was "serious harm" as defined by s 91R(2).

The approach of the second Tribunal

75 *Religious freedom in Iran: relevant inhibitions*: In order to identify the error of the second Tribunal, it is necessary to record additional passages from its

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46 *NABD* [2002] FCA 384 at [19]-[38]. The Full Court did not consider that it needed to decide the question: [2002] FCAFC 249 at [39].

47 The Act, s 91R(1), 91R(3).

decision beyond those that appear in the majority reasons[48]. This is somewhat tedious. However, without a fuller appreciation of the reasoning of the Tribunal, its jurisdictional error is not revealed.

76 The decision of the second Tribunal quoted documents supplied by the Australian Department of Foreign Affairs and Trade ("DFAT") as a country profile of Iran[49] and by the United States Department of State *Annual Report on International Religious Freedom for 1999: Iran*[50]. The United States document records the fact that 99 percent of the population of Iran is Muslim. The Christian community constitutes only a portion of the remaining 1 percent, being approximately 117,000 persons in all according to Iranian figures. The United States report proceeds[51]:

> "The government is highly suspicious of any proselytizing of Muslims by non-Muslims and can be harsh in meting out its response, in particular against Baha'is and evangelical Christians."

77 In the DFAT report, as quoted by the second Tribunal, it is stated[52]:

> "Apostasy is widely reported as carrying a nominal death sentence. However, there are only one or two cases (high profile Christian clergy) where this sentence has ever been imposed. Moreover, some senior and influential clerics have recently publicly questioned such an interpretation of Koranic law. The evidence is that those converts who go about their devotions quietly are generally not disturbed (it is either those who actively seek attention, or who are engaged in conspicuous proselytization, who have run into difficulties, usually with the local mosque rather than the State authorities[])]. The last convert to be sentenced to death was Mehdi Dibaj, a high-profile Christian pastor with a long history of proselytization. He was given a last minute reprieve in early 1992 but found murdered a year later."

78 The DFAT report continues:

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48 One passage appears in the reasons of Gleeson CJ at [9]. Other passages appear in the joint reasons at [155]-[156].

49 Decision of the second Tribunal at 11-12.

50 Decision of the second Tribunal at 11.

51 Decision of the second Tribunal at 11.

52 Decision of the second Tribunal at 11-12.

> "Death sentences for apostasy have traditionally been issued to Baha'is and occasionally Christian converts who have been active in proselytising. However, the death sentence has rarely been carried out for apostasy alone. … People who do publicly convert away from Islam would … be harassed, possibly imprisoned and threatened with death, if they had been found to be active in proselytising among Muslims. … Those who worship privately and maintain a low profile will be very unlikely to suffer any adverse attention from the authorities for their conversion, unless they are involved in other activities which would attract security interest."

79 In another passage of the DFAT report, reference is made to a legal prohibition on attempting to "influence a Muslim to convert faith" which is described as a "serious criminal offence" both for the Christian and Muslim concerned. The legal provision is described as "arbitrary and ambiguous". Its intention is said to be "to harass". Those working in government and revolutionary organisations may "experience workplace harassment, discrimination and possible dismissal if it becomes known that they have converted".

80 The second Tribunal did not indicate any disbelief of these reports. It would have been astonishing if it had done so, given the unanimity with which, from different sources, the reports spoke of the lack of religious freedom in Iran. In his reasons in the Federal Court, reviewing the second Tribunal's decision, Emmett J quoted from a further document, reinforcing the foregoing reports. This was a background paper prepared by the United Nations High Commissioner for Refugees and published in January 2001[53]. Describing the plight of Christians in Iran, that report states:

> "A Christian group reported that between 15 and 23 Iranian Christians disappeared between November 1997 and November 1998. Those who disappeared reportedly were Muslim converts to Christianity whose baptisms had been discovered by the authorities. The group reporting the disappearances believed that most of them were killed. In 1999 one organisation reported eight deaths of evangelical Christians at the hands of the authorities in the past 10 years."

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53 [2002] FCA 384 at [30]. As Emmett J pointed out, this passage was quoted in the decision of the first Tribunal. It appeared in material that his Honour was prepared to accept was before, or available to, the second Tribunal. See also Boyle and Sheen, *Freedom and Belief – A World Report*, (1997); cf *WAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 908 at [14].

81 Read in the light of these apparently authentic and trustworthy descriptions of non-Muslim religious difficulties in Iran, any suggestion of a benign "tolerance" of Iranian converts to Christianity that might flow from the short extract from the country profile quoted in the joint reasons[54] is dispelled. Iran is portrayed in the reports as a country with harsh laws and social practices, officially condoned, restricting the individual observance of religion that is permitted in most other countries[55]. Moreover, Iran is portrayed as a land given to disappearances, murders and reported murders of converts to Christianity, sharp intolerance, possessed of vaguely worded and ambiguous laws that are designed to prevent attempts (or what might be perceived or described as attempts) to convert members of the Muslim majority to Christian beliefs.

82 It can be assumed that the appellant was aware of this situation, in his country of nationality, as described in the reports provided to the Tribunal by the Minister and apparently accepted by it. The conditions described must be kept in mind in judging whether the appellant had a "well-founded" fear of "persecution" for reasons of religion.

83 *Genuineness of conversion*: Yet was the appellant a "genuine" convert to Christianity? Or was his conversion opportunistic, effected so as to secure a favourable outcome to his application for a protection visa in Australia[56]?

84 Upon this subject, the second Tribunal's reasons were somewhat ambivalent and, with respect, rather ill-structured. On the one hand, the Tribunal noted that "the [appellant] is among 100 detainees in the same [detention] centre who have embraced Christianity in just eight months"[57]. Moreover, it gave weight to a report that described the economic downturn in Iran as the source of

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54 Joint reasons at [154].

55 See Sim, *Fundamentalist World: The New Dark Age of Dogma*, (2004) at 74-75.

56 The "genuineness" of a conversion could be relevant to assessing fear of persecution. It may provide evidence as to the likely behaviour of a person upon return to the country of origin. It should be noted, however, that there is no *necessary* link between genuineness and fear. An "opportunistic" conversion might still lead a Shari'a judge to view a person as an apostate. A person need not actually *be* or *believe* something for their fear of persecution to be well-founded. What is relevant is the perception of the alleged persecutor as to the nature of the belief of the asylum seeker. These perceptions, or whether the persecutor is aware of the belief of the asylum seeker, *might* be influenced by the genuineness of the conversion, in that it might affect that person's behaviour.

57 Decision of the second Tribunal at 13.

"growing numbers of illegal Iranian immigrants"[58]. Yet each of these statements, which suggest a doubt on the Tribunal's part concerning the genuineness of the appellant's conversion from Islam to Christianity, appears *after* the Tribunal records its finding that his application was to be considered on the basis that his conversion was genuine[59].

