FEDERAL MAGISTRATES COURT OF AUSTRALIA

M93 OF 2004 v MINISTER FOR IMMIGRATION & ANOR *[2006] FMCA 252*

MIGRATION – Protection visa – whether jurisdictional error – whether error in application of s.91R of Migration Act – real chance test – convention nexus – whether 'serious harm' – whether denial of opportunity for education constitutes serious harm for a child – whether overt 'physical ill treatment' required pursuant to s.91R – denial of education sufficient – failure to properly consider State protection – decision quashed.

Migration Act 1958, ss.36(2), 65(1), 91R, 91S, 430, 474, 477

VAT v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 255
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Multicultural Affairs v Zamora (1998-99) 85 FCR 458
Ram v Minister for Immigration and Ethnic Affairs and Anor (1995) 57 FCR 565
Craig v South Australia (1995) 184 CLR 163
Yusuf v Minister for Immigration and Multicultural Affairs (2001) 206 CLR 323
Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379
Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2001) 75 ALR 589
VTAO v Minister for Immigration and Multicultural and Indigenous Affairs (2004) FCA 927
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 1987 ALR 389
Applicant A v Minister for Immigration & Ethnic Affairs (1997) 142 ALR 331
Minister for Immigration and Multicultural Affairs v Khawar (2002) 187 ALR 574
Minister for Immigration & Multicultural Affairs v Respondents S152/2003 (2004) HCA 18

Applicant:	APPLICANT M93 OF 2004
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLG 1369 of 2004
Judgment of:	McInnis FM
Hearing date:	11 August 2005
Delivered at:	Melbourne
Delivered on:	24 February 2006

REPRESENTATION

Pro Bono Counsel for the Applicant:	Ms N Karapanagiotidis
Solicitors for the Applicant:	Asylum Seeker Resource Centre
Counsel for the Respondents:	Mr P Gray
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) The time be extended to 26 November 2004 for the filing of the Application.

(2) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 14 October 2002.

(3) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(4) The First Respondent shall pay the Applicant's costs.

(5) Liberty to apply is granted to parties in relation to the issue of costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1369 of 2004

APPLICANT M93 OF 2004
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. In this application, the applicant seeks review of a decision of the Refugee Review Tribunal (the Tribunal) which had affirmed a decision of the delegate of the first respondent not to grant a protection visa to the applicant.

2. The applicant is a citizen of Thailand. She was born on 6 February 1992 and is 13 years of age. The applicant's parents are still living. However because of their itinerant lifestyle and impoverishment, they are unable to care for the applicant and had previously sent the applicant to live with extended family at a farm in the countryside in Thailand. The applicant's younger brother was sent to live with his maternal great grandmother.

3. The applicant arrived in Australia on 24 December 2001. She was then accompanied by her paternal grandmother. It should be noted that at the outset in this application the applicant's paternal grandfather has

been appointed a litigation guardian for the applicant pursuant to rule 11.11 of the *Federal Magistrates Court Rules 2001*.

4. Before her arrival in Australia, the applicant had resided at the farm referred to earlier in this judgment for a period of some three years.

5. After arriving in Australia, the applicant, assisted by her paternal grandfather, the litigation guardian, lodged an application on 8 February 2002 for a protection visa. On 20 May 2002, a delegate of the first respondent refused, as indicated earlier, to grant the applicant a protection visa. The delegate based the decision in part on a finding that the applicant had not been prevented from attending school and maintaining a continuous residence since 1996 and could relocate elsewhere within Thailand.

6. The applicant applied for review of the delegate's decision. The applicant gave oral evidence to the Tribunal on 12 September 2002 by videoconference. It is noted that throughout the proceedings before the Tribunal and before the delegate, the applicant was not legally represented, though assisted by her grandmother and the litigation guardian who I note is the step-grandfather of the applicant. Both grandparents gave evidence at the hearing of the Tribunal. The Tribunal, as indicated earlier, affirmed the delegate's decision not to grant a protection visa.

The applicant’s claims

7. The parties agree that the following represents an accurate summary of the applicant's claims as set out in the applicant's contentions of fact and law prepared by pro bono lawyers on behalf of the applicant. The summary provides:

   a) She was at risk of harm because of her membership of a particular social group variously described as "young abandoned unprotected girls" [CB86.5], "abandoned young girls in Thailand at risk of child prostitution and abuse" [CB100.3] or "abandoned young girls" [CB102.1].

b) Young prepubescent girls and abandoned girls were frequently sold in Thailand to brothels and to AIDS victims who believed sex with a young virgin would cure them [CB16].

c) Her extended family on the farm were "greedy, money-grubbing, drug-addicted, lazy wasters" [CB47]. Her maternal grandfather was "on the run from the police for a variety of crimes". Her maternal grandmother was a "habitual drunk" and paternal grand-uncle a "drug addict" [CB48.4]. She was not cared for properly, and upon her arrival in Australia she was "infested with intestinal worms" [CB49.3].

d) Her grandparents sent her money regularly to attend school and that money was not used for the applicant's benefit, but rather to feed "hard drug habits" of relatives [CB47.2].

e) The applicant had been exploited and made to work in dangerous conditions instead of going to school [CB47.2]. She was "being used as a virtual slave" [CB48.5], had sold pornographic material [CB99.2] and was illiterate in the Thai language [CB86.1].

f) The government and authorities in Thailand were unable or unwilling to protect the applicant. The country suffered from the "cancer of corruption" and "neither the police, judiciary, local government officers or indeed the government itself (could) be trusted not to put their greed for money above the needs of protection for children" [CB83.2].

