FEDERAL COURT OF AUSTRALIA

SZEOE v Minister for Immigration & Multicultural & Indigenous Affairs

[2005] FCA 694

MIGRATION – appeal from judgment of Federal Magistrate – protection visa application – membership of a particular social group – claim based on appellant's homosexuality – whether fear of persecution well-founded – whether Refugee Review Tribunal divided social group into those who live discreetly and those who do not – whether Refugee Review Tribunal focused on appellant's individual claim as opposed to the fate of the particular social group – discretion to dismiss application for judicial review on account of delay – seven year delay in seeking judicial review of decision of the Refugee Review Tribunal – high threshold for appellate interference in Federal Magistrate's exercise of discretion.

Federal Court of Australia Act 1976 (Cth), s 25(1A)
Judiciary Act 1903 (Cth), s 39B
Migration Act 1958 (Cth), s 425(1)

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 discussed
Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 29 referred to
House v R (1936) 55 CLR 499 cited
Minister for Immigration and Ethnic Affairs v Singh (1997) 72 FCR 288 cited
Minister for Immigration and Multicultural and Indigenous Affairs v Khawar (2002) 210 CLR 1 referred to
NAUV v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 124 referred to
Plaintiff S157 v Commonwealth of Australia (2003) 211 CLR 476 cited

SZEOE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
NSD 46 OF 2005

STONE J
31 MAY 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 46 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZEOE** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**STONE J**
DATE OF ORDER:	**31 MAY 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

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PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from the judgment of a Federal Magistrate given on 16 December 2004 dismissing an application for judicial review of a decision of the Refugee Review Tribunal ('Tribunal'). The Chief Justice has determined, pursuant to s 25(1A) of the *Federal Court of Australia Act 1976* (Cth), that the appeal should be heard and determined by a single judge.

2 The Tribunal's decision was made on 5 September 1997 but the appellant's application for review of the Tribunal's decision in the Federal Magistrates Court was not made until 11 October 2004. The very considerable lapse of time between the Tribunal's decision and the application to the Federal Magistrates Court is explained by the fact that the appellant escaped from the Villawood Immigration Detention Centre ('Villawood') after he made his application to the Tribunal but before the Tribunal made its decision. His application to the Federal Magistrates Court was made after his recapture and re-detention in 2004. The relevance to this appeal of this long delay in seeking a review of the Tribunal's decision is discussed below at [57]-[59].

BACKGROUND

3 The appellant is a citizen of Morocco. He arrived in Australia on 20 March 1997 and was

detained by the Department of Immigration and Multicultural Affairs ('Department'). The appellant lodged an application for a protection visa on 26 March 1997. A delegate of the respondent ('Delegate') refused to grant the appellant a protection visa and this information was conveyed to the appellant in a letter from the Department dated 7 May 1997. On 14 May 1997, the appellant applied to the Tribunal for review of the Delegate's decision. It is not clear exactly when the appellant escaped from Villawood but it was during the period from 14 May to 12 June 1997 on which date the Tribunal received a translated copy of a letter left at Villawood by the appellant when he escaped.

4 By letter dated 14 May 1997, the Tribunal wrote to the appellant at Villawood. The letter acknowledged receipt of the review application and informed the appellant that he had the opportunity to forward documents or written arguments to the Tribunal. The appellant was also put on notice that if he did not provide further documentary material, the Tribunal would consider the review application on the basis of the documents in its possession and would either grant the review application or invite the appellant to attend a hearing. A copy of this letter was sent to the appellant's immigration advisor.

5 On 17 June 1997, the Tribunal sent another letter to the appellant inviting him to attend a hearing of the Tribunal to give oral evidence and specifying the time, date and location of the hearing. The letter, which was sent to Villawood, stated that if the appellant failed to accept the hearing invitation the Tribunal might proceed to make a decision on the evidence it already had.