85 Thus, even in respect of the events that preceded the appellant's departure from Iran, the second Tribunal stated that it "accepts that the applicant befriended a Christian in Iran and that he occasionally discussed the Christian faith with him"[60]. It also accepted that, in Indonesia, he "might have been intimidated by some generalized violence against Christians … and by some personal harassment"[61]. Whilst finding that some of his claims were not genuine (such as the letter attributed to the appellant's brother) and expressing "serious reservations about his motivations", it stated quite clearly that it "accepts … that [the appellant] might have genuinely embraced Christianity over time"[62]; that he had been baptised in Indonesia; that he had undertaken Bible study courses by correspondence; and that he had attended religious gatherings in Indonesia and whilst in detention in Australia[63].

86 These conclusions led the Tribunal to accept that the appellant "has engaged in other religious activities as outlined by him at the hearing before this Tribunal" and that these included distribution of religious pamphlets, speaking to others privately about his faith and encouraging interested persons to attend church services[64]. Whilst raising again the question whether the appellant had converted "for convenience", the second Tribunal held back from making such a finding. On the contrary, it proceeded to assume that the appellant "has now done so", that is, embraced Christianity[65]. Upon that assumption – which cannot be questioned in this Court – the Tribunal then proceeded to consider the appellant's position, were he to return to Iran.

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58 Decision of the second Tribunal at 14.

59 Decision of the second Tribunal at 12.

60 Decision of the second Tribunal at 7.

61 Decision of the second Tribunal at 9.

62 Decision of the second Tribunal at 10.

63 Decision of the second Tribunal at 10.

64 Decision of the second Tribunal at 11.

65 Decision of the second Tribunal at 12.

87 It follows that this is not a case where the Tribunal dismissed the appellant's assertion of religious conversion to Christianity. On the contrary, the acceptance that an interest existed before he left Iran; that he was baptised in Indonesia; and that he had been engaged in Christian activities whilst in detention all indicate that the case was to be approached on the footing of a "genuine" religious conversion. This footing was reinforced by a letter provided to the Tribunal by Reverend Watts, the Uniting Church Minister serving the detention centre where the appellant was held. That letter is reproduced in the reasons of Emmett J[66]. There is no apparent reason to doubt the truthfulness of its contents:

> "[The appellant] likes to be able to tell Moslem people he knows about Christianity particularly if they are showing an interest. He has told me he is doing this at [the detention centre]. It seems he cannot resist sharing his faith with others. I do not see this as a bad thing but rather that it is great because [the appellant] is merely living out the call of Christ to share the good news with others. This is an essential part of being a Christian."

88 To say the least, if the appellant were to return to Iran, and to continue such conduct, it would put him on a course of infraction of the laws of that country; specifically expose him to the risk of enlivening the apostasy law; render him vulnerable to complaint to authorities and intimidation for his religious beliefs by anyone with a grudge against him; and subject him to discriminatory practices of a kind unknown today in most countries, including Australia.

89 *The apostasy question*: The second Tribunal acknowledged in its reasons the existence of the Iranian law against apostasy. It nowhere made a specific finding that the appellant was not exposed to punishment under that law. At the most, this was left to an inference, on the basis that the appellant would not be punished because of the prediction that he would quietly practise his faith and not proselytise[67], taking care to "maintain a low profile".

90 That there is a sentence of death attaching to apostasy; that the appellant, on being returned to Iran as someone who has converted to Christianity, would be exposed to that penalty; and that (although rarely carried out) converts had been murdered, had disappeared and had been harassed, in combination, called for a specific conclusion as to whether the crime of apostasy was a real risk so far as the appellant was concerned. No such finding was made.

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66 [2002] FCA 384 at [13].

67 Decision of the second Tribunal at 15.

91 The death penalty has long been abolished in every Australian jurisdiction[68]. Enlightened belief in Australia finds that form of punishment abhorrent. Australia is a party to the International Covenant on Civil and Political Rights ("ICCPR")[69]. The Second Optional Protocol to the ICCPR[70] aims at the abolition of the death penalty throughout the world. It commits State Parties to abolish that punishment within their own jurisdiction. The principle adopted in Art 1.1 of the Second Optional Protocol is mirrored in the requirement of the *Extradition Act* 1988 (Cth) governing the extradition of persons by Australia to countries that maintain the death penalty[71]. It necessitates the provision of an undertaking to Australia that a person so extradited will not be subject to the death penalty or, if so subject, that the penalty will not be carried out. Without the provision of that undertaking the person – citizen or non-citizen – will not be extradited.

92 Where the Federal Parliament has spoken so clearly on this topic and the Executive Government on behalf of Australia has adhered to the Second Optional Protocol, the Tribunal and the courts of Australia should approach the meaning and application of the Act in ways that are consonant[72].

93 It is far from clear that the Tribunal and the Federal Court addressed themselves directly to the appellant's fear about the risk of the imposition of the death penalty, now or in the future, as it might be faced by him were he returned to Iran. That risk would need to be judged by reference not only to current political and religious conditions in Iran but also to possible future conditions. Those conditions might change; not necessarily for the better. These questions were not considered explicitly by the second Tribunal, although clearly raised by the appellant's reference to the dangers of return to Iran for an apostate Muslim like himself. They are crucial in judging whether his "fear" of persecution is "well-founded".

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68 Kirby, "The High Court and the death penalty: Looking back, looking forward, looking around", (2003) 77 *Australian Law Journal* 811 at 817-819.

69 Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23.

70 Done at New York on 15 December 1989, [1991] *Australian Treaty Series* No 19 ("Second Optional Protocol").

71 *Extradition Act* 1988 (Cth), s 22(3)(c).

72 cf *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).

94 I also agree with the Federal Court of Australia in *SGKB v Minister for Immigration and Multicultural and Indigenous Affairs*[73] that the Tribunal:

> "... ought to have considered whether or not the mere possibility of a death sentence, regardless of how remote that possibility might be, could itself constitute persecution. In our view, to live under the shadow of such a threat might well do so."

95 The comments of French J in another Federal Court case are equally applicable to this matter[74]:

> "The Tribunal found that there was no evidence of low profile apostates attracting persecution of any kind in Iran. The evidence before it however indicates that the death penalty may be inflicted on apostates. When the Tribunal found that there was no evidence of low profile apostates attracting persecution it is not clear that this finding extended to apostates who are known to the authorities. It may be that there is no evidence of low profile apostates attracting persecution because they are not known to be such."

96 *Tenets of the Christian religion*: In the Federal Court and in this Court, the appellant also complained of the reliance by the Tribunal on assumptions it had made concerning the tenets of the Christian Church with which he had become involved in Indonesia and whilst in detention in Australia. On this, the Tribunal expressed its own view, presumably on the basis of its knowledge of, or perceptions about, the Uniting Church in Australia. The Tribunal accepted specific evidence that the appellant "discussed Christianity with other detainees"[75], distributed pamphlets and encouraged others to attend church[76].

97 In the reasons of the second Tribunal, it was said[77]:

> "In reaching its findings, the Tribunal also gives weight to the fact that the [appellant] is not a member of a denomination that exhorts its adherents to proselytize. A letter from his spiritual adviser indicates that the church the

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73 [2003] FCAFC 44 at [21].

74 *WAHI* [2003] FCA 908 at [38].