8. Apart from that summary of the claim, it is relevant to recite in this judgment correspondence which had been relied upon by the applicant before the Tribunal. The correspondence includes a translation of a letter claimed to be from the applicant's parents [CB46] which provides:-

> *"Dear Mum,*
>
> *I would like you to look after (the applicant). Don't let her go back to the farm. It's no good. I can't look after her in Bangkok. You know how Bangkok is like. My wife and I only do a bit of work and depend on the shift. I thought (the applicant) will be safe at the farm. But no-one like to take care of her. Even you and Ken send the money to her. They still let (the applicant) sell*

vegetables in the morning and in the afternoon. Sometimes they don't send her to school. Now (the applicant) can't read properly. Her relatives took all your money to spend on themselves. She have to walk back home every night. I am very concern about her, especially someone move back to the farm with HIV plus +ve (AIDS) and Uncle V he on drug this moment he got no money to buy it. I afraid he going to hurt (the applicant) to get the money. Please look after her for us. I know you and Ken love her." [sic]

9. The litigation guardian who is the step-grandfather of the applicant also provided written material to the department set out in the court book. That written material effectively recites a number of the claims set out earlier in this judgment. It is noted in that correspondence the author refers to the intention to adopt the applicant by the litigation guardian and the applicant's grandmother.

10. However, in the correspondence, reference is made to the litigation guardian in 2002 then being aged 66 years, and the grandmother aged 54 years. Hence instead of adopting the applicant, they agreed to support her through her school years, and to that effect sent money on a regular basis to Thailand. Reference is made to the money not being used for the child's care and schooling, but that it had been "regularly spent feeding hard drug habits".

11. In correspondence, the litigation guardian states [CB48-49] the following:-

> *"It now transpires that (the applicant) is being used as a virtual slave, when she was 6yrs old she was put to work on the trains selling water, a stop was put to that as soon as we heard about it but the exploitation has continued. Before and after school she is required to sell eggs at the market often returning home (if that is what it can be called) alone after dark with whatever money she has collected together with any unsold stock.*
>
> *As a direct result of this the young girl is far behind in her school work even though my wife and I have been paying full school fees. At weekends she is made to attend local markets selling whatever the family can find to sell.*
>
> *Several of the neighbours have died from AIDS related diseases, another neighbour, whose house my wife and I are in the process of acquiring, is/was a drug dealer (the uncles supplier) now on*

the run from the police. As you can see this is not a suitable place for any young girl to live.

What bothers me greatly, in addition to the young girls living conditions and lack of schooling, is the very real fear of sexual abuse and the fact that in rural Thailand there is a belief that sex with a pre pubescent virgin will cure AIDS - and I would not put it past that lot to sell her virginity or to use her themselves and put her life at risk for what would amount to just a few A$. When (the applicant) arrived here she was infested with intestinal worms, a sure sign that her living conditions are poor - all this in spite of the money my wife and I have handed out to the family on a regular basis for years."

12. In further correspondence [CB52] the litigation guardian states the following:-

> *"Because of her deprived childhood, her parents virtually abandoned her, she is unable to read and write her own language, Thai. I am attending to all of her application for protection status."*

13. Other issues are addressed in that correspondence in answer to questions forwarded by the department to the applicant.

The Tribunal decision

14. The parties agree that in this instance, the Tribunal made no specific adverse credibility findings against the applicant or indeed it would seem against the litigation guardian and his wife, that is her grandparents. The applicant, in contentions of fact and law, has provided a summary of the Tribunal's decision which again has been agreed by the parties to be accurate as follows:-

- The Tribunal accepted that the applicant's grandparents generally held fear and concerns about the applicant's future and accepted the claims as put on behalf of the applicant in relation to the living arrangements on the farm [CB101.3 and 101.4]. In addition, the Tribunal accepted that child prostitution in Thailand was "serious problem" [CB101.4] and that corruption was rife in Thailand and laws were not enforced "at street level" [CB103.1].

- The Tribunal decided that the applicant was not a person to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol for the following reasons:-

    a) The Tribunal did not accept that the applicant's living conditions on the farm in themselves involved "serious harm" as required by s.91R(1)(b) of the Act in order to constitute persecution [CB101.4].

    b) The Tribunal was not satisfied that there was a "real chance" that the applicant would be persecuted in Thailand. It considered as "highly speculative" the risk of the applicant being raped or forced into child prostitution and as a consequence contracting HIV and AIDS [CB101.4]. In addition, the Tribunal did not accept that the applicant's relatives would "allow her to be raped or sold into prostitution".

    c) The Tribunal did not make an explicit finding as to whether the applicant was a member of a particular social group, such as "abandoned young girls at risk of prostitution and abuse" or "abandoned young girls". However, it did go on to consider the "Convention nexus" issue and found that those who may persecute the applicant were not motivated to do so because of her membership of any particular social group. Rather, they "would be motivated by financial reasons or personal gratification [CB102.3].

    d) The Tribunal accepted that the Convention nexus could also be found in the failure of the State to protect an applicant from persecution by non-State agents where the failure was "for reasons of" the applicant's membership of a particular social group. The Tribunal found that corruption was rife in Thailand and laws were not enforced at street level. However, the evidence did not establish that the Government of Thailand condoned or tolerated the rape or sale into prostitution of "abandoned young girls" nor that there was a systematic failure to protect "abandoned young girls" [CB103.1].

