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PRINCIPLES OF REFUGEE LAW: CONVENTION GROUNDS AND DEFINITION

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PART I

PART III

1. CONVENTION GROUNDS AND DEFINITION; INTERPRETATION

a) Introduction

The prescribed criteria for the grant of a protection visa are set out in Pt 866 of Sch 2 of the Migration Regulations 1994 ("the regulations"). One such criterion is that at the time of decision the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol ("the Convention").

Relevantly, Australia has protection obligations to the applicant if she demonstrates that she is a person who:

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

This definition was considered by the High Court in Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 and in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559. The critical issue is whether the applicant had a "well-founded fear of being persecuted" for one or more of the Convention reasons contained within the definition.

Note per the Full Court in WABR v MIMA [2002] FCA 124 (2002) 121 FCR 196 stating the accepted position derived from the definition:

> 6…This means, in practical terms, that it was necessary for the Minister's delegate and, on review, for the Tribunal, to be satisfied, that the appellant was a refugee as defined in Article 1A(2) of the Convention. Whether the appellant is a person to whom Australia has protection obligations is to be assessed upon the facts as they existed at the time when the decision was made. However, that assessment also requires a consideration of the matter in relation to the reasonably foreseeable future (bold added).

The Full Court (Sackville, Allsop and Jacobson JJ.) in NAGT of 2002 v MIMIA [2002] FCAFC 319 discussed a possible error of law if the assessment of risk of

persecution is confined to a relatively short period following return to a country of origin. The Court said:

20 There is, however, a plausible argument, although it is not expressed by the appellant, that the RRT committed an error of law by misconstruing the Convention definition of "refugee". As the primary Judge pointed out, the RRT did not examine the frequency with which elections are held in Bangladesh nor the likelihood of the Awami League being returned to or otherwise assuming power in the country. This might suggest that the RRT assumed that the question of whether the applicant had a well-founded fear of persecution had to be assessed by reference to a relatively short period following his return to Bangladesh. In other words, the RRT may have interpreted the Convention definition as precluding the possibility that the applicant might have a well-founded fear of being persecuted in Bangladesh at some time after the current BNP government loses power.
…
22 There is nothing in the RRT's analysis or in the authorities which suggests that a fear of persecution can be "well-founded" only if it relates to events which might occur (if at all) immediately upon or soon after the applicant's return to his or her country of nationality. As the joint judgment in Minister for Immigration and Ethnic Affairs v Guo points out (at 572), the task of the RRT includes making findings as to whether particular events "might or might not occur in the future". It is true that a finding that there is no real chance that an applicant will suffer persecution for some time after his or her return to the country of nationality may make it difficult to persuade the RRT that there is a real chance that the applicant will suffer persecution in the more distant future. But if the RRT is to apply the correct test - that is, whether an applicant has a well-founded fear of persecution for a Convention reason - it may be necessary to consider whether the applicant's fear of being persecuted in the more distant future (and not merely in the period shortly after his or her return) is well-founded.
23 As we understood Mr Kennett, who appeared for the Minister, he did not dispute that the RRT would have erred if it had construed the Convention definition of "refugee" to limit consideration of the applicant's fear of persecution to a relatively short period following his return to Bangladesh….Mr Kennett acknowledged that the RRT had not expressly considered whether the appellant's fear of persecution might prove to be well-founded should the BNP lose power at some stage. Nonetheless, so he argued, the RRT must be taken to have implicitly found either that there was no real chance that the appellant would be persecuted even if the Awami League regained power, or that the BNP could be expected to remain in power more or less indefinitely.
24 It is by no means clear that the RRT's reasons, even if given a benevolent construction, can be read this way…the RRT gave as the reasons for rejecting the appellant's claims the advent of the BNP government, its lack of interest in harming Freedom Party members, and the independence of Bangladesh's judiciary. The RRT simply did not advert to the question of whether the appellant's fear of persecution would be well-founded if the BNP lost power in Bangladesh. It is difficult to interpret the RRT as doing anything other than approaching the appellant's case on the basis that it was required only to consider whether he had a well-founded fear of persecution for such time as the BNP government remained in power. It must be remembered that the appellant claimed that members of the Awami League had not only laid false criminal charges against him, but had threatened to kill him. While the RRT had serious doubts about the veracity of the appellant's claims, it proceeded on the basis

that they were true. An independent judiciary could hardly protect the appellant against the threat to kill him if those making the threat acquire the means to carry it out.

…

2. RELATIONSHIP BETWEEN SUBJECTIVE AND OBJECTIVE FEARS

In Selliah v MIMA [1999] FCA 615 the Tribunal was not obliged to make findings in relation to the applicant's subjective fear of persecution. It was entitled to assume the existence of a subjective fear and then assess whether any such fear would be well-founded: at [40] the Full Court said:

The appellant contended that the Tribunal failed to apply the correct test in that it neither made an express finding as to the appellant's subjective fear nor identified the characteristics of that fear as claimed by him. However, even if it be assumed that the appellant had the relevant fear, the question still remains as to whether the fear was well founded. The Tribunal, in effect, made a finding that any fear which the appellant in fact had was not well founded. Accordingly, the failure to make a finding as to the appellant's subjective fear is of no relevance."

Selliah was referred to in SAAD v MIMIA [2003] FCAFC 65 where Carr J. (Cooper and Finkelstein JJ. agreeing) said:

SUBJECTIVE FEAR OF PERSECUTION

37 The Tribunal found that even if the Iranian authorities became aware that the appellant had claimed to have converted to Christianity whilst in Australia, this would not be of any adverse concern to them. That is, it found that objectively the appellant did not have a well-founded fear of persecution.

38 In those circumstances the authorities show that the Tribunal was not obliged to consider whether the appellant had a subjective fear of persecution: Selliah v Minister for Immigration and Multicultural Affairs [1999] FCA 615 at [40]. It is not necessary to refer to other authorities to similar effect. In my view, this principle is well established. This ground of appeal has not been made out.

The Full Court in Suleiman v Minister for Immigration & Multicultural Affairs [2001] FCA 752 had this to say:

16 It is hard to imagine how the question of the existence of a particular social group could arise unless there is some evidence that the applicant for a protection visa had a subjective fear of persecution on the grounds of membership of that social group. Subjective fear would, at least ordinarily, be established if the applicant said he or she had that fear and his evidence was accepted. Perhaps it could also be inferred in a particular case. But, there was nothing before the Tribunal at all to suggest that the appellant here had a fear of persecution (harm or injury) by reason that he was a member of a class of "coastal people", even assuming that such a class was capable of constituting a particular social group.

17 There was nothing in the stowaway interview or the statutory declaration made by the appellant and filed with the Tribunal which suggested that the appellant in any way feared persecution by reason that he was a "coastal person". Nor was there anything in the

submission made on his behalf to the Tribunal by his solicitor. His claim was fear of persecution or torture on his return because of his relationship with his father. The delegate of the Minister who made the decision ultimately referred to the Tribunal noted in the material which was before the Tribunal that there was no claim of persecution by reason of membership of a particular social group. Nothing in the Tribunal's reasons suggested any evidence that, because the appellant was a coastal person, he had a ground for a subjective fear of persecution.
18 It must follow in the present case that whether there did exist within the meaning of the Convention a social group comprised of "coastal persons" or, indeed, whether any fear the appellant had because of membership of that particular social group would be well founded, were not issues which could arise unless there was evidence upon which the Tribunal could find directly or by inference that the appellant had a subjective fear of persecution for that reason. Accordingly, there could be no failure to make findings on either of these matters as material facts.

The Full Court (Cooper and Carr JJ. Finkelstein J dissenting) in SDAQ v MIMIA [2003] FCAFC 120 (2003) 199 ALR 265 129 FCR 137 dismissed the appeal from the judgment of Hill J. Cooper J. said:

THE CASE ON APPEAL

8 It was submitted by Senior Counsel for the appellant in his written submission that Hill J erred in holding that it was necessary for the appellant to satisfy the RRT that '... he has a subjective fear of persecution on religious grounds as a result of the religious beliefs that have been imputed to him.' The error arose, it was submitted, because:
(a) a subjective fear is not an essential element of the definition of 'refugee' in Art 1A(2) of the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as modified by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 ('the Convention'); or
(b) if a subjective fear is an essential element of the definition, then it does not need to be a precise subjective fear articulated by reference to the relevant Convention ground.
…

DISPOSITION OF THE APPEAL

10 Article 1A(2) of the Convention provides …

11 The definition contains four key elements as held by the High Court of Australia in a joint judgment (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 570, where their Honours said:

'Elements of the Convention definition of "refugee"

> The definition of "refugee" in Art 1A(2) of the Convention contains four key elements: (1) the applicant must be outside his or her country of nationality; (2) the applicant must fear "persecution"; (3) the applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (4) the applicant must have a "well-founded" fear of persecution for one of the Convention reasons.'
>
> (original emphasis)

In respect of the third element (persecution for a Convention reason) their Honours said (at 570):

> 'An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A(2) of the Convention.'

In respect of the fourth element, 'well-founded' fear of persecution for a Convention reason, their Honours said (at 571 - 572):

> 'An applicant for refugee status must also establish that his or her fear of persecution for a Convention reason is a "well-founded" fear. This element adds an objective requirement to the requirement that an applicant must in fact hold such a fear. In Chan (1989) 169 CLR 379 at 433, Mason CJ said:
>
> "If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring."'

12 The definition of 'refugee' involves both subjective and objective elements. Elements (2) and (3) as identified by the High Court in Guo require the existence of a subjective fear of persecution, and it must be shown that this fear is held by the relevant person in fact and that this fear is a fear of persecution for a Convention reason: see also the judgment of the High Court in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 389, 396, 406, 429 and Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at 658. The objective element is introduced in the fourth element, which requires that the subjective fear objectively be 'well founded'.

13 The third element identified by the High Court in Guo requires that the applicant for refugee status makes out the nexus between his or her subjective fear of persecution and one or more of the Convention reasons. It is not sufficient for the purposes of the definition in Art 1A(2) of the Convention that the person has a well founded fear of being persecuted in his or her country of nationality. The feared persecution must be driven by one of the specified grounds in the Convention: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 233, 244 - 245, 247 - 248, 257 - 258, 284; Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 302 - 303.

14 The approach taken by the High Court in Guo, Applicant A and Chen Shi Hai, is also that taken by the House of Lords in the United Kingdom. In Sepet v Secretary of State for the Home Department [2003] 1 WLR 856, Lord Bingham of Cornhill, with whom Lords Steyn, Hutton and Rodger of Earlsferry agreed, said (at 862 - 863):

> 'To make good their claim to asylum as refugees it was necessary for the applicants to show, to the standard of reasonable likelihood or real risk, (1) that they feared, if they had remained in or were returned to Turkey, that they would be persecuted (2) for one or more of the Convention reasons, and (3) that such fear was well-founded. Although it is no doubt true, as stated in Sandralingham v Secretary of State of the Home Department; Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97, 109, that the Convention definition raises a single composite question, analysis requires consideration of the constituent elements of the definition. At the heart of the definition lies the concept of persecution. It is when a person, suffering or fearing persecution in country A, flees to country B that it becomes the duty of country B to afford him (by the grant of asylum) the protection denied him by or under the laws of country A. History provides many examples of racial, religious, national, social and political minorities (sometimes even majorities) which have without doubt suffered persecution. But it is a strong word.

> Its dictionary definitions (save in their emphasis on religious persecution) accord with popular usage: "the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it;" "A particular course or period of systematic infliction of punishment directed against the professors of a (religious) belief": Oxford English Dictionary, 2nd ed (1989). Valuable guidance is given by Professor Hathaway (The Law of Refugee Stats (1991), p112) in a passage relied on by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 495: "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community." In this passage Professor Hathaway draws attention to a second requirement, no less important than that of showing persecution: the requirement to show, as a condition of entitlement to recognition as a refugee, that the persecution feared will (in reasonable likelihood) be for one or more of the five Convention reasons. ...'.

15 What must the applicant for refugee status show to make the nexus between his or her fear of persecution and one or more of the Convention reasons? It is necessary to show that the persecution he or she fears will, in all reasonable likelihood, be for one or more of the five Convention reasons. Professor Hathaway (The Law of Refugee Status, 1991 at 112) describes this requirement as a condition to entitlement to refugee status. The requirement obliges a Tribunal to ask the question "Why the applicant was, or fears he or she will be, persecuted?" This was the question posed by McHugh J in Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1, where his Honour said (at 33):

> '[102] ... In this case, among the questions which the Tribunal should have asked were (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) why will the applicant be subjected to that harm? and (d) if the answer to (c) is "because of his membership of a particular social group", would the harm constitute persecution for the purpose of the Convention?'

16 The approach of McHugh J in Ibrahim, which was cited with approval by Lord Bingham of Cornhill in Sepet (at 872), requires that the question of nexus be addressed by inquiring as to the real reasons actuating the mind of the persecutor. In Sepet, Lord Bingham of Cornhill expressed the test in the following way (at 871 - 872):

> '[22] ... In his judgment in Sivakumar v Secretary of State for the Home Department [2002] INLR 310, 317, para 23, Dyson LJ stated: "It is necessary for the person who is considering the claim for asylum to assess carefully the real reason for the persecution." This seems to me to be a clear, simple and workmanlike test which gives effect to the 1951 Convention provided that it is understood that the reason is the reason which operates in the mind of the persecutor and not the reason which the victim believes to be the reason for the persecution, and that there may be more than one real reason. The application of the test calls for the exercise of an objective judgment. Decision-makers are not concerned (subject to a qualification mentioned below) to explore the motives or purposes of those who have committed or may commit acts of persecution, nor the belief of the victim as to those motives or purposes. Having made the best assessment possible of all the facts and circumstances, they must label or categorise the reason for the persecution. The qualification mentioned is that where the reason for the persecution is or may be the imputation by the persecutors of a particular belief or opinion (or, for that matter, the attribution of a racial origin or nationality or membership of a particular social group) one is concerned not with the correctness of the matter imputed or attributed

> but with the belief of the persecutor: the real reason for the persecution of a victim may be the persecutor's belief that he holds extreme political opinions or adheres to a particular faith even if in truth the victim does not hold those opinions or belong to that faith. ...
>
> [23] However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. That reason would, in this case, be the applicants' refusal to serve in the army. But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason. The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason for the persecutory treatment. ...'.

17 The same approach was taken by Lord Rodger of Earlsferry, with whom Lord Hoffman agreed, in R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840 at 854 where his Lordship said:

> '[41] In a case like the present the task of the person considering a claim for asylum is therefore to assess carefully the reason or reasons for the persecution in the past and to draw the appropriate inference as to the reason or reasons for any possible persecution in the future. There is no rule that, if an applicant is to succeed, the decision-maker must be satisfied that the Convention reason was, or would be, the only reason for his persecution. In Suarez v Secretary of State for the Home Department [2002] 1 WLR 2663, 2672, para 29 Potter LJ said: 'so long as an applicant can establish that one of the motives of his persecutor is a Convention ground and that the applicant's reasonable fear relates to persecution on that ground, that will be sufficient.' Keene LJ and Sumner J agreed. Potter LJ's guidance is indeed valuable, provided that it is remembered that the law is concerned with the reasons for the persecution and not with the motives of the persecutor. For instance, the law is concerned with whether state officials may persecute someone because he is Jewish, but the motives of those officials for any such persecution - whether a desire to give effect to the theories of racial purity in Hitler's Mein Kampf or simple jealousy of the prosperity of the Jewish community - are irrelevant. So long as the decision-maker is satisfied that one of the reasons why the persecutor ill-treated the applicant was a Convention reason and the applicant's reasonable fear relates to persecution for that reason, that will be sufficient. Ex hypothesi any such reason will be an operative reason for the persecution - but, as in the fields of sex and race discrimination, there is little to be gained from dwelling unduly on the precise adjective to use to describe the reason: Nagarajan v London Regional Transport [2000] 1 AC 501, 512 - 513, per Lord Nicholls of Birkenhead.'