75 Decision of the second Tribunal at 13.

76 Decision of the second Tribunal at 11.

77 Decision of the second Tribunal at 15-16.

> [appellant] attended in Indonesia has similar tenets to the Uniting Church denomination to which he has become attached in Australia.
>
> A distinction can be drawn between the quiet sharing of one's faith as an evangelist and the aggressive outreach through proselytizing by adherents of some more fundamental faiths. … [C]ountry information indicates that the actual capacity of the [appellant] to practise his faith in Iran without a well-founded fear of persecution for a Convention reason is consistent both with his Christian teachings in Australia and, similarly, in Indonesia. A requirement to proselytize is not a core component of his faith nor, indeed, at all essential to it."

98 The appellant submitted that this finding, made without specific evidence, involved a procedural unfairness to him. In so far as there was evidence at all on this issue, it was contained in the statement by Reverend Watts that telling other people, specifically Muslim people, about Christian beliefs was "living out the call of Christ to share the good news with others" and "an essential part of being a Christian".

99 It might be true that, in Australia, the Uniting Church does not ordinarily proselytise "aggressively". However, a person who has converted to Christianity, as the appellant was accepted to have done, living in a country overwhelmingly constituted of adherents to a different religion, might feel a greater desire to tell others about his new beliefs. So it certainly was historically in Australia, as in England, in the case of the Protestant denominations which, in 1977, combined in the Uniting Church in Australia.

100 The second Tribunal appears[78] to have believed that it could draw the inference which it did on the basis of its own general knowledge rather than proof or, at least, by putting the issue to the appellant so that he could respond to it according to his own beliefs. Once again, this appears to be the type of error exposed in *Appellant S395*. Instead of concentrating on the appellant's fears and prospective conduct, the Tribunal superimposed an *a priori* classification derived from its own conceptions of the usual practices of the Christian denomination which the appellant had embraced. Remarkably, it then transferred Australian norms and conduct to the completely different circumstances of the appellant in Iran. This is the kind of error into which this type of classification easily leads the decision-maker.

101 *Quiet sharing of Christian faith*: Whatever the defects and errors in the foregoing reasoning, I now reach the critical parts of the second Tribunal's decision where its ultimate conclusion was stated.

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78 Decision of the second Tribunal at 13.

102 Influenced by the taxonomy reflected in the DFAT country information, the second Tribunal arrived at the conclusion stated in other reasons[79]. However, it is very important to note that such conclusion followed a recognition by the Tribunal of the classification adopted in the DFAT materials[80]:

> "Information from DFAT indicates that converts who go about their devotions quietly are not bothered; it is only those who actively seek public attention through conspicuous proselytizing who encounter a real chance of persecution."

103 It is therefore against the background of this classification that the Tribunal expressed its opinion that the appellant "would not choose to generally broadcast his practice of Christianity or conspicuously proselytize in Iran"[81]. Yet this "choice" is given meaning by reference to the peril that the appellant would face were he to "choose" any other course[82]:

> "If he were to choose to practise Christianity in Iran and to quietly spread the word the Tribunal concludes there is not a real chance that he would face persecution as a consequence."

104 Viewed in context, the prediction of what would occur is obviously based on the immediately preceding acknowledgment that any hope that a convert to Christianity in Iran would be let alone is dependent on a willingness to proceed "quietly" and to avoid risks of "public attention". The contrary course spells very serious dangers.

105 That this was the dichotomy accepted by the second Tribunal can be seen in several passages in the closing pages of its reasons[83]:

> "According to DFAT, Iranian converts to Christianity who go about their devotions quietly and maintain a low profile are generally not disturbed … provided they do not seek to convert others or engage in high profile religious activities."

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79 Reasons of Gleeson CJ at [9]; joint reasons at [155].

80 Decision of the second Tribunal at 13.

81 Decision of the second Tribunal at 13.

82 Decision of the second Tribunal at 13.

83 Decision of the second Tribunal at 15.

And:

> "A distinction can be drawn between the quiet sharing of one's faith as an evangelist and the aggressive outreach through proselytizing by adherents of some more fundamental faiths."

106 Having accepted that a "quiet" (equivalent to "discreet") practice of religious beliefs was imperative for safety in Iran, the second Tribunal effectively *imposed* the requirement of "quiet sharing of one's faith" on the appellant, were he to be returned to Iran. Its prediction of what he would do was necessarily dependent upon its assessment of what alone it would be safe for him to do in Iran.

107 The issue for this Court is whether the approach so described constitutes jurisdictional error. Does it involve the Tribunal, as in *Appellant S395*, in focussing incorrectly upon a classification derived from the practices of the country of nationality? Does this approach divert the Tribunal from addressing itself, as the Act and the Convention require, to whether, in *his* circumstances, the appellant has sufficiently established a relevant "fear" of persecution "for reasons of … religion". And if he did, whether such fear was "well-founded" in all of the circumstances of the case?

The Convention and the ground of religion

108 *The Convention in context*: The Convention is part of the international law that upholds basic human rights. The Preamble to the Convention recites the Charter of the United Nations and the Universal Declaration of Human Rights ("UDHR") as each affirming "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination"[84].

109 The Preamble also recites the United Nations' "profound concern for refugees" and its endeavours "to assure refugees the widest possible exercise of these fundamental rights and freedoms"[85]. This is why the Convention has been recognised in Australia[86], the United Kingdom[87] and elsewhere as an instrument embodying principles for the protection of basic human rights. This Court should interpret the Convention accordingly.

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84 Convention, Preamble, par 1.

85 Convention, Preamble, par 2.

86 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231-232, 296-297.

87 *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 639 per Lord Steyn.

110 From this premise, it has been said, correctly in my view, that if a State is "unable or unwilling to afford one of its own citizens his or her human rights as set forth in the UDHR, refugee and asylum law should recognize that individual's right to asylum in a state that will uphold those rights"[88]. Thus, the Convention is a practical means of "providing tangible redress from certain basic human rights violations", making it amongst "the foremost international human rights instruments"[89].

111 The ambit of "persecution" within the Convention remains the subject of debate. However, the term can be described as including the "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"[90]. The link to international human rights law is important because "it attaches refugee protection to the denial of core human rights and thus forges a close connection to other human rights instruments"[91].

112 *Religion as a human right*: This context also assists in understanding the reference to "religion" in the definition of "refugee" in the Convention, with its express mention of "well-founded fear of being persecuted for reasons of … religion". In practice, it is a ground that has had less attention than others; but that neglect is now being repaired[92].

113 Reading the Convention in the context of international human rights law, specifically as that law defends freedom of religion, helps to demonstrate why the imposition of a requirement that a person must be "discreet", "quiet", "low profile" and not "conspicuous" is incompatible with the objects of the

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88 Parish, "Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection", (2000) 22 *Cardozo Law Review* 223 at 258.

89 Steinbock, "Interpreting the Refugee Definition", (1998) 45 *UCLA Law Review* 733 at 736. See also Hall, "Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law", (1998) 73 *Washington Law Review* 105; Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129 at 131-132.

90 Harvey, "The Right to Seek Asylum in the European Union", (2004) 1 *European Human Rights Law Review* 17 at 20, citing Hathaway, *The Law of Refugee Status*, (1991) at 104-105.