15. It is relevant to note specific extracts from the Tribunal's reasons which appear under the heading "CLAIMS AND EVIDENCE" as follows:-

> *"Mrs Ritchie referred to the applicant's living conditions on the farm where she lived with relatives including her aunt's son-in-law. She stated that the applicant was made to sell things and went to school only for 1-2 days a week. Mrs Ritchie was also concerned for the applicant's safety and was worried she may be raped. Reference was made to a man in a concrete house nearby who tried to touch her and to the aunt's son-in-law who acted improperly towards her. Mr Ritchie indicated that the applicant and her 14-year-old girlfriend would visit the man in the concrete house who had pornographic material and the man would act improperly. Mrs Ritchie added that it was the 14-year-old friend who would sell the pornographic material to the man not her grand –daughter.*
>
> *…*
>
> *The applicant referred to her 14-year-old friend with whom she played. They would sell pornographic books to the man in the concrete house to obtain money to buy sweets she stated. She noted she did not go to school regularly and referred to the work she did to help the relatives. She stated she was not happy living on the farm with the relatives and spoke of her living conditions there. The applicant noted she had been smacked by a relative. She stated she did not know why but added that it could have been for selling pornographic books to the man in the concrete house.*
>
> *…*
>
> *Mr Ritchie stated he was aware that the current Minister of Interior in Thailand was having a blitz on social ills with prostitution being targeted. However he referred to other material submitted referring to the sex trade, child prostitution and the like stating that corruption was rife in Thailand and the laws were not enforced at street level. As well he noted the police themselves were involved in prostitution and the new Minister had not stamped this out.*
>
> *Mr Ritchie stated he had no idea where the applicant would go in Thailand as her family were largely drunks or drug addicts there."*

16. In its reasons for decision under the heading "FINDINGS AND REASONS" the Tribunal relevantly states the following:-

"The Tribunal accepts that the applicant's family in Australia genuinely holds fears and concerns about the applicant's future in Thailand. The Tribunal accepts that her parents are poor and move about. The Tribunal accepts that her education has been interrupted. The Tribunal accepts that she and her 14-year-old friend have sold pornographic material to the man in the concrete house for money to buy sweets. The Tribunal accepts that some of her relatives may be drunks and/or on drugs.

The Tribunal accepts that, if the applicant returns to Thailand now or in the reasonably foreseeable future, she will have to return to the farm where she previously lived with her relatives. The Tribunal accepts that while living at the farm she will not go to school regularly and will be required to work to help her relatives. However the Tribunal does not accept on the evidence before it that the Applicant's living conditions on the farm in themselves involve 'serious harm' as required by S. 91R(1)(b) of the Act in order to constitute persecution. The Tribunal accepts that, as referred to in the material produced by Mr Ritchie, child prostitution is a serious problem in Thailand but the Tribunal considers that the fears which Mr and Mrs Ritchie expressed that the applicant may be raped or forced into child prostitution and as a result contract HIV and AIDS are highly speculative. The Tribunal does not accept on the evidence before it that the applicant's relatives on the farm are so lacking in care for the applicant that they would allow her to be raped or would sell her into prostitution. They have, after all, provided her with a home for some 3 years. The Tribunal is unable to be satisfied on the evidence before it that there is a real chance that the applicant will be persecuted if she returns to Thailand now or in the reasonably foreseeable future.

Moreover, even if the Tribunal were to accept the possible gravity of the applicant's situation in Thailand with her relatives and the harm that could befall her could amount to persecution, it must have a "Convention nexus". That is, as referred to above, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. In the present case it was submitted that the applicant was part of "a particular social group" in Thailand, namely "abandoned young girls at risk of child prostitution and abuse". So formulated the suggested social group would appear to offend against the principle established in Applicant A's case, that the persecution which an applicant fears cannot be used to define the particular social group. If, on the other hand, the

particular social group is defined as "abandoned young girls" it becomes more difficult to establish that the harm the applicant fears is "for reasons of" her membership of the suggested social group.

…

In this case the Tribunal finds that any harm or threat of harm that would emanate from the applicant's relatives or others would be motivated by financial reasons or personal gratification. These people are not motivated by a desire to persecute the applicant because of her race, religion, nationality or political opinion, nor because of her membership of any particular social group for the purposes of the Convention such as "abandoned young girls". Mr Ritchie at the hearing noted that those who would harm the applicant would do so for financial reasons and their own satisfaction.

The Tribunal notes that the relevant Convention nexus can also be found in the failure of the State to protect an applicant from persecution by non-State agents where the failure is "for reasons of" the applicant's membership of a particular social group. In this context it will not be sufficient to show maladministration, incompetence or ineptitude by the police or that the failure is due to a shortage of resources. What is required is state toleration or condonation of the persecution in question and systematic discriminatory implementation of the law: see Khawar, referred to above, per Gleeson CJ at [26] and per McHugh and Gummow JJ at [84] to [87]. The Tribunal accepts that, as Mr Ritchie stated, corruption is rife in Thailand and laws are not enforced at street level. However, the Tribunal does not accept that the evidence establishes that the Government of Thailand condones or tolerates the rape or sale into prostitution of "abandoned young girls" as a particular social group nor that there is a systematic failure to protect "abandoned young girls" in Thailand. The Tribunal does not accept on the basis of the evidence before it that the essential and significant reason for any failure on the part of the authorities in Thailand to protect the applicant from harm emanating from her relatives or others will be the applicant's membership of the particular social group of "abandoned young girls" in Thailand. Even if the Tribunal were to accept, therefore, that there was a real chance that the Applicant would be persecuted if she returns to Thailand now or in the reasonably foreseeable future, the Tribunal would not accept that one or more of the Convention reasons is the essential and significant reason for the persecution which she fears as required by s.91R(1)(a) of the Act.”

17. I have deliberately set out the extracts in some detail from the Tribunal decision as it places into context the critical findings of the Tribunal which have been referred to earlier in the agreed summary. A matter of some significance which was raised during the course of the hearing in relation to the findings was the specific finding by the Tribunal set out above where it states the following:-

> *"The Tribunal does not accept* ***on the evidence*** *before it that the applicant's relatives on the farm are so lacking in care for the applicant that they would allow her to be raped or would sell her into prostitution". (Emphasis added)*

18. During the course of submissions, the court sought from the parties reference to "the evidence" referred to in that passage. It is clear from that passage and indeed the context of the paragraph in which it is taken that essentially reliance is simply placed upon the provision by the relatives of what is described as a "home for some three years".

19. It is equally clear from the extract and indeed the paragraph that the evidence claimed to be relied upon led to a conclusion that the relatives were not "so lacking in care" for the applicant that they would "allow her to be raped or would sell her into prostitution". The level of care related to those two risk factors. The level of care on the material before me does not appear to provide any positive evidence over and above the mere occupation of a home, that is the provision of shelter. So much is clear from the material presented on behalf of the applicant and indeed other material which relates to the level of care could only be described as negative.

