HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

STCB APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR RESPONDENTS

STCB v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] HCA 61
14 December 2006
A5/2006

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S D Ower for the appellant (instructed by McDonald Steed McGrath)

C Gunst QC with M J Roder for the first respondent (instructed by Sparke Helmore)

Submitting appearance for the second respondent

CATCHWORDS

STCB v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Application for protection visa – Fear of persecution – Persecution for reason of membership of particular social group – Family – Fear of persecution because of family involvement in blood feud – Whether decision-maker required by s 91S of *Migration Act* 1958 (Cth) to disregard fear of persecution – Albanian citizens subject to customary law – Whether a "particular social group".

Migration Act 1958 (Cth), s 91S.
Convention relating to the Status of Refugees 1951, Art 1A(2).

1 GLEESON CJ, GUMMOW, CALLINAN AND HEYDON JJ. The appellant is a citizen of Albania who claims to be a refugee.

The appellant's application for a visa

2 On 7 November 2000 the appellant applied to the Minister for Immigration and Multicultural and Indigenous Affairs (the first respondent) for a Protection (Class XA) visa. His application was based on the claim that in 1944-1945 his grandfather had killed a member of the Paja family; that the Paja family was therefore obliged by the customary law of Albania known as the Kanun or Code of Lekë Dukagjini ("the Kanun")[1] to kill a male member of the appellant's family; that he feared that he would be killed by the Paja family if he returned to Albania; and that the Albanian police were powerless to stop this.

3 By reason of s 36(2) of the *Migration Act* 1958 (Cth) ("the Act"), the appellant's claim to a protection visa depended on his establishing that he was a non-citizen to whom Australia owed protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). Article 1A(2) of the Convention provides that a necessary condition of refugee status is having a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". In this appeal the appellant contended that he had a well-founded fear of persecution by reason of being a member of two relevant social groups: his family and "Albanian citizens who are subject to the customary law".

The relevant legislation

4 On 1 October 2001 the *Migration Legislation Amendment Act (No 6)* 2001 (Cth) came into force. It inserted s 91S into the Act. Section 91S provides:

> "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:

---

1 In order to avoid misunderstanding, it is desirable to say that the Kanun appears to deal with many subjects innocuously; only small parts of it concern blood feuds, and even these provisions are directed in some measure to the peaceful resolution of quarrels.

(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."

The decision of the first respondent's delegate

5 On 30 January 2002 the first respondent's delegate refused the appellant's application for a protection visa. The reasoning of the delegate centred on what the Decision Record described as the "definition" of "membership of a particular social group" in s 91S. The delegate said:

"While the definition does not exclude a family from being regarded as a particular social group for the purposes of the Convention, it does not provide for protection to persons with derivative claims. It does not provide that protection responsibilities are owed to a person whose claims to protection derive from his association with another person, where the other person would not be a Convention refugee. From the information provided by the claimant, it is clear that after the claimant's grandfather had allegedly killed a member of the Paja family in 1944-45 he did not experience any fear of persecution or any persecution from the Paja family for reasons of one or more of the Convention grounds. Accordingly, it is reasonable to conclude that the fear of persecution or persecution the claimant has experienced from the Paja family would not exist as his grandfather's fear or persecution for the reason of a Convention reason had never existed. In other words, the claimant's grandfather would not have been a Convention refugee himself and the fact that the claimant is related to his grandfather would not make him a Convention refugee now. Having examined the claimant's circumstances overall, I find that any harm that the claimant might be subjected to if he returns to Albania cannot be seen to be for reasons of his membership of a particular social group."

The Refugee Review Tribunal's decision

6 Before the delegate of the first respondent the appellant apparently relied only on membership of one social group – his family. Before the Refugee Review Tribunal ("the Tribunal"), as in the Federal Court and as in this Court, he relied on membership of a second social group – "Albanian citizens who are subject to the customary law". It is no doubt not a coincidence that the appellant first came to rely on the second social group after s 91S was enacted and after the first respondent's delegate had applied s 91S to reject the appellant's claim to a protection visa based upon his membership of the first social group. In this appeal the appellant has relied on both social groups.

7 On 15 September 2003 the Tribunal affirmed the delegate's decision not to grant a protection visa.

8 The Tribunal accepted the appellant's claim that his family was involved in a blood feud with the Paja family because the appellant's grandfather had killed a member of the Paja family in 1944-1945. It also found that there was a tradition of blood feuds in Albania, particularly in the north, and that these feuds had revived after many years of repression by the Communist regime in power until 1991-1992. However, it found that the Albanian authorities had recognised, and shown willingness to address, the problems presented by blood feuds. Further, the Tribunal found that the motivation of the Paja family to harm a member of the appellant's family was revenge for the murder committed by the appellant's grandfather, and that fear of revenge for a criminal act was not fear of persecution for a reason falling within the Convention definition of persecution. The Tribunal considered that s 91S prevented it from having regard to any fear of persecution on the appellant's part arising from the fact that he was a member of a family, another member of which feared, or had feared, persecution for a non-Convention reason.

9 The Tribunal also rejected the appellant's alternative claim to be a member of a social group comprising Albanian citizens subject to the customary law. The Tribunal said that it was necessary, for persons to form part of a "particular social group", that they share a characteristic, other than a common fear of persecution, which sets them apart from society at large. The Kanun was, at least in the north of Albania, a law or practice of general application. The population affected was too heterogeneous to be regarded as having a characteristic distinguishing them from the rest of Albanian society.

Finn J

10 On 15 March 2004 the Federal Court of Australia (Finn J) dismissed an application by the appellant for review of the Tribunal's decision. He did so because, after the Tribunal's decision had been delivered, the decision of von Doussa J in *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs*[2], on which the first respondent had successfully relied in the Tribunal, had been upheld by the Full Court of the Federal Court of Australia[3], and the appellant conceded that the latter decision was determinative of the issues[4].

Full Court of the Federal Court of Australia

11 The Full Court of the Federal Court of Australia (Spender, Stone and Bennett JJ) dismissed an appeal by the appellant against Finn J's orders. The fact that counsel for the appellant resiled from the concession made before Finn J about the binding effect of *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs* led the Full Court to suggest that what was said about s 91S in both courts in *SCAL* consisted only of obiter dicta[5].

12 The Full Court dealt with the two grounds of appeal to it as follows.

13 The first ground of appeal contended that the Tribunal had made a jurisdictional error in failing to determine whether the fear of the appellant's grandfather was for a Convention or a non-Convention reason. The Full Court rejected this on the ground that the only reason that the appellant's grandfather was vulnerable was that he was the killer of a member of the Paja family, and that the Tribunal had accepted that as an element of the appellant's account[6].

---

2 [2003] FCA 548 at [15]-[21].

3 *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 301.

4 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 276 at [2].

5 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266 at [12].

6 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266 at [19].

14 The second ground of appeal criticised the Tribunal for not taking into account the subjective perceptions of the Albanian community in concluding that Albanian citizens subject to the Kanun comprise too heterogeneous a group to be a particular social group. The Full Court considered that the Tribunal was correct so far as it followed the reasoning of von Doussa J in *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs*. The Full Court did, however, criticise the Tribunal's stress on the diversity of the social group relied on[7]. The Full Court concluded that in the absence of any common element making Albanian citizens subject to the Kanun "a cognisable group within Albanian society", there was no occasion for the Tribunal to consider what the subjective perceptions of the Albanian community were[8].

15 The appellant has obtained special leave to appeal to this Court against the Full Court's orders. For the reasons given below, that appeal should be dismissed.

The background to s 91S

16 In *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)*[9] Merkel J (Heerey and Sundberg JJ concurring) held that a family was capable of constituting a particular social group for Convention purposes. It was also held that a Colombian threatened with murder if a debt contracted to underworld figures by her subsequently assassinated brother were not repaid by her could be seen as being persecuted for a Convention reason, namely membership of a particular social group comprising her family.

17 The Explanatory Memorandum to the Migration Legislation Amendment Bill (No 6) 2001, which, on enactment, inserted s 91S into the Act, said that s 91S[10]:

---

7 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266 at [31].