91 Harvey, "The Right to Seek Asylum in the European Union", (2004) 1 *European Human Rights Law Review* 17 at 21.

92 Musalo, "Claims for Protection Based on Religion or Belief", (2004) 16 *International Journal of Refugee Law* 165 at 169.

Convention, properly understood. True, the human rights of the applicant for protection must be accommodated to the human rights of other individuals, both in the country of nationality and in the country in which protection is sought. Violent, aggressive or persistently unconsensual conduct "for reasons of … religion" are not protected by the Convention, any more than by other instruments of international law. Yet neither is it an answer to an assertion of a "fear" of being "persecuted for reasons of … religion" that such "fear" is not "well-founded" because it can be avoided by the behavioural expedients of discretion, quietness, maintaining a "low profile" and so forth. Such an approach is incompatible with the inclusion of religious freedom in the Convention.

114 "Religion", in that context, connotes not simply a private belief, or lack of belief, kept secret to the person concerned. Necessarily, it involves manifestations, and the practice of such a belief, including where relevant in community with others[93]. So much follows from nothing more than the use in the Convention of the word "religion".

115 This conclusion is reinforced by the developments of international law respecting freedom of religion as a basic human right[94]. Thus, Art 18 of the UDHR provides that:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

116 Article 18 of the ICCPR is in similar terms, making it clear that the right there expressed is subject "only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"[95].

117 In a General Comment on Art 18 of the ICCPR[96], the United Nations Human Rights Committee adopts a wide interpretation of the right of the individual to manifest his or her religion. Such manifestation extends to worship;

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93 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at 550 [5].

94 Anker, *Law of Asylum in the United States*, 3rd ed (1999) at 403-404.

95 ICCPR, Art 18.3.

96 United Nations, Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, (1993) at [4].

ritual and ceremonial acts; customs; the wearing of distinctive clothing; use of particular languages; choice of leaders; establishment of schools; and "the freedom to prepare and distribute religious texts or publications". In the General Comment, the display of symbols, the conduct of public worship and other observances are included in the concept of "religion". The situation of religious minorities in Iran, as described in the uncontested country descriptions before the second Tribunal, fall far short of this elaboration of the activities inherent in freedom of religion as understood in international human rights law.

118 The general statements in the UDHR and ICCPR have been further elaborated, relevantly, by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proclaimed by the General Assembly of the United Nations in 1981[97]. This Declaration states that the "freedom of thought, conscience and religion" includes the manifestation of a religion or belief in "worship, observance, practice and teaching"[98]. It includes, relevantly, freedom to "worship or assemble"; to "write, issue and disseminate relevant publications"; to "teach a religion or belief in places suitable for these purposes"; and to "establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels"[99].

119 There are similar elaborations of the freedoms inherent in manifesting one's religion or beliefs in regional human rights instruments[100]. The law, social practices and attitudes to the manifestation of minority religious beliefs in Iran, as described in the uncontested record, seriously conflict with these virtually universal statements of what is involved when international instruments, such as the Convention, refer to the protection of individual rights with respect to "religion".

120 The connection between the reference in the Convention to "religion" and this body of international law is acknowledged in the *Handbook on Procedures*

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97 United Nations, General Assembly Resolution 36/55 (25 November 1981).

98 Art 1.1.

99 Art 6(a), (d), (e), (i).

100 See European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art 9.2; American Declaration of the Rights and Duties of Man (1948), Art III; American Convention on Human Rights (1969), Art 12; Arab Charter on Human Rights (1994), Art 27; African Charter on Human and Peoples' Rights (1981), Art 8; Lester and Pannick, *Human Rights Law and Practice*, 2nd ed (2004) at 324-334 [4.9.3]-[4.9.14]; *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 at 824 [31].

and Criteria for Determining Refugee Status, issued by the United Nations High Commissioner for Refugees[101]. According to that Handbook, a prohibition on religious worship in private or in public and "serious measures of discrimination" imposed on religious grounds enliven the operation of the Convention. It is now well established that the Convention "protects not only religious beliefs, but also religious manifestations"[102]. What is at stake is not simply the defence of private thoughts and opinions. Of their nature, such internal processes can usually be maintained whatever the oppressive efforts of State power. International instruments, such as the Convention, are concerned with protecting the individual's public activities in interaction with others. This includes being open about one's religion and discussing it freely with others whilst at the same time respecting the rights of others to adhere to a different religion or no religion at all.

121 The foregoing approach to the Convention is further confirmed by decisions of the European Court of Human Rights in elaboration of Art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[103]. In *Kokkinakis v Greece*[104], that Court affirmed that religious freedom includes the freedom:

> "[T]o manifest one's religion … not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour ... through 'teaching', failing which … 'freedom to change [one's] religion or belief' … would be likely to remain a dead-letter."

122 Similarly, in *Metropolitan Church of Bessarabia v Moldova*[105], the same Court insisted on the right of those of a particular belief to be allowed to "associate freely, without arbitrary interference by the State". This, it was held, was "indispensable to pluralism … and is therefore at the very heart of the protection". Mere "tolerance", in the sense of ignoring a minority religious belief

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101 (1992) at [71]-[72]; Vevstad, *Refugee Protection – A European Challenge*, (1998) at 73-74.

102 Johnson, "Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?", (1996) *Brigham Young University Law Review* 757 at 764.

103 See Lester and Pannick, *Human Rights Law and Practice*, 2nd ed (2004) at 323-334 [4.9.1]-[4.9.14].

104 (1993) 17 EHRR 397 at 418.

105 (2002) 35 EHRR 13 at [118].

whilst confirming legal and State protection for others, was said to be no substitute for "recognition", since only recognition is capable of conferring enforceable rights on those concerned[106].

123 The idea that individuals have *rights* to religious freedom, and to change or abandon an earlier religion or religion in general, is thus one that lies at the heart of the word "religion" appearing in the Convention. It does not give religious adherents a *carte blanche* in the manifestation of their beliefs and the practice of their religion. The assertion of their rights must be respectful of the rights of others. However, the picture of religious intolerance, and the limitations (legal and otherwise) imposed on Christian believers in Iran, especially Muslim converts to Christianity, falls far short of the notion of religious freedom expressed in international law[107], to which the Convention is intended to contribute.

124 *Postulate of "quiet exercise of faith"*: Against this understanding of the purpose and content of the reference to "religion" in the Convention, it remains to consider the approach of judicial and other authorities to the suggestion that a "fear" of persecution for reasons of religion will not be "well-founded" if it can be avoided in the country of nationality by the exercise of "discretion" on the part of the putative refugee.

125 Generally speaking, scholars and courts that have considered the identified grounds in the Convention have rejected the notion that such is the content of the freedoms referred to there[108]. Their rejection is explained by reference to the fact that, were it otherwise, the Convention would itself become an instrument to diminish, instead of to protect and enhance, the nominated freedoms. Courts, tribunals and other decision-makers in countries of refuge would become, effectively, enforcers for those who diminish the identified freedoms instead of the protectors of those who claim that their freedoms are at risk[109].