Relevant legislation

20. Section 65(1) of the *Migration Act 1958* (the Act) provides that a visa may only be granted only if the decision-maker is satisfied that the prescribed criteria for the visa has been satisfied. Sub-section 36(2) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

21. Section 91R of the Act provides as follows:-

> *Persecution*
>
> *(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
>
> *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
>
> *(b) the persecution involves serious harm to the person; and*
>
> *(c) the persecution involves systematic and discriminatory conduct.*
>
> *(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:*
>
> *(a) a threat to the person's life or liberty;*
>
> *(b) significant physical harassment of the person;*
>
> *(c) significant physical ill-treatment of the person;*
>
> *(d) significant economic hardship that threatens the person's capacity to subsist;*
>
> *(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;*
>
> *(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*
>
> *(3) For the purposes of the application of this Act and the regulations to a particular person:*
>
> *(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*
>
> *disregard any conduct engaged in by the person in Australia unless:*

> *(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol."*

22. Section 91S of the Act provides as follows:-

> *"For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:*
>
> *(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and*
>
> *(b) disregard any fear of persecution, or any persecution, that:*
>
> *(i) the first person has ever experienced; or*
>
> *(ii) any other member or former member (whether alive or dead) of the family has ever experienced;*
>
> *where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed."*

23. Australia is a party to the Refugee Convention and the Refugees Protocol and, generally speaking, has protection obligations to people who are refugees as defined in them.

24. Article 1A(2) of the Refugees Convention relevantly defines a refugee as any person who:-

> *"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."*

Relevant law

25. In considering the issue of jurisdictional error I adopt and apply the following passage from the Full Court of the Federal Court decision in *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255 where the Court states:-

> *"16 It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description of what constitutes jurisdictional error as it appears in Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness: Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 per Gummow and Hayne JJ at [49], footnote 26 referring to Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82 and Re Minister for Immigration & Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57."*

26. Any jurisdictional error detected must affect the exercise or purported exercise of power in order to provide a proper basis upon which the Court should intervene by way of judicial review. A failure to take into account a relevant consideration would not of itself constitute an error unless it was a consideration that the Tribunal was bound to take into account (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).

27. It is noted that in the decision of the Tribunal it appropriately and relevantly referred to a number of well-known authorities. The first of those authorities in dealing with the issue of persecution was the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Zamora* (1998-99) 85 FCR

458 where at page 464 the court said that *Applicant A's* case is authority for the following propositions:-

> *" ... To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals;... Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community."*

28. Reference was made to the decision of Birchett J in *Ram v Minister for Immigration and Ethnic Affairs and Anor* (1995) 57 FCR 565 at 569 as follows:-

> *" ... When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group."*

The applicant's submissions

29. It is appropriate to set out the submissions in the light of the grounds of the claim which in this application have been summarised as follows:-

    a) The Tribunal erred in law in its application of the definition of what amounts to serious harm under s.91R of the Act.

    b) The Tribunal erred in its consideration and application of the "real chance" test.

    c) The Tribunal erred in its consideration of the Convention nexus issue.

    d) The Tribunal erred in its consideration of the issue of state protection.

30. All of those grounds, it was submitted, are sufficient for attracting the relief sought and provide a basis upon which the court should conclude that there has been jurisdictional error and that the decision therefore is

not protected from review by s.474 of the Act, and nor is it subject to time limits set out at s.477 of the Act. The applicant has relied upon the relevant principles set out in *Craig v South Australia* (1995) 184 CLR 163 and *Yusuf v Minister for Immigration and Multicultural Affairs* (2001) 206 CLR 323, and in particular referring to *Craig's* case recites the following where the Court states in relation to an administrative Tribunal that it:-

> *" … falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."*

Ground (a) The Tribunal erred in law in its application of the definition of what amounts to serious harm under s.91R of the Act

31. The applicant submitted that the Tribunal erred in its application of the definition of what amounts to serious harm under s.91R of the Act. After setting out the section, it was submitted that the concept of "serious harm" is inclusive not exhaustive. Reliance was placed upon the decision of the High Court in the matter of *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 where McHugh J states:-

> *"Moreover to constitute 'persecution' the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute persecution for the purposes of the convention and protocol. Measures in "disregard" of human dignity may in appropriate cases constitute persecution.*

32. The applicant further relied upon the decision of McHugh J in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2001) 75 ALR 589 where at paragraph 65 the court states:-

> *"Framing an exhaustive definition of persecution for the purpose of the Convention is probably impossible. Ordinarily, however, given the rationale of the Convention, persecution for that purpose is:*

- *unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason*
- *which constitutes an interference with the basic human rights or dignity of that person or the persons in the group*
- *which the country of nationality authorises or does not stop and*
- *which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned."*

33. It was submitted on behalf of the applicant that the Tribunal is required to apply the correct tests and ask the correct questions in arriving at its determination (see *VTAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) FCA 927).

34. After referring to the claims accepted by the Tribunal and noting its finding that it did not accept that the living conditions on the farm in themselves involve "serious harm" as required by s.91R(1)(b) of the Act, it was submitted by the applicant that the Tribunal's finding in respect to that issue was "clearly inadequate". It was submitted that it demonstrated the Tribunal did not turn its mind to the issues that it was required to address in order to discharge its functions of review and duties pursuant to s.430 of the Act. The Tribunal fell into error in not recognising the experiences of the applicant on the facts as accepted by it constituted "serious harm" for the purposes of s.91R(1) and Article 1A(2) of the Convention.