6 As the Tribunal was aware that the appellant had escaped from detention, it could have had no real expectation that it would come to the attention of the appellant. However, the Tribunal also sent a copy of the letter of 17 June 1997 to the appellant's immigration advisor. Not surprisingly there was no response from the appellant, however, it appears that the immigration advisor sought the Tribunal's view on whether the immigration advisor would be permitted to attend the appellant's hearing before the Tribunal and to present the appellant's case. In a letter dated 18 June 1997, the Tribunal responded in the following terms:

> *'The legislation requires the Tribunal to "give the Applicant an opportunity to appear before it to give evidence" (s.425(1)(a)). The Tribunal is not required to allow any other person to address it orally about issues arising in relation to the decision under review (s.425(2)). In this case, the Tribunal does not*

> *consider that the Applicant's case would be advanced by the adviser presenting oral evidence at the Tribunal hearing on the Applicant's behalf if he is not present.*
>
> *Written arguments relating to the issues arising in relation to the decision under review may be made…The Tribunal is prepared to accept written submissions from the Applicant and/or his adviser by close of business 25 June 1997. The Tribunal has responded to your enquiry about attending the hearing promptly so that you can ensure that your written submissions are comprehensive.'*

7 On 19 June 1997, the appellant's immigration advisor provided written submissions to the Tribunal. In addition, the appellant's immigration advisor, on behalf of the appellant, submitted a statutory declaration; see [21] below. As the Federal Magistrate commented, however, the advisor did not seek an adjournment of the hearing date. His Honour accepted the respondent's submission that, in making submissions, the advisor (on the appellant's behalf) acquiesced in the manner in which the Tribunal proceeded.

THE APPELLANT'S CLAIMS

8 Given the submissions made in this appeal, it is necessary to set out in some detail the claims the appellant made to the Tribunal.

Interview with appellant on arrival in Australia

9 When the appellant arrived in Australia an officer of the Department interviewed him with the assistance of an interpreter. The Tribunal described his claims at this interview as follows:

> *'The Applicant originally said that he had family in another country and wanted to lodge a refugee claim there, later he said that he knew no-one in that country. The Applicant claimed to be a university graduate; later he said he went to high school for one year and was a manual worker. He first claimed that his sister's boyfriend wanted to kill him. He later stated that his girlfriend's brothers wanted to kill him because they were a wealthy Arab family and were protective of female family members.'*

Appellant's protection visa application

10 In his application for a protection visa the appellant claimed that he feared mistreatment in Morocco because he is homosexual, which is illegal in Morocco and also because he escaped from prison in Morocco and left the country illegally. He claimed that for these reasons he

would be imprisoned for thirty years and possibly executed. He feared harm by the government and therefore could not rely on the authorities to protect him.

11 The appellant claimed to have attended school for fourteen years and university for one year, majoring in the Arabic language. He described his occupation as 'farmer' and further claimed that he had worked as an assistant electrician, in a café in Libya and as a room boy, and that he had been unemployed between September 1995 and January 1997.

12 The appellant's reasons for leaving Morocco were set out in a typed statement attached to the application form. He claimed that he worked and resided in Libya in 1994. While working as a 'night guard', the appellant met a director of an Italian company ('director'), with whom he commenced a homosexual relationship. In mid-September 1994, the 'liaison officer' of the Italian company discovered the relationship between the appellant and the director and threatened to inform the Libyan government that the appellant was homosexual. Because of this the appellant returned to Morocco.

13 The appellant claimed that after his return to Morocco the director would contact him every week. Because of the frequency of these telephone calls the appellant's family found out about his relationship with the director and, as a result, rejected the appellant, forcing him to live with his uncle.

14 According to the appellant, the director contacted the appellant in December 1996 and asked the appellant to rent a home for him because he was coming to Morocco. The director came to Morocco and spent a week with the appellant, during which time they spent their days in the rented house and nights at a hotel. This behaviour was said to have aroused suspicions among the appellant's friends as to the appellant's sexuality.

15 The appellant claimed that, prior to the director's arrival, he had commenced a sexual relationship with a woman he described as a lesbian ('girlfriend'). The appellant stated that her brothers found out about the relationship and began to beat her around June 1996. He further claimed that his girlfriend's brothers began to beat and assault him when they encountered one another. In his application the appellant referred to a particular incident in which he was followed by two of his girlfriend's brothers and was forced to seek refuge in a stranger's house.

16 The appellant claimed that on New Year's Eve (presumably 31 December 1996) the appellant, the director, another male friend and two 'girls' went to a hotel to celebrate. Because they saw his girlfriend's brothers there, the appellant and the director left to return to the house they were renting. The appellant said that the brothers yelled insults at him and that a day or so later the rented house he was sharing with the director was broken into and, among other things, video tapes of the appellant and the director having sex were stolen. Shortly afterwards his sister told him that the police were looking for him. He stated that he 'knew' that his girlfriend's brothers had given the video tapes to the police as punishment for the appellant having a sexual relationship with their sister. At this point, the appellant and the director agreed that the appellant had to leave the country as soon as possible. The appellant claimed he withdrew all his money from a bank and went to Casablanca to change the money into 'dollars', presumably US dollars.