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106 (2002) 35 EHRR 13 at [129].

107 See also *Murphy v Ireland* [2003] ECHR 352 (10 July 2003) at [65].

108 See Hathaway, "The Michigan Guidelines on Nexus to a Convention Ground", (2002) 23 *Michigan Journal of International Law* 211 at 213.

109 Dauvergne and Millbank, "*Before the High Court: Applicants S396/2002 and S395/2002*, a gay refugee couple from Bangladesh", (2003) 25 *Sydney Law Review* 97 at 110; Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia", (2002) 26 *Melbourne University Law Review* 144 at 176-177; Kendall, "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?", (2003) 15 *International Journal of Refugee Law* 715.

126 In *Fosu v Canada (Minister for Employment and Immigration)*[110] an applicant for refugee status complained of being arrested by authorities in Ghana under a law that prohibited public manifestations of the beliefs of Jehovah's Witnesses. Responding to the decision of the refugee tribunal in Canada that the applicant could pray to God and study the Bible in Ghana, Denault J stated that this was an "unduly limited" conception of the practice of "religion" protected by the Convention[111]:

> "The fact is that the right to freedom of religion also includes the freedom to demonstrate one's religion or belief in public or in private by teaching, practice, worship and the performance of rites. As a corollary to this statement, it seems that persecution of the practice of religion can take various forms, such as a prohibition on worshipping in public or private, giving or receiving religious instruction or the implementation of serious discriminatory policies against persons on account of the practice of their religion."

127 Similar conclusions have been reached in Canada in other cases where the Canadian tribunal had applied an approach postulating that the applicant could avoid persecution by concealment and discretion[112]. In *Irripugge v Canada (Minister of Citizenship and Immigration)*[113], the Federal Court of Canada reversed a refugee tribunal finding that the claimant was not persecuted for practising his religion as a Roman Catholic Christian in China because he could continue to do so in secret and thus avoid coming to the attention of State authorities. Sharlow J found that such an approach to persecution was erroneous, and affirmed the finding in *Fosu* that being forced to worship in private can amount to "persecution"[114]. Why should this Court endorse for Australia a narrower and less freedom-respecting view of the content of the Convention?

128 In Australia, individual judges of the Federal Court have adopted an approach similar to the Canadian courts. Thus in *Woudneh v Inder*[115], Gray J, in

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110 (1994) 90 FTR 182.

111 (1994) 90 FTR 182 at [5].

112 *Husseini v Minister of Citizenship and Immigration* [2002] FCT 177; *Sadeghi-Pari v Canada* [2004] FCT 282 at [29].

113 (2000) 182 FTR 47.

114 See also von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law*, (2002) at 31.

115 Unreported, Federal Court of Australia, 16 September 1988 at 19.

the context of the exercise of religion concluded that the "mere fact of the necessity to conceal would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds". There are similar decisions of other judges[116]. In respect of freedom from political persecution of a political dissenter, also envisaged in the Convention, Madgwick J, in *Win v Minister for Immigration and Multicultural Affairs*[117], expressed the point succinctly in words that I would endorse:

> "[U]pon the approach suggested by [the Minister], Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation."

129 The courts in the United States of America have adopted a similar approach to claims of fear of religious persecution where the relevant tribunal has found such a fear inapplicable to a person who keeps a "low profile". In *Bastanipour v Immigration and Naturalization Service*[118], Judge Posner, in the Court of Appeals (7th Circuit), dealing with a case of an Iranian convert to Christianity, rejected the suggestion that the petitioner in that case could conceal his religion and be thereupon free from fear of persecution:

> "If [the petitioner] has converted to Christianity he is guilty of a capital offense under Iranian law. No doubt there are people walking around today in Iran, as in every other country, who have committed a capital offense but have managed to avoid any punishment for it at all. [The petitioner] might be one of these lucky ones. But his fear that he will not be is well founded."

130 The United States courts have emphasised the importance for religious freedom of the entitlement to practise the religion openly[119]. In *Bucur v Immigration and Naturalization Service*[120], the Court of Appeals (7th Circuit)

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116 eg *Minister for Immigration and Multicultural Affairs v Zheng* [2000] FCA 50 at [41] per Hill J, [57] per Carr J.

117 [2001] FCA 132 at [18]. See also *Omar v Minister for Immigration and Multicultural Affairs* (2000) 104 FCR 187 at 200 [42].

118 980 F 2d 1129 at 1133 (7th Cir, 1992).

119 *Najafi v Immigration and Naturalization Service* 104 F 3d 943 at 949 (7th Cir, 1997).

120 109 F 3d 399 at 405 (7th Cir, 1997).

observed that an essential feature of religious "persecution" is the attempt it involves to preclude those who espouse a particular religion from practising it openly. Doing so challenges the power of those who wish to preserve their own dominance, or the dominance of their ideas, which will only give way to the diversity inherent in freedom when those ideas are publicly perceived to be subject to differing ideas, beliefs and conduct[121].

131 According to this view, to reinforce in any way the oppressive denial of public religious practices (or any other feature of freedom essential to human rights) is to participate in the violation of the purposes that the Convention is intended to uphold[122]. It is to disempower the freedom of the individual who applies for protection by demanding that he or she acquiesce in "discreet" conduct ("the quiet sharing of one's faith"). That is not what the reference to "religion" in the Convention is designed to defend. It would be to diminish the capacity of the Convention to protect individuals from abusive national authority to force them, in the respects identified in the Convention, to survive by the concealment of the fundamental freedoms that the Convention mentions[123]. Moreover, effectively, it would place an onus on the *victim* to justify a demand for a basic freedom rather than to require the putative *persecutor* who, contrary to the international law of human rights demands that the victim "maintain a low profile"[124], to justify such abusive conduct.

132 In the South African Constitutional Court[125], Sachs J has explained with great clarity how a well-established means to prevent the attainment of fundamental human rights is to pressure the oppressed to be invisible, so that they continue to be regarded as shameful, powerless, exceptional and dangerous to the majority. No Australian tribunal or court has the authority or power *directly* to inflict such a wrong on a national of another country. Nor should it do so *indirectly* by imposing such a test for the determination of whether a claimed "fear of persecution" is unfounded, because it could be avoided by subscribing to

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121 See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 738, 748.

122 See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 740.

123 See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 739.

124 Decision of the second Tribunal at 15.

125 *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* (1999) (1) SALR 6 (CC) at [110], [126]. See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 736-737.

the oppression that diminishes one of the individual's core freedoms. I agree with Mahoney JA of the Canadian Federal Court of Appeals that[126]:

> "A person successfully hiding from his persecutor can scarcely be said to be experiencing no problems. Such a finding is perverse."

Conclusion: jurisdictional error is shown

133 *Three arguable errors of jurisdiction*: There are three preliminary errors in the reasoning of the second Tribunal which suggest that it failed to address itself to the correct legal question or did so in a way that involved procedural unfairness to the appellant.