8 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266 at [32].

9 (2001) 107 FCR 184 at 192-193 [28]-[33] and 199 [52].

10 Migration Legislation Amendment Bill (No 6) 2001 (Cth), Explanatory Memorandum at 10 [28].

> "addresses a recent court finding that a relative of a person facing persecution for a non-Refugees Convention reason, such as pursuit by criminal elements for repayment of debts, is themselves [sic] facing persecution for the Convention ground of membership of a particular social group when the attentions of the agents of persecution turn to them, for example for repayments of the debts. This type of situation falls outside the range of grounds for persecution covered in the Refugees Convention."

The Explanatory Memorandum then gave a summary of s 91S, and concluded[11]:

> "The above provisions do not prevent a family, per se, being a particular social group for the purpose of establishing a Convention reason for persecution. However, they prevent the family being used as a vehicle to bring with [sic] the scope of the Convention persecution motivated for non-Convention reasons."

18 In the Second Reading Speech the Minister for Immigration and Multicultural Affairs said[12]:

> "The convention was not designed to protect people who fear persecution for personal reasons that have little or nothing to do with the convention – for example, because they have failed to pay their family's debts.
>
> Yet a recent Federal Court case provides for this very scenario.
>
> The legislation will also prevent people from using elaborate constructs to claim that they are being persecuted as a member of a family and thus under the convention ground of a particular social group, when there is no convention related reason for the persecution.
>
> This will remove a potential avenue for criminal families to claim protection on the basis of gang wars – not those that the government would see as warranting international protection."

---

11 Migration Legislation Amendment Bill (No 6) 2001 (Cth), Explanatory Memorandum at 11 [31].

12 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 August 2001 at 30422.

19 Gang wars have resemblances with blood feuds, and it is plain that the Minister's intention was to restrict the capacity to claim visas on grounds of these kinds. The question here, however, is simply whether the language of s 91S applies to the present appellant.

Application of s 91S

20 Subject to certain contentions of the appellant to be considered below, s 91S is fatal to the appellant's claim that he fears persecution for the reason of membership of a particular social group that consists of his family.

21 It was implicit in the appellant's claim to the Tribunal that at the time his grandfather killed a member of the Paja family in 1944-1945 the Kanun was still in operation, the Communist regime having not yet stamped it out; hence the grandfather must have feared revenge for the murder. Indeed, although there is no explicit finding on the point, the appellant did tender material to the Tribunal suggesting that the grandfather had left his village after the murder, and the Tribunal did not criticise that evidence.

22 The Tribunal set out without criticism the following account given by the appellant. The appellant first heard of the threats of the Paja family to kill either himself or his brother on 1 September 1997, while he was living with his father and mother. After his father's death in October of that year he then moved with his brother to his uncle's home: this was a means of obtaining sanctuary from the Paja family, since under the Kanun, if they killed him in the home of his mother's relatives, they would end up in a feud with that family. He lived there until he left for Australia in 2000. His brother lived there until he left for Italy on or about 1 March 2000. His brother's residence outside Albania was a secret, because it was not safe for him to live in Europe otherwise in view of the ease with which Albanians could travel there. In addition, the appellant accepted an assumption in one of the Tribunal's questions that he and his brother had a strong interest in staying in touch so that they would know if there were any developments in the blood feud. It follows that the brother must have been aware of the blood feud and feared being killed as a matter of revenge, and the same is true of the appellant's father during the short period between learning of the blood feud and dying.

23 The failure of the Tribunal to criticise this account, and its acceptance of the appellant's claim "that his family is involved in a blood feud with the Paja family because the [appellant's] grandfather killed a member of the Paja family in 1944-45", suggest that the Tribunal made implicit findings that this account was correct.

24 Applying s 91S(a), it is clear that the grandfather had a fear of persecution for a reason other than those mentioned in Art 1A(2) of the Convention – revenge for murder. Section 91S(a) requires that fear of persecution to be disregarded. Section 91S(b)(i) requires the appellant's fear of persecution to be disregarded, for it is reasonable to conclude that that fear would not exist if the grandfather's fear had never existed. And s 91S(b)(ii) requires that the brother's and the father's fear of persecution be disregarded, for it is reasonable to conclude that neither of those fears would exist either if the grandfather's fear had never existed. The result of disregarding the fears of persecution of the grandfather, the appellant, the father and the brother is that the appellant is to be treated as not having a well-founded fear of persecution for the reason of membership of a particular social group that consists of the appellant's family.

The appellant's arguments on s 91S

25 No controversy about the construction of s 91S divided the parties. Rather, the appellant attempted to carry out the necessary task of showing error in the Full Court's reasoning by contending that its reasoning had failed to detect and correct errors on the part of the Tribunal, and that the Full Court had attempted to sidestep such errors by making findings which the Tribunal had failed to make. The appellant argued that the Tribunal had failed to consider and make findings in relation to each aspect of s 91S.

26 The appellant argued that s 91S(a) required findings to be made on three issues:

(a) whether any other member or former member of the appellant's family had been persecuted in the past or had a fear of persecution;

(b) if so, what the reason for that persecution was; and

(c) whether the reason was mentioned in Art 1A(2) of the Convention.

27 The appellant then argued that the Tribunal had not explicitly addressed issue (a); had erred in finding on issue (b) that the reason for any persecution was "revenge for a criminal act"; and had failed, by making the finding in that way, to inquire properly into issue (c), because an act of revenge could be based on a Convention reason. The appellant submitted that the Tribunal should have asked whether the Paja family sought revenge against the other members of the appellant's family "'essentially and significantly' because of who they are as

individuals ... [or] because they are members of a particular family"[13]. The appellant submitted that if the latter were the case, then the persecution was for a Convention reason, and was not to be disregarded. The appellant cited, in support of this submission, *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)*[14]. The appellant submitted that in *SDAR v Minister for Immigration and Multicultural and Indigenous Affairs*[15] Merkel J had erred in equating the circumstances of *Sarrazola (No 2)* to Albanian blood feud cases.

28 Finally, the appellant submitted that the Tribunal had failed to consider the question posed by s 91S(b).

Rejection of the appellant's arguments on s 91S

29 The appellant is correct to suggest that s 91S required the Tribunal to consider each of the questions posed by s 91S(a) and (b) before determining that it could disregard the appellant's fear of persecution in this case. However, it did this to the extent necessary.

30 When the Tribunal accepted the appellant's "claim that his family is involved in a blood feud with the Paja family", it accepted that at least the following members of the appellant's family feared persecution by the Paja family – the appellant's grandfather, the appellant's father, the appellant's brother and the appellant himself. As indicated earlier, this proposition was inherent in the appellant's claim and in what he told the Tribunal. So far as the appellant was suggesting that other members of his family feared persecution, that suggestion was also accepted by the Tribunal when it made that finding. The appellant criticised the Full Court for using similar reasoning in relying on matters inherent in the appellant's claim in relation to the vulnerability of the appellant's

---

13 The words "essentially and significantly" take up the language of s 91R(1)(a) of the Act, which provides that Art 1A(2) of the Convention:

> "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".

14 (2001) 107 FCR 184 at 192-193 [28]-[33] per Merkel J (Heerey and Sundberg JJ concurring).

15 (2002) 124 FCR 436 at 443 [19].

grandfather, and submitted that this was an attempt to remedy the defects in the Tribunal's decision by constructing its own findings of fact to fill the vacuum left by the failure of the Tribunal to make them. This is not a sound criticism. An appellate court which elucidates, by analysis, the findings of another body in the light of unchallenged factual averments by a claimant is not "constructing" its own different findings. The first step in the appellant's argument thus fails.