35. It was submitted that in considering whether the applicant had been exposed to "serious harm" the Tribunal was required to undertake the following inquiries:-

    a) Address each claim of harm as presented on the facts then consider whether it was capable of constituting serious harm. For instance it was submitted it is entirely unclear whether the Tribunal even considered the applicant's schooling and education.

b) Considering the cumulative effect of all of the forms of harm and address the question of whether the totality of that treatment met the legislative criterion of persecution involving harm.

36. The applicant referred to the decision of Finkelstein J in *Verma v Minister for Immigration & Multicultural Affairs* [2002] FCA 324 where the court states the following:-

> *"10. Whether particular treatment that is likely to be accorded to a person upon return to his or her country of nationality amounts to persecution for the purposes of the Convention, is a question of fact. It is the tribunal, as the trier of fact, that is in the best position to assess the evidence and determine whether, based on that evidence, a well-founded fear of persecution has been established on the specific facts of the case. So, if it appears that the tribunal considered and weighed all the evidence, and that the reasons reveal an understanding of the issues and a fair assessment of the evidence, then there is no basis upon which to review the decision. Conversely, if a reasonable finder of fact would have been compelled to treat conduct as amounting to persecution, but the tribunal did not do so, that is likely to indicate that there has been an error of law, namely a misunderstanding of the meaning of persecution."*

37. It was submitted the Tribunal did not consider and weigh all the evidence and a reasonable finder of fact would have been compelled to treat the conduct claimed as amounting to persecution.

38. The first respondent submitted that the Court should note that the Tribunal had clearly stated that it did not accept evaluative conclusions and descriptive phrases contained in certain material referred to by the applicant. It accepted the applicant's family in Australia had genuinely held fears and concerns about the applicant's future in Thailand and other matters referred to earlier in this judgment. It was submitted that questions of the degree of what constituted serious harm pursuant to s.91R of the Act involved an assessment by the Tribunal of the relevant material. It was submitted the Tribunal had made a finding that the applicant's education had been interrupted and that she would not go to school regularly if she returns to the farm in Thailand. It should not then be implied from that finding that the Tribunal must have accepted that the Applicant's ability to subsist would be threatened. Clear reliance was placed upon s.91R(2) where the words "threatens the

persons capacity to subsist" appear in relation to issues concerning "significant economic hardship", 'denial of access to basic services' and 'denial of capacity to earn a livelihood of any kind'.

39. Reference was made by the first respondent to the Tribunal's findings and it was noted that there was no finding made in terms or by implication to the effect that the applicant had suffered significant physical ill treatment. There was no finding made arising out of the applicant's claim to be required to sell drinks on a train from age six , and that constituted being "forced to work in dangerous conditions". It was submitted the Tribunal did not accept the applicant's living conditions constituted 'serious harm'. It was submitted that in this instance the assessment of whether the work requirement or the conditions of the work constituted "serious harm" was a question of fact involving issues of degree for the Tribunal to determine. No finding was made that the applicant had suffered 'economic hardship' and nor was that claim put to the Tribunal arising out of the assertion that if required to return to the farm the applicant would be required to work. There was no finding that the life and liberty of the applicant had been threatened and it was further submitted that the findings of the Tribunal concerning living conditions did not involve serious harm. The Tribunal set out its findings as to the situation the applicant would face upon return and that evaluation did not lead it to conclude that the situation involved 'serious harm'. The Tribunal was not required to do any more than it had done in making an assessment of the material according to the first respondent's submissions.

40. In relation to the issue of education it was submitted by the first respondent the Tribunal considered that issue and had accepted the applicant's education had been interrupted and that she would not go to school regularly if she returns to the farm in Thailand. It was therefore submitted that having considered the issue it could not be assumed the Tribunal then put the issue out of its mind when it made the finding that the applicant's living conditions would not involve 'serious harm'. It was submitted there was no foundation for the assertion by the applicant that the Tribunal failed to consider the totality of the applicant's circumstances in making its finding.

Reasoning

41. In my view the key issue concerning the matter of serious harm in this instance relates to the potential threat to the applicant's life or liberty and what I regard as material which could properly provide a basis for determining serious harm as a result of a finding of significant economic hardship which does threaten the applicant's capacity to subsist. Further, the issue of denial of access to basic services to the applicant where that denial threatens the person's capacity to subsist may well potentially arise from the fundamental right of the applicant to an education. The only finding in relation to an education which appears from the extracts set out earlier in this judgment appears to be a negative finding, that is, the Tribunal has determined the issue in the following terms set out earlier:-

> *"… The Tribunal accepts that while living at the farm she will not go to school regularly and will be required to work to help her relatives. However the Tribunal does not accept on the evidence before it that the Applicant's living conditions on the farm in themselves involve 'serious harm' as required by s.91R(1)(b) of the Act in order to constitute persecution."*

42. It is difficult to conceive that a child returned to Thailand to work on a farm, denied the opportunity of education, could be regarded as not suffering serious harm. The Tribunal conclusion set out in the extract above in my concluded view demonstrates that the Tribunal has misdirected itself as to the meaning of serious harm required by s.91R(1)(b) of the Act. The serious harm as illustrated by the instances referred to in s.91R(2) need not be overt physical ill treatment, significant economic hardship or denial of access to basic services but rather may be constituted by the simple denial of education to a child which at the very least would appear to be a fundamental right. The denial of an education must surely be a basis upon which it could be concluded that there is a threat to the person's capacity to subsist. In developing countries it is difficult to conclude that a lack of provision of education would not have an impact on a person's capacity to subsist as at the very least it provides a basic denial of access to an essential service namely an education, or involves significant economic hardship threatening the person's capacity to subsist by denial of that education. To draw the conclusion as it did that the applicant would not go to

school regularly and would be required to work to help her relatives and to then not accept on the evidence before it that those living conditions on the farm with the denial of an opportunity for education involve serious harm in my view leads to the conclusion that the Tribunal has taken a far too narrow view of what is meant by 'serious harm' as required by s.91R(1)(b) of the Act. In my view the concept of serious harm must include denial of education to a child. This is not to expand the instances referred to in s.91R(2) of the Act but rather to give full meaning and effect to the notion that children are entitled to an education and the denial of education may of itself constitute serious harm. In my view it is clearly capable of providing evidence of physical ill treatment as it can constitute by its denial a deprivation of physical and mental development of the child. It clearly has the potential to provide the basis for significant economic hardship or denial of access to basic services where in both instances that denial threatens the person's capacity to subsist. The section does not provide instances of serious harm where the person has to establish an inability to subsist but rather a threat to the person's capacity to subsist. By failing to recognise that fact the Tribunal has further fallen into error and has otherwise misdirected itself in relation to the issue of serious harm to be applied in this instance.