134 First, its failure to address specifically the appellant's complaint that, as an apostate Muslim, he was liable in Iran, upon prosecution, to the death penalty and thus rendered vulnerable to any enemies or critics of his religious conversion (or other activities). This aspect of his claim was not explicitly decided. It appears simply to have been assumed that he would fall outside the class of Christian converts who, according to the uncontested country information, are murdered or disappear in Iran. This, in my view, was jurisdictional error[127]. Where there is any risk of death or disappearance, assumption is not good enough. Express findings must be made.

135 Secondly, the Tribunal did not consider the possibility that the situation in Iran might change for the worse for converts. Self-evidently, Iran and its region are volatile, not static. As they have demonstrated, religious forces are capable of asserting themselves. At least arguably, the Shari'a law presents risks to apostates in Iran that cannot be treated as trivial unless a firm conclusion is reached that the "conversion" was opportunistic and would be safely shed upon return, and that in Iran, such a "conversion" would not become known at all and so result in no well-founded fear of persecution. No such conclusion was made in the appellant's case. In reviewing a claim based on apostasy, the Court of Appeals (7th Circuit) has stated that the formalities of conversion and even the sincerity of beliefs is not what is ultimately critical, but rather "what would count

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126 *Sabaratnam, Thavakaran v Minister for Employment and Immigration*, Federal Court of Appeals (Canada) No A-536-90, 2 October 1992, at 2 per Mahoney JA, cited in Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 739-740.

127 See *SGKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 44 (special leave to appeal refused 14 August 2003: [2003] HCATrans 313); *WAHI* [2003] FCA 908 at [37]; *VFAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 367 at [36]; Anker, *Law of Asylum in the United States*, 3rd ed (1999) at 403-404.

as conversion in the eyes of an Iranian religious judge"[128]. In the appellant's case, the Tribunal held back from making the necessary findings. It gave the appellant the benefit of the doubt as to his conversion: a course supported by the evidence. It did not address the resulting issue of the fear of the appellant in Australia having regard to the possible reactions of officials in Iran.

136 Thirdly, there is the appellant's complaint of imputing to an adherent to the Uniting Church, tenets of his religion that appear contrary to the evidence of its Minister about the Christian duty to share the message of Jesus with those presently outside his religion.

137 I will set these three errors to one side. I can adopt this course because the outcome in this case, in my view, is clearly governed by the error of the second Tribunal in its approach to the suggestion that the appellant's fear of persecution was not "well-founded" because he could, and would, avoid that outcome by following "the quiet sharing of [his faith]", if returned to Iran and by refraining from what authorities there might regard as "the aggressive outreach through proselytizing".

138 *The error of postulating self-censorship*: The fundamental error of the second Tribunal in this case is similar to that identified by this Court in *Appellant S395*. It lay in the second Tribunal's conclusion that "a distinction can be drawn" between "the quiet sharing of one's faith" and aggressive proselytising and in its stated belief that, if returned to Iran, the appellant would adhere to the former classification and avoid the latter, not because of fear of persecution by the Iranian authorities but because that was the kind of Christianity he had accepted.

139 The inter-connectedness of the taxonomy applied by the second Tribunal and its prediction of how the appellant *would* conduct himself if returned to Iran are critical. Without the *a priori* classification ("quiet sharing of one's faith" against "aggressive outreach through proselytizing"[129]), the second Tribunal would not have asked, and decided, the second question of what the appellant *would* do if returned to Iran. Thus, the classification of "discreet" conduct was accepted, although this is erroneous as this Court later demonstrated in *Appellant S395*. The classification has no foundation in the Convention. It is destructive of the achievement of the Convention's purpose to uphold a fundamental human right. It diverts attention from the real question posed by the Act, and the Convention, namely whether there is a fear of persecution in the applicant for a Convention reason and whether that fear is "well-founded" in all of the circumstances.

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128 *Bastanipour* 980 F 2d 1129 at 1132 (7th Cir, 1992).

129 Decision of the second Tribunal at 15.

140 Yet can it be said (as the majority in this Court holds) that the identified classification is ultimately immaterial, so that the real issue depends on the factual finding made by the Tribunal as to how this particular appellant would "choose to" conduct his religion if he were returned to Iran, as a Christian convert[130]? The joint reasons conclude that it is possible to divorce the uncontested oppressive features of the Iranian State in the matter of religion from the prediction of how the appellant himself would feel about possible persecution in Iran and how he would behave, as an apostate, if returned to that country. With all respect, this approach involves a feat of unrealistic mental gymnastics.

141 The notion that the appellant, upon return to Iran, would act discreetly, keep a "low profile", avoid "aggressive outreach" and "quietly share his faith" might be uncontestable in this Court. However, the idea that he would do so because of his personal "choice"; the tenets of the Uniting Church in Australia; or the pattern of his conduct whilst in the artificial circumstances of immigration detention in this country is fanciful. With the law of apostasy hanging over him, and the chance of murder or disappearance in prospect now, or in unstable conditions in the future, the risk of his freely practising his religion as he chooses would be minuscule. But that was not the question that the Tribunal was required to address. That question, which it failed to consider in the correct way, was whether the appellant's propounded fear was "well-founded", given the uncontested evidence that the Tribunal received of the situation of conversion in Iran.

142 The Tribunal is not entirely at fault in the approach which it took and the conclusion that it reached. The supposed *a priori* classification that it endorsed was adopted without the benefit of this Court's decision in *Appellant S395*. Moreover, it was encouraged by some of the language of the DFAT country profile (although not, it should be said, repeated in the United States material or in that of the High Commissioner for Refugees).

143 Following the decision in *Appellant S395*, it is necessary to rid this area of decisional discourse of the supposed dichotomy between applicants for protection visas who might be able to avoid or diminish the risks of persecution by conducting themselves "discreetly" in denial of their fundamental human rights and those who assert those rights or who might deliberately or even accidentally manifest them, or be thought or alleged to have done so. The most effective way that this Court can ensure that this untextual, irrelevant and undesirable dichotomy is deleted from refugee decisions in Australia is by the insistence that, where it surfaces, the outcome is set aside and the matter remitted for reconsideration, freed from such error.

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130 Reasons of Gleeson CJ at [10]; joint reasons at [166].

144 In the present case, the classification is patent on the face of the second Tribunal's reasons. It thus invites the application of the principle upheld by this Court in *Appellant S395*. The suggestion that, although repeatedly mentioned by it, the dichotomy did not affect the second Tribunal's fact-finding about the likely response of the appellant were he returned to Iran, is quite unconvincing. If it was irrelevant to that response, why did the Tribunal repeatedly mention it? By mentioning it, the impact of the *a priori* classification on the assessment of what the appellant *would* do is demonstrated.

145 *The importance of legal accuracy*: I remind myself of the importance of legal accuracy in decisions of this kind. In a case such as the present, decisions of this kind can literally affect the lives of those subject to them[131]. A rehearing would not ensure the appellant of success in his application for a protection visa. However, it would ensure that the Tribunal addressed itself accurately to the application of the Act to the facts as found. It would also maintain compliance, in the application of this country's law, with the Convention that Australia has ratified. It is a misfortune to order a third hearing of the appellant's application to the Tribunal. However, in my view it is required by the logic of the principle that this Court endorsed in *Appellant S395*. The possible risks at stake also support that course.