31 So does the next step. The relevant finding is that the reason for the persecution is not just "revenge", but "revenge for a criminal act". While some types of revenge may be motivated by Convention reasons, the Tribunal did not deflect itself from inquiring whether revenge for the grandfather's criminal act was within Art 1A(2): it explicitly and correctly found that it was not. The appellant put a submission that the grandfather had a fear of persecution by reason of being a member of his own family rather than by reason of his crime. This submission must be rejected, because the appellant did not suggest before the Tribunal that any aspect of the grandfather's membership of the family was relevant to the blood feud: the only matter relevant to it so far as he was concerned was his crime. As the Tribunal noted, the appellant never submitted that the desire for revenge against the appellant's grandfather was Convention-based. The appellant's arguments on this point ultimately boil down to a complaint about a finding of fact, rather than a jurisdictional error.

32 The dichotomy in the next step of the appellant's argument – between whether revenge was sought against the appellant's family as individuals, or as members of the family – is not a helpful one. Revenge was sought because of their relationship with the grandfather, whose crime had triggered the Paja family's desire for revenge. While *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)*[16] held that a family was capable of constituting a particular social group, and while s 91S preserves that possibility, s 91S reverses another aspect of that case so far as it permitted claims of persecution by one family member deriving from persecution of another for non-Convention reasons. The appellant's reliance on that case flies in the face of its reversal by s 91S. The appellant's criticism of Merkel J[17] for treating the reversal of that case as significant for Albanian blood feud cases is thus groundless.

---

16 (2001) 107 FCR 184.

17 *SDAR v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 436 at 443 [19].

33 The appellant's final submission, that the Tribunal did not expressly consider the application of s 91S(b), must be rejected. In the present case the Tribunal's conclusions about s 91S(a) meant that the answers to the s 91S(b) issues were inevitably adverse to the appellant. The want of express consideration of s 91S(b) is therefore not a sign of any jurisdictional error.

"Albanian citizens who are subject to the customary law"

34 The appellant additionally submitted that he belonged to a particular social group comprising "Albanian citizens who are subject to the customary law". The appellant submitted that the Tribunal made a jurisdictional error in that it did not make a finding with regard to the subjective perceptions of Albanian society as to whether this group was distinguished or set apart from society at large.

35 In *Applicant S v Minister for Immigration and Multicultural Affairs*, Gleeson CJ, Gummow and Kirby JJ said there were three steps in determining whether a group is a "particular social group" for the purposes of Art 1A(2) of the Convention[18]:

> "First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."

They also held that there was no requirement that a society should recognise or perceive the existence of a particular social group before it would be found to exist, although that recognition or perception might be relevant to that question. One way in which the third requirement[19]:

> "may be determined is by examining whether the society in question perceives there to be such a group. Thus, perceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society."

---

18 (2004) 217 CLR 387 at 400 [36].

19 (2004) 217 CLR 387 at 397-398 [27].

36 It is unnecessary to consider the reasoning of the Tribunal and the Full Court in detail. It is sufficient to deal with the appellant's point in this way. So far as the Kanun is a source of customary law in truth binding on all Albanian citizens in a particular area, the appellant failed to demonstrate that the third element of the test stated by Gleeson CJ, Gummow and Kirby JJ was satisfied. So far as the Kanun is not a source of customary law binding on all Albanian citizens in a particular area on the ground that some criminals employ it merely as a guise for their desire to settle accounts with other criminals, the appellant's proposed particular social group collapses, for in truth Albanian citizens are not subject to customary law, but to gangs of criminals acting in the name only of customary law.

37 The Tribunal found that not every Albanian citizen is subject to customary law. It is mainly those who are resident in the north of Albania who are subject to it. The Tribunal appeared explicitly to find that the Kanun:

> "is to be treated, at least in the geographical areas from which the [appellant] comes, as a law or practice of general application."

It did so by quoting those words from the decision of von Doussa J in *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs*[20], which was itself a case about Albanian blood feuds. Let it be assumed that by that adoptive technique the Tribunal did make an explicit finding, and that that finding is in terms correct. In those geographical areas, the characteristic which Albanian citizens have of being subject to customary law is not a characteristic which distinguishes that group from society at large. All members of society have that characteristic. Despite invitations, counsel for the appellant was not able to indicate convincingly any classes of people in the area from which the appellant comes who are not subject to customary law. He said it depended on the beliefs of each individual, but that a desire on the part of a particular individual not to be subject to customary law could not exempt that individual from its force if others decided to enforce against that individual one of its parts, such as the blood feud. No doubt the appellant and his family did not desire to be part of any blood feud, yet for the purposes of the proceedings it was essential to the appellant's case that the family members were subject to customary law despite their desires.

38 However, the adoptive finding about the general application of the Kanun may not have been intended as a complete statement of the position, and it may have to be qualified by some information collected by the United Kingdom in

---

20 [2003] FCA 548 at [19].

April 2003, which the Tribunal quoted without criticism. The Kanun was said to be "a means of settling accounts amongst gangs of traffickers, smugglers, and other criminal elements who, in the absence of official law and order, can use the fear, respect and moral justification associated with the Kanun to terrorise people into a code of silence." If in fact, and to the extent that, the Kanun is only a cloak for criminal activity, it cannot be said that the relevant geographical section of Albanian citizens are subject to customary law.

39 The failure of the group relied on by the appellant to comply with the third requirement stated by Gleeson CJ, Gummow and Kirby JJ in *Applicant S v Minister for Immigration and Multicultural Affairs*[21] is not one which could have been overcome by inquiry into the subjective perceptions of Albanian society. Gleeson CJ, Gummow and Kirby JJ said that that inquiry was one which could be relevant but was not necessary. The nature of the appellant's claims in these proceedings made the inquiry irrelevant. The inquiry is also irrelevant so far as the Kanun is, in truth, only a cloak for criminal activity rather than a body of customary law. Counsel for the appellant conceded in oral argument that in relation to any inquiry into the subjective perceptions of Albanian society, "the material ... in the Tribunal was somewhat scarce ... as were the contentions". Criticism of the Tribunal is thus misplaced in view of the fact that no request was made to it to consider the subjective perceptions of Albanian society, and in view of the apparent absence of materials which might have been used as a necessary aid in doing so.

Other matters

40 There was some argument about the significance of the Tribunal's finding that "the Albanian authorities have recognised the problems presented by blood feuds and have shown that they are willing to address them." It is not necessary to consider whether this is a finding that, contrary to the appellant's claim, Albania has not failed to provide adequate protection against blood feuds.

Orders

41 The appeal is dismissed with costs.

---

21 (2004) 217 CLR 387.

42 KIRBY J. STCB[22] ("the appellant") is a national of Albania. He arrived in Australia in June 2000. Soon after his arrival, he sought a protection visa. He did so on the basis that, in accordance with s 36 of the *Migration Act* 1958 (Cth) ("the Act"), he was a person to whom Australia owed protection obligations under the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees ("the Refugees Convention")[23].

43 The appellant's claim was rejected by the delegate of the first respondent ("the Minister"). The second respondent, the Refugee Review Tribunal ("the Tribunal"), affirmed the delegate's decision. It did so primarily on the basis that s 91S of the Act prevented it from having regard to the appellant's fear of persecution because "family reasons" formed the basis of that fear.

44 The appellant sought judicial review of the Tribunal's decision in the Federal Court of Australia, but the application was dismissed by Finn J[24]. His Honour applied the then recent decision of the Full Court of the Federal Court in *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs*[25]. That was a case with certain factual similarities to the present[26]. An appeal to a Full Court of the Federal Court was dismissed[27]. By special leave, the appellant now appeals to this Court.

---

22 The name of the appellant is anonymised in compliance with s 91X of the *Migration Act* 1958 (Cth).

23 Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150; 1954 ATS 5 (entered into force 22 April 1954); Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267; 1973 ATS 37 (entered into force 4 October 1967).

24 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 276.

25 [2003] FCAFC 301, applied *STCB* [2004] FCA 276 at [1] per Finn J.

26 *SCAL* involved an application for a protection visa by an Albanian man who, like the appellant in this appeal, claimed to be the subject of a blood feud. SCAL claimed refugee status on the basis of his membership of a particular social group, said to be his family, who were targets of the blood feud. SCAL did not articulate a claim such as that in issue in this appeal. In the Federal Court, von Doussa J concluded that such a claim could not have been considered by either the Minister or the Tribunal; and that in any case, the nominated group was too indistinct from the rest of Albanian society to be classified as a particular social group within the meaning of the Refugees Convention.