17 The appellant claimed he met with the chief of the Department of Water and Forestry and gave him about 3 million Magrebien (Moroccan currency) to get him out of the airport. He stated that he did this because he 'knew' that the authorities would either kill or arrest and jail him. The appellant further claimed that on returning to his family house from Casablanca he was arrested for 'immoral behaviour and being a homosexual'. He stated that on 5 January 1997 he was jailed and after procuring some headache tablets from his brother, he took 10 in an attempt to commit suicide. The appellant claimed that he passed out and 'didn't come around' until 8 January 1997, when he escaped from the hospital and left Morocco.

Departmental interview

18 The Tribunal made reference in its reasons to a 'Departmental interview' which, it would appear, was held by an officer of the Department in order to assess the appellant's application for a protection visa. The Tribunal detailed the claims made by the appellant during that interview as follows:

(a) he was bi-sexual/homosexual;

(b) his female partner was a well-known lesbian;

(c) two women had participated in the acts depicted on the video tape stolen from the rented house;

(d) he could be charged with a range of offences, including immoral behaviour, trading in pornography as well as homosexuality;

(e) on his arrest, he was taken to the 'PJ' (secret services) section of a maximum security prison, as the secret service handled the charges against him which were too complex for the constabulary;

(f) he bribed a guard so his family could bring him food;

(g) his family was able to conceal headache pills in the food;

(h) after escaping from the hospital, he made the 300 km journey by road to Casablanca with his brother and they were twice stopped at checkpoints by police but were not asked for documents;

(i) the official from the Department of Water and Forestry to whom the bribe was paid was the holder of many other influential positions and arranged for a person employed by customs to help the appellant leave the country;

(j) at the airport when he was leaving Morocco, his passport was stamped and a staff member accompanied him through exit control in case there were any problems.

Appellant's letter to Department

19 The appellant wrote a letter to the Department, which he left at Villawood prior to his escape. It was translated by the Department and provided to the Tribunal. The letter apologised for his having escaped from detention and stated that the Department was the reason as he could not live in 'this jail' after being persecuted in Morocco. The appellant stated that he was not lying, that his story was 'factual' and that he would not fabricate his claims. The appellant invited the Department to contact the People's Bank of Morocco in respect of his claims and the Moroccan 'authorities' to find out whether his life was at stake or not.

Immigration advisor's submissions

20 The submissions that the appellant's immigration advisor provided to the Tribunal were largely directed to addressing the inconsistencies and deficiencies that the Delegate had noted in the appellant's claims and which led to the Delegate's adverse credibility findings. The submissions also attacked the findings of the Delegate, claiming the Delegate was prejudiced, misinformed and presumptuous.

21 The immigration advisor also submitted a statutory declaration made by a Moroccan man then detained at Villawood, who stated that:

- he had lived in Morocco for 10 years and was familiar with the customs and practices

of Morocco;

- he was aware of having heard over the radio in Morocco of a department called the Department of Forestry and Water Resources, or similar name;
- he was certain it was against Moroccan law to participate in homosexual activity;
- it was possible to be severely punished or even killed for participating in homosexual activity;
- that unmarried sexual relations between a man and a women were also illegal; and
- that it was possible to illegally depart from an airport in Morocco.

THE TRIBUNAL'S REASONS

22 The Tribunal noted that as at the date of the decision, being 5 September 1997, the appellant had not made contact with the Tribunal but that the Tribunal was satisfied that the appellant had been offered the opportunity to appear, as required by s 425(1) of the *Migration Act 1958* (Cth) ('the Act') and stated that it would proceed to make a decision on the evidence before it. The Tribunal sent notification of its decision to the appellant by letter dated 9 September 1997 sent to Villawood.

23 The Tribunal had serious doubts about the credibility of the appellant. It noted that the Delegate found that the appellant's claims were not credible and, given the failure of the appellant to attend the hearing or contact the Tribunal, the Tribunal was unable to explore the appellant's claims or directly assess his credibility.