Orders

146 I agree in the orders proposed by McHugh J.

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131 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577-578 [191]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 101-102 [146], 114 [186].

147 HAYNE AND HEYDON JJ. The appellant, an Iranian national, sought, but in January 2001 was refused, a protection visa. He claimed that, after he had left Iran and while living in Indonesia, he had embraced the Christian faith. He said that he feared that, if he returned to Iran, he would be executed by the authorities because he had converted from Islam to Christianity.

148 In April 2001, the Refugee Review Tribunal ("the Tribunal") affirmed the decision to refuse the appellant a protection visa. This decision of the Tribunal was set aside by the Federal Court of Australia and the Tribunal, differently constituted, again reviewed the decision to refuse the appellant a protection visa. In December 2001, the Tribunal again affirmed the refusal.

149 The appellant made application to the Federal Court of Australia, pursuant to s 39B of the *Judiciary Act* 1903 (Cth), for certiorari to quash the Tribunal's decision, mandamus to compel it to review the decision to refuse him a protection visa, and prohibition to prevent the Minister giving effect to the Tribunal's decision. The application was dismissed[132] and an appeal to the Full Court of the Federal Court was also dismissed[133]. By special leave, the appellant now appeals to this Court.

150 The determinative issue in the appeal to this Court is whether the Tribunal addressed the fundamental question that arose in its review of the decision to refuse the appellant a protection visa. That question was: did the appellant have a well-founded fear of persecution on the ground of religion? The appellant contended that the Tribunal did not address that question. He submitted that the Tribunal had sought to categorise the way in which he expressed his belief, with insufficient regard to his individual circumstances, and had asked whether he could avoid persecution while practising his religion in a manner consistent with his core beliefs. He submitted that the Tribunal had thus committed a jurisdictional error similar to the error identified in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[134], decided by this Court after the primary judge and the Full Court decided the present matter.

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132 *NABD v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 384.

133 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 249.

134 (2003) 216 CLR 473.

151 The Tribunal did not ask itself a wrong question[135]. It considered whether the appellant had a well-founded fear of persecution if he returned to Iran. It did not ask (as had been the case in *Appellant S395/2002*) whether it was possible for the appellant to live in Iran in such a way as to avoid adverse consequences. To explain why that is so, it is necessary to say something more about the claims which the appellant made and about the Tribunal's decision.

The appellant's claims and the Tribunal's decision

152 The central claim made by the appellant was that, as a convert to Christianity, he would be regarded as an apostate in Iran and, for that reason, would face persecution in that country. He sought to amplify that claim by reference to certain events which he said had occurred before he left Iran, but the Tribunal did not accept that those events had happened, or that he had been "pursued by the authorities [in Iran] for any reason given by him or for any other Convention reason". Rather, the Tribunal accepted that the appellant had been baptised while he was in Indonesia, that he had thereafter undertaken a Bible study course by correspondence, and that he had attended religious gatherings, both in Indonesia and while in immigration detention in Australia. In addition, despite what the Tribunal described as "some serious reservations about the genuineness" of the appellant, it accepted that the appellant had engaged in other religious activities while in detention in Australia including distributing pamphlets, speaking to others privately about his faith, and encouraging interested persons to attend church services held in the detention centre.

153 The Tribunal considered information it had about the way in which Christians were treated in Iran. That information included a publication of the State Department of the United States of America[136] and a "Country Profile for use in Refugee Determination: Islamic Republic of Iran (1996)" prepared by the Australian Department of Foreign Affairs and Trade ("DFAT"). The Tribunal summarised the effect of this material by saying that "converts who go about their devotions quietly [in Iran] are not bothered; it is only those who actively seek public attention through conspicuous proselytizing who encounter a real chance of persecution".

154 Although this summary was accurate, it was no more than a summary of a longer and more complex description given by DFAT in its country profile. This

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135 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ; *Craig v South Australia* (1995) 184 CLR 163 at 179.

136 *Annual Report on International Religious Freedom for 1999: Iran*.

country profile recorded that apostasy was widely reported as carrying a nominal death sentence in Iran, but that there were only one or two cases (of what were described as "high profile Christian clergy") where the sentence had ever been imposed and that there were "some senior and influential clerics" in Iran who had recently publicly questioned this interpretation of the Qur'ān. The country profile also recorded that:

> "Converts are generally tolerated as long as they maintain a very low profile. However, those working in Government and revolutionary organisations may experience workplace harassment, discrimination and possible dismissal if it becomes known that they have converted. The most common source of pressure on converts is from 'concerned' family members."

But neither in the Tribunal nor in any of the subsequent court proceedings has the appellant sought to contend that he would be exposed to this kind of conduct, or that such conduct would constitute persecution. It may, therefore, be put to one side.

155 The Tribunal concluded that "the available evidence indicates that if [the appellant] were to practise as a Christian in Iran he would be able to do so in ways he has practised his faith in Australia without facing a real chance of persecution". It went on to say that, although the appellant claimed that he felt it his duty to tell others about his faith, "the evidence is that he is able to do so without facing any serious repercussions providing he does not proselytize".

156 The Tribunal found that the appellant "would not choose to generally broadcast his practice of Christianity or conspicuously proselytize in Iran". Standing alone, that finding would be consistent with the appellant choosing the course described in order to avoid adverse consequences befalling him. But the Tribunal found that the appellant's likely conduct in Iran was not motivated by fear of adverse consequences. It said:

> "In weighing all the evidence, including [the appellant's] practice of his faith to date and the tenets of that faith, the Tribunal finds that any decision to avoid proselytizing in Iran or of actively seeking attention on matters of religion is not inconsistent with his beliefs and practices. It finds that [the appellant] is not constrained in the practice of his avowed faith, nor would he be in Iran, due to a perception that to behave more openly or aggressively would leave him at risk of persecution."

Jurisdictional error?

157 The appellant's case in the courts below has always been, and in this Court was, founded in an allegation of jurisdictional error. The way in which that

jurisdictional error has been identified, however, has changed as the case has progressed through the courts, but nothing was said to turn on those changes. In the courts below, some emphasis was given to whether the Tribunal had failed to take into account relevant considerations. In this Court, it was submitted that the Tribunal had fallen into an error of law which caused it to ask itself a wrong question[137]. It had done so, the appellant submitted, by seeking to categorise the way in which he expressed his beliefs.

158 As was pointed out in *Appellant S395/2002*[138], it is perhaps inevitable that those, like the Tribunal, who must deal with large numbers of decisions about who is a refugee, will attempt to classify cases. There are, however, dangers in creating and applying a scheme for classifying claims to protection. The question for the Tribunal must always be whether the particular applicant is entitled to the visa which is sought. That requires consideration of the criteria prescribed by the *Migration Act* 1958 (Cth) ("the Act"). In most cases coming to the Tribunal the central question will be, as it was in this case, whether the Tribunal is satisfied[139] that the visa applicant is a non-citizen to whom Australia has protection obligations under the Refugees Convention[140] as amended by the Refugees Protocol[141].