27 *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266.

Narrowing the issues

45 *Background facts and legislation*: The background facts are stated in the reasons of Gleeson CJ, Gummow, Callinan and Heydon JJ ("the joint reasons"). Those reasons describe the way in which the appellant came to Australia in a claimed attempt to escape dangers arising from his supposed subjection to blood feud customs alleged to apply in Albania. Those customs were said to apply to him because his late grandfather had killed a member of a now rival family (the Paja family)[28].

46 Also set out in the joint reasons are the terms of, and arguments presented upon, s 91S of the Act, requiring that specified fears for nominated family reasons are to be disregarded in determining whether a claimant has a "well-founded fear of being persecuted for the reason of membership of a particular social group"[29]. This is the category of persecution in the Refugees Convention to which alone the appellant appealed in his request for a protection visa.

47 *Provisions of the Convention*: It is as well, once again, to set out the language of art 1 of the Refugees Convention, which gives meaning to the term "refugee". Article 1A(2) states that the term "refugee" shall apply to a 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 …".

48 As the joint reasons point out, between the time of his application to the Minister and his application to the Tribunal, the appellant re-expressed the way in which he presented his claim for protection[30]. However, before both, the essentials of his claim were the same. He asserted:

(1) The existence of a well-founded fear;

(2) That the fear was that of being "persecuted";

---

28 Joint reasons at [1]-[9].

29 s 91S. The section is set out in the joint reasons at [4].

30 Joint reasons at [6].

(3) That the persecution alleged was "for reasons of … membership of a particular social group";

(4) That he was outside the country of his nationality (Albania); and

(5) That, owing to such fear, he was unwilling to avail himself of the protection of that country.

49 *Re-expression of the claim*: The shift in expression of the claim related only to item (3). It concerned the definition of the "particular social group" of which the appellant claimed membership. As defined before the delegate, the applicable "social group" had been confined to membership of his family. It referred to his suggested fear of persecution for reasons of membership of that family, derivatively established because of the alleged acts of his grandfather and the "blood debt" that followed from those acts which were said to expose him to risks occasioning his fear. Before the Tribunal, however, the appellant advanced a second definition of the "social group" upon which he relied. This was "Albanian citizens who are subject to the customary law, the Code of Lek Dukagjini, or the Kanun". According to a letter sent by the appellant's agent to the Tribunal, reliance on this added "social group":

- Afforded "a more precise articulation of the identifiable social group to which [STCB] belongs";
- Identified more clearly the social group "that is subject to persecution by reason of the inability of the current Albanian government to halt customary law blood feuds or to protect those persons who are rendered victims of such feuds in northern Albania"; and
- Arose by analogy to this Court's decision in *Minister for Immigration and Multicultural Affairs v Khawar*[31], to which specific attention was directed.

50 *Availability of the new category*: There is no suggestion that, in re-expressing his claim in this way, the appellant altered his story, casting doubt on its veracity. To the contrary, the materials in the record show that the appellant's statement about the source of his "fear" has been consistent from the beginning. In his original application for a protection visa, contained in the record, the appellant said:

> "I left Albania because the Paja family intends to kill me. They believe that blood is owed to them by our family. In Albania the people live by

---

31 (2002) 210 CLR 1.

> the ancient code of Lek Dukegjini. Under the code a family must kill a male member of the opposing family where blood is owed. The Paja family believe that blood is owed because in 1944 and 1945 my grandfather … killed [a member of the Paja family]. … Efforts have been made to resolve this feud … All efforts to negotiate a resolution of the dispute have failed. … The Albanian government could not protect me. Thousands of men are in hiding in Albania because they have been targeted under a blood feud. The government cannot stop the killings and will not act just because a response is made that another family intends to take revenge. The Albanian police are not well organised. The population is heavily armed."

51 The appellant was entitled to re-express his claim in the light of advice he received concerning the interpretation of the Refugees Convention in accordance with Australian law. The Tribunal was fully apprised of the two ways in which the appellant's claim was advanced. It addressed each of them in its reasons. There is no technical or procedural reason warranting refusal of the re-cast submission. The position in this case was completely different from that discussed in *SCAL*[32], which the Tribunal cited at some length. In that case, the re-expressed claim had not been made "either in the visa application or before the Tribunal". It was held that this prevented the Tribunal from considering it[33]. Such was not the present case.

52 It was therefore proper for the Tribunal to determine both of the ways in which the appellant presented his claim of refugee status. The issue is whether, in respect of either such expression of his claim, the Tribunal committed a jurisdictional error, thereby attracting an entitlement to judicial review.

53 *Analysis of s 91S of the Act*: For the purposes of these reasons, I am prepared to accept the analysis set forth in the joint reasons concerning the appellant's claim to fear persecution for the reason of membership of a particular social group consisting of his family[34]. That claim obviously attracted the application of s 91S of the Act. The conclusion reached in the joint reasons is one that I can accept because, in my view, the appellant has established error in the way in which the Tribunal approached the second aspect of his claim. That conclusion entitled the appellant to relief in the Federal Court. Such relief should now be granted by this Court so as to require a rehearing before the Tribunal, freed of the jurisdictional error demonstrated by the Tribunal's treatment of the amended claim.

---

32 [2003] FCA 548.

33 [2003] FCA 548 at [16] per von Doussa J.

34 Joint reasons at [20]-[28].

Particular social group: blood feud victims

54 *Tribunal's factual findings*: In its reasons, the Tribunal set out a substantial passage from a report of the Home Office in the United Kingdom, published in April 2003, concerning the situation of persons in Albania who claim refugee status on the basis of fear that they will be killed in a blood feud if they return to Albania[35]. The Tribunal concluded[36]:

> "Based on the above information, the Tribunal accepts that there is a tradition of blood feuds in Albania, particularly in the north of the country. The Tribunal finds that the Albanian authorities have recognised the problems presented by blood feuds and have shown that they are willing to address them.
>
> The Tribunal accepts the applicant's claim that his family is involved in a blood feud with the Paja family because the applicant's grandfather killed a member of the Paja family in 1944-45. The information about blood feuds noted above indicates that there has been a resurgence of blood feuds in the north of Albania (where the applicant comes from) and that feuds have been reactivated after many years of being suppressed by the Communist regime."

55 After disposing of the appellant's first claim (by the application of s 91S of the Act), the Tribunal addressed the second claim. It quoted, with apparent acceptance, from a translated version of the Code of Lek Dukagjini, otherwise known as "the Kanun", which it accepted was "applied mainly, although not exclusively" in northern Albania[37]. It then went on to give its reasons as to why the appellant's second claim should be rejected. The relevant reasons were brief[38]:

> "The potential social group of Albanian citizens who are subject to the laws of the Kanun could reasonably be said to comprise at least a third of the population of Albania, and includes men, women and children, people who live in urban areas and those who live in rural areas, people who are wealthy and people who are poor, those who are well-educated and have

---

35 United Kingdom, Home Office, *Albania Assessment*, (April 2003), Section 6, set out in the decision of the Tribunal (ref V02/13750) at 12-14 ("Tribunal decision").

36 Tribunal decision at 14.

37 Tribunal decision at 20.

38 Tribunal decision at 20.

> good jobs and those who have neither. The Tribunal does not accept that such heterogeneous groups of people could sensibly be said to be united, cognisable or distinguished from the rest of Albanian society. The Tribunal finds that a group comprising 'Albanian citizens who are subject to customary law, the code of Lek Dukagjini, or the Kanun' does not meet the requirements for a particular social group which is recognised under the Refugees Convention.
>
> … The Tribunal therefore finds that if the applicant were to return to Albania now or in the reasonably foreseeable future, there is not a real chance that he would be persecuted for a reason which comes under the Refugees Convention. The Tribunal finds that the applicant's fears are not well-founded."

56 *The emerging issue*: The question presented by the appellant's application for judicial review is whether the foregoing approach to the second aspect of his case conformed to the requirements of the Refugees Convention, as relevantly incorporated into Australian law by the provisions of the Act[39].