43. Further, in my view, the only positive evidence which appears to arise from the factual material before the Tribunal in relation to the accommodation of this applicant at the farm appears to be the issue of shelter. The mere provision of shelter does not of itself in my view provide any or any sufficient basis on a proper interpretation of s.91R for the Court to conclude that this applicant does not suffer the potential of persecution involving serious harm.

44. During the course of the submissions, it became clear to me that the issue of serious harm involved not just the consideration of schooling or education, but also health issues which are readily apparent from the claim made for and on behalf of the applicant.

45. It is necessary to further consider other grounds relied upon having found that this ground has been established.

Ground (b) The Tribunal erred in its consideration and application of the "real chance" test

46. It is submitted that the Tribunal had erred in its understanding of or its application of the test to determine whether the applicant has a well-founded fear of persecution for reasons of her membership of a particular social group. The Tribunal made a finding in relation to the real chance of persecution recited earlier in this decision. It was submitted that the Tribunal in that finding where reference was made to the material produced by Mr Ritchie that the Tribunal did not undertake the analysis required of it in order to properly assess whether the harm feared by the applicant was well founded, in other words whether there was a "real chance of persecution".

47. It was submitted that whether a fear of persecution is well-founded requires consideration of whether there is a substantial basis for the fear. Reference was made to the statement of principle of the High Court in the joint judgment of Brennan CJ and Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572:-

> *"No doubt in most, perhaps all, cases arising under s 22AA of the Act, the application of the real chance test, properly understood as the clarification of the phrase "well-founded", leads to the same result as a direct application of that phrase. Wu Shan Liang*[20] *is an example. Nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. In the present case, for example, Einfeld J thought that the "real chance" test invited speculation and that the tribunal had erred because it "has shunned speculation".*[21] *If, by speculation, his Honour meant making a finding as to whether or not an event might or might not occur in the future, no criticism could be made of his use of the term. But it seems likely, having regard to the context*[22] *and his Honour's conclusions concerning the tribunal's reasoning process, that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is "well-founded" when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50% chance that the object of the fear will eventuate. But no fear can*

be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the tribunal and the Federal Court have used the term "real chance" not as epexegetic of "well-founded", but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

48. Further reference was made to a statement by the court in *Guo* at 579 follows:-

> *"Moreover, a declaration, even if drawn in specific terms, should not have been made. The Tribunal was empowered by s 166BC(1) of the Act to exercise all the powers and discretions conferred upon the primary decision-maker. The Act provided (s 22AA) for determination by the Minister that a person was a refugee, but this power was exercisable upon the Minister being satisfied that a person had that status or character. The rights of the appellants to the issue of visas, which the Full Court purported to declare with present effect, would only arise upon satisfaction of statutory conditions including the determination by the Minister under s 22AA or by the Tribunal under s 166BC."*

49. It was submitted that on the basis of that authority the Tribunal in the present case was required to undertake the following task:-

> *(a) consider and identify the harm feared; and*
>
> *(b) consider whether there was a real chance the harm feared would occur.*

50. In order to do this it was submitted the Tribunal must make findings as to what occurred in the past, because what occurred in the past is a reliable guide to the future.

51. It was submitted that in this case the Tribunal did not identify and consider the harm feared. It considered only the claim that the applicant may be "raped or forced into child prostitution and as a result contract HIV and AIDS". It was submitted that other forms of fear by the applicant included the following:-

- sexual abuse, particularly in light of a belief in rural Thailand that sex with a pre-pubescent virgin will cure AIDS
- being sold into child prostitution
- raped
- child abduction
- poor living conditions
- lack of schooling
- homelessness

52. It was submitted the Tribunal did not consider whether there was a real chance of all the harms inflicted upon the child applicant. Instead it confined its inquiry to whether she was at risk of being "raped or forced into child prostitution and as a result contracting HIV and AIDS".

53. Further, it was submitted that the Tribunal limited its inquiry to whether the applicant was at risk of harm by members of her family, given the claim was put in relation to family "or neighbours" or others. Hence the Tribunal satisfied itself it was not at risk because "they would not allow her to be raped" nor would they sell her into prostitution. In doing so it failed to broaden the inquiry and consider whether she was at risk in Thailand in light of her status as "an abandoned young girl" and in light of the country information which depicted the country as corrupt and identified "child prostitution" as a real issue.

54. It was submitted the Tribunal failed to consider whether the applicant's fears were "well-founded" in light of what occurred in the past. The finding that the applicant's fears were not well-founded because it was satisfied the relatives on the farm were not so lacking in care to allow her to be raped or sold into prostitution stands, it was submitted, was in direct conflict and was irreconcilable with the Tribunal's acceptance or at least non-rejection of past events and other factual claims made on behalf of the applicant set out earlier in this judgment.

55. It was submitted that the inconsistency and contradiction in the findings implies that the Tribunal failed to consider the past matters and events in assessing whether there was a real chance of future persecution.

56. The first respondent submitted the Tribunal is not required to refer to each and every piece of evidence in its reasons for decision and that no inference should be drawn that relevant material or considerations were ignored due to a failure to refer to a piece of evidence. It was submitted that provided the integers of the applicant's claim were addressed then no jurisdictional error will have occurred.