159 The *Migration Legislation Amendment Act (No 6)* 2001 (Cth) ("the Amending Act"), among other things, introduced the provisions of subdiv AL of Div 3 of Pt 2 of the Act (ss 91R-91X)[142]. Since these amendments, account must be taken of the provisions of s 91R (concerning what is "persecution") and other provisions of subdiv AL of Div 3 of Pt 2 which may be engaged in a particular case. Although the provisions now found in subdiv AL applied to the appellant

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137 *Minister for Immigration and Multicultural Affairs v Yusuf* (2000) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ; *Craig v South Australia* (1995) 184 CLR 163 at 179.

138 (2003) 216 CLR 473 at 499 [76] per Gummow and Hayne JJ.

139 *Migration Act* 1958 (Cth), s 36(2).

140 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

141 The Protocol relating to the Status of Refugees done at New York on 31 January 1967.

142 These amendments apply to applications for a protection visa not granted before these provisions of the Amending Act came into operation on 27 September 2001. See *Migration Legislation Amendment Act (No 6)* 2001 (Cth), Sched 1, Pt 2, Item 7.

nothing was said to turn in this case upon those provisions and they may be put to one side.

160 When reviewing a refusal to grant a protection visa, the question for the Tribunal must always be whether the particular applicant has a well-founded fear of persecution (as persecution is now to be understood[143]) for a Convention reason. If the applicant fears persecution for a Convention reason, examining whether that fear is well founded requires the Tribunal to decide whether there is a real chance that the applicant would suffer persecution for a Convention reason. As pointed out[144] in *Chan v Minister for Immigration and Ethnic Affairs*, reference to a real chance of persecution must not be substituted for, or be permitted to obscure the content of, the test prescribed in the Convention – whether an applicant holds a well-founded fear of persecution. It is sometimes convenient nonetheless to use the expression "real chance" as a shorthand reference to the nature of the factual inquiry being made.

161 The available material bearing on whether an applicant's subjective fear of persecution for a Convention reason is a fear that is well founded will vary from case to case. Usually, considering whether an applicant's fear is well founded will be assisted by considering how others, in like case to the applicant, are being, or have in the past been, treated[145]. The difficulties of making such comparisons are obvious. As was pointed out[146] in *Appellant S395/2002*, "the critical question is how similar are the cases that are being compared". It is here that the risks of classification are acute. Putting an applicant in one class rather than in another may determine the outcome of the inquiry; the defining characteristics of the class that is chosen may eliminate from consideration matters that bear upon the chances of the applicant being persecuted.

162 In *Appellant S395/2002*, the Tribunal was held to have erred by dividing the genus of homosexual males in Bangladesh into two groups – discreet and non-discreet homosexual males. That led, in that case, to the Tribunal assigning the appellants to the former group, without it considering how the appellants wished or intended to behave if returned to Bangladesh. Moreover, the

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143 s 91R.

144 (1989) 169 CLR 379 at 389 per Mason CJ, 398 per Dawson J, 407 per Toohey J, 429 per McHugh J. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

145 *Guo* (1997) 191 CLR 559 at 575.

146 (2003) 216 CLR 473 at 499 [75] per Gummow and Hayne JJ.

classification which was adopted was one which appeared[147] to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. More fundamentally, however, the reasoning adopted by the Tribunal in that case revealed that it had not made the essentially individual and fact-specific inquiry which is necessary: does the applicant for a protection visa have a well-founded fear of persecution for a Convention reason?

163 In the present case, the appellant submitted that for the Tribunal to distinguish, as it did, between Christians in Iran who go about their devotions quietly, and those who actively or conspicuously proselytise, revealed error. It was submitted that this revealed error because it showed that the Tribunal had argued from an a priori classification of Christians in Iran to the particular conclusion that the appellant's fears were not well founded because there was not a real chance that the appellant would face persecution in that country. There are two reasons to reject the argument. First, it does not take account of the nature of the information provided to the Tribunal about conditions in Iran. Secondly, it does not accurately reflect the factual findings made, and reasoning recorded, in the Tribunal's reasons for decision.

164 The information available to the Tribunal about Iran was that apostasy was punishable by death. But the information also suggested that there was no real chance of that or other punishment being exacted in any but exceptional cases. Thus the information available to the Tribunal said that there were "only one or two cases (high profile Christian clergy) where this sentence has ever been imposed". Rather, so the information said, "[t]he evidence is that those converts who go about their devotions quietly are generally not disturbed ... [I]t is either those who actively seek attention, or who are engaged in conspicuous proselytization, who have run into difficulties, usually with the local mosque rather than the State authorities".

165 In assessing whether there was a real chance of the appellant being persecuted for a Convention reason, it was essential for the Tribunal to consider the material it had available about conditions in Iran. The information distinguished between those "who go about their devotions quietly" and those who "actively seek attention, or who are engaged in conspicuous proselytization". Applying such a distinction may well be difficult. The two classes are distinct but it may not always be possible to describe an individual's behaviour as falling wholly within one class rather than the other. It follows that there may be cases in which it would be difficult for a decision-maker to choose between the two as an accurate and complete factual description of past or future patterns of behaviour. But the proceedings in the courts below, and on appeal to

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147 (2003) 216 CLR 473 at 501-502 [83] per Gummow and Hayne JJ.

this Court, were not directed to the sufficiency or accuracy of the Tribunal's fact finding. Rather, the proceedings were necessarily directed to identifying whether there was jurisdictional error. In that respect, attention must be focused upon the findings which the Tribunal made and the reasoning it adopted.

166 In the present case, the Tribunal made findings about the way in which the appellant had hitherto practised his faith and about what he would choose to do in Iran. It accepted that he had discussed Christianity with other detainees but it did not accept that his activities since leaving Iran "constitute[d] active attempts to convert others through proselytism as distinct from quiet sharing of his faith". It concluded that he would not "choose to generally broadcast his practice of Christianity or conspicuously proselytize in Iran". It found that "any decision to avoid proselytizing in Iran or of actively seeking attention on matters of religion is not inconsistent with his beliefs and practices". And, as noted earlier, it found that he was not constrained in the practice of his faith "nor would he be in Iran, due to a perception that to behave more openly or aggressively would leave him at risk of persecution".

167 The Tribunal related its conclusions to the information it had about conditions in Iran. That information drew a distinction which, whatever its difficulties and imperfections, the Tribunal had to consider. It concluded that the appellant's conduct in Australia, if continued in Iran, was properly described as not being proselytizing or actively seeking attention. That is, the Tribunal concluded that the appellant's conduct would fall wholly within one of the descriptions of conduct given in the information it had about treatment of Christians in Iran.

168 At no point in its chain of reasoning did the Tribunal divert from inquiring about whether the fears which the appellant had were well founded. It did not ask (as the Tribunal had asked in *Appellant S395/2002*) whether the appellant could *avoid* persecution; it asked what may happen to the appellant if he returned to Iran. Based on the material the Tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way *he* chose to do so, there was not a real risk of his being persecuted.

169 No jurisdictional error was demonstrated. The appeal should be dismissed with costs.