57 *Analysis of the reasons*: Three points emerge from the cited passage of the Tribunal's reasons. They are:

- That the Tribunal accepted the existence of the blood feud rules in Albania, described in the Kanun; that the Kanun applied mainly in northern Albania, from where the appellant derives; and that it had been suppressed during the Communist rule of Albania but had lately been revived;
- That the chief apparent reason for rejecting the appellant's second claim was that the "social group" that he nominated was too heterogeneous and did not qualify as a "particular social group" within the terms of the Refugees Convention; and
- That, were he returned to Albania, there was no real chance that the appellant would be persecuted for a Convention reason. In effect, he would be persecuted (if at all) because of the blood feud "tradition" of Albania, the existence of which the Tribunal accepted, but which, it concluded, fell outside the Convention grounds.

58 The closing remarks of the Tribunal, to the effect that the appellant's fear was "not well-founded"[40], appear to constitute something of an after-thought.

---

39 The Act, s 36; cf *Khawar* (2002) 210 CLR 1 at 6 [1], 16-17 [45]-[46], 20-21 [60].

40 Tribunal decision at 20.

There was no explanation of why the appellant's fear of the blood feud risks in Albania, previously found, was "not well-founded". On the face of the Tribunal record, there was every reason to conclude that it was well founded. Earlier, the Tribunal had made its reasoning clear[41]:

> "Although the Tribunal is satisfied that in the Albanian context the applicant's family can be considered to be a particular social group under the Convention, the Tribunal finds that the motivation of the Paja family to harm a member of the applicant's family is revenge for a murder committed by the applicant's grandfather. Revenge for a criminal act is not a reason for harm which comes under the Convention."

59 It follows that the statement that the appellant's "fears are not well-founded", read in this context, must be understood as meaning no more than that the appellant's fears were not "well-founded" for "a reason which comes under the Refugees Convention". Read as a whole, the Tribunal's reasons accept the existence of "fear" and that such fear was for a reason flowing from the revived operation of the Kanun. The Tribunal simply concluded that the appellant had failed to engage the Refugees Convention because he had not identified a "particular social group" of which he was a member. But for that, every other component of a valid claim for protection was established.

60 The unwillingness to avail himself of the protection of his country of nationality was not concluded against the appellant. The Tribunal accepted that the Albanian authorities had "recognised" the problem presented by blood feuds. But it noted the revival of such feuds after the overthrow of Communist rule. The Home Office report (and much other uncontested information in the record) sustained the conclusion about the revival of blood feuds; their widespread impact; the imperfect response of the Albanian authorities to the danger; and the fear that such blood feuds occasioned to their victims.

61 *The victims of blood feuds*: It is important to recognise that the appellant's case was not only that he suffered from "fear" but that, as a victim of a blood feud that actually put his life in danger, his "fear" was for the reason of an inhumane practice alien to civilised societies and contrary to the appellant's most fundamental human right, the right to live, free from such violent inter-generational vengeance[42].

---

41 Tribunal decision at 15.

42 The right to life is recognised in art 6 of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171; 1980 ATS 23 (entered into force 23 March 1976) ("the ICCPR"). It has been described in the International Court of Justice as part of the "irreducible core of human rights". See *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226

(Footnote continues on next page)

62 The country report on Albania which the Tribunal apparently accepted (having included a large extract in its reasons without criticism or qualification) makes it clear that the blood feud rule, of which the appellant complained, was a very real phenomenon, especially in particular areas of Albania; that a large portion of the population were affected by it; and that governmental attempts to respond to its revival were commendable but inadequate and significantly ineffective.

63 The following is the key passage from the Home Office report, quoted by the Tribunal[43]:

> "It would be difficult to separate the issue of blood feuds from the larger problem of lawlessness in Albania, especially in the mountainous north of Albania and in remote areas. …
>
> The numbers of persons affected directly or indirectly by blood feuds vary widely. A survey conducted by the Law Faculty of Tirana University in March 2000 showed that 210,000 Albanians (six per cent of the total population) were 'affected' by blood feuds including about 1,250 people locked in their homes for fear of being killed. The Albanian Human Rights Group reported that during 2001, 2,750 families were self-imprisoned at home and that 900 children were prevented from attending school due to fear of revenge. According to the Ministry of Public Order, more than 14 individuals were killed in blood feuds in 2001. Figures published by the National Mission for Blood Feud Reconciliation, in August 2000, stated that 756 blood feuds had been reconciled, allowing the people involved to return to put an end to self-confinement at home. The missioners explained that the roots of this problem lie in the ill-intentioned interpretation of the Kanun and in the reluctance of citizens to obey the laws of the state.
>
> According to the Ministry of Public Order, more than 29 individuals were killed in blood feuds which was practised by individuals particularly in the northern part of the country. Under the kanun, only adult males are acceptable targets for blood feuds, but women and children often were killed or injured in the attacks. The Albanian Human Rights Group

---

at 506. The Office of the United Nations High Commissioner for Human Rights in its *General Comment No 14: Nuclear Weapons and the Right to Life (Art 6)*, (1984) at [1] has described the right to life as "the supreme right from which no derogation is permitted even in time of public emergency". See Hathaway, *The Rights of Refugees Under International Law*, (2005) at 450-451.

43 Tribunal decision at 13 (emphasis added).

> (AHRG) estimated that 1,400 families were self-imprisoned at home and that 140 to 400 children were prevented from attending school due to fear of revenge.
>
> Several agencies provide reconciliation services to families involved in blood feuds, although according to the International Crisis Group there has been no concerted and coordinated strategy devised to combat this *growing and deeply damaging phenomena*. …
>
> The Albanian Penal Code does not contain any provisions which directly address blood feuds. … [T]o incorporate any special provisions dealing with blood feuds in the Criminal Code would be seen as a retrograde step in Albania by giving official recognition to an archaic custom."

64 *Extracts from the Kanun*: The provisions of the Kanun, which were written down in an attempt to replace pure vigilantism with a minimal set of rules, are found in the text recorded by Shtjefën Gjeçov, a Franciscan priest:

> "CXXV
>
> 'Blood Follows the Finger'
>
> §898. According to the old Kanun of the mountains of Albania, only the murderer incurs the blood-feud …
>
> §900. The later Kanun extends the blood-feud to all males in the family of the murderer, even an infant in the cradle; cousins and close nephews, although they may be separated, incur the blood-feud during the 24 hours following the murder; after 24 hours, the family of the victim must give a guarantee of truce."

65 *Unavailing national protection*: The uncontested facts that were before the Tribunal indicate that very large numbers of persons in Albania, particularly in the north (from where the appellant derives), are forced, by their fear of inter-generational murder under the revived Kanun, to hide in their homes. The exact number involved is a matter of dispute. The success of the government's recent endeavours is also a matter of contest. However, the facts disclosed by the passage from the Home Office report cited, and apparently accepted, by the Tribunal establish that thousands of Albanians were "self-imprisoned at home" because of their fear on this ground. The measures adopted by the Albanian government might be sincere. But at the time of the report they were obviously of limited effectiveness. For many Albanians, the national government is unable to provide protection from the cause of their fear. Self-evidently, fear must be

acute to cause people to imprison themselves in their homes, locking themselves in their residences "for fear of being killed"[44].

66 Before the Tribunal, the appellant asserted that he had been hiding in Albania for two and a half years before escaping to Australia on a borrowed passport. Such prolonged relinquishment of fundamental human rights would seem naturally to sustain a desire to leave the country of nationality where such things could happen, and where governments were powerless to provide reasonably effective protection.

67 The point has been made in many cases that it is not every source of fear that attracts an entitlement to protection under the Refugees Convention. In *Applicant A v Minister for Immigration and Ethnic Affairs*[45] Gummow J observed that:

> "[W]hilst as a matter of ordinary usage, a refugee might be one whose flight has been from invasion, earthquake, flood, famine or pestilence, the definition is not concerned with such persons."