18 The proceedings under Pt 7 of the Act are not adversarial. There is no contradictor who joins issue upon all or any of the facts alleged by a claimant to refugee status. There is an ultimate question expressed in terms of the Convention definition of a refugee for determination by the RRT. That question requires that the RRT be satisfied that each of the elements applicable to the composite definition of a refugee is made out. Ordinarily, a claimant, for the purpose of satisfying the RRT that there should be a favourable resolution of the ultimate question, will give a history of past events and an account and justification of present fears: Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 325 per Gleeson CJ at 330. The account and justification of the present fears may

include a subjective belief that the feared treatment was, or would be, inflicted for a particular reason or reasons which are Convention reasons. However, that subjective belief as to the reason for the feared treatment, unless the RRT is satisfied that it is, or there is a real chance that it is, the true reason is beside the point. The RRT will seek the reason, for the feared treatment by posing the questions stated by McHugh J in Ibrahim. The answers to those questions may reveal that the fear of persecutory treatment was for the reason the claimant articulated as his or her subjective belief, for a Convention reason unknown to the claimant, or, for a reason which is not a Convention reason, and thus one which would not entitle a claimant to refugee status: Sepet at 871 - 872; Sivakumar at 854; Chen Shi Hai at 302 - 303. The RRT makes its decision as to its satisfaction that the claim for refugee status has been made out on the basis of the history of past events and the account and justification of present fears placed before it by the claimant, and any other materials available to it which it regards as relevant to a determination of the ultimate issue

19 For the purposes of this appeal, the alternative case of a well founded fear of being persecuted for reasons of religion as a result of having imputed to the appellant the religious beliefs of those Baha'is with whom he associated, had to arise squarely on the materials available to the RRT before it had a statutory duty to consider it. That is, it had to arise squarely on the history of past events and the account and justification of present fears… It required a subjective fear of being persecuted which was well founded and further that the reason for such persecution was, or would be, imputed Baha'i religious beliefs. The question of having a well founded fear of being persecuted did not arise unless the appellant in fact had a subjective fear of being persecuted and that feared persecution was for an imputed Baha'i religious belief(bold added)…in terms of the four elements of the definition in Guo, [Hill J.]was of the view that there was material available to the RRT, if it so chose, to be satisfied of the fourth element, if the appellant otherwise satisfied the second and third elements. The issue on appeal is whether there was material before the RRT which, if accepted by the RRT, would have satisfied those second and third elements, having regard to the test applied by his Honour as to what was necessary as a matter of law to satisfy those elements.

20 To succeed before the RRT in respect of the contended alternative case of imputed religions beliefs, the appellant would have had to satisfy the RRT that he had a subjective fear that he would be persecuted if he were returned to Iran. He would also have to show that the persecution he feared would be for a Convention reason. Relevantly to the circumstances of the appellant, he would have to show that the reason for the persecution he feared would be Baha'i religious beliefs imputed to him by the Iranian authorities because he had a girlfriend and other friends of the Baha'i faith when he was in Iran. That required that the appellant satisfy the RRT, on the materials before it, that the Iranian authorities had imputed, or would impute, to him Baha'i religious beliefs because of previous association with persons of that faith. There was no evidence before the RRT that the Iranian authorities had imputed, or would impute, to the appellant Baha'i religious beliefs based on his association with persons of that faith. There was also no evidence that the appellant had any fear of persecution because of such imputed religious beliefs (bold added).

21 The specific circumstance which the appellant put forward as entitling him to refugee status (the account and justification of his present fear of being persecuted) was a conversion or intended conversion to the Baha'i faith from his family religion of Muslim Shi'a…the subjective fear of persecution which the appellant claimed to have was persecution for conversion or intended conversion to the Baha'i faith. The articulated reasons for the fear lay in the circumstances he deposed to in his original claim for refugee status and in his oral testimony before the RRT going to his conversion, or communicated

intent to convert, to the Baha'i faith. The RRT was not satisfied that the appellant had a genuine commitment to the Baha'i faith, concluding that he constructed the story of identification with the faith, or of an intention to convert to it, in order to manufacture a false basis for a claim to refugee status.
22 The test which Hill J held the appellant must satisfy if he was to succeed on the alternative case before the RRT was:

> '[27] ... the applicant must not only satisfy the Tribunal on a review, that there would be imputed to the applicant the religious beliefs of those Baha'is with whom he is friendly, but that he has a subjective fear of persecution on religious grounds as a result of the religious beliefs that have been imputed to him. It must also be shown that there is objective evidence to show that that fear of persecution is well-founded.'

23 Properly understood, his Honour has said no more than that the appellant was required to satisfy the RRT that :
(a) he would have imputed to him the religious beliefs of those Baha'is with whom he was friendly; and
(b) he had a subjective fear of being persecuted if he returned to Iran;
(c) the reason he would be persecuted if he returned to Iran was the Baha'i religious beliefs which had or would be imputed to him by the authorities;
(d) any subjective fear of being persecuted was 'well founded' on the objective evidence.
24 His Honour found that there was no evidence upon which the RRT could find the matters in (a), (b) and (c). Absent such material the country information and the observations of his Honour in respect of it in par [26] of his reasons, did not overcome such a deficiency. Therefore, his Honour found that the alternative case was not squarely raised on the materials and the RRT was not obliged to consider such a case.
25 The test as formulated by his Honour is in accordance with the Australian and United Kingdom authorities set out above. The test advanced by the appellant as sufficient to attract refugee status is totally inconsistent with those authorities and the language of Art 1A(2) of the Convention.
…

Carr J. said:

29 I do not think that this is a case of an applicant for protection as a refugee advancing a subjective fear of persecution based upon a mistaken belief about the source of such persecution. Nor is the appellant a person who was unaware of the real reason for his persecution. On his own case, the appellant knew that he would be persecuted if the Iranian authorities believed he held Baha'i views, whether that belief was based on his actual religious views or religious views imputed to him. He knew that by announcing an intention to convert to the Baha'i religion he would risk persecution. That was the fear which he claimed to have.
30 In oral evidence before the Tribunal, in response to questions from the Tribunal member, the appellant said he knew that it was illegal, in terms of the Islamic religion, to associate socially with Baha'i people. His evidence was that he had a Baha'i girlfriend and some other Baha'i friends, and that Baha'i friends sometimes visited him at home. I shall refer to this as "his Baha'i association". If there was a risk of being imputed (by the Iranian authorities) with Baha'i religious beliefs due to his Baha'i association, the appellant knew about that. …That was not the basis for his asserted subjective fear of persecution.
31 In my opinion, there was a very significant difference (and a vital missing link) between the objective evidence, i.e. the country material, referred to by the learned primary judge,

and the evidence which the appellant put before the Tribunal about his subjective fear of persecution. The country material, so his Honour held, would suffice to permit the Tribunal to conclude that there was a real chance of the appellant being persecuted on religious grounds should the Iranian authorities impute to him the Baha'i faith as a result of his association with his girlfriend and other friends (my emphasis). As I have said, the appellant was well aware that if his Baha'i association was sufficient for the authorities to impute to him the Baha'i faith then he was at risk of persecution. He did not claim to have any such fear of imputation. As Cooper J has stated in his draft reasons, there was no evidence that the appellant ever held that fear.

…

33 I agree that it may not be essential for a refugee claimant to be able to identify a particular Convention ground as being the basis for his or her fear. As Finkelstein J has pointed out, there may be cases where a person does not know why the authorities have persecuted him, or are likely to do so. In those circumstances, all that person can do (and all he or she needs to do) is to place the facts which give rise to his or her fear before the decision-maker.

34 In the present matter the appellant failed to place before the Tribunal what the authorities establish is a fact essential to refugee status and (one peculiarly within his knowledge) i.e. that he had a subjective fear of being imputed with Baha'i beliefs, or for that matter political beliefs or membership of a particular social group, due to his Baha'i association…..

Finkelstein J. said:

35…in a finding which was not challenged on appeal, the judge said that there was evidence before the tribunal from which it could conclude that there was a real chance that the appellant might be persecuted on religious grounds because of his association with his girlfriend and other people of the Baha'i faith. The tribunal had not considered this evidence. The judge found that the tribunal did not err in that regard

… As I read his reasons, the judge seems to have based his decision on two related propositions, namely that: (1) the Convention definition requires there be a well-founded fear of persecution based on a Convention reason which the applicant must correctly specify; and (2) the Convention definition also requires the applicant to correctly identify the facts before the decision-maker which will establish that reason.

36 If this reasoning is correct the problems that will arise are manifest. I can explain what I mean by referring to Lord Hoffman's example of the Jewish shopkeeper living in Nazi Germany in 1935. It will be remembered that this shopkeeper was attacked by a gang organised by an Ayran competitor who smashed his shop, beat him up and threatened to do it again if he remained in business. The competitor was motivated by business rivalry. The authorities allowed the competitor to act as he did because the victim was a Jew. For the purposes of this case I wish to add to the story. The Jewish shopkeeper is also an active member of the bund. He regularly publishes pamphlets advocating the establishment in Germany of a socialist state. The Jewish shopkeeper knows that his competitor can with impunity organise the gang because the authorities will not intervene. But because the events are set in 1935, the shopkeeper does not yet know what is motivating the authorities. He thinks that they will not act because he is a communist. In fact, the competitor is allowed to victimise the shopkeeper because he is a Jew. Is he a Convention refugee? In substance, the issue boils down to this. A putative refugee who seeks asylum will necessarily claim that he fears persecution for a Convention reason. He knows that unless

he can establish a causal connection between his fear of persecution and a Convention ground, his application for refugee status must fail. What happens in a case where the putative refugee, who will be persecuted for a Convention reason if he returns to his country of nationality, is not aware of the real reason for his persecution? Does Australia owe protection obligations to such a person?

37 It is convenient to begin by looking at cases which, in general terms, have defined what is meant by the term "refugee". In Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ gives breaks down the definition of "refugee" into the following four elements: "(1) The applicant must be outside his or her country of nationality; (2) The applicant must fear "persecution"; (3) The applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (4) The applicant must have a "well-founded" fear of persecution for one of the Convention reasons." The third element was amplified. The justices said (at 570):

> "An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A (2) of the Convention."

In Reg v Immigration Appeal Tribunal; ex parte Shah [1999] 2 AC 629 Lord Steyn said (at 638):

> "In order to qualify as a refugee the asylum seeker (assumed to be a woman) must therefore prove (1) that she has a well founded fear of persecution; (2) that the persecution would be for reasons of race, religion, nationality, membership of a particular social group, or political opinion; (3) that she is outside the country of her nationality; (4) that she is unable, or owing to fear, unwilling to avail herself of the protection of that country."

In Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 504 Lord Lloyd said that he agrees with every word in the following passage from the judgment of Stuart-Smith LJ when the case was in the Court of Appeal (Horvath v Secretary of State for the Home Department [2000] INLR 15):

> "It is apparent that there are five conditions that the applicant must satisfy to establish his status as a refugee, namely that: (1) He is out of the country of his nationality because he has a fear of ill-treatment. (2) The ill-treatment that he fears is of a sufficiently grave nature as to amount to persecution. (3) His fear of persecution is well founded. (4) The persecution is for a Convention reason. (5) He is unable, or owing to fear of the persecution, is unwilling to avail himself of the protection of that country."

38 There is a clear thread that runs through each of these passages. A refugee must of course have a well-founded fear of persecution. That aspect has two elements. (1) The refugee must subjectively fear persecution; and (2) His fear must be well-founded in an objective sense. It is only when consideration is given to the latter condition that it becomes necessary to determine whether the persecution is for a Convention reason. What must be established is an objective connection between the feared persecution and a Convention reason. In the absence of that nexus refugee status will not be made out. There is nothing in the definition, when read in isolation, or read in the context of the Convention as a whole, which requires the refugee to accurately pinpoint which Convention reason governs his case. All he must show is that there is a connection between his fear and one or other of those reasons.

39 So much for general statements. I now turn to cases which have specifically dealt with the issue presently under consideration. What follows is a selection of some of the authorities. In Saliba v Minister for Immigration and Ethnic Affairs (1998) 89 FCR 38, 49-50 Sackville J said:

> "[Counsel for the Minister] submitted, if all else failed, that the applicant could not rely on the imputed political opinion point, because he had not explicitly drawn it to the attention of the RRT. I must confess that I found this a rather surprising submission. If correct, it would mean that an unrepresented claimant, who established facts entitling him or her to the protection of the Convention, and who might be at risk of death if returned to the country of origin, would fail on an application for review simply because he did not specifically alert the RRT to a legal issue it should in any event have appreciated. This would be so even if (as is commonly the case) the applicant spoke little or no English.
>
> ...
>
> The general principle is that a tribunal is not obliged to make out an applicant's case. However, there are circumstances where the tribunal may be obliged to undertake further factual inquiries, even though the applicant has not specifically requested that course: Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 at 170 per Wilcox J; Luu v Renevier (1989) 91 ALR 39 (FC) at 49-50. It seems to me that, where an unrepresented applicant presents evidence to the RRT which, if accepted, is capable of making out the applicant's claim that he or she satisfies the Convention on a particular basis, the RRT may be required to consider the issue. Particularly is this so where the RRT accepts the substance of the applicant's account. I agree with the comments recently made by Branson J in Bouianov v Minister for Immigration and Multicultural Affairs (unreported, Federal Court, No 134 of 1998, 26 October 1998), at 2:
>
> 'The respondent contends that the applicant did not articulate before the RRT a conscientious objection to military training and service. It is true that he did not expressly do so, and a decision-maker is not obliged to make a case for an applicant (Luu v Renevier). However, in my view, in appropriate cases, a decision-maker such as the RRT may be required to give consideration to whether evidence in fact given by an applicant might support an application on a basis not articulated by an applicant. This will more likely be found to be the case where an applicant is unrepresented, as the present applicant was before the RRT.'
>
> ...
>
> In my view, the fact that the applicant did not draw the doctrine of imputed political opinion to the attention of the RRT is not a basis for denying him relief."

In Re Attorney-General of Canada and Ward; United Nations High Commissioner for Refugees et al., Interveners 103 DLR (4th) 1, 38 La Forest J, who delivered the judgment of the Supreme Court, said:

> "Political opinion was not raised as a ground for fear of persecution either before the board or the Court of Appeal. It was raised for the first time in this court by the intervener, the United Nations High Commissioner for Refugees, who, in his factum, expressed the view that the Court of Appeal had 'erred in considering that the claimant's fear of persecution was based on membership in an organization'. The

additional ground was ultimately accepted by the appellant during oral argument. I note that the UNHCR Handbook, at p. 17, para. 66, states that it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground (idem, para. 67). While political opinion was raised at a very late stage of the proceedings, the court has decided to deal with it because this case is one involving human rights and the issue is critical to the case."