Reasoning

57. In my view the respondent's submissions are incorrect. In this case the issues raised and identified for and behalf of the applicant go well beyond the identified risk of the applicant being "raped or forced into child prostitution and as a result contracting HIV or AIDS". The integers of the claim go beyond that to include poor living conditions, lack of schooling and homelessness. Those crucial issues in my view should have been addressed by the Tribunal as essential integers of the claim and by failing to do so the Tribunal has fallen into jurisdictional error by failing to properly consider and make a specific finding on those relevant issues.

58. It is necessary to consider the other grounds.

Ground (c) The Tribunal erred in its consideration of the Convention nexus issue

59. It was submitted by the applicant that the Tribunal did not make an explicit finding as to whether the applicant did form part of a particular group. The group postulated was "abandoned young girls at risk of child prostitution and abuse". It was acknowledged the Tribunal noted an alternative characterisation of the group as "abandoned young girls". It then stated however that the wide the definition the group propounded then the more difficult it may be for the applicant to show that the suggested fear is one of "persecution" which is "well founded" and exists "for reasons of membership of that social group".

60. The applicant submitted in this instance the group of "abandoned young girls at risk of child prostitution and abuse" or "abandoned young girls" in Thailand is capable of constituting a particular social group for the purpose of the Convention. It was submitted specifically that the following are characteristics of that group:-

a) Its members are young girls – children

b) Its members are alone without adult protection, guidance or support

c) Its members are identifiable as a social group because of their gender, immaturity, limited knowledge and experience and access to resources.

61. The applicant referred to the High Court decision in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 1987 ALR 389 where the Court stated the importance of correctly identifying and defining a particular social group. It was submitted in the present case that the Tribunal did not explicitly find that "abandoned young girls" could constitute a particular social group. In reaching that decision it is submitted that the Tribunal appears to have accepted that it was capable of doing so as it went on to consider whether the harm feared was "for reasons of the applicant's membership of a particular social group such as abandoned young girls" [CB 102]. However, it is submitted that in consideration of the issue the Tribunal fell into error.

62. It was submitted that the Tribunal failed to assess whether the applicant was at risk of persecution for reason of her membership of the particular group. It was submitted that in this instance the Tribunal was required to consider the following questions:

- Was the risk of harm faced by the applicant Convention based?
- Was the harm more likely to fall on the particular social group of which the applicant was a member than on other people?
- Were members of the particular social group prone to be singled out as targets of rape, sexual abuse, child prostitution?

- Was the harmful behaviour attracted for a Convention reason namely having the qualities that identify a person as a member of the particular social group?

- Did the Thai State lack the capacity to protect members of the particular social group from this persecution?

- Would the motivation in part include a desire to target girls in the social group?

63. Reference was made to the Tribunal's reasons set out earlier in this decision, an extract of which may be restated, as follows:-

> *"In this case the Tribunal finds that any harm or threat of harm that would emanate from the applicant's relatives or others would be motivated by financial reasons or personal gratification. These people are not motivated by a desire to persecute the applicant because of her race, religion, nationality or political opinion, nor because of her membership of any particular social group for the purposes of the Convention such as "abandoned young girls". Mr Ritchie at the hearing noted that those who would harm the applicant would do so for financial reasons and their own satisfaction."*

64. It was submitted that that extract is fundamentally flawed as the Tribunal has effectively held that the harm or threat of such harm including child prostitution could not amount to persecution for a Convention reason because the motivation is for "financial reasons and their own satisfaction". It was submitted that reasoning supports a finding that child prostitution or forced prostitution can never amount to persecution for Convention reasons simply because the perpetrators of the harm are financially motivated. It was submitted that persecution for reasons of financial reward can nonetheless be for reasons of the applicant's particular social group. In this instance the claim was based upon the applicant's status as "an abandoned young girl" who was vulnerable and at risk of commercial exploitation in the form of child prostitution. That risk it was submitted was real because of the Government's inability to protect her and because child prostitution was a significant problem partly due to the country's extreme poverty.

65. In support of the submissions concerning this ground reference was made to a press report referring to commercial exploitation being a problem of children in the sex trade [CB p.87] and other reports concerning commercial exploitation and child prostitution in Thailand set out in the supplementary Court Book.

66. The First Respondent submitted that once the Tribunal found that there was no real chance of persecution it was not necessary to consider the question of the Convention nexus. It was further submitted that the issue of state protection (Ground (d)) should be considered in conjunction with the issue of the Convention nexus. It was submitted the analysis of the Tribunal in relation to a particular social group was based upon the application of the principles set out by the High Court in *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 142 ALR 331. The First Respondent submitted the Tribunal correctly set out and applied the test. It was submitted the proposed formulation of the particular social group of "abandoned young girls at risk of child prostitution and abuse" does not conform to the principles that the proposed particular social group must not be defined by reference to the persecution feared and the Tribunal was correct in their observation to that effect. In any event it was submitted the Tribunal further considered the possible particular social group of "abandoned young girls" whilst it did not make any finding that the applicant was actually a member of such a social group, it dealt with the formulation of a particular social group as a hypothetical for the sake of dealing with the arguments which had been advanced on behalf of the applicant. As I understand the argument of the First Respondent it was suggested that the applicant had not been "abandoned" given that she had lived with some relatives for some three years prior to departure from Thailand.

67. It was noted by the first respondent that the Tribunal is required by s.91R(1)(a) to determine that one or more convention reason be the essential and significant reasons for the feared persecution. In this instance the Tribunal made findings about the motivations of those who it was claimed would harm the applicant to the effect that the motivations were for financial reasons and personal gratification. Those motivations were concluded by the Tribunal to be not for Convention reasons but rather private reasons analogous to a situation

where a husband inflicts domestic violence on a wife (see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574).

68. The first respondent conceded that the fact that the motivation of a non state attack is not a Convention reason does not itself mean the harm inflicted is outside the Convention and it is necessary to analyse and consider the position of the State. It was submitted that in its decision the Tribunal clearly understood this concept in the extract referred to earlier in this judgment (see paragraph 16).