68 *Applying correct criteria*: Yet did the Tribunal err in law in concluding that the type and source of "fear" recounted by the appellant, based on his experience in Albania, fell outside the limited grounds for which the Refugees Convention affords protection? The appellant argued that the answer to this question could be found by consideration of this Court's reasoning in *Khawar*[46]. He claimed that the proper application of *Khawar* to the facts of his case would result in the success of his application. In particular, he submitted, a proper reflection on *Khawar* would have convinced the Tribunal that its reasoning by reference to the "heterogeneous" character of the "social group" that he secondly identified, and to the fact that such group comprised "at least a third of the population of Albania", involved error. It is therefore necessary to consider *Khawar* and to decide whether, as the appellant submitted, his case is analogous to *Khawar*, and should result in a like conclusion, namely, orders in his favour.

---

44 Article 9(1) of the ICCPR affords the right to liberty and security of person. See Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd ed (2004) at 303; Hathaway, *The Rights of Refugees Under International Law*, (2005) at 457.

45 (1997) 190 CLR 225 at 277-278.

46 (2002) 210 CLR 1.

Consistency with the decision in *Khawar*

69 *Decision in Khawar*: *Khawar* involved an application by a Pakistani female for a protection visa on the basis of a well-founded fear of persecution for reason of her membership of a particular social group. Ms Khawar initially identified that group as women in Pakistan. As refined, she identified the "social group" as female victims of domestic violence, perpetrated by a husband and members of his family, in circumstances where the police authorities in Pakistan were unwilling or unable to investigate and lay charges in respect of complaints of domestic violence against the woman concerned[47].

70 The delegate of the Minister and the Tribunal successively rejected Ms Khawar's claim that Australia owed her protection obligations. In the Federal Court, a single judge (Branson J) upheld the complaint of jurisdictional error[48], a conclusion later confirmed by a majority of the Full Court[49]. In both instances, the Federal Court concluded that it was open to the Tribunal to accept that she was a member of a particular social group whose attributes attracted protection obligations.

71 On appeal to this Court by special leave, a majority held that the Federal Court had been correct to find jurisdictional error on the Tribunal's part[50]. The matter was remitted to the Tribunal for correct determination of whether Ms Khawar was entitled to Australia's protection on the basis that she feared persecution by reason of her membership of a "particular social group".

72 *Defining the social group*: As Callinan J pointed out in his dissenting reasons in *Khawar*, in the course of her proceedings Ms Khawar made a number of attempts to define the "particular social group" of which she was a member[51]:

> "[Her] case before the Tribunal was put in a number of alternative ways with respect to her membership of a particular social group: women; married women in Pakistan; married women in Pakistan without the protection of male relatives; married women in Pakistan separated from their husbands and without the protection of male relatives; married

---

47 *Khawar* (2002) 210 CLR 1 at 7-8 [7]-[12], 17-19 [49]-[53], 30-32 [93]-[97]; cf at 44-45 [134]-[145].

48 *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190.

49 *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501.

50 Gleeson CJ, McHugh and Gummow JJ and myself; Callinan J dissenting.

51 (2002) 210 CLR 1 at 44 [134].

> women in Pakistan suspected of adultery; or, women who have transgressed the mores of Pakistani society."

73 In comparison with these multiple attempts, the present appellant's single attempt to reframe the "particular social group" to which he claimed to belong was positively modest and confined.

74 *The social group in Khawar*: The majority of this Court upheld Ms Khawar's claim to an arguable membership of a "particular social group". However, there were differences between the members of the majority in the expression of the "particular social group" concerned.

75 Thus, Gleeson CJ concluded that, on the material before the Tribunal, it was open to it, as a matter of law, to conclude that "women in Pakistan are a particular social group"[52]. In their joint reasons, McHugh and Gummow JJ were of the opinion that it was open to the Tribunal to determine that there was "a social group in Pakistan comprising, at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household"[53]. Still other possible definitions of the "group" were not to be excluded. My own reasons were somewhat similar to those of McHugh and Gummow JJ. I identified the "group" as being[54]:

> "of married women in Pakistan, in dispute with their husbands and their husbands' families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law".

76 *Misdirection by the Tribunal*: In my view, the reasoning of this Court in *Khawar* is, as the appellant argued, directly relevant to the disposition of the present appeal.

77 First, it is self-evident that, in a country as populous as Pakistan, any of the foregoing "particular social groups" identified by members of this Court would comprise huge numbers of persons. Certainly, they would exceed, by many multiples, the number of Albanians in fear of their lives (and possibly in hiding) by the application of the blood feud customs of the Kanun. Gleeson CJ,

---

52 (2002) 210 CLR 1 at 13 [32].

53 (2002) 210 CLR 1 at 28 [81].

54 (2002) 210 CLR 1 at 43-44 [129].

who contemplated the "social group" of the widest ambit (women in Pakistan), was unperturbed by the large numbers of potential members[55]:

> "The size of the group does not necessarily stand in the way of such a conclusion. There are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur. In some circumstances, the large size of a group might make implausible a suggestion that such a group is a target of persecution, and might suggest that a narrower definition is necessary. But I see nothing inherently implausible in the suggestion that women in a particular country may constitute a persecuted group, especially having regard to some of the information placed before the Tribunal on behalf of Ms Khawar."

These remarks reflect earlier comments of my own in response to an objection to the admissibility of claims to refugee status of parents in China affected by that country's "one child policy"[56].

78 Even the narrower "social groups" accepted by McHugh and Gummow JJ and myself in *Khawar* would, in a country like Pakistan, include a huge number of potential members, inferentially running into many hundreds of thousands, even millions. In my reasons, I too noted that this had been one of the arguments pressed by the Minister to resist the identification of the persons nominated as enjoying the character of a "social group" or one having a "particular" character[57]. But I also said[58]:

> "The Minister conceded in argument that the number of persons potentially involved in a 'particular social group' would not of itself put an applicant otherwise within that group outside the Convention definition. This must be correct. After all, there were six million Jews who were incontestably persecuted in countries under Nazi rule. The mere fact that they were many would not have cast doubt on their individual claims to protection had only there been an international treaty such as the Refugees Convention in force in the 1930s and 1940s."

79 The United Nations High Commissioner for Refugees has similarly concluded that using large group size to refuse recognition of a particular social

---

55 (2002) 210 CLR 1 at 13-14 [33].

56 *Applicant A* (1997) 190 CLR 225 at 297-299.

57 (2002) 210 CLR 1 at 43-44 [129].

58 (2002) 210 CLR 1 at 43 [127].

group has "no basis in fact or reason, as the other grounds are not bound by this question of size"[59].

80 Against this background, the reference by the Tribunal in the present case to the potential of the appellant's second category to comprise "at least a third of the population of Albania" suggests error. By inference, Gleeson CJ's willingness to accept in *Khawar* that women could constitute a "particular social group" involved a reference to half of the population of Pakistan. Extension to a third of the population, if that were the case, would of itself be immaterial, so long as a "social group" of the particular character alleged existed.

81 Secondly, social groups of the kind identified by the majority in *Khawar* are inevitably heterogeneous. Thus, half of the population of Pakistan (being women) would be half of the population in all of its heterogeneity. Likewise, each of the categories which the other members of the majority in *Khawar* contemplated would inevitably be very diverse. By their description, they would, in the words of the Tribunal in rejecting the present appellant's second category, include[60]:

> "people who live in urban areas and those who live in rural areas, people who are wealthy and people who are poor, those who are well-educated and have good jobs and those who have neither".

82 This consideration in the Tribunal's reasons was therefore, likewise, erroneous and irrelevant. If such a consideration disqualified a person from being a member of a "particular social group", it would equally have disqualified Ms Khawar. Yet this Court upheld her entitlement to relief.

83 Thirdly, so far as the Tribunal rejected the appellant's claim on the basis that the "particular social group" that he secondly nominated could not "sensibly be said to be united"[61], this too indicates error. It appears to hark back to the notion that a "particular social group" is "united" in the sense of members of a club or a beleaguered aristocracy[62]. The possession of such unity on the part of a

---

59 UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (2002) at [31].

60 Tribunal decision at 20.

61 Tribunal decision at 20.

62 *Applicant A* (1997) 190 CLR 225 at 300-301, citing authorities on early expectations of the operation of the Refugees Convention.