24 The Tribunal found that, over the life of his application, the appellant's claims had expanded and changed considerably and in the Tribunal's view, were 'at the very least, exaggerated'. Commenting on the inconsistencies in the appellant's claims the Tribunal said:

> *'Furthermore, many of the things he has stated are later directly contradicted. This is so in minor matters such as his education, his journey to Australia, the fate of his Moroccan passport, the existence of contacts in another country and his family's knowledge and reaction to his homosexuality. It is also the case with regard to more important matters. For example, the Applicant's initial evidence was that he feared harm from his sister's boyfriend, then at the same interview, that his girlfriend's brothers wanted to kill him because they are a wealthy Arab family who were protective of female family members. The Applicant's initial evidence was that the video was of him and his (male) partner but later he claimed that it included two women; it is unclear whether one of the women was his girlfriend. The Applicant first claimed to be homosexual, he then claimed to be bi-sexual.'*

25 The Tribunal also commented on the lack of detail in the appellant's claims including that:

> *'...there is no evidence about the Applicant's previous homosexual or bisexual activities* [prior to the video tape] *and no suggestion that he has ever been harmed or even discriminated against for either his homosexuality or bisexuality and no evidence to suggest that the Applicant ever had any problems with the authorities for these reasons in the past even though he had lived in Morocco most of his life.'*

26 The Tribunal found that many of the appellant's claims were implausible and contradictory and stated that it did not accept them. The Tribunal gave as an example the fact that the appellant's girlfriend was said to be a 'well-known lesbian' but there was no evidence that she had suffered as a result. Of particular relevance to this appeal, however, is the following statement by the Tribunal:

> *'In any case, the Tribunal accepts the independent country information above about the occurrence and punishment of homosexuality in Morocco; it suggests that homosexuality, although illegal, is generally tolerated.'*

27 The Tribunal was referring to independent country information from a number of sources, not all of which was consistent. There was no dispute that in Morocco, at least at that time, homosexuality was illegal and punishable by six months to three years imprisonment and a fine of 120 to 1,000 dirhams (then about $17-140). The Tribunal referred to some independent information that despite this illegality, many Moroccan men seem to have homosexual contacts that are condoned. Other reports indicated that covert homosexuality was not uncommon and that the taboo associated with homosexuality had not been broken. Another report stated that 'in recent years' fundamental Islam had become more aggressive towards gays, at least partly due to prostitution which was 'rigorously combatted'. This report advised gays to be discreet and listed bars, clubs, restaurants and accommodation that were 'either owned by gays' or were 'sympathetic'. The Tribunal referred to advice from the President of the Moroccan Human Rights Organisation to the effect that 'prosecution and punishment of homosexuals does not occur frequently'. The Tribunal then commented, presumably in confirmation of this advice, that it had found 'few' references to prosecutions for homosexuality or other sexual acts and gave examples of some such references:

> *'In 1997 a Moroccan paedophile was given a six month prison sentence ... In 1992 a foreigner was jailed for three years for inciting young boys to debauchery and two Moroccan accomplices were jailed for two years ... The*

only reference to pornographic film concerned a police chief sentenced to death for multiple rape, deflowering virgins, sexual violence and abducting women. It was stated that he also made 118 pornographic videos of sexual orgies involving hundreds of women and girls. Ten police officers were jailed as accomplices and senior security chiefs removed from office. The report also refers to the interrogation by the examining magistrate of the alleged rape of 18 boys. A photographer who took pictures of the homosexual orgies was an alleged accomplice.'

28 In the light of this information the Tribunal went on to state:

'The Tribunal finds it implausible that the Applicant escaped from the authorities and would be severely punished if he returned, yet he was stopped twice by the police after he escaped but was allowed to proceed and he was able to leave the country on a passport in his own name, with someone walking him through exit formalities at the airport. ...the Tribunal does not accept that the Applicant paid an amount of 3 million Moroccan currency, approximately AUD$400,000 for clearance through airport exit formalities to escape a small fine and short term jail sentence…

In this case, the Tribunal finds that the Applicant is not a credible witness. Despite the Applicant's assertion that he has not fabricated his story, the Tribunal concludes that his claims have been at the very least highly exaggerated and that his evidence is contradictory, implausible or fabricated. In view of the Applicant's unconvincing claims and evidence, the Tribunal is not satisfied that the Applicant would be harmed by the authorities for the reasons he claimed if he returned to Morocco. ***It is the view of this Tribunal that the Applicant's claims have been contrived to support his efforts to be recognised as a refugee****.'*

[Emphasis added]

On the basis of these findings the Tribunal concluded that there was not a real chance that the appellant would face persecution for any of the reasons put forward by him, if he was returned to Morocco and therefore that he did not have a well-founded fear of persecution for a Convention reason.