In Emmanuels v Minister of Citizenship and Immigration 2002 FCT 865, [14]-[16] a decision of the Federal Court of Canada, Dawson J said:

"I am not persuaded that this principle can be extended to a failure on the part of the [Convention Refugee Determination Division of the Immigration an Refugee Board] to consider all of the grounds for making a claim to status as a Convention refugee, even where the grounds were not raised by a claimant. The UNHCR Handbook ('Handbook'), at page 17, paragraphs 66 and 67 states:

'In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail.

It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.'

In Canada (Attorney-General) v Ward [1933] 2 SCR 689 at paragraph 80, the Supreme Court considered political opinion as a ground for fear of persecution notwithstanding that the issue was first raised in the Supreme Court by the United Nations High Commissioner for Refugees.

To summarize, Mrs Emmanuels raised the issue of racism as a ground for fear of persecution. Even if she did not, the Handbook and Ward suggest that it is for the examiner, in this case the CRDD, to ascertain the reasons for the persecution feared and whether the definition of Convention refugee is met. There was some evidence in Mrs Emmanuels' PIF and in the country condition documentation which ought to have been evaluated by the CRDD."

In Osorio v Immigration and Naturalization Service 18 F3d 1017 (2d Cir, 1994) Oakes J, who delivered the opinion of the United States Court of Appeals, said:

"Congress has set forth five grounds of persecution: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, and (5) political opinion. As the United Nations' Handbook on Procedures and Criteria for Determining Refugee Status (the 'U.N. Handbook') notes, 'it is immaterial whether the persecution arises from any single one of [these] reasons or from a combination of two or more of them.' U.N. Handbook, PP 66-67. The U.N. Handbook also states that it is not necessary for the application to identify the correct ground; the fact

finder should consider all or any combination of them. See id. Thus, the BIA must have considered all grounds for asylum when it concluded that Osorio 'has not demonstrated that his fear of persecution is premised upon political opinion or any of the other enumerated grounds.' BIA Opinion, at 4."

40 In my opinion, the judge adopted an approach different to that which I draw from these cases and he was, consequently, in error. A fortiori when one considers the situation where an applicant fails to point to the particular facts before the decision-maker which ground his case. …While the facts may not support the conclusion that the appellant is susceptible to persecution because he is a genuine adherent to the Baha'i faith, as the judge found, the facts leave open the possibility that he may face persecution because of his close association with people of the Baha'i faith. The tribunal ought to have considered this possibility.

41 Since preparing these reasons Cooper J has brought to my attention two recent House of Lords decisions: Sepet v Secretary of State for the Home Department [2003] 1 WLR 856 and R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840. These cases deal directly with the point under consideration and confirm the view that I have taken as regards the proper construction of Article 1A(2).

….

3. WELL-FOUNDED FEAR

The Full Court per Cooper J. Carr J delivering a separate judgment. Finkelstein J dissenting) in SDAQ v MIMIA [2003] FCAFC 120 (2003) 199 ALR 265 129 FCR 137 at [11] –[18] (see above Chapter 2)

In Puerta v MIMA [2001] FCA 309 the Full Court (Moore, Mathews & Stone JJ) set out the correct approach to applying the test of well-founded fear:

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

> "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 per cent 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."

9 Save for one matter which we mention shortly, the approach of the Tribunal was, in our opinion, unexceptionable. Any analysis or discussion of whether a person has a well founded fear is likely to involve the use of words other than the words of the Convention. Plainly enough, the use of other words should have the effect of not erecting a principle or test that does not conform with the requirements of the Convention. Nevertheless, words or expressions such as "remote", "insubstantial" or "far fetched possibility" are not uncommonly used in the discourse about the proper approach to be taken in determining whether a fear is well founded. This can be illustrated by the observations of members of the Court in Chan v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 379. At 389 Mason CJ said:

> "But I prefer the expression 'a real chance' because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it is an expression which has been explained and applied in Australia: see the discussion in Boughey v The Queen (1986) 161 CLR 10 at p 21, per Mason, Wilson and Deane JJ." (Emphasis added.)

[the quote continues: If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin."]

To similar effect were the observations of Dawson J at 398:

> "In Reg v Home Secretary; Ex parte Sivakumaran [1988] AC, at p 1000 the House of Lords in considering the Convention concluded that for an applicant's fear to be well-founded 'there has to be demonstrated a reasonable degree of likelihood of his persecution for a Convention reason'. That would seem to be a more restrictive test than that suggested, although hardly dogmatically, by Stevens J in Cardoza-Fonseca. Whilst alternative verbal formulations of the correct test may be useful in identifying shades of meaning, none can ever offer complete precision. Nevertheless, for the sake of uniformity of approach I should express my preference for a test which requires there to be a real chance of persecution before fear of persecution can be well-founded. It is sufficient to justify that choice to point to the fact, as does the Chief Justice in his reasons for judgment, that it is a test which has been recently expanded by this Court in another context in Boughey v the Queen (1986) 161 CLR 10, at p 21, in a manner which is helpful in the present context. A real chance is one that is not remote, regardless of whether it is less or more than 50 per cent." (Emphasis added.)

Toohey J dealt with the same issue in the following terms at 407:

> "The test suggested by Grahl-Madsen, 'a real chance', gives effect to the language of the Convention and to its humanitarian intendment. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time." (Emphasis added.)

McHugh J put it slightly differently at 429:

> "The decisions in Sivakumaran and Cardoza-Fonseca also establish that a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in Cardoza-Fonseca an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterized as 'well-founded' for the purpose of the Convention and Protocol." (Emphasis added.)

10 In our opinion the use by the Tribunal of the word "remote" does not, in context, signify any error. The Tribunal was doing nothing more, in our opinion, than investigating, as it had to, whether the fear of persecution not only existed (which it earlier found was the case) but, additionally, whether it was well founded. No error of law can be inferred from the language used or the approach apparent in the passages earlier set out.

11 The specific matter adverted to at the beginning of paragraph 9 above, concerns a submission made by the appellant that a matter the Tribunal should have considered, but did not, in deciding whether the fear of persecution was well founded, was the gravity of the harm that the appellant would be exposed to if he were to return to Peru. That is, he was at risk of political assassination. We were referred to no authority nor any writing on the subject which indicates that the gravity of the risk is to be considered in the balance when determining whether the asylum seeker has a well founded fear of persecution (added). Plainly enough, the harm to which the asylum seeker might be exposed upon return to the country of nationality is of central importance in determining whether the asylum seeker is at risk of persecution. As is now settled in this country, "persecution" involves a serious punishment or penalty or a significant detriment or disadvantage: see Chan at 389 and 429-

30. While ultimately it is necessary to determine whether an asylum seeker has a well founded fear of persecution in a holistic sense, there are, nonetheless, discreet elements that call for consideration. One is whether the threat or risk to which the asylum seeker might be exposed can be properly characterized as "persecution". Another is whether the asylum seeker fears that persecution and whether the fear is a well founded one. The High Court's decision in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 (particularly at 572) established that it is acceptable to use terms such as "a real chance", "based in substance", "not far-fetched" or "not remote" as explanatory of "well founded" although not as a substitute for it(added) These terms clarify the meaning of well founded. If there is no real chance that the applicant will be persecuted, or there is no real basis in substance for the applicant's fear, if it is remote or far-fetched then the fear is not well founded. This shows, in our opinion, that determining if a fear is well founded does not call for further assessment of the nature of the risk or threat.

While the majority of the High Court Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 observed that in most cases the application of the real chance test would lead to the same result as an application of the phrase, 'well-founded', it also commented at 572 that,

> "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 ...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 per cent 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".

In Guo at (1997) 191 CLR 559 at 574-5, 144 ALR 567 at 579 Brennan CJ, Dawson, Toohey,Gaudron, McHugh and Gummow JJ. state:

The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability - high or low - of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort

the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.

Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.

In Chan v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 379 Mason CJ. said concerning the relationship between a well-founded fear on departure from the country of origin and that pertaining at the time an application is considered at 387:

….a logical starting point in the examination of an application for refugee status would generally be the reasons which the applicant gave for leaving his country of nationality. Those reasons will necessarily relate to an earlier time, since when circumstances may have changed. But that does not deny the relevance of the facts as they existed at the time of departure to the determination of the question whether an applicant has a "fear of persecution" and whether that fear is "well-founded".
…

and at 491

While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure. Those changes are a matter which, if they were to be relied upon, needed to be established and stated by the delegate in reasons. As I have said, the required justification was not established

A person may have a well-founded fear of persecution for a Convention reason even though that person may not have experienced persecution in the past.: McHugh J in Ibrahim v MIMA (2000) 204 CLR 1; 175 ALR 585; 74 ALJR 1556 at

[83], Perampalam v MIMA (1999) 55 ALD 431 at [14]. In Gnanasambanther v MIMA [2001] FCA 693 the Full Court reaffirmed this principle: at [24]:

…It is certainly correct to say that a finding of refugee status could be made notwithstanding the absence of persecution of an appellant in the past. The question is whether there is a real risk of persecution upon return to Sri Lanka…

That the correct approach is to look at the totality of the statutory provision was affirmed by McHugh J. in Applicant A v MIEA (1997) CLR 225 at 256:

"The phrase, a well founded fear of being persecuted for reasons of membership of a particular social group is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed to ignore the totality of the words that define a refugee for the purposes of the Convention in the Act would be an error of law by virtue of a failure to construe the definition as a whole."

Minister for Immigration and Ethnic Affairs v Singh (1997) 72 FCR 288 stands for the proposition that the decision-maker must make his or her decision as to whether an applicant satisfies the definition in the Convention as at the date of the decision having regard to all the circumstances placed before the Tribunal up to that date. See also Minister for Immigration and Multicultural Affairs v Guo Ping Gui [1999] FCA 1496 at [35] per Heerey J.

In MIMA v W64/01A [2003] FCAFC 12 French J as a member of the Full Court (Carr J. wrote a separate judgment with which Finkelstein J. agreed) said:

37 The Tribunal, in assessing claims and evidence before it, is required to undertake a process of "looking to the future" which is the "essence of the Chan test" - Wu at 278. Chan was acknowledged in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 as establishing that a person can have a well-founded fear of persecution even though the probability of persecution occurring is well below fifty per cent. But the joint judgment in that case went on to caution:

> "... to use the real chance test as a substitute for the Convention term "well-founded fear" is to invite error." (p 572)

The application of that test may require findings that an event might or might not occur in the future but does not require the decision-maker to engage in conjecture or surmise (at p 572). The future-looking process accepted in Wu was elaborated in Guo where it was said that:

> "... unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future." (p 575)

In most cases that process will require findings of past events as the bases for inferences about what will happen in the future. The Tribunal is entitled to weigh material before it and to make findings before it engages in any consideration of whether or not a fear of persecution on a Convention ground is well-founded. If the findings are sufficiently strong, the Tribunal may not be bound to consider the possibility that they are inaccurate. The examination of past events does not require definitive findings as to their occurrence for:

> "... in determining whether there is a real chance that an event will occur or will occur for a particular reason, the degree of probability that similar events have or have not occurred or have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future." (p 576)

The question to be addressed by the Tribunal is whether an applicant has "a well-founded fear of persecution for a Convention reason having regard to possible past occurrences and possible future events" - WAAD v Minister for Immigration & Multicultural Affairs [2002] FCAFC 399 at [38].

38 Where the Tribunal finds that a past event has not occurred but cannot exclude the possibility that it did, that possibility may provide a basis for finding a well-founded fear of persecution in the future - Guo at 576; Abebe v The Commonwealth (1999) 197 CLR 510 at 544-545 (Gleeson CJ and McHugh J); Rajalingam at 236. If the Tribunal has no real doubt that its findings as to past events are correct, it is not bound to consider the possibility that those findings are wrong - Rajalingam at 238. Depending on the importance of the asserted past event a failure to consider the possibility that it occurred could constitute a failure to undertake the "reasonable speculation" necessary to determine whether there is a substantial basis for the claimed fear of persecution - Rajalingam at 240. Relevantly for the present case Sackville J observed, at 241:

> "... the RRT's reasons may show that no consideration was given to the possibility (albeit not a likelihood) that such persecution had occurred, a possibility left open by the RRT's findings."

…

See also Regina v. Secretary of State for the Home Department (Appellant ex parte Sivakumar (Respondent) [2003] 1 WLR 840 [2003] UKHL 14 (Lord Bingham of Cornhill Lord Steyn Lord Hoffmann Lord Hutton Lord Rodger of Earlsferry)

The Full Bench of the High Court in ***Appellant S395/2002 v MIMA; Appellant S* [2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8** (Gleeson CJ (diss), McHugh, Gummow, Kirby, Hayne, Callinan (diss) Heydon (diss) JJ. allowed the appeal from Kabir v MIMA [2002] FCA 129 [2002] FCAFC 20. Gummow and Hayne JJ. said in finding error in the treatment of the ultimate question for determination of whether there was a well-founded fear:

Applicable principles

72 It is well established that the Convention definition of "refugee" has subjective and objective elements. Does the applicant fear persecution for a Convention reason (the subjective element)? Is that fear well founded (the objective element)? The fear will be well

founded if there is a real chance that the applicant would face persecution for a Convention reason if the applicant returned to the country of nationality[33] Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 571-573.

73 The objective element requires the decision-maker to decide what may happen if the applicant returns to the country of nationality. That is an inquiry which requires close consideration of the situation of the particular applicant. It requires identification of the relevant Convention reasons that the applicant has for fearing persecution. It is necessary, therefore, to identify the "reasons of race, religion, nationality, membership of a particular social group or political opinion" that are engaged.

74 Because the question requires prediction of what may happen, it is often instructive to examine what has happened to an applicant when living in the country of nationality. If an applicant has been persecuted for a Convention reason, there will be cases in which it will be possible, even easy, to conclude that there is a real chance of repetition of that persecution if the applicant returns to that country. Yet absence of past persecution does not deny that there is a real chance of future persecution.

75 Again, because the question requires prediction, a decision-maker will often find it useful to consider how persons like the applicant have been, or are being, treated in the applicant's country of nationality. That is useful because it may assist in predicting what may happen if the applicant returns to the country of nationality. But, as with any reasoning of that kind, the critical question is how similar are the cases that are being compared.

….

78 The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how this applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made[34] R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840 at 841 [2] per Lord Bingham of Cornhill, 843 [7] per Lord Steyn, 854 [42] per Lord Rodger of Earlsferry; [2003] 2 All ER 1097 at 1099, 1101, 1112.

….

79 The dangers of arguing from classifications are particularly acute in matters in which the applicant's sexuality is said to be relevant. Those dangers lie within the notions of "discretion" and "being discreet": terms often applied in connection with some aspects of sexual expression. To explain why use of those terms may obscure more than they illuminate, it is useful to begin by considering Convention reasons other than membership of a social group defined in terms of sexual identity.

80 If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

81 It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership

of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense "discreetly") may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.