"social group" has long since been rejected as a matter of law. In *Applicant A*[63], the Minister did not support the proposition that associational membership was necessary or sufficient to establish the existence of a requisite "group". Many "social groups" that have been accepted by this Court were not "united". Indeed, of their nature, many members of such groups would not be known to other members. To be "united" could be very dangerous for them. The position of homosexuals in some countries[64] and Muslim apostates in their home countries[65] are illustrations of this fact. To demand that the social group should be "united" is clearly erroneous in law.

84 Fourthly, the Tribunal, in describing the further criterion that it applied to the appellant's second postulated "particular social group", also rejected that social group because it "could [not] sensibly be said to be … cognisable or distinguished from the rest of Albanian society"[66]. However, this too constitutes error when measured against the "particular social group" accepted in *Khawar*. Women in Pakistan, as such, might indeed be "cognisable or distinguished" from the rest of Pakistani society. But of their nature, the more particular categories accepted by the other members of the majority in *Khawar* would not be "cognisable or distinguished" in the way described. Of its very nature, the situation of women in their private circumstances in their own households, the subject of domestic violence from their husbands or their husbands' families, would quite often not be known to, or distinguished from, the rest of their society. That, indeed, was the complaint of such women, namely, that the people within their homes from whom they ought to receive protection, their husbands, were unwilling to give it or, indeed, supported the oppressive conduct.

85 Fifthly, there are important factual similarities between the categories of women accepted in *Khawar* as potentially constituting a "particular social group" and the persons in the sub-class of the Albanian population to which the appellant belonged and upon which his claim relied. Each was a member of a large and disparate group in society. Each, by reason of cultural norms, was commonly confined to the home. Each was oppressed by behavioural features of the society which constituted an affront to fundamental human dignity and human rights. Indeed, each was at risk of losing life itself. And each was unable to look to the authorities for effective and reasonable protection from those non-

---

63 (1997) 190 CLR 225 at 301.

64 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

65 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142; 216 ALR 1.

66 Tribunal decision at 20.

state agents which were the instruments occasioning their fear and initiating their flight in order that they might remove themselves from such an intolerable situation.

86 *Relevant overseas decisions*: In both Canada and the United Kingdom, Albanians the subject of blood feuds have been recognised as falling within a particular social group for Convention purposes. In *Pepa v Canada (Minister of Citizenship and Immigration)*[67], the Federal Court of Canada overturned a decision of the Immigration and Refugee Board, in which the Board concluded that the applicant, a victim of the Kanun, was not a member of a particular social group entitled to Canada's protection. The Board had erred in concluding that because the acts of vengeance had arisen out of a "private vendetta", they could not be said to have been performed for a Convention reason. In reaching this conclusion, the Board had focused, "incorrectly, on the perpetrators and not on the victims".

87 In the United Kingdom, the question of whether the subject of a blood feud is a member of a particular social group will depend on the facts of the case[68]. In the recent case of *Brozi*[69], the Immigration Appeal Tribunal ("the IAT") concluded that the applicant, a victim of a blood feud, did belong to a particular social group and was therefore entitled to protection. On the issue of State protection, the IAT concluded that "[t]he Albanian government does not have in place a system which offers sufficiency of protection. There is no reasonable willingness by the police to detect, prosecute and punish those responsible for blood feuds." Whilst State protection is assessed on a case-by-case basis, it was said in *Brozi* that there will generally be an insufficiency of protection in Albanian blood feud cases. The same result was reached in the case of *Koci v Secretary of State for the Home Department*[70].

88 Once again[71], this Court adopts an approach to the Refugees Convention that is out of line with the standards of the High Commissioner for Refugees and different from that adopted by other countries of asylum. For my own part, in the

---

67 2002 FCT 834.

68 See, eg, *TB (Blood Feuds – Relevant Risk Factors) Albania CG* [2004] UKIAT 00158.

69 [2003] UKIAT 06978 at [14], as quoted in *TB* [2004] UKIAT 00158 at [34].

70 [2003] EWCA Civ 1507.

71 cf *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53; *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54.

local application of international treaties to which Australia is a party, I would not adopt such a narrow approach.

89 *Conclusion: an incorrect test*: The result is that the Tribunal misdirected itself by its reference to irrelevant considerations. It is not a requirement of a "particular social group" that the group must:

- Be of modest numbers;
- Be of non-heterogeneous composition;
- Be united; and
- Be clearly cognisable or distinguished as such from the rest of the society.

90 These errors demonstrate that the Tribunal did not apply the correct legal standard for judging whether the appellant was a member of a "particular social group". Because of the importance of the lawful determination of the appellant's claim by the Tribunal, addressed solely to relevant considerations, it is my view that the application of the approach in *Khawar* requires identical orders in this case and for substantially the same reasons. Freed from the erroneous criteria applied by it, the Tribunal might still arrive at a conclusion adverse to the appellant. But the appellant is entitled to have the Tribunal exercise its jurisdiction by reference to relevant criteria, derived from the Refugees Convention and not by reference to extraneous and immaterial considerations of the kind that it relied on.

A futile exercise?

91 *Provision of reasonable protection?* But can it be said that it would be futile to return the matter to the Tribunal because, even if it confined itself to relevant considerations, it would be bound, on the appellant's second category, to come to an adverse conclusion? Such arguments were strongly pressed upon this Court in *Khawar*, as members of the Court recognised[72]. Indeed, this was the basis upon which Callinan J dissented in that case[73]. Thus, if, contrary to the lengthy extract from the Home Office report, the Tribunal were to conclude in the present case that, at the time of its decision, based on up-to-date country information, the government of Albania had blood feuds under reasonable control and gave adequate protection to those who feared the application of the Kanun, the Tribunal might indeed conclude that the appellant's fears were not

---

72 (2002) 210 CLR 1 at 29 [88]-[89], 44 [131].

73 (2002) 210 CLR 1 at 47 [151]-[152].

well founded. In such circumstances the fears would not sustain the appellant's unwillingness to look to his country of nationality for protection.

92 *A private dispute?* Likewise, if, on a rehearing, the Tribunal were to conclude that the appellant did not have a well-founded fear of being persecuted "for reasons of … membership of a particular social group"[74], but for reasons of some purely private animosity on the part of the Paja family[75], the claim under the Refugees Convention might, on those new facts, be rejected. Establishment of the existence of a "particular social group", or even of membership of such a group, is not sufficient to assure entitlement to protection. The causal connection between an established "fear" and membership of such a "social group" must be demonstrated. However, on the basis of the Tribunal's earlier finding, adverse conclusions on these issues would appear unlikely. They would not warrant this Court's refusal of relief at this stage.

93 Can it be said that the appellant would be bound to fail either because he could not demonstrate "persecution" within the meaning of the Convention[76]; or because, however refined and re-expressed, the "social group" to which he claims membership is not adequately "particular" or sufficiently analogous to others that have been recognised by this Court?

94 *Absence of persecution?* As to proof of "persecution" there are still issues of uncertainty in Australian law concerning the extent to which the actions of non-state agents may amount to "persecution" to which the Refugees Convention responds[77]. Those uncertainties have been examined in several cases of which *Khawar* was one. It is settled law in this country that nation States are not obliged to eliminate all risks of harm or to guarantee the safety of their nationals in all circumstances[78]. The Refugees Convention was written against the background of circumstances in which countries have varying resources with which to afford protection to their nationals against the acts of non-state entities.

95 Nevertheless, it is now clear, at least in Australia, that the Refugees Convention is not confined to affording protection against the affronts to fundamental human rights by agents of the State in the country of the putative

---

74 cf *Khawar* (2002) 210 CLR 1 at 33 [99].

75 cf *Khawar* (2002) 210 CLR 1 at 31-32 [96].

76 cf *Khawar* (2002) 210 CLR 1 at 33 [99].

77 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1.