FEDERAL MAGISTRATE'S DECISION

29 As noted above, the appellant was re-detained in 2004 and, on 11 October 2004, he filed an application in the Federal Magistrates Court seeking judicial review of the Tribunal's decision pursuant to s 39B of the *Judiciary Act 1903* (Cth). At the hearing of this application on 16 December 2004, the appellant appeared for himself with the aid of an interpreter. Although the appellant was not legally represented at the hearing, he had been given access to the Court's Legal Advice Scheme and, at the hearing, he confirmed that he had been given

advice on 23 November 2004. Despite this, the Federal Magistrate, 'mindful of the need to exercise caution when dealing with an unrepresented applicant', raised some issues of his own initiative.

30 In particular his Honour asked whether the appellant had ever raised any issue such as was considered in *Minister for Immigration and Multicultural and Indigenous Affairs v Khawar* (2002) 210 CLR 1. In this regard, his Honour considered whether, in relation to the harm the appellant claimed to fear in respect of his girlfriend's brothers, the claim constituted harm from private individuals that the State tolerated or condoned. His Honour held that the appellant had never put his claims in such a way and in any event the appellant's claims in this respect were not related to his membership of a particular social group. In addition, his Honour held that the appellant had not claimed that the authorities had failed to protect him from this harm.

31 The Federal Magistrate also addressed the appellant's claims of harm on the basis of his homosexuality and the illegal status of homosexuality in Morocco, as well as his fear of harm in respect of his illegal departure from Morocco. His Honour held that the Tribunal had considered all the appellant's claims and 'essentially' did not believe him. His Honour continued, at [25] of his reasons:

> *'I should emphasise for the benefit of the applicant that it is due to his own actions and omissions that he did not pursue the opportunities that were available to him to support his claims. I note his comments of his fears* [that the Tribunal would not make a fair decision]*, but in all the circumstances the Tribunal acted reasonably and on the material before it, was entitled to come to the view that it did.'*

32 His Honour also held, at [21], that there was nothing in the circumstances of the case to show that the Tribunal did not afford procedural fairness to the appellant. He stated that the Tribunal had complied with all the statutory requirements and that, in the circumstances, its invitation to the appellant to attend a hearing before the Tribunal could not be said to be 'an empty gesture'. His Honour further held that the application to the Federal Magistrates Court, and the submissions made by the appellant, did not identify any ground of review, beyond seeking a review of the merits of the Tribunal's decision.

Delay in applying for judicial review

33 The appellant filed his application for judicial review of the Tribunal's decision over seven years after the Tribunal's decision was made. The respondent submitted that because of this delay the Federal Magistrate should exercise his discretion to dismiss the application for judicial review on account of delay; see *NAUV v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 124 ('*NAUV*'). His Honour accepted that, given the length of the delay and the absence of a satisfactory explanation for it, he could exercise his discretion to dismiss the application without entertaining the application.

34 Despite this, his Honour proceeded to consider the appellant's substantive claims and concluded that he could find no error, 'let alone a jurisdictional error'. His Honour stated, at [26] of his reasons, that the Tribunal's decision was a privative clause decision, as explained in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, and continued:

> *'The application is dismissed on that basis as it lacks merit. I note, nonetheless, I* ***could*** *have dismissed* [it] *on the basis of unwarrantable delay but felt it was more appropriate to provide the applicant with a more complete explanation as to the ultimate reason for the dismissal of his application to the Court.'*
> [Emphasis added]

THIS APPEAL

35 At the hearing on 28 April 2004, Mr Kirk, counsel for the appellant, was given leave to file a further amended notice of appeal which alleges that the Federal Magistrate erred in failing to find certain errors in the Tribunal's decision. It is claimed that the Tribunal failed to apply the correct test, constructively failed to exercise jurisdiction and failed to address a central issue raised by the appellant in that:

1. the Tribunal did not consider whether in light of the appellant's homosexuality/bisexuality, he had a well-founded fear of persecution if required to return to Morocco by reason of his membership of a particular social group;
2. the Tribunal assumed that the appellant could have no well-founded fear of persecution given evidence that homosexuals might not be persecuted in Morocco if they lived their lives discreetly or in secret;
3. the Tribunal asked itself whether it was 'satisfied that the Applicant would be harmed' for the reasons he claimed if he returned to Morocco.