82 Saying that an applicant for protection would live "discreetly" in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker "expects" that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant must do….if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.

83 Addressing the question of what an individual is entitled to do (as distinct from what the individual will do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the Tribunal in other cases, cited by the Federal Court in Applicant LSLS v Minister for Immigration and Multicultural Affairs[35] [2000] FCA 211 at [20]-[21], leads to error. It distracts attention from the fundamental question. It leads to confining the examination undertaken (as it was in LSLS) merely "to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in [the country of nationality], disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result"[36] [2000] FCA 211 at [24]. That narrow inquiry would be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged. On its face it appears to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. Whether or not that is so, considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution.

….

86 Nowhere in the reasons of the Tribunal is any consideration given explicitly to whether there was a real chance that the appellants would be subjected to any of the "more serious forms of harm" to which the Tribunal alluded. Nowhere in the reasons is any consideration given explicitly to whether the appellants would be subjected to ill-treatment by police. Nowhere is there consideration of whether subjection to any of these "more serious forms of harm" would amount to persecution.

87 …the primary judge and the Full Court both read the Tribunal's reasons as finding that the appellants were likely to live in a way that would not cause Bangladeshi society to confront their homosexual identity.

88 This reveals the error made by the Tribunal. The Tribunal did not ask why the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live

as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is not possible to "live openly as a homosexual in Bangladesh"; secondly, that "[t]o attempt to [live openly] would mean to face problems"; and, thirdly, that "Bangladeshi men can have homosexual affairs or relationships, provided they are discreet". Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly.

89 The Tribunal did not deal with the question presented by s 36(2) of the Act - did Australia owe protection obligations to the appellants? It either did not correctly apply the law to the facts it found, or its decision involved an incorrect interpretation of the applicable law. ..

….

Note per Kirby J. (dissenting on the basis that in his view there were errors amounting to a denial of procedural fairness) in Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002 [2003] HCA 60:

74….A common factual element in the establishment of a "well-founded fear" of the stated kind is the existence, for reasons of a prohibited ground, of an inability on the part of the person claiming to be a refugee to rely upon the police or other governmental officials of the country of that person's nationality to provide basic protection[22] Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 12 [26], 28-29 [84]-[87], 35 [107], 38-40 [114]-[118]. Clearly, if an applicant could show that, on such grounds, he or she was subjected to violence, oppression and deprivation of basic rights by police or other officials of the government of the country, that would be a relevant evidentiary step in establishing the "well-founded fear" necessary to enliven the right to protection.

In Labara v MIMA [2002] FCAFC 145 the Full Court (Lee Moore and Madgwick JJ.) allowed an appeal from Labara v MIMA [2001] FCA 652 and set aside a RRT decision for jurisdictional error. the Tribunal erred by not considering whether the Ukrainian government was able, in a practical sense, to prevent harm in circumstances where it had accepted that the first appellant had been assaulted by private citizens and suffered property damage because of his adherence to the Jehovah's Witness religion. There was error because examination of the Tribunal's reasons indicated it only went so far as considering whether the appellant sought and failed to obtain protection from the Ukrainian authorities. There was no specific consideration of the State's ability, in a practical sense, to provide protection. The High Court in MIMIA v Respondents S152/2003 [2004] HCA 18 (2004) 78 ALJR

678 205 ALR 487 77 ALD 296 (Gleeson CJ. . McHugh, Gummow Kirby Hayne JJ.) allowing appeal from **Labara v MIMA held that the case which the applicant sought to make was not one of the inability of the State to afford protection but rather one of instigation and encouragement by the Ukrainian authorities of the harm suffered . There was no error in the Tribunal's approach so the orders of Wilcox J. at first instance were affirmed
(see Chapter 14 below)

The question of evaluation of evidence taking into account the formulations of what makes up a well-founded fear of persecution proposed in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 was considered in ***B90 of 2003 v RRT*** **[2004] FCA 1557** by Dowsett J. . He noted two important points of guidance derived from the judgment of Gaudron J.. although Her Honour's approach was not representative of the other judges reasons concerning the test to be applied. First evidence of actual persecution, known to an applicant, if accepted, may qualify or exemplify the effect of the country information which is otherwise available. Almost by definition, such information will, on occasions, not reflect the whole picture. The Tribunal should be careful not to discount direct evidence from an applicant merely because it does not accord with more general country information. Secondly, where circumstances are said to have changed for the better since any incident testified to by an applicant, the Tribunal should exercise care in ensuring that such changed circumstances relate to the circumstances in which the incident occurred and recognize that change is, almost inevitably, relatively gradual, incremental and unlikely to take effect in a uniform way throughout any particular geographical region. He said:

17 I should add that the Tribunal appears to have accepted that the incident involving the abduction of the applicant's brother and the death of his father was motivated by a Convention reason. It also seems to have accepted that his sister's mistreatment by army personnel was similarly motivated. It is, in effect, submitted that in the circumstances, the Tribunal could only have rejected the applicant's claim if it had misunderstood the relevant test.

18 The Tribunal considered, on the one hand, the history of quite horrible abuse suffered by members of the applicant's family, apparently at the hands of the security forces and apparently for reasons associated with their Tamil ethnicity or, perhaps, their perceived support of LTTE, and on the other, the relatively quiet life led by the applicant in both Jaffna and Colombo, save for the one significant incident in 1992. It also relied upon available country information which suggested that he was not in those categories of Tamils identified as likely to be of interest to the authorities. The Tribunal concluded that

there was no real chance that the applicant would face persecution for Convention reasons in Sri Lanka, apparently giving greater weight to the applicant's own experience and the country information than to the treatment of his brother (and incidentally, his father) and his sister. It recognized that he had been imprisoned for an extended period in 1992, but not otherwise. It presumably discounted that incident as a reliable guide to future events on the basis that it was, in the applicant's case, an isolated event. It inferred that the reason that the applicant was not attacked in 1997, when his brother and his sister were attacked, was that they were of interest to the authorities and he was not. That was not the only available inference, but it was available to the Tribunal, particularly having regard to the country information as it applied to the applicant.

19 As I have observed, the country information suggested that a person might be "investigated" if a relative was known to be an LTTE member. The treatment of the applicant's brother and sister may have been motivated by suspicion of LTTE involvement, although there is no direct evidence to that effect. The Tribunal seems to have concluded that the adverse attention to them was prompted by something other than their Tamil ethnicity. Suspected association with LTTE is the most likely explanation. It might well follow that the applicant would be a possible target for further "investigation" in light of the country information. However the Tribunal concluded that the applicant's experience before and after the incidents involving his siblings and his father demonstrated that the security forces were not interested in him. This effectively disposed of those incidents as objective bases for fear of persecution in the future. As I have said, that conclusion was open on the evidence. In any event investigation is not necessarily persecution.

20 Prima facie, the Tribunal's decision involved the evaluation of evidence, which evaluation led to a particular conclusion. There is no apparent legal error. However the applicant points to comments made by Gaudron J in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 415, as supporting his position. Her Honour said:

> 'The definition of "refugee" looks to the mental and emotional state of the applicant as well as to the objective facts. It is a commonplace, encapsulated in the expression "once bitten, twice shy", that circumstances which are insufficient to engender fear may also be insufficient to allay a fear grounded in past experience. Although the definition requires that there be "well-founded fear" at the time of determination it would be to ignore the nature of fear and to ignore ordinary human experience to evaluate a fear as well-founded or otherwise without due regard being had to the applicant's own past experiences.
>
> If an applicant relies on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality. To require more of an applicant for refugee status would, I think, be at odds with the humanitarian purpose of the Convention and at odds with generally accepted views as to its application to persons who have suffered persecution ... .'

21 For reasons which will become apparent, it is appropriate to note certain comments made by other members of the Court in Chan. Mason CJ said, at 389:

> 'I agree with the conclusion reached by McHugh J. that a fear of persecution is "well-founded" if there is a real chance that the refugee will be persecuted if he

returns to his country of nationality. ... But I prefer the expression "a real chance" because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it is an expression which has been explained and applied in Australia ... . If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.'

22 At 398, Dawson J said:

'Nevertheless, for the sake of uniformity of approach I should express my preference for a test which requires there to be a real chance of persecution before fear of persecution can be well-founded. It is sufficient to justify that choice to point to the fact, as does the Chief Justice in his reasons for judgment, that it is test which has been recently expanded by this Court in another context ... in a manner which is helpful in the present context. A real chance is one that is not remote, regardless of whether it is less or more than 50 per cent.'

23 At 406, Toohey J said:

'The use of the adjectival expression "well-founded" must be taken as qualifying in some way the "fear of persecution". It is hard to conceive of a fear which has no objective foundation at all as well-founded, no matter how genuine the fear might be. If the test were entirely subjective, the expression "well-founded" would serve no useful purpose. On the other hand, it is fear of persecution of which Art. 1A(2) [of the Convention] speaks, not the fact of persecution. So it is apparent that while the requirement is not entirely subjective, it is not entirely objective. Both elements are present. There must be fear on the part of the applicant and that fear must be of persecution. But what is meant by "well-founded"?

24 At 407, his Honour concluded:

'The test suggested by Grahl-Madsen, "a real chance", gives effect to the language of the Convention and to its humanitarian intendment. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time.'

25 At 429, McHugh J said:

'Courts, writers and the U.N.H.C.R. Handbook agree, however, that a "well-founded fear" requires an objective examination of the facts to determine whether the fear is justified. But are the facts which are to be examined confined to those which formed the basis of the applicant's fear? In [R v Home Secretary; Ex parte Sivakumaran [1988] AC 958] the House of Lords, correctly in my view, held that the objective facts to be considered are not confined to those which induced the

applicant's fear. The contrary conclusion would mean that a person could have a "well-founded fear" of persecution even though everyone else was aware of facts which destroyed the basis of his or her fear.

The decisions in Sivakumaran and [Immigration and Naturalization Service v Cardoza-Fonseca (1987) 480 U.S. 421] also establish that a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in Cardoza-Fonseca an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterized as "well-founded" for the purpose of the Convention and Protocol.'

26 These passages are of particular importance because, in Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, Gummow J observed at [150]:

'It is established by what was said by Mason CJ, Dawson J, Toohey J and McHugh J in Chan that the Convention definition of "refugee" involves mixed subjective and objective elements. In particular, there must be a state of mind, a fear of being persecuted, and a basis for that fear which is well founded. Without a real chance of persecution there cannot be a well-founded fear of persecution and the objective facts are not confined to those which induced the applicant's fear. The view of Gaudron J in Chan that, if the experiences of the applicant produced a well-founded fear of being persecuted, "then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality" does not represent the view of the Court in Chan.'

27 In Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57 at [69], Gaudron J responded to that observation as follows:

'Further, and as I pointed out in Chan, a fear which is well-founded because of persecution to which an individual has been subjected in the past will not, in the case of that individual, cease to be well-founded simply because circumstances have so changed that the current circumstances would not, of themselves, engender a well-founded fear in others. It is true, as Gummow J pointed out in [Eshetu], that what I said in Chan did not represent the view of the Court in that case. However, nothing that was said in Chan or that has been said in subsequent cases suggests that what I said was wrong.

To answer the question whether a fear is well-founded by reference to the current situation and without regard to persecution actually suffered by the individual concerned is to ignore the subjective aspect of the Convention definition of "refugee" and, also, the nature of fear. Further, it is to overlook what the concluding words of the definition postulate, namely, that a fear may be well-founded notwithstanding that the individual concerned is able to avail himself or herself of the protection of the country of his or her nationality.'

28 Clearly, the Tribunal was obliged to proceed in accordance with the views of the other members of the Court in Chan. It purported to do so. It looked to all known circumstances, including, but not limited to, those which directly concerned, and were within the personal knowledge of, the applicant. In those circumstances, the views expressed by Gaudron J had no particular legal relevance for present purposes. However they did offer useful guidance to the Tribunal in two respects. Firstly, evidence of actual persecution, known to an applicant, if accepted, may qualify or exemplify the effect of the country information which is otherwise available. Almost by definition, such information will, on occasions, not reflect the whole picture. The Tribunal should be careful not to discount direct evidence from an applicant merely because it does not accord with more general country information. Secondly, where circumstances are said to have changed for the better since any incident testified to by an applicant, the Tribunal should exercise care in ensuring that such changed circumstances relate to the circumstances in which the incident occurred and recognize that change is, almost inevitably, relatively gradual, incremental and unlikely to take effect in a uniform way throughout any particular geographical region. I see no reason to believe that the Tribunal failed to understand the nature of its task, including these aspects.
…

Minister For Immigration And Multicultural And Indigenous Affairs v SZANS **[2005] FCAFC 41** (Weinberg Jacobson and Lander JJ.) allowed the appeal from SZANS v MI [2004] FMCA 445 (Driver FM) The claim by the respondent was that as a homosexual his family would impose a heterosexual marriage upon him and he did not wish to marry . The RRT held that any pressure upon the respondent to marry was not for a Convention reason. There was a further finding that respondent was discreet about his homosexuality and had made no claims that he suffered because of it . It held that as a discreet man whose pattern of behaviour would not change there was no real chance that he would be exposed as a homosexual if he returned . The argument was that the Tribunal overlooked element of claim that he faced serious harm from the consequences of a heterosexual marriage - Federal magistrate found that RRT failed to consider consequences whether respondent would be persecuted if he succumbed to pressure of marriage and that consequences of being forced to enter into a heterosexual marriage constituted persecution for a Convention reason

It was held on appeal - no basis for issue of whether respondent would succumb to pressure to marry - RRT did not consider claim - application had been dismissed purely on ground of absence of Convention nexus - respondent did not claim that

he would succumb to any such pressure - RRT not obliged to deal with a hypothesis not raised - Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 [2003] HCA 1 (2003) 211 CLR 441 applied.

Furthermore any consideration of this hypothesis would involve speculation as to what the consequences may be – a well-founded fear cannot be based upon speculation.

It was also difficult to see how there was any subjective fear – the appellant's evidence was of social and familial pressure on him to marry, and the effect of marriage on any prospective wife.Concern for the welfare of another was not relevant when considering whether the respondent had the relevant fear of persecution.

The RRT's findings that respondent would not change his pattern of behaviour, that he would not come to the adverse attention of people in Bangladesh and that there was no Convention nexus, effectively disposed of claim. There was no jurisdictional error in finding an absence of any Convention nexus. (see Chapter 7. MEMBERSHIP OF A PARTICULAR SOCIAL GROUP e) Homosexuals)

In ***SVTB v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 104** (Marshall Mansfield and Stone JJ.) dismissed the appeal from *SVTB v MIMIA* [2004] FCA 1610) Lander J.) in which membership of a particular social group accepted as single women in Albania without male protection. The issue was one of non-state agents of persecution and whether the appellant faced a real chance of being sexually assaulted or trafficked by reason of her membership of that group - RRT rejected her evidence as "most unconvincing" - it appeared not to accept that she faced a real chance of being sexually assaulted by reason of her membership of that social group - women in the particular social group were no more vulnerable to those consequences than other women generally in Albania - it also did not accept appellant was at risk of being trafficked for sexual exploitation or in order to harvest her organs on the basis of country

information. It was held on appeal that it was significant that the Tribunal did not expressly make a finding that it was not satisfied that the appellant subjectively had a fear of persecution for a Convention reason. The RRT did not accept past persecution. The fact that particular claimed events have not occurred in the past does not logically lead to the conclusion that there is no real chance of something occurring in the future, although it may be an indication of such a conclusion. It was held on appeal that the Tribunal simply assumed the appellant held the fears she claimed for the future, and addressed the other steps necessary to determine if the appellant was a refugee - it then found her assumed fears not to be well-founded.