69. It was submitted by the first respondent that if there was a finding that the State is not in fact providing protection it is necessary for the Tribunal to then make a finding as why that is so. Where the relevant non State agents motivation does not constitute a Convention reason and the relevant failure of the State protection is not due to discriminatory implication of law or toleration or condemnation of the harm but rather due to mal administration in competence or ineptitude or shortage of resources by law enforcement authorities then it is submitted there is no Convention nexus (see *Minister for Immigration v Khawar* at [26] [84] [130]). It is submitted that in this instance the findings of the Tribunal set out earlier in this judgment fall within the framework of the law referred to in the relevant passages from the High Court decision in *Khawar* and accordingly there is no error.

Reasoning

70. In my view the applicant's submissions in relation to this ground are correct. To the extent that I am satisfied that the Tribunal appears to have focused on the motivation of those inflicting harm rather than considering as in my view it is required to consider that financial motivation does not detract from or necessarily lead to a conclusion that there is no Convention nexus or that the person being persecuted is persecuted by reason of a member of the social group identified. Having dismissed effectively the Convention nexus due to the financial motivation of the perpetrator's of the persecution the Tribunal in my view has misdirected itself and has fallen into error.

71. I shall deal with the issue of State protection under the next ground. I accept as submitted by the first respondent that there is an overlap and

that it is necessary to consider State protection in the context of ground (c) but I prefer to deal with it separately.

Ground (d) The Tribunal erred in its consideration of the issue of State protection.

72. I have already set out the arguments advanced by the first respondent in relation to State protection relied upon in relation to ground (c) which were adopted in arguments advanced in relation to this ground.

73. It is noted that the further submissions of the applicant in support of this ground sought to contend that there was a failure by the Tribunal to consider relevant country information regarding this issue. Further, that it had made critical findings without evidence or failed to consider whether the Government was unable to protect the applicant from persecution and/or failed to consider whether Thailand has effective judicial/law enforcement agencies/laws designed to protect its nationals.

74. Reference was made to relevant country information which included material from UNICEF suggesting that there were estimates of children who were sold for sex ranging from 100,000 to 800,000 [CB 55] and other data including US Department of State report on trafficking and persons dated July 12, 2001 which referred to victims being primarily "young women and girls" (CB 57). It was submitted that the claim of the applicant was that her fear of harm was well-founded and that she was unwilling to return to Thailand or seek protection because Thailand is unable to protect her. The Applicant did not claim that the Thailand government or authorities themselves were the source of the threat.

75. In support of the submissions on behalf of the applicant reliance was placed upon the majority judgment in *Minister for Immigration & Multicultural Affairs v Respondents S152/2003* (2004) HCA 18. In that case it was claimed there were two steps identified to be taken namely:-

    a) To determine whether there was a real chance (as explained in Chan and other cases in the High Court) that the applicant will

suffer serious harm at the hands of the non State entity or group for a Convention reason;

b) If there is a well-founded fear of serious harm from a non State entity or group the second step is to determine whether the country of nationality has taken reasonable measures to protect the lives and safety of its citizens by the provision of a reasonably effective police force and a reasonable impartial system of justice. An alternative formulation to the second question may be whether the State police and authorities meet international standards (see S152/2003 at 459 [28]).

76. It was submitted that in this instance the Tribunal failed to address the question required by s.36(2) of the Act as explained by the High Court in *S152/2003*. The Tribunal failed to engage in the relevant line of enquiry including whether the Thai authorities and police were so inadequate that the applicant would not be blamed for not relying on them for protection. Other questions concerning capacity or willingness to provide effective protection and access to that protection should have been considered. Reference was made to the following paragraph from *S152/2003* where the Court states the following:

> *"26. No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. …"*

77. It was noted the Tribunal had already made findings that corruption was rife in Thailand and laws were not enforced at street level. That finding suggests, according to the applicant's submissions, that Thailand does not provide a reasonably effective and impartial police force and justice system.

78. The first respondent in addition to relying upon the extracts from *Khawar's* case submitted that in this instance the relevant finding by the Tribunal was that the evidence did not demonstrate the State condoned or tolerated relevant harm. That was an evaluation of material reasonably open to it. The first respondent sought to distinguish the authorities relied upon by the applicant and in particular the comments of the High Court in *S152/2003* on the basis that in that case the Court was directed to the obligations of a Ukranian State to take reasonable measures to protect its citizens including the "provision of a reasonable effective and impartial police force and justice system". Those comments were made in the context of a case in which non State agents had a Convention motive for persecuting the applicant, namely religion. It was submitted that there is still a "discriminatory element" required if a failure of State protection were held to be relied upon to support a Convention nexus in this case.

Reasoning

79. In my view whilst I agree that acceptance of a discriminatory element is required if the failure of State protection were to be relied upon and that there be a Convention nexus I have already found that the Tribunal has fallen into error for its failure to consider those essential issues.

80. Likewise in my view the Tribunal has fallen into error in the sense that it has confined its enquiry in relation to State protection to the narrow issue of whether or not the State condoned or tolerated the relevant harm. The authorities relied upon by the Applicant in my view provide a proper basis upon which the Court can conclude as a matter of law the Tribunal was bound to further consider the issue relevant in this instance as to whether or not the Government of Thailand could provide a reasonably effective and impartial police force and justice system to protect the life of the Applicant who at least potentially may have a Convention reason and based upon which the Tribunal, if considering the law appropriately, may have found persecution and serious harm as discussed earlier in this judgment.

Conclusion

81. For the reasons given it follows in my view that the relief sought by the Applicant should be granted. To the extent that any extension of time may be required then I consider it in the interests of justice given the findings I have made that that extension be granted.

82. For the reasons given I am satisfied that there has been jurisdictional error.

I certify that the preceding eighty-two (82) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 24 February 2006