36 At the hearing of the appeal Mr Kirk also sought to introduce new evidence in the form of two documents: a statutory declaration of the appellant, and a document headed 'Refugee Review Tribunal CMS Case Notes'. I rejected both documents as irrelevant except for two paragraphs of the statutory declaration, which related to the circumstances of and reasons for the appellant's escape from Villawood.

37 It is clear that the Tribunal made serious adverse credibility findings against the appellant. It commented on the inconsistencies, both major and minor, in the appellant's account of his experiences in Morocco as well as the lack of detail to support his claims. As the Tribunal noted, the appellant's failure to attend a hearing and make oral submissions to the Tribunal meant that there was no opportunity for the Tribunal to explore these issues and that the decision had to be made on the information contained in the documents available to the Tribunal. Clearly the Tribunal was not satisfied that the appellant had a well-founded fear of persecution should he be returned to Morocco. Moreover, as indicated in [28] above, it regarded the appellant's account as 'contrived' to support his claim for refugee status.

38 Although it is not easy to discern the Tribunal's precise findings, it is tolerably clear that the Tribunal accepted:

- that homosexuality, or at least its practice, is illegal in Morocco; and
- the independent country information, which suggested that, although illegal, homosexuality is generally tolerated; and
- at least for the purpose of assessing the likelihood of harm should he be returned to Morocco, that the appellant was actively homosexual (as distinct from merely having homosexual inclinations).

I am satisfied that the Tribunal did not accept the appellant's claims to have been threatened by his sister's boyfriend or his girlfriend's brothers or his evidence about the video tape allegedly stolen from the rented house. It did not accept that he had ever come to the adverse attention of the Moroccan authorities because of his sexual practices. It did not accept that he had been arrested and escaped from captivity or that he had left Morocco illegally having bribed an official to assist him.

39 Whether an applicant has a well-founded fear of persecution for a Convention reason must be determined as at the time of the determination; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288. The determination involves making a prediction about an

applicant's likely fate if returned to his or her country of nationality. In making this prediction the applicant's past experiences in the relevant country are important evidence but they are not determinative. The situation in the country may have improved or may have deteriorated so as to weaken the predictive value of past experiences or significance of the lack of such evidence. The fact that the Tribunal totally rejected the appellant's account of his experiences of harassment, arrest and escape does not answer the appellant's fundamental claim that he feared persecution, as he stated in his application, 'Because I am a homosexual and this is against the law in Morrco [sic]'.

40 In circumstances where, as here, the Tribunal totally rejects a visa applicant's account of his experiences then, as far as the personal experiences of the visa applicant are concerned, the determination must be made in an evidentiary vacuum. As the Tribunal did not accept that the appellant had left the country illegally or had ever come to the attention of the Moroccan authorities by reason of his homosexuality or otherwise, it did not accept his claim to fear persecution for these reasons as well-founded; see the comments of Tribunal quoted at [25] above.

41 In the absence of such evidence the Tribunal drew heavily on independent country information about the legal status and treatment of homosexuals in Morocco. That information is summarised above at [27] and, as noted, the Tribunal accepted that information. It then remained for the Tribunal to draw its conclusions from the information it accepted, in the context of there being no credible evidence of previous mistreatment of the appellant. In doing so the Tribunal was not only using information about past conduct to make a prediction about what might happen to the appellant in the future, but it was also drawing conclusions from the general to the particular; about the treatment of others to predict what might happen to the appellant. That information, like information about an applicant's own history, may be of assistance but it is also not determinative.

42 The High Court recognised these limitations in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ('*S395/2002*'). In evidentiary terms the situation pertaining in *S395/2002* is similar to that presently under consideration. There, two male citizens of Bangladesh claimed to have a well-founded fear of persecution because of their homosexuality. The Tribunal accepted their claim to have been ostracised by their families and accepted that they may have been subjected to 'gossip and taunts from

neighbours who suspected they were homosexuals'; per McHugh and Kirby JJ at [29]. However, the Tribunal rejected other aspects of their account including that they had been subject to threats and violence over many years and had been sentenced to death by a religious council; it explicitly found that the applicants did not experience serious harm or discrimination in Bangladesh.