8 The Tribunal appeared not to accept that the appellant faces a real chance of being sexually assaulted by reason of her membership of that social group. Women in the particular social group, it found, were no more vulnerable to those consequences than other women generally in Albania. It concluded:

'While the level of violence directed at women is clearly a serious problem in Albania, there is no evidence before the Tribunal that single women without male protection are at greater risk of being subjected to sexual abuse, assault, or any other crime than Albanian women who are married and/or who have male protection. In fact, domestic violence appears to be an area of criminality which is of particular concern for Albanian women, with married women at risk of spousal abuse. Noting the information set out above, the Tribunal is satisfied that the Albanian authorities have acknowledged that violence towards women is a problem and they have created institutional structures and put in place proper police and judicial procedures to address gender-related violence. Single women without male protection are not excluded from accessing these services. The Tribunal finds that the Albanian authorities would be able and willing to provide protection sufficient to remove a real chance of persecution for the applicant if she feared she was at risk of being sexually assaulted or subjected to a criminal attack because she was a single woman without male protection.'

9 It also did not accept that the appellant is at risk of being trafficked for sexual exploitation or in order to harvest her organs. It noted the country information that the number of Albanians being trafficked is declining in response to government measures, and that 'increasingly, Albanians who are trafficked are children between the ages of 14 and 17'. It observed that persons who are abducted are often orphans who are sold by family members, or are recruited because their economic circumstances make them susceptible to the rewards promised by traffickers. It noted that the appellant is not in a position where she is at risk of her family selling her against her will, and that she is aware of the dangers posed by traffickers and is not likely to succumb to false inducements from traffickers. Consequently, it concluded there is no real chance of the appellant being trafficked because of her individual attributes or because of her membership of the particular social group.

....

16 It is axiomatic that, if the appellant were to be granted a protection visa, the Tribunal was required to be satisfied both that the appellant subjectively held a fear of persecution if she were to return to Albania by reason of being a single woman in Albania without the support of male relatives, that is by being a member of the particular social group to which the Tribunal accepted she belonged, and secondly that her fear was well-founded. Those

two elements are aspects of the definition of refugee: see *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379; *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 (*Appellant S395/2002*) e.g. per Gummow and Hayne JJ at 498-499, [72]-[74]. The Tribunal clearly understood that. It recorded its awareness of those two elements in the opening part of its reasons.

17 In that context, in our view, it is significant that the Tribunal did not expressly make a finding that it was not satisfied that the appellant subjectively had a fear of persecution for a Convention reason if she were to return to Albania. It found that single women in Albania who do not have the protection of male relatives do constitute a particular social group. It accepted that the appellant was part of that group from January 1997. To an extent, therefore, it accepted her evidence as to her family history, although it expressed dissatisfaction with her evidence overall. It found that gender violence and the trafficking of women are significant problems in Albania.

18 The Tribunal did not accept that the appellant had suffered the detriments which she claimed to have experienced in the past…

19 The reason why it was appropriate for the Tribunal to address the specific claims which the appellant made as to her experiences in the period up to when she left Albania is apparent. In *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 575 explained:

'Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.'

The fact that particular claimed events have not occurred in the past does not logically lead to the conclusion that there is no real chance of something occurring in the future, although it may be an indication of such a conclusion. As their Honours said at 574, past events are not a certain guide to the future, although in many areas of life they may provide a reliable basis for determining the probability of their recurrence. See also per Gummow and Hayne JJ in *Appellant S395/2002* at 499, [74].

20 The sequence of reasoning of the Tribunal also indicates that it took the separate step of considering whether the appellant faces a real chance of persecution for a Convention reason if she were to return to Albania after finding she had not been persecuted in the past. The question it posed, that is the real chance test, involves both subjective and objective elements. Its reasoning, after identifying the nature of the particular social group as claimed by the appellant, focused on the objective element of that question. It did not suggest that its findings adverse to the appellant in respect of her claimed past experiences made that inquiry unnecessary because it had rejected any claim she made to fear persecution if she were to return to Albania.

21 For those reasons, in our judgment the Tribunal did not find implicitly that the appellant did not fear being persecuted for a Convention reason if she were to return to Albania. To that extent, we respectfully disagree with the learned judge at first instance. We also do not agree with counsel for the appellant that, by implication, the Tribunal positively accepted that the appellant subjectively feared persecution for a Convention reason if she were to return to Albania. It has simply expressed no view on the matter. Our reading of its reasons is that the Tribunal simply assumed that the appellant held the fears she claimed for the

future, and addressed the other steps necessary to determine if the appellant is a refugee. It then found her assumed fears not to be well-founded….

….

4. STATELESS PERSON / FORMER HABITUAL RESIDENCE

In MIMA v Savvin (2000) 171 ALR 483, 61 ALD 107, 98 FCR 168 [2000] FCA 478 the Full Court substantially agreed with the reasoning of Cooper J in Rishmawi v MIMA [1997] 77 FCR 421, and in particular with his conclusion that Article 1A(2) is not be construed literally but in accordance with the object and purpose of the Convention as disclosed by the preparatory work for the 1951 version of it and with the context in which Article 1A(2) appears. The conclusion is that Article 1A(2) is to be construed as including the requirement that a stateless person, being outside the country of his former habitual residence, have a well-founded fear of being persecuted for a Convention reason. Being outside his country of former habitual residence and being unable to return is not sufficient to bring him within the Convention. In W395 v MIMA [2001] FCA 1737 at [8]-[9],[13] French J. implicitly accepted this principle in finding that there was no error in the Tribunals reasons in such a case.

In QAAE of 2002 v MIMIA [2002] FCA 1213 Cooper J. dealt with the issue of statelessness as a claim made within the Refugees Convention. His Honour said (with implicit or express approval of the principles stated by the RRT):

17 The applicant was born in Moldova when it was part of the USSR. He claimed before the RRT that he left Moldova for Ukraine on 1 July 1992 and remained there until 16 November 1999 when he left to travel to Australia. He claimed that in March 1996 he went to the Moldovan Embassy in Kiev and there renounced his Moldovan citizenship in writing. He thereupon applied for Ukrainian citizenship. However, he had not obtained such citizenship when he decided to travel to Australia.

18 The applicant claimed fear of persecution in Moldova because he was part of the Dniester militia which fought against Moldova in secessionist fighting. He claimed that he served with the militia for two months (May-June) in 1992 and during that time he was captured and beaten by Moldovan police. As a result of his activity in the militia, he claimed that he was the subject of outstanding criminal charges and that he feared that if he returned to Moldova he would be imprisoned.

19 The RRT found that the applicant was born in Moldova and was a national of Moldova until 1996, when he renounced his citizenship and that he is now a stateless person. The RRT then dealt with the applicant's claim as one of fear of persecution for an imputed political opinion in his country of former habitual residence, Moldova.

…

24 Ultimately, the RRT held that the applicant was not outside his country of former habitual residence (whether Moldova or Ukraine) because of Convention-related persecution. The RRT was further satisfied that the applicant's inability to return to either country was not a consequence of a Convention-related fear of persecution. In reaching this conclusion, it relied on the decisions in Rishmari v Minister for Immigration and

Multicultural Affairs (1997) 77 FCR 421 and Diatlov v Minister for Immigration and Multicultural Affairs (1999) 167 ALR 313.

25 The RRT held, correctly, that statelessness alone was not of itself sufficient to establish refugee status: Minister for Immigration and Multicultural Affairs v Savvin (2000) 98 FCR 168; Revenko v Secretary of State for the Home Department [2000] 3 WLR 1519 (CA).

…

5. POLITICAL OPINION

a) Definition

The Convention ground of political opinion has been dealt with on several occasions in the context of whether acts of opposition to criminal groups with links to the State apparatus are Convention related.

The clearest exposition of the law relating to political opinion is contained in ***Voitenko v MIMA*** **(1998) 55 ALD 629 [1999] FCA 428** aka ***V v MIEA*****(1999) 92 FCR 355** to which reference is made in C & S v Minister [1999] FCA 1430; 94 FCR 366 where the authorities are canvassed: ***Saliba v Minister*** **(1998) 159 ALR 247,** ***Ranwalage v Minister*** **(1998) 159 ALR 349,** ***Minister v Y*** **(unreported, Davies J, 15 May 1998)**

In ***Minister v Y*** Davies J held that it was open to the Tribunal to hold that Y's fear of persecution was by reason of his political opinion. At 4-5 he said:

> "In the context of Refugees' Convention, an opinion could be thought to be a political opinion if it were such as to indicate that its holder, the claimant for refugee status, held views which were contrary to the interests of the State, including the authorities of the State. A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government, or which are antithetic to the Government and the instruments which enforce the power of the State, such as the Armed Forces, Security Forces and Police Forces or which express opposition to matters such as the structure of the State or the territory occupied by it and like matters."

The correctness of ***Y*** was debated before the Full Court in ***Voitenko (V)*** . All three members of the Court approved the decision. At paras 16-18 Wilcox J. said:

> "As I understand Davies J, as a matter of law it is enough that a person holds (or is believed to hold) views antithetic to instruments of government, and is persecuted for that reason. It is not necessary that the person be a member of a political party or other public organisation or that the person's opposition to the instruments of government be a matter of public knowledge. Of course, the higher the person's political profile, the easier it may be to persuade a tribunal of fact that the person has been persecuted on account of political opinion, rather than for some other reason; but that is a matter going to proof of the facts, not a matter of law.
>
> The other relevant point about Y is that it contains no suggestion of a dichotomy between criminal activity and persecution on account of political opinion. The abduction and torture of Y and his friend, and the abduction and rape of Y's wife, were

undoubtedly serious criminal acts, but nobody suggested this prevented them being categorised as persecution on account of political opinion.

I reject the submission that an attitude of resistance to systemic corruption of, and criminality by, government officers cannot fall within the description 'political opinion'. Whether particular resistance amounts to an attitude having a political dimension, or whether it is simply a product of other causes such as fear of detection, is, of course, a question of fact for determination in the particular case."

Hill J's judgment was to the same effect. Whitlam J. in dealing with the case on a limited basis nonetheless expressed agreement with Davies J. in Y.

This approval of Davies J.'s views by the Full Federal Court in V v MIEA(1999) 92 FCR 355 subject, perhaps, to the implicit suggestion in them that the view had to be one that had actually been publicly expressed as suggested by Hill J. in Applicant N 403 of 2000 v MIMA [2000] FCA 1088 at [21 are repeated below from the FCR report .

Wilcox J. said at [16] :

"As I understand Davies J, as a matter of law it is enough that a person holds (or is believed to hold) views antithetic to instruments of government and is persecuted for that reasons. It is not necessary that the person be a member of a political party or other public organisation or that the person's opposition to the instruments of government be a matter of public knowledge. Of course, the higher the person's political profile, the easier it may be to persuade a tribunal of fact that the person has been persecuted on account of political opinion, rather than for some other reason; but that is a matter going to proof of the facts, not a matter of law."

also per Hill J. at [32]:

"The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion....

and at [33]

"It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not

limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower that the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by acts ... With respect, I agree with the view expressed by Davies J in Minister for Immigration and Ethnic Affairs v Y ... that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case."

Note also the recent Full Court decision of ***Ramirez v MIMA*** **[2000] FCA 1000**, citing ***V*** and ***Y*** with approval, which considered the circumstances in which the resistance to extortion and exposure of corruption can manifest a political opinion so as to attract the protection of the Convention if persecution follows (see also the authorities listed below under Victims of Crime).

In ***Zheng & Anor v MIMA*** **[2000]FCA 670** Merkel J. summarised the state of the law in this area as follows:

32 The case law to which I have referred demonstrates that exposure of corruption can, in a wide range of circumstances, lead to political persecution. Thus, exposure of corruption in circumstances where it so permeates government as to become part of its very fabric can quite easily lead to a fear that the exposure, of itself, may be imputed to be an act of opposition to the machinery, authority or governance of the state. Likewise, refusal to participate in a corrupt state system can also be seen as an expression or manifestation of political opinion as the refusal to participate may be imputed by the authorities to be a challenge to the machinery, authority or governance of the state. Also, as the recent Canadian decision in Klinko demonstrates, exposure of systemic corruption may be an expression of "political opinion" even if the state is against corruption but is unable to protect the applicant from persecution on this account. In such a case, however, it may be difficult to establish that the exposure of corruption is a manifestation of a political act such as defiance of, or opposition to, the machinery, authority or governance of the state.
33 It needs to be emphasised that where individual, rather than systemic, corruption is exposed it is less likely that the act of exposure will be one in which a political opinion will be seen to have been manifested. This is because the exposure in that instance is more likely to be seen as the reporting of criminal conduct rather than as any form of opposition to, or defiance of, state authority or governance.
34 A critical issue will always be whether there is a causal nexus between the actual or perceived political opinion said to have been manifested by the exposure of corruption and the well-founded fear of persecution: see Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 240, 268 and 284. In each case the question of whether the nexus has been established is a question of fact for the RRT.

In the circumstances of the case His Honour went on to hold that:

39 The difficulty with the applicant's claims is that although he might have viewed his acts as "political" there was no material that suggested that the authorities had viewed, or might view, his acts in exposing Mr He as having any political aspect. In particular, the material and evidence provided by the applicant was bereft of any basis upon which the authorities might perceive his exposure of his superior's corruption as a political act in any of the senses described in the cases to which I have referred. Thus, there was no material or evidence before the RRT that suggested that the Chinese authorities or for that matter, anyone else, perceived the conduct of the applicant to be resistance to, defiance of, or any threat to the authorities or the State or to have any other political aspect to it.

40 The RRT's acceptance that the applicant's complaints to the authorities concerning his superior's corruption had not been investigated or responded to offered some support for the applicant's fear that Mr He had instigated the investigation of the applicant. However, that suggests that Mr He's influence was such that he was able to divert the corruption investigation requested by the applicant to a corruption investigation of the applicant. While these matters might constitute corrupt activities by the individuals concerned, the issues raised by them remain personal rather than political in the sense that they relate to Mr He's personal influence and conduct in relation to the specific events rather than to any systemic corruption being exposed by the applicant (my emphasis). The fact that the Bank was government owned or that Mr He's parents were senior Communist Party Officials does not, per se, give the investigation of the applicant a political aspect: cf Chen v Minister for Immigration and Multicultural Affairs [1999] FCA 1022…

42 In summary, the material and evidence provided by the applicant in support of his application failed to reveal a causal nexus between his exposure of his superior's corruption and the political persecution he claims to fear. Put another way, there is no material or evidence that raises a case that an actual or perceived political opinion has been attributed to the applicant by the authorities as a result of his exposure of Mr He's corruption or by reason of his refusal to co-operate with Mr He in relation to his corrupt activities (my emphasis). Accordingly, the material relied upon by the applicant does not suggest that the authorities, Mr He or the officials in the Public Security Bureau responsible for the investigation of the applicant are doing so for any political reason or on the basis that they believe that there is any political aspect to the applicant's conduct.