78 *Respondents S152/2003* (2004) 222 CLR 1.

refugee's nationality. I remain of the view, derived from successive opinions of the House of Lords[79], that the applicable law in this regard can be summed up in the descriptive formulation:

> "Persecution = Serious Harm + The Failure of State Protection".

96 The absence of "persecution" would not appear to be a fruitful avenue for success on the part of the Minister in the present case. The level of protection that can be expected of a putative refugee's country of nationality is that which affords a "practical standard, which takes proper account of the duty which the state owes to all its own nationals"[80]. It is not one[81]:

> "indifferent to conditions which reasonable human beings should not have to accept and are entitled to escape from and in respect of which they are entitled to seek protection from the international community because they feel that invocation outside their country of nationality of protection from that country will only lead to their being returned to conditions of risk of harm that they ought not to have to tolerate".

97 In the light of the Home Office report, cited in the reasons of the Tribunal, it would certainly be open to the Tribunal, on the stated criteria, to conclude that the appellant had established "persecution". It has been held in this Court that "detention"[82], and "a threat to life or freedom for a Convention reason"[83], amount

---

79 *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 653 per Lord Hoffmann; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 515-516; cf *Khawar* (2002) 210 CLR 1 at 40 [118]; *Respondents S152/2003* (2004) 222 CLR 1 at 35 [100].

80 *Horvath* [2001] 1 AC 489 at 500.

81 *Respondents S152/2003* (2004) 222 CLR 1 at 40-41 [117] (footnotes omitted); cf Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2000) 12 *International Journal of Refugee Law* 548. This is confirmed by the fact that the Preamble to the Refugees Convention recites affirmation of the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination". See *NABD* (2005) 79 ALJR 1142 at 1160 [108]; 216 ALR 1 at 26.

82 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570, quoting with approval *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 390 per Mason CJ.

83 *Chan* (1989) 169 CLR 379 at 399 per Dawson J. See now s 91R(2)(a) of the Act. The relevance of "persecution" in s 91R of the Act, inserted by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth), was not argued in this appeal;

(Footnote continues on next page)

to persecution. If it were shown that thousands of Albanians were hiding in their homes for fear of being victims of a blood debt exacted under the Kanun, it would be open to the Tribunal to find that the fear of the appellant was a fear "of being persecuted" within the Convention, in the same way as Ms Khawar's fear was classified as such by the majority in her case. Ms Khawar did not allege that the chief source of her oppression was the police or other State authorities in Pakistan. As in the present appellant's case, her claim was that the State authorities were unwilling, or at least unable, to intervene[84]. They had left her in such an intolerable situation that she was forced to flee. She was forced to look to another country, Australia, to afford her a kind of surrogate protection from persecution that ordinarily could be expected from the country of nationality[85]. This is what the present appellant also claims.

An arguable "particular social group"?

98 *The three-fold test*: Against this background, I come to apply the three steps for the ascertainment of a "particular social group" explained in the joint reasons in *Applicant S v Minister for Immigration and Multicultural Affairs*[86]. Accepting that test for the purposes of the Refugees Convention, are the three steps fulfilled in the appellant's case? Approaching the case in the way explained by *Applicant S*, would it be open to the Tribunal to reach a conclusion in favour of the appellant?

99 The first requirement is the possession of an identifiable characteristic or attribute common to the members of the posited group. On the basis of the country information, quoted by the Tribunal, there is evidence to support such common characteristics or attributes. The applicable features involve being citizens of Albania, caught up in a blood feud, subject to the Kanun and (perhaps) forced into self-imprisonment for their own safety because of the incapacity or unwillingness of State agents to protect them. The geographical origin of most such people, being from the north of Albania, where the Kanun is still strongly observed, may be a further feature of the group to which the appellant belongs. On the basis of the country information cited, there would be no doubt that, in Albania, "self-imprisonment", in fear of such blood-feud

---

cf *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 60.

84 cf *Khawar* (2002) 210 CLR 1 at 12 [27].

85 cf *Khawar* (2002) 210 CLR 1 at 23 [69]. See *Butler v Attorney-General* [1999] NZAR 205 at 216-217 (CA).

86 (2004) 217 CLR 387 at 400 [36]. See joint reasons at [35].

vengeance, exists; is well known as a social phenomenon; and is widespread. The "group" involved does not comprise trivial numbers.

100 The second step requires that the relevant characteristic or attribute is not solely the shared fear of persecution. That step may be taken. This is not a case of random violence or the total breakdown of law and order. The joint reasons postulate that the appellant's "social group collapses" because in truth he is "not subject to customary law, but to gangs of criminals acting in the name only of customary law"[87]. With respect, I see no hint of this factual conclusion in the Tribunal's reasons. It would mean that thousands of Albanians condemned to self-imprisonment are mistaken in their belief that the risk they face arises from the blood debt exacted by the Kanun. It should be left to the Tribunal, not this Court, to reach such a conclusion.

101 Moreover, simply because conduct is "criminal", does not mean that it is committed for a solely "criminal" purpose, or that it is being performed by "crime gangs" with no motivation other than "criminal revenge". Acts of violence are often "criminal", and claims of persecution are usually supported with reference to persecutory conduct that entails "criminal" behaviour. This should not be taken to exclude the possibility that the conduct has also been committed for a Convention reason, as it was in this case.

102 Nor can it be said that members of the appellant's social group are defined solely by their mutual fear of persecution. The cause of the fear in the appellant's case, according to his evidence, preceded the identification of the group[88]. That cause is the revival in recent years of the operation of the Kanun, previously suppressed, and the imposition of the serious risk of inter-generational violence for innocent victims such as the appellant. It affected many others in a like position.

103 The third step requires that the nominated characteristic or attribute of the posited group should distinguish it from society at large. According to the country information, the victims of the Kanun can be identified by reference to its rules. Those rules are written down and their force has lately been revived. The rules do not provide general protection. If they are applied, the ordinary Albanian may, according to the country information quoted by the Tribunal, still be subject to corruption, violence and general lawlessness. But he or she will not be forced to hide to escape the vengeance of another family for a wrong done years ago by a blood relative. The Kanun is quite particular in this respect. It distinguishes a person such as the appellant from other citizens of Albania at

---

87 Joint reasons at [36].

88 cf *Khawar* (2002) 210 CLR 1 at 28 [83].

large. The Kanun rules may seem inhumane, irrational and unjust to Australians. But, on the evidence, it would be open to the Tribunal to conclude that those rules would be well known, and understood, in Albania, particularly amongst people from the north.

104 *Conclusion: rehearing required*: The result is that the Tribunal, which reached its conclusion before *Applicant S* was decided by this Court, applied incorrect criteria for the determination of whether the second "social group" nominated by the appellant was a "particular social group" within the Refugees Convention. By failing to address the correct questions, it failed to exercise its jurisdiction according to law. That failure should have been detected and corrected by the Federal Court. It amounted to jurisdictional error entitling the appellant to the judicial review he sought. The Federal Court erred in refusing to hold that the Tribunal had constructively failed to exercise its jurisdiction in accordance with law[89].

105 As in *Khawar*[90], this conclusion does not necessarily mean that the appellant would succeed in the rehearing before the Tribunal. There remain factual issues to be determined in the light of further refinement of the "particular social group" of which the appellant claims to be a member. But a rehearing would not be futile. The appellant is entitled to have a hearing before the Tribunal that addresses his claim and applies the correct legal criteria to it.

Orders

106 The appeal should be allowed. The judgment of the Full Court of the Federal Court of Australia should be set aside. In place of that judgment it should be ordered that the appeal to the Full Court be allowed and the judgment of Finn J set aside. A writ of *certiorari* should issue to the Refugee Review Tribunal quashing its decision of 15 September 2003. A writ of *mandamus* should issue to the Tribunal directing it to hear and determine the appellant's application according to law. The first respondent should pay the appellant's costs in the Federal Court and in this Court.

---

89 *Craig v South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82]; cf *NABD* (2005) 79 ALJR 1142 at 1147-1148 [28], 1165 [133], cf at 1167 [151]; 216 ALR 1 at 8-9, 32, 36.

90 (2002) 210 CLR 1. See above these reasons at [69]-[78].