43 The Tribunal assessed the applicants' claims in the light of that finding and, as in the present case, it drew heavily on the independent country information about the position of homosexuals in Bangladesh. On that basis, the Tribunal found that the applicants did not have a real chance of being persecuted because of their sexuality should they be returned to Bangladesh. In a passage quoted by McHugh and Kirby JJ at [30], the Tribunal stated:

> *'... while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over four years without experiencing any more than minor problems with anyone outside their own families.* ***They clearly conducted themselves in a discreet manner and there is no reason to suppose they would not continue to do so if they returned home now.***'
> [Emphasis added by McHugh and Kirby JJ]

44 In considering the significance of evidence of past persecution of the individual or of the members of a particular social group, McHugh and Kirby JJ commented at [58]:

> *'*[N]*either 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. Moreover, helpful as the history of the social group may be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. 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 added by McHugh and Kirby JJ]

45 As Gummow and Hayne JJ pointed out, at [75], 'the critical question is how similar are the cases that are being compared'. Their Honours referred to the dangers attendant on classifying claims for protection, as for example, claims based on homosexuality, stating at [76]-[77]:

> *'*[C]*lassification carries the 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. ...

...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 by the word "generally". Thus it would be necessary in the example given to consider whether, on return to Bangladesh, the applicant would stand apart from other homosexuals in that country for any reason.'

46 In *S395/2002*, the Tribunal's failure to 'pay close attention' to the qualification to which their Honours refer, was critical to its division of homosexual men into those who live discreetly and those who do not and its consequent failure to explore the implications of its finding that the applicants had lived discreetly and would do so in the future.

47 The High Court (McHugh, Gummow, Kirby and Hayne JJ; Gleeson CJ, Callinan and Heydon JJ dissenting) held that the Tribunal had made a jurisdictional error by effectively dividing homosexual males in Bangladesh into two groups: those who lived discreetly and those who did not. This led the Tribunal into the further error of failing to explore why the applicants had lived discreetly and whether it was a voluntary choice uninfluenced by a fear of harm.

48 More recently, in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29 ('*NABD*'), the High Court has confirmed the necessity to focus on the individual claim as opposed to the fate of the class of which the applicant is a member. In relation to the claim of a Christian who had converted to Christianity after leaving Iran, Gleeson CJ commented at [8]:

'The ultimate concern of the Tribunal, of course, was with the appellant, not with Christians as a class.'

See also Hayne and Heydon JJ at [158].

49 In this case the appellant made an explicit claim to fear persecution by the authorities because of his sexuality. In considering the appellant's claim, the following propositions were central to the Tribunal's reasoning: (a) that, although he had lived in Morocco for most of his life, the appellant had never experienced discrimination or harassment from the authorities or anyone else because of his homosexuality; and (b) that, although homosexuality is illegal, it

is generally tolerated.

50 The appellant submitted that, either the Tribunal did not address the issue of persecution based on the appellant's membership of a particular social group, namely those with homosexual inclinations, or it addressed it on the basis that the appellant had avoided harm in the past because he lived discreetly. In this way, it is submitted, the Tribunal fell into the errors that the High Court identified in *S395/2002.*

51 I do not accept this submission. The Tribunal referred to inconsistencies in the appellant's evidence of his homosexuality but it did not reject the claim at least, as I indicated in [38] above, for the purpose of assessing the appellant's claims. Similarly, the Tribunal's discussion of the independent information about the treatment of homosexuals in Morocco shows that it considered those claims on the basis of the appellant being a member of a particular social group. That discussion was in the context of the Tribunal's acceptance that homosexuality was illegal in Morocco; see the Tribunal's statement quoted at [26] above.

52 Similarly, I do not accept that the Tribunal found that the appellant had lived discreetly in Morocco or that he could avoid persecution in the future only if he lived discreetly. The Tribunal obtained a variety of information from the reports it consulted. As indicated at [27] above, some of the reports referred to covert homosexuality being 'not uncommon' and to the more recent aggression towards homosexuals from fundamental Islam. However, the Tribunal also had information that homosexuality was 'generally tolerated' and that prosecution 'does not occur frequently'. Given that information the Tribunal was obliged to consider the implications of this information for the appellant as an individual not just as a member of a class.