In ***VNAY v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 96** the Full Court (Hill Finn and Kenny JJ.) dismissed an appeal from Federal Magistrates Court and an argument that the RRT did not consider the case as one of political opinion in that the appellants's knowledge of activities of a powerful person with links to PA government could be said to be capable of constituting political opinion. (reference to ***Ranwalage v Minister for Immigration and Multicultural Affairs*** **(1998) 90 FCR 173 (1998) 159 ALR 349**. It was held at first instance following approach the in ***Zheng v Minister for Immigration & Multicultural Affairs*** **[2000] FCA 670** that there was a difficulty in
the applicant's claim as the material did not suggest the authorities had viewed or

might view the applicant as being exposed to risk on the basis of any political matter. On appeal the Court held that the words "political opinion" are capable of a wide meaning and may extend to matters such as criticising corruption in the society or, criticising a corrupt politician (as in ***Ranwalage***) – however there is a need to exercise care not to move from a discussion of a particular issue in a case such as ***Ranwalage*** to a finding that the discussion is relevant in a particular case divorced from the facts, either as claimed or found. In the present case the fear the appellant claimed to have was not one engendered by exposing or seeking to expose Mr X **as a politician –** rather it was a fear emanating from the threats which Mr X made and which, apparently, he was capable of ensuring that they would be carried out, both because he wielded power and because he associated with "thugs" and criminals., To the extent that it was any part of appellant's case he feared Mr X controlled the police, that was dealt with adversely to him by RRT's finding that the police would do what was necessary to safeguard him. In reaching the latter conclusion Tribunal was aware of claim that Mr X was influential and politically significant . The RRT committed no error in understanding the meaning of political opinion, so far as that expression related to the facts of the present case. The Court said:

8 The Tribunal set out, in summary form, the facts as claimed by the appellant. These were as follows:

"The Applicant states that he operated a tour business in Sri Lanka, hiring out his vehicles to various businesses. He was helped in developing his business through favourable treatment extended to him by an unnamed former classmate (identified only as 'Mr X') who had contacts with the People's Alliance (PA), the coalition that was, at that time, in government. As a favour to Mr X, he provided a vehicle for the latter's use during the 1994 election campaign. The vehicle was duly returned. In December 1995, the Applicant was taken into custody by police and was questioned about a murder that occurred during the election campaign, in which his vehicle had been identified. He told the police that he had lent it to Mr X at that time and he was released on the condition that he be available to provide further evidence. Fearing that Mr X would attack him, he moved to his wife's parents' house, outside Colombo. Subsequently he was informed by his brothers that Mr X had called at his house and left a warning that he would 'take care' of the Applicant if he provided any information to police. He understood that to be a death threat.

….

The reasons of the Federal Magistrate

…

11 It was submitted on behalf of the appellant that the Tribunal had made no reference to the fact that during the presidential election in 1994, Mr X had used the motor vehicle which the appellant lent to him for propaganda and election preparation activities, or that, through his political connections, which were apparently considerable, Mr X wielded significant power through his control of "thugs" and "gangs". It was submitted that the fear

of persecution, which the appellant had, arose by virtue of political opinion. The Sri Lankan officials were aware, it was said, that the car had been used for propaganda and election preparation activities and were also aware that the appellant knew this. His knowledge was, it was submitted, capable of constituting "political opinion". So, it was submitted, the Tribunal had fallen into jurisdictional error by not considering the appellant's case as one of persecution for political opinion. It might be added here that at no time does it appear that the appellant ever mentioned political opinion in the context of his claimed fear of persecution. Nevertheless, if it was necessarily implicit in what he said that there would be a fear of persecution by reason of his political opinion, it might not be necessary to spell that out.

12 Before the Magistrate and before us, the appellant relied upon *Ranwalage v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 173. In that case too, the applicant had been a citizen of Sri Lanka. His brother had been a security guard for the late President Premadasa and had been killed when the President was assassinated. The applicant had been told by his brother that a previous assassination, which had been blamed upon the LTTE (Tamil Tigers), was in fact the work of a Mr Cooray, a minister in the United National Party government, an underworld figure and a person of great influence in Sri Lanka. The applicant and his wife had been the subject of threats and claimed to fear persecution by reason of political opinion. The Tribunal, which found no well founded fear of persecution for political opinion, had drawn a distinction between assertions and opinion. In this Court, Heerey J rejected that distinction. His Honour said that the accusations which the applicant was perceived as wishing to ventilate concerning Mr Cooray necessarily involved an opinion that Mr Cooray was unfit for public life in Sri Lanka. There was a further element that, even if the applicant wished to keep his dangerous knowledge to himself, the present authorities in Sri Lanka might insist that he become involved in proceedings against Mr Cooray.

13 In overturning the decision of the Tribunal in *Ranwalage*, his Honour had regard to two decisions of Davies J to which he made reference, both given on 15 May 1998. In the first, the applicant had witnessed a policeman shoot and possibly kill one of a group of youths being assaulted and had reported the police to the authorities, as a result of which, he had been abducted and assaulted. In the second, the applicant had been a police officer and had given information to the authorities concerning corrupt activities. In both cases, Davies J rejected the argument that the respective applicant's fear was of harm from corrupt and criminal individuals rather than the State and hence not a matter of "political opinion" within the meaning of the Convention. As Heerey J said at 178:

"...it is implicit in his Honour's reasoning that knowledge of a fact – that police had been involved in criminal activity – could be just as much 'political opinion' as views on political, economic or philosophical issues."

14 The learned Magistrate was of the view that the reliance upon *Ranwalage* was misplaced for the reasons given by Merkel J in *Zheng v Minister for Immigration & Multicultural Affairs* [2000] FCA 670 where at [39] his Honour had said:

"The difficulty with the applicant's claims is that although <u>he</u> might have viewed his acts as 'political' there was no material that suggested that the authorities had viewed, or might view, his acts in exposing Mr He as having any political aspect. In particular, the material and evidence provided by the applicant was bereft of any basis upon which the authorities might perceive his exposure of his superior's corruption as a political act in any of the senses described in the cases to which I have referred. Thus there was no material or evidence before the RRT that suggested that the Chinese authorities or for that matter, anyone else, perceived the conduct of the applicant to be resistance to, defiance of, or any threat to the authorities or the State or to have any other political aspect to it." (emphasis

in original)
15 The learned Magistrate said at [18]:
"I am satisfied in the present case that likewise there is a difficulty in the applicant's claim as the material does not suggest that the authorities had viewed or might view the applicant as being exposed to risk on the basis of any political matter and further, having released him, it was open to the RRT to make the finding in relation to protection of the applicant in the future."

The appellant's submissions

16 As already noted, the appellant was not represented before us on the appeal. However, he had the advantage of a notice of appeal prepared by counsel, which set out the basis of the argument of why it was said that the learned Magistrate fell into error.
17 In essence, the appellant's appeal to this Court claims that the learned Magistrate failed correctly to apply *Ranwalage.* It is said that it followed from that case and the two decisions of Davies J referred to in it, that knowledge of a fact involving criminal activity would be political opinion because it was capable of adversely impacting on the reputation of a political figure. It is said that *Zheng,* upon which the Magistrate relied is distinguishable, or alternatively, that the application of it to the facts of the case involved a misconstruction of the appellant's claims. This is said to be the case because the appellant did not claim to be at risk of further persecution for a Convention reason by the State, or even that there was a possible failure of State protection for a Convention reason. The appellant's claim relied instead, it is said, on the political motivation of the non-State agent, "Mr X", who he had described as being "severely involved" in the political activities of the present party. It is said to be this motivation, being the motivation of a political figure protecting his interest, which provided the necessary Convention nexus in this case, as it had in *Ranwalage.*

Discussion

18 It is obvious that the words "political opinion", as they appear in the definition of "refugee" in the Convention, are capable of a wide meaning and may extend to matters such as criticising corruption in the society (as in *V v Minister for Immigration and Multicultural* Affairs [1999] FCA 428) or, criticising a corrupt politician (as in *Ranwalage*) and that a person may be a refugee if that person, on the facts of the case, has a well founded fear of persecution because of what has happened. However, one must be careful not to move from a discussion of a particular issue in a case such as *Ranwalage* to a finding that the discussion is relevant, or may have relevance, in a particular case divorced from the facts, either as claimed or found.
19 In *V,* a dichotomy was sought to be drawn between criminal activity and persecution on account of political opinion. That dichotomy was rejected by the Full Court of this Court (Wilcox, Hill and Whitlam JJ). Justice Wilcox accepted that an attitude of resistance to systemic corruption of, and criminal activity by, government officers, could fall within the description "political opinion" but that whether particular resistance amounted to an attitude having a political dimension, or whether it was simply a product of other causes, was a question of fact for determination.
20 Hill J said at [33]:
"It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts

(which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in Minister for Immigration & Ethnic Affairs v Y *[1998] FCA (unreported 15 May 1998, No 515 of 98) that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention.* ***Whether they do so will depend upon the facts of the particular case."*** (emphasis added)

21 Justice Whitlam, in the same case, also referred to what Davies J had said in *Y* with apparent approval. His Honour eschewed entering into a discussion of the meaning of "political opinion", noting only that the words "political opinion" could be shown by repeated conduct "which is never (or rarely) converted into articulate political protest of the kind familiar to Australian society".

22 It is unnecessary also, for the purposes of the present case, to attempt an exhaustive definition of "political opinion". Rather, to see why the cases relied upon on behalf of the appellant do not assist the appellant here, it is necessary to note just what he claimed. His case is set out in a document annexed "A" in his original application for a visa. The essence of that has already been summarised. However, the appellant made the point that Mr X was a "heavily influential person", that the vehicle lent to Mr X had been used for political purposes, but that it had also been involved in a murder case. The involvement had resulted in the appellant being bashed and questioned by the police, but then released. However, Mr X had political influence, which could result in the appellant being killed. This was demonstrated by threats on the appellant's life, said to have been made. The appellant claimed that the authorities did not, or would not, intervene and Mr X could not be brought to justice because of the influence he wielded. Indeed, he was said to be highly influential with political support from the ruling government party. The fear the appellant claimed to have was not, however, a fear engendered by exposing or seeking to expose Mr X as a politician. It was a fear which emanated from the threats which Mr X made and which, apparently, he was capable of carrying out, or ensuring that they would be carried out, both because he wielded power and because he associated with "thugs" and criminals.

23 In our opinion, the present case was not one in which persecution was alleged for political reasons, whether those reasons were based on some opinion held, or whether they involved an act, or were a belief imputed to the appellant by reason of some act. To the extent that it was any part of the appellant's case that he feared that Mr X controlled the police, that was dealt with adversely to the appellant by the Tribunal finding that the police would do what was necessary to safeguard the appellant.

24 In summary, the Tribunal rejected the appellant's claim for two reasons, neither of which involved the meaning of the words "political opinion". The first was that the appellant's fear arose from a threat of murder, unrelated to a convention ground. The second was that the appellant had no reason to fear the authorities in Sri Lanka because the police would protect him from any interference by Mr X. In reaching the latter conclusion, the Tribunal was aware of and had indeed stated the appellant's claim that Mr X was influential and politically significant.

25 In our opinion, the Tribunal addressed the appellant's claim, it did not err in its understanding of the meaning of political opinion, so far as that expression related to the facts of the case, and made no jurisdictional error. …

…

The principle that actions perceived to be a challenge to governmental authority can appropriately be considered to be expression of political opinion was re-affirmed by the Full Court in Rajanayake v MIMA [2002] FCA 143 but no such claim was advanced before the RRT . Branson J.(Spender and Gray JJ. agreeing) said:

39 For the present purposes the accuracy of the conclusion drawn by Hathaway in The Law of Refugee Status (1991) that:

> "Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of political opinion."

may be accepted (see V v Minister for Immigration and Multicultural Affairs (1999) FCA 428; 92 FCR 355 (FC) per Wilcox J at [14] and Hill J at [33]). On this basis, actions perceived by the governmental authorities of Sri Lanka to be supportive of the aspirations of the Tamil minority may be considered to be the expression of political opinion. That is, evidence that the police were subjecting the appellant to serious harm, such as the deprivation of his liberty and serious assault, for the purpose of extorting money from him or those connected with him for reason of their perception that he was supportive of the aspirations of the Tamil minority could well amount to evidence of persecution for a Convention reason. I do not consider that the primary judge sought to suggest to the contrary. His Honour did, however, as I understand his reasons for judgment, indicate (rightly, in my view) that where extortion is practiced against a person in circumstances in which he or she neither has, nor has imputed to him or her, any relevant political opinion, the extortion cannot logically be regarded as persecution for reason of his or her political opinion. If the person against whom the extortion is perceived is particularly vulnerable to extortion by reason of some other characteristic protected by the Convention (ie race, religion, nationality or membership of a particular social group), it may be that he or she is being persecuted for reason of that characteristic. However, understandably, no such claim was advanced in this case. It could not have been seriously contended that the appellant had a well-founded fear of persecution by reason of being Sinhalese, and there was no evidence before the Tribunal that Sinhalese in Sri Lanka who associate with Tamils comprise a particular social group in that country.

Knowledge of a fact can be just as much “political opinion” as views on political, economic or philosophical matters e.g knowledge of an allegation of complicity in politically motivated assassinations (***Ranwalage v Minister*** **(1998) 159 ALR 349; (1998) 90 FCR 173**) or that police had been involved in criminal activity (implicit in the reasoning in Y v Minister).

Cases that do not come within the definition are those involving extortion by criminal elements where there is no nexus to a Convention ground constituted by

e.g. the actions of the victim in opposing criminal activities linked to the State. These cases have also been argued on the basis of particular social group.

The Convention can apply to a person who is seen as a threat by a group unrelated to the government if the threat arises by reason of the person's political viewpoint and he is at risk of harm at the hands of that group. (Devarajan v Minister [1999] FCA 796 (and assuming lack of State protection in the sense of unwillingness or inability to protect). In that case error of law was found by Moore J. at [27].

Buljeta v MIMA **[1998] 1579** FCA shows that there can be cases in which a decision-maker falls into error by determining a claim on evidence as to opinions that the authorities may impute to the applicant where he in fact holds actual opinions different from the imputed ones, but which are also relevant to his claim for refugee status.

The distinction between engagement in political activity and imputation of political opinion was emphasised in ***Tanji v MIMA*** **[2001] FCA 1110** per Tamberlin J.:

13 The difference between being imputed with engagement in "political activity" and holding a particular "political opinion" is a real distinction. A person may have no history of political activity or not be imputed with "political activity", but nevertheless be persecuted because of a perception that such person holds a particular "political opinion". In the present case, the accepted evidence is that when he was attacked and detained his attackers stated that he was "like his father". The only rational explanation of the use of this language is that he was imputed in their perception with holding a political opinion similar to or identical with that of his father. The best guide as to the reasons which actuated the attack must be the words used by the attackers at the time. There is no contest that words linking him with his father were uttered at the time.

The approach of Gyles J. in Shaibo v MIMA [2002] FCA 158 at first instance that it be necessary for persecutors to be ("consciously") motivated by a political opinion held or perceived to be held by their victim was affirmed by the Full Court in NAEU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 259 There must be a connection between the fear of persecution and the persecutor's knowledge of the political opinion. It is not enough that there be a fear of harm and a Convention reason. (Madgwick J. said(Merkel and Conti JJ. agreeing)

3 Central to his claim for refugee status are the circumstances relating to his employment and desertion from the Sri Lankan police force in 1993. The appellant claims that he joined the police force in July 1993, fulfilling a long held ambition of his. However, contrary to his expectations of being posted to his own area and serving as a village police officer, in November 1993 he was posted, after attending the Sri Lankan Special Task Forces Training School, to a Tamil area; he was stationed at a police station at Mannar Island. At that time the Sri Lankan government and the LTTE were running parallel administrations in the area. The appellant claims that the police deployment there was to fill a military void left by army preoccupation elsewhere and that, as he was a Tamil speaker and Muslim, he along with other officers of a similar ethnic and religious background, were sent to this region.
4 The appellant claims that he deserted nine days later and returned home on 13 November 1993. He claims he did this for two reasons; firstly, he was warned by an LTTE informer that he was being targeted by the LTTE and secondly, he did not wish to be involved in killing Tamil civilians or be associated with human rights abuses including the torture and rape of Tamil civilians. …
…
Decision of primary judge
8 The questions raised by the application before Gyles J were:
(i) whether his desertion from the Sri Lankan police was in part motivated by a political opinion, being to the effect that Sri Lankan police should not rape and torture civilians;
(ii) whether any lawful punishment he received would result in part from the expression of that opinion; and
(iii) whether in the circumstances, the imposition of such punishment would amount to persecution.
The appellant also claimed that the Tribunal did not have jurisdiction and that the decision was not authorised by the Migration Act 1958 (Cth) ("the Act") because the Tribunal had failed to take into account relevant considerations.
9 Gyles J accepted, for argument's sake, that opposition to criminal acts by certain Sri Lankan police officers against Tamils may be a political opinion and that the appellant's desertion was subjectively motivated, in part, by his political opinion. However, Gyles J rejected the submission that lawful punishment for desertion in this case, would result, in part, from expression of his political opinion as there was no evidence to support that his desertion was or would be objectively considered by the Sri Lankan authorities as an expression of his political opinion. The appellant's only action was to desert his post on Mannar Island, which Gyles J considered was a "politically neutral" act….
10…counsel for the appellant had conceded that there was no evidence that the appellant had disclosed to the Sri Lankan authorities his real reasons for deserting. …
11 Gyles J rejected the appellant's argument that it is sufficient if there be a nexus between feared persecution and a Convention ground and that that nexus may be present without any conscious "motivation" on the part of the alleged persecutors. His Honour agreed with submissions for the respondent that, in the absence of evidence that the authorities knew of the appellant's motives for desertion, namely his political opinion, there was "no room for any unknown persecution by punishment for desertion". His Honour referred (at [11]) to:

> "the judgment of Beaumont J (agreed in by Foster J) in Guo v Minister for Immigration & Ethnic Affairs (1996) 64 FCR 151 at 158-165, on this point is not affected by the subsequent decision of the High Court (Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559) and makes clear that it is the perception of the activities of the applicant for refugee status by the persecutor which is

critical. To the same effect, see Wilcox J at [14], Hill J at [33] and Whitlam J at [36] in V v Minister for Immigration & Multicultural Affairs. In Minister for Immigration & Ethnic Affairs v Y, Davies J said at p 4:

'A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government ...'" (emphasis added by Gyles J)

….
Grounds of appeal
12 The grounds set out in the appellant's notice of appeal were:
1. His Honour erred in holding that it is necessary for persecutors to be motivated by a political opinion held or perceived to be held by their victim if their conduct is to constitute persecution for reason of political opinion in the terms of the Refugees Convention.
2. His Honour should have found that it is only necessary that there be a sufficient causal nexus between the persecution feared and the appellant's political opinion, for there to exist persecution for reason of political opinion in the terms of the Refugees Convention.
….
Connection between fear of persecution and persecutor's knowledge of political opinion
14 In my opinion, it is not sufficient, as submitted by counsel for the appellant, that the appellant need only establish that there was a fear of harm and a Convention reason (in this case, his political opinion) for that harm to qualify for protection under the Convention. The appellant was also required to establish that his persecutors had actual or imputed knowledge of his political opinion and would exact punishment at least partly because of that political opinion. In Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559, a case involving a fear of persecution because of the respondents membership to a particular social group of Chinese citizens who opposed the government's "one child policy", the following comments were made by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (at 570-71):

"An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A(2) of the Convention. The first respondents claimed before the Tribunal that they feared persecution in the form of punishment for contravening the PRC government's 'one child policy' and for their illegal departures and that such persecution would be inflicted for the Convention reason of 'political opinion' and/or 'membership of a particular social group'.

For the purposes of the Convention, a political opinion need not be an opinion that is actually held by the refugee. It is sufficient for those purposes that such an opinion is imputed to him or her by the persecutor. In Chan Gaudron J said:

'persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief.'

In the same case, McHugh J said that:

"It is irrelevant that the appellant may not have held the opinions attributed to him. What matters is that the authorities identified [Mr Chan] with those opinions and, in consequence, restricted his liberty for a long and indeterminate period." (emphasis added)

15 Counsel for the appellant, correctly in my view, conceded that the act of desertion per se is politically neutral, that is, no inference of any particular political opinion should be drawn from it. Thus, to establish that the appellant was a person to whom Australia owed protection obligations, it was necessary for the appellant to point to evidence that would establish that any punishment for his desertion would be exacted, in part or in whole, because of his political opinion. This required that there be material showing that the Sri Lankan authorities (the alleged persecutors) were aware of the applicant's claimed political opinion or had imputed such an opinion to him. There simply is no evidence to support the existence of such knowledge or imputation.
16 Counsel for the respondent submitted that Guo does not support the proposition that it is sufficient for protection as a refugee simply to show that there is a real chance that an applicant will be subjected to harm because he or she has broken a law of general application in circumstances where it is not established that the persecutors are aware that he or she has done so for reasons of political opinion (or other Convention related reason).
17 I agree. The persecution must be "for reasons of" a Convention related ground of persecution. In Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 Brennan CJ (at 233) considered that this excluded persecution that is no more than:

> "punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of 'refugee' "

Dawson J said (at 240):

> "The words 'for reasons of' require a causal nexus between actual or perceived membership of a particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group."

Likewise, McHugh J said (at 257):

> "When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group."

18 In this case, the appellant has failed to establish that there is a nexus between the harm feared and persecution for a Convention reason. There simply is no evidence to support that the authorities would exact punishment for his desertion, in whole or in part, because of his political opinion. The decision in Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814 does not assist the appellant. In that case, those imposing the punishment were doing so on the basis that the individuals concerned were being punished as conscientious objectors to compulsory military service; that is, on the basis of their political or religious opinion. Nor does Wang v Minister for Immigration & Multicultural Affairs (2000) 105 FCR 548 assist. That case involved a law that was itself persecutory (the law made practising in an unregistered church in China a crime). The appellant here will not be treated any differently from anyone else for his desertion.

Madgwick J. doubted the approach the Full Court (over which he had presided)

had accepted in ***NAEU of 2002 but felt he was required to follow it in NACM v MIMIA*** **[2003] FCA 1554 (2003) 134 FCR 550** . His Honour said:

The Tribunal's decision

16 The Tribunal accepted that the applicant is a citizen of Georgia; that he was the head doctor in the Georgian Border Forces; that, based on the material produced by the applicant, he was in fact falsely accused by corrupt officials of armed robbery, convicted and imprisoned for that offence and that his fear of serious harm if he returned was well-founded.

17 The critical issue, in the Tribunal's opinion, was whether the applicant's fear was based on persecution for a Convention reason. The Tribunal noted that the applicant had said that there were two possible reasons why the false charges were laid against him: firstly, his knowledge of the illegal arms supply by the General and the applicant's intention to inform the President of such wrong doing and; secondly, his having refused certain homosexual overtures by Sadjaia, Secretary General of the Georgian National Security Council, in consequence of which Sadjaia had threatened to destroy him. Addressing the second possible reason first, the Tribunal considered that any revenge taken by Sadjaia would be for personal reasons and not based on a Refugees Convention reason.

18 The Tribunal then considered whether the feared persecution would occur because of the applicant's intention to report on illegal arms sales and whether it could be said that his persecutors would impute a political opinion to the applicant. The Tribunal Member accepted that the applicant had 'close links' with the leader of the People's Party and sympathised with that party's political views. The Tribunal also acknowledged that he may have owed his appointment as Head of Border Forces to his close friendship with that Party's former leader and that two people who, the applicant claims, were instrumental in his appointment, were imprisoned following an assassination attempt on the President in August 1995. However, in respect of his association with those men, the Tribunal considered that, if the applicant was 'tainted' by that association, then action would likely have been taken against him in 1995 and, if such claims were correct, it was not plausible that he would be able to arrange a personal meeting with the President in 1996, as claimed.

19 The Tribunal considered the motivation of General Chkeidze and reached the conclusion that 'the motivation of those who connived to have the applicant framed and convicted was not political in nature'. Any revenge would be taken on the basis that the General's business was threatened by the applicant's intention to disclose these activities to the President. The Tribunal made reference to the applicant's own opinion that, as the Tribunal put it, 'the General realised that his 'business' was under a threat and acted to neutralise the threat posed by the applicant.' The Tribunal found that, whilst the applicant was initially charged with a political offence, this had been quickly replaced by criminal charges and it was clear, in the Tribunal's opinion, that these actions were not a response to any political opinion genuinely attributed to the applicant, but an excuse for his arrest. The Tribunal concluded that, whilst it may be common for 'political' prisoners to be charged with criminal offences, the motivation in this case 'of his persecutors was to protect their criminal business' and not because of any political opinion held by the applicant.

….

22 The Tribunal concluded that the applicant's well-founded fear of harm was not the result of persecution for a Convention reason.

…

30 It seems to me that, despite his careful consideration of the matter, the Tribunal Member overlooked an important issue.

31 It is necessary, in the current cliché, to unpack the proposition that, because the General feared exposure of his alleged criminality, he had false charges lodged and false convictions obtained against the applicant. The General was, as a military officer, unlikely to have laid the false charges himself or to have supervised, either at all or alone, the processes of the criminal justice system attendant upon the manufacture and presentation of false evidence. One or more other persons and, one would infer, publicly employed lawyers and/or police, must have done this. There is no way of knowing, on the material before the Tribunal, whether or not the others (I assume more than one would have been involved) knew that the General's wrongdoing was his real motivation for pursuing the applicant. If they did not know that, it is unlikely that the General would have informed them of that fact. If the General did not so enlighten them, it could be inferred that he would have urged prosecution of the applicant on account of his actual or imputed, political opinions: the applicant was initially prosecuted, in terms, on that account; further, why would the officials otherwise be motivated to harm the applicant by falsehoods? If so, the applicant was clearly a refugee. Likewise, to the extent that the applicant might realistically fear revenge from the sexually rebuffed senior official, after the latter's threat to 'destroy' him, a similar process of unpacking what is clearly implicit in the prospect that that official might cause or help to cause the persecution of the applicant might reveal similar issues not addressed by the Tribunal.

32 Thus, there was implicit in the applicant's story as accepted by the Tribunal a potentially real, substantial basis for a Convention-reason being the cause of the persecution he had faced and feared, which the Tribunal did not address. An assessment should have been made of the probabilities and possibilities of such events having occurred.

…

Imputed political opinion

34 A question also arose as to whether the Tribunal Member had fully comprehended the questions of imputed political opinion raised by his essential acceptance of the applicant's story and whether, in seeking to disclose the General's alleged corrupt arms dealing, the applicant had been or may have been giving expression to an opinion that corrupt official conduct of that kind should not be allowed and should be stamped out. Such an opinion would, in my view, be a political opinion.

35 As counsel for the applicant submitted, a number of cases indicate that, where an applicant reports or seeks to expose corruption by a person in authority and the applicant suffers persecution on this account, the persecution may be for reason of the applicant's political opinion. In the Full Court decision in V v Minister for Immigration & Multicultural Affairs (1999) 92 FCR 355 ('V') at [32], Hill J stated:

> 'The exposure of corruption itself is an act, not a belief. However, it can be the outward manifestation of a belief. The belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion.'

36 In Ramirez v Minister for Immigration & Multicultural Affairs (2000) 176 ALR 514 ('Ramirez') at [41] the Full Court of this Court referred to the above statement of Hill J with approval.

37 In Zheng v Minister for Immigration & Multicultural Affairs [2000] FCA 670 the applicant reported to the authorities the corrupt activities of Mr He, his superior in the Heping District Branch of the government owned Construction Bank of China. Mr He then instigated threats against the applicant's life and fabricated a case of corruption against him. The Tribunal found that the action taken against the applicant by Mr He did not constitute persecution for reasons of political opinion. Merkel J (at [19]) accepted that 'exposure of corruption or whistleblowing can result in persecution by reason of an actual or imputed political opinion', although (at [34]) 'a critical issue will always be whether there is a causal nexus between the actual or perceived political opinion said to have been manifested by the exposure of corruption and the well-founded fear of persecution'. Merkel J referred to a number of Canadian authorities which support the point that in certain circumstances opposition to corrupt or criminal acts of persons in authority may give rise to persecution for reason of political opinion. The cases (discussed at [21] to [28]) are Vassiliev v Minister for Citizenship and Immigration (1997) 131 FTR 128, Klinko v Canada (2000) 184 DLR (4th) 14, and Guzman v Minister for Citizenship and Immigration (1999) 93 ACWS (3d) 733. In C v Minister for Immigration & Multicultural Affairs (1999) 94 FCR 366 the applicant reported
activities concerning the Mafia and corrupt government officials in Colombia to the police, following which he received threats to his life. The Tribunal found that:

> '... the applicant husband is being targeted as an individual because of what he knows, and what he has exposed and what he might expose, and not for reasons of his actual or imputed political opinion.'

38 Wilcox J set aside the Tribunal's decision on the ground that, on the basis of the Tribunal's reasons, it appeared that the Tribunal was not aware that 'resistance to systemic corruption of, or criminality by, government officers might be regarded as a manifestation of political opinion, depending on the circumstances': see [25]. It is implicit in Wilcox J's decision that his Honour accepted that threats experienced by the applicant could be for reasons of political opinion.

39 In Rajaratnam v Minister for Immigration & Multicultural Affairs (2001) 62 ALD 73 at [46] – [48] Finn and Dowsett JJ in the Full Court, in considering a matter where the Tribunal accepted that the applicant had experienced threats from an army officer after making a complaint about him but found that the army officer's motivation in seeking to harm the applicant was not for a Convention reason, observed:

> 'As this court has indicated on several occasions, care needs to be taken when considering whether extortion has been practised upon a person for a convention reason: see, eg, Minister for Immigration and Multicultural Affairs v Sarrazola (1999) 95 FCR 517 ...
>
> In a particular setting, then, extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of convention-related persecutory conduct. For this reason, the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrators interest in the extorted personal or was it convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual

character.'

40 If the applicant was expressing a political opinion against official corruption, then the applicant's fear of being arrested might well be for reasons of such opinion, since the expression of the political opinion and the threat to the General's business were entirely constituted by the same intended actions of the appellant.
41 The Tribunal Member considered that the applicant's attempts to disclose information about the illegal arms trade had not led his persecutors to impute a political opinion to him: their motivation 'was to protect the criminal 'business' '. However, the Tribunal Member's failure to consider whether the General's actions were or might have been a response to both the threat to his illicit business and the applicant's implicit political opinion on that subject, could lead to the conclusion that the Tribunal had not asked itself the correct question or failed to understand that there was an alternative finding available on the evidence: see for example Kalala v Minister for Immigration & Multicultural & Indigenous Affairs [2001] FCA 1594 at [24].
42 The manner in which the Tribunal dealt with the matter is inconsistent with the statement of law of Hill J in V at [32] [see [35] above], referred to with approval by a Full Court in Ramirez. For example, applying the words of Hill J, if the corruption identified by the applicant in relation to General Chkeidze 'is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion'.
43 Counsel for the respondent argued that the Tribunal Member had considered the question of whether the applicant's persecutors had imputed a political opinion to him: the findings of the Tribunal exclude a finding that the applicant's persecutors' actions were motivated by either an actual or imputed political opinion held by the applicant. Counsel denies that, if the General were involved in alleged arms dealing, and had known that he was about to be exposed, this must necessarily mean that his rage would be motivated by the applicant's political opinion. These submissions seem to me to be correct but that does not meet the point based on V. If, as appears to be the case, the Tribunal Member misdirected himself by his evidently inadequate appreciation of the law, and thereby failed to appreciate that inferences that might assist the applicant were open, the error is not cured by an actual failure to draw those inferences: it is still the case that the Tribunal failed to ask itself, in that respect, the right question and, had it done so, a different result might possibly have ensued.
44 On this account also, the applicant is entitled to have the Court intervene.
Persecution and persecutors' motivations
45 If that conclusion is incorrect the case exposes another difficult question. That question relates to the Tribunal's evident understanding of the Convention, so far as it concerned a 'well-founded fear of being persecuted for reasons of ... political opinion'.
46 The Tribunal accepted that:

- 'the applicant was in fact falsely accused, by corrupt officials, of armed robbery and was convicted and sentenced to a term of imprisonment',

- the applicant's 'deprivation of liberty, the mistreatment [i.e. torture] he experienced and the prevention of him [from] securing employment' were within the concept of persecution amounting to 'serious harm' set up by s 91R of the Act,

• ‘the reason for his arrest was because he was preparing to inform the President of corrupt actions of the General’,

• that ‘proposed course of action [by the applicant] was arrived at in consultation with Mr Giorgadze’, the leader of the People’s Party, and

• the appellant has a ‘well-founded fear of persecution in Georgia’.

47 Nevertheless, the Tribunal rejected this claim, on the basis that:

• the motivation of his persecutors was to protect their criminal ‘business’ and not because of any political opinion the applicant had;

• therefore the ‘motivation for [the applicant’s] persecution does not lie in any of the five reasons mentioned in the Convention’.

48 If the matter were free of authority, I would approach this matter in the following way….

49 It is well-settled that it will suffice for a putative refugee to show a ‘real, substantial basis’ [Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559 at 572] for a fear of persecution (even if there is considerably less than a probability of its occurring) where the would-be persecutor is motivated by the actual or imputed political opinion of the claimant.

50 Because this is a sufficient condition of refugee status associated with political opinion, it is often stated, in one form or another, as if it were a necessary condition, usually, answering that test will resolve the issue. I have perpetrated this confusion myself: see NAEU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 259 (‘NAEU’), on which occasion I was joined by Merkel and Conti JJ, and an earlier first instance decision, Jarrin and Ors v Minister for Immigration & Multicultural & Indigenous Affairs [1998] FCA 765. However, on further reflection it seems to me that neither analysis of the text of the Convention nor a consideration of its relevant context compel that conclusion. On the contrary, each tends to the view that, in some cases, although one cannot say that a real and substantial motivation of the persecutor is the claimant’s actual or imputed political opinion, it is enough if the claimant demonstrates that such political opinion is the true cause of his or her predicament, namely unwillingness to return because of the fear of persecution.

The text of the Convention

51 The Convention itself does not say that the feared persecutors must be motivated by anything in relation to the applicant for refugee status, except insofar as motivation of the persecutor might be implicit in the concept of ‘being persecuted’, a matter to which I shall return. Indeed, the Convention does not fasten on qualities of the persecutor at all. On the contrary, it concerns itself with the person who has the fear ‘of being persecuted’. Nor does it expressly require that such person’s fear be conditioned by anything to do with the persecutor’s actual motivation. It is enough that there be a fear that the person concerned will be persecuted for reasons of political opinion. In using the passive voice of the verb ‘to persecute’, it seems to me that the Convention set up a test, conformable with dictionary definitions of ‘persecute’, of being seriously oppressed. That idea is also consistent with the causational expression ‘for reasons of’ (which introduces the Convention-proscribed attributes of the person concerned) being linked to the oppressed condition of that person. Thus, it appears textually to suffice, among other things, if it can reasonably and realistically be said that the putative refugee fears being persecuted because, in fact, he or she holds a political opinion, whether or not the persecutor knows of this.

52 The only textual indication to the contrary is, as indicated, the view that it is inherent in the concept of 'being persecuted' that the persecutor be activated by the reason or motivation that the subject person holds (or a belief that the latter holds) a political opinion, etc. But, as dictionaries confirm, the primary meaning of the verb 'to persecute' is to pursue with injurious or oppressive action. The secondary meaning, it is true, requires also the persecutor's motivation that the persecuted holds an heretical opinion or belief. However, the Convention definition itself expressly deals with the elements of causation ('for reasons of') and of the kinds of persecution that are relevant: it is not necessary to find them in the interstices of the phrase 'being persecuted'. Hence, having regard to the text, even without considering its broader context, the better view appears to be that conscious motivation of the persecutor by any of the Convention-proscribed grounds is not inherent in the phrase '... fear of persecution'.

53 However, in construing international treaties it is mandatory to construe the 'ordinary meaning' of the text in the light of its object and purpose: see Vienna Convention on the Law of Treaties 1969. The contextual considerations support the 'bare' textual analysis offered above.

54 In Minister for Immigration & Multicultural Affairs v Sarrazola [2001] FCA 263, the Full Court (Merkel J, Heerey and Sundberg JJ agreeing) indicated that the major international human rights instruments, the 'International Bill of Rights' as they are often called, were part of the context of the Convention: see also at first instance Sarrazola v Minister for Immigration & Multicultural Affairs (No 3) [2000] FCA 919. It is enough to refer to the Universal Declaration of Human Rights ('UDHR') and the International Covenant on Civil and Political Rights 1966 ('the ICCPR')

The UDHR, adopted by the General Assembly of the United Nations in 1948, proclaimed:

> 'Article 18
>
> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
>
> Article 19
>
> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

55 The ICCPR, adopted in 1966, by the General Assembly, provides:

> 'Article 2
>
> ...
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

...
Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

...
Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

...
Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

56 It is clear enough that, at least for some people in some situations, an Article 19 'opinion' on political matters will also amount to 'thought' and 'belief' within Article 18. Thus, the right to hold a political opinion may well be within the category of rights so highly respected internationally that no derogation may be made from them, even in the circumstances of overwhelming public emergency that Art 4(1) contemplates.
57 The quoted treaty provisions indicate that the ability of people to hold and to express their subjective thoughts, opinions and beliefs was sought to be guaranteed by the international community. As the Preamble to the Refugees Convention puts it, '... the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of [the UN affirmed] fundamental rights and freedoms' (emphasis added). The Preamble as a whole also makes it clear that the aim of the Refugee Convention was international cooperation for the

'protection of refugees'. That is, the focus is on the plight of the refugee, not punishing or even shaming his or her persecutor. If the putative refugee's politically motivated act results in his or her illegitimate oppression, it is of no comfort that the oppressor is not actually motivated by an appreciation of what drives the refugee. Indeed, it would make a mockery of the international human rights guarantees if a person in fear of oppression because he or she has acted or threatened to act on a political conviction could be denied refugee status merely because an official oppressor is motivated by an intention to prevent, or to seek revenge for, the act impelled by the victim's political conviction, but is too distracted or for other reasons fails to appreciate also that the person fearing oppression had been motivated by such conviction, or where the victim's motivation simply does not concern the oppressor. The putative refugee is nevertheless in his or her predicament because of political belief. The only way to avoid (in this case, to have avoided) the persecution would be to deny oneself the expression of the political opinion. But that is to ask of a committed person that he or she deny what accepted notions of human dignity assert need not be denied. Such is exactly what international human rights law seeks to guard against. The right to hold an opinion is nothing if there is no right lawfully to express it, including by acting on it.

58 The Convention is of course not only concerned with political opinion: it also seeks to relieve persecution for reasons of race, religion, nationality and membership of a particular social group. An unwarrantedly narrow view of 'being persecuted' is likely to disadvantage people in relation even to the expression of their natures or innate characteristics, which might be regarded as even more fundamental to human dignity than freedom of thought. See now Appellant S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] HCA 71. Thus any narrow, literalist approach (assuming my preferred literalist analysis to be mistaken) to the notion of being 'persecuted' for reasons of political opinion appears disconsonant with the concerns properly to be imputed, as a matter of interpretation, to the framers of the Convention.

59 From first principles, to borrow and extend an expression from Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex parte Shah [1999] 2 AC 629 per Lord Hoffman at 653: 'persecution = harm + failure of state protection + discrimination'. Discrimination law, both nationally and internationally, treats as uncontroversial the proposition that discrimination may be legally established where either the intent or effect of conduct is discriminatory. Domestically, see for example Disability Discrimination Act 1992 (Cth), s 6.

60 Internationally,

> '[T]he term "discrimination" as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (emphasis added): UN Human Rights Committee, "General Comment No. 18: Non-Discrimination" (1989), at para 7, UN Doc. HRI/Gen/1/Rev.5, Apr 26 2001.'

61 Powerful support for the approach I favour is provided in an erudite judgment given by Messrs RPG Haines QC and DJ Plunkett in a New Zealand case: Refugee Appeal No 72635/01 NZ Refugee Status Appeals Authority (unreported) 6 September 2002 paras 167-176 (available at www.refugee.org.nz). See also (2002) 23 Michigan Journal International

Law 207ff, where Professor Hathaway introduces articles supportive of the analysis that I find persuasive.

62 Here, the 'reason in the mind of the persecutor' and the 'real reason for the persecutory treatment' depends on who is regarded as the persecutor. On the 'unpacking' analysis offered above, the persecutors are or include the legal/police functionaries. Otherwise, the persecutor was the General. No doubt the reason in his mind was to rid himself of or to discredit an informant as to his criminal activity. But were it not for the willingness of State functionaries to pervert State legal processes, the persecution as feared by the applicant could not occur. Hence the 'real reason' still requires that regard be had to those the General managed to influence. And, finally, the 'real reason for the persecutory treatment' might well be thought to be the applicant's expression of a political opinion.

63 The question conventionally asked has been: Is the motivation of the persecutor the actual or perceived political opinion of the claimant? A more practical and properly inclusive question would appear to be: Is it the claimant's actual or perceived political opinion that accounts for the persecution the claimant fears? The latter question includes the former and is a closer paraphrase of the actual Convention language. It also better fastens attention on the necessity, in the interests of the vindication of human dignity, to rescue the claimant from the fearful predicament in which the combination of his/her political opinion (or other Convention protected attribute) and the lack of effective state protection of the right to express such opinion puts him or her.

64 Some caveats may be immediately entered (and experience might well suggest others). It is not in every case where a persecutor is a public official that his or her persecution of the victim has been stimulated by any political opinion held by the latter. An aspect of the present case furnishes an example. If the official whose sexual advances the appellant rebuffed sought revenge on the appellant by entirely private means, nothing in that scenario would indicate or implicate any political opinion on the part of the appellant, who merely expressed a preference, quite private in nature, to reject those advances. Next, there are cases where the logic of the Convention definition, as I suggest it should be understood, should avail a person who has, out of fear, never done anything to express his or her political opinion – a conscientious objector to participation in a war involving war crimes, who would be shot as a mutineer, might be an example, c.f. NAEU supra. In an era when so many claims of refugee status are rejected as factually false, decision-makers can be relied upon to accept such claims as having a 'real, substantial basis' only after considering the extent to which the claims must be taken with a grain of salt.

65 Unfortunately, however, it seems to me that a single judge of this Court cannot give effect to these views. In light of the authority of NAEU, that can only be done at an appellate level by a Full Court. In that case, the other members of the Full Court joined me in saying:

> '...it is not sufficient, as submitted by counsel for the appellant, that the appellant need only establish that there was a fear of harm and a Convention reason (in this case, his political opinion) for that harm to qualify for protection under the Convention. The appellant was also required to establish that his persecutors had actual or imputed knowledge of his political opinion and would exact punishment at least partly because of that political opinion. In Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559, a case involving a fear of persecution because of the respondents membership to a particular social group of Chinese citizens who opposed the government's "one child policy", the following comments were made by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (at 570-71):

"An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A(2) of the Convention. The first respondents claimed before the Tribunal that they feared persecution in the form of punishment for contravening the PRC government's 'one child policy' and for their illegal departures and that such persecution would be inflicted for the Convention reason of 'political opinion' and/or 'membership of a particular social group'.
For the purposes of the Convention, a political opinion need not be an opinion that is actually held by the refugee. It is sufficient for those purposes that such an opinion is imputed to him or her by the persecutor. In Chan Gaudron J said:
'persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief.'
In the same case, McHugh J said that:
'It is irrelevant that the appellant may not have held the opinions attributed to him. What matters is that the authorities identified [Mr Chan] with those opinions and, in consequence, restricted his liberty for a long and indeterminate period.' (emphasis added)

> Counsel for the appellant, correctly in my view, conceded that the act of desertion per se is politically neutral, that is, no inference of any particular political opinion should be drawn from it. Thus, to establish that the appellant was a person to whom Australia owed protection obligations, it was necessary for the appellant to point to evidence that would establish that any punishment for his desertion would be exacted, in part or in whole, because of his political opinion. This required that there be material showing that the Sri Lankan authorities (the alleged persecutors) were aware of the applicant's claimed political opinion or had imputed such an opinion to him. There simply is no evidence to support the existence of such knowledge or imputation.
>
> Counsel for the respondent submitted that Guo does not support the proposition that it is sufficient for protection as a refugee simply to show that there is a real chance that an applicant will be subjected to harm because he or she has broken a law of general application in circumstances where it is not established that the persecutors are aware that he or she has done so for reasons of political opinion (or other Convention related reason).
>
> I agree. The persecution must be "for reasons of" a Convention related ground of persecution. In Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 Brennan CJ (at 233) considered that this excluded persecution that is no more than:

"punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of 'refugee' "

> Dawson J said (at 240):

"The words 'for reasons of' require a causal nexus between actual or perceived membership of a particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group."

Likewise, McHugh J said (at 257):

"When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group."

> In this case, the appellant has failed to establish that there is a nexus between the harm feared and persecution for a