53 In my view the Tribunal gave the matter the appropriate consideration. It must be remembered that this decision was made in 1997 without the benefit of the High Court's decision in *S395/2002* and therefore it does not explicitly draw attention to its avoidance of the error identified by the High Court in that case as one finds in Tribunal reasons since that decision. However, it is the substance of the Tribunal's reasons that is crucial; there is no requirement for formulaic expression nor is it appropriate to subject the Tribunal's expression to over-zealous scrutiny.

54 The Tribunal accepted the country information summarised at [26]-[27] above. I am satisfied that the Tribunal then assessed the significance of that information for the appellant an individual not just as a member of a group. It explored the qualifications in the information that homosexuality was 'generally tolerated' and that prosecution 'does not occur frequently' by examining the few references it had found to prosecutions for homosexuality or other sexual offences. Such references as it found were related to paedophilia, offences with young boys, pornographic films made by the police chief sentenced to rape etc and his accomplices. The Tribunal did not make any finding that the appellant had been discreet about his sexuality in the past nor was it obliged to do so. There was no claim that this had been the case. In view of the conduct that was the subject of the prosecutions discussed by the Tribunal, it is not surprising that the Tribunal failed to conclude, explicitly or implicitly, that the appellant would need to live discreetly to avoid such prosecutions. Given that the Tribunal:

(a) made a positive finding that the appellant's expression of his sexuality had never caused him to suffer persecution, although he had lived most of his life in Morocco, and

(b) made no finding that the appellant had a practice of being discreet about his homosexuality,

it was open to the Tribunal to conclude that the appellant's fear of persecution should he be returned to Morocco was not well-founded.

55 Unlike the Tribunal in *S395/2002,* the Tribunal in the present case did not divide the class of homosexuals into discreet and non-discreet groups and then fail to explore the implications of this division. It did not qualify its conclusion that the appellant could live in Morocco without adverse consequences by reference to any requirement to live discreetly or otherwise distort his expression of his sexuality. As Hayne and Heydon JJ pointed out in *NABD* at [162], the fundamental error made by the Tribunal in *S395/2002* was 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?' Their Honours (as well as Gleeson CJ) found that the Tribunal whose reasons were being reviewed in *NABD* had not made this error and said, at [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.'*

56 Because, for reasons explained above at [2], the appellant did not appear at a hearing before the Tribunal, the Tribunal had no direct opportunity to explore his claims or assess his credibility. It was entitled to proceed with the appellant's application and, in my view, it did not make any jurisdictional error. There was thus no basis for relief in the Federal Magistrates Court or in this Court.

The respondent's notice of contention

57 The respondent filed a notice of contention in this Court on 27 April 2005 contending that the decision of the Federal Magistrate should be affirmed on grounds other than those relied on by his Honour, namely:

(a) the Federal Magistrate erred in not entertaining the respondent's application to dismiss the matter on account of delay;

(b) the Federal Magistrate, if he did exercise his discretion and refused the respondent's application, exercised his discretion in an unreasonable or perverse manner;

(c) the delay was so inordinate and unexplained his Honour should have exercised his discretion to dismiss the application for judicial review on account of delay.

58 Counsel for the respondent, Ms Clegg, submitted that the respondent strongly pressed the notice of contention given the length of delay in this case. The respondent submitted that the Federal Magistrate erred in failing to consider exercising his discretion to refuse relief on account of delay.

59 In my opinion, this submission must be rejected. The Federal Magistrate's discussion of the Full Court's judgment in *NAUV* at [12]-[13] and [19]-[21] of his reasons shows that his Honour was clearly aware of the issues to be considered. That being so, his Honour's statement, quoted at [34] above, that he dismissed the application 'on the basis that it lacks merit' is a clear indication that his Honour decided not to exercise his discretion in favour of the respondent by dismissing the appellant's application for judicial review on account of delay. I see no basis to interfere with his Honour's exercise of his discretion and certainly no

error that would meet the high threshold for such interference discussed in *House v R* (1936) 55 CLR 499 at 505.

60 The appeal and the notice of contention in this matter must both be dismissed. Although the respondent has not succeeded in obtaining the relief sought in the notice of contention, I do not consider that the notice of contention added to any significant extent to the duration or complexity of the appeal. For this reason I do not think that it warrants any departure from the usual practice that the unsuccessful appellant bears the cost of the appeal.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:

Dated: 31 May 2005

Counsel for the Appellant:	Mr JK Kirk
Counsel for the Respondent:	Ms L Clegg
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	28 April 2005
Date of Judgment:	31 May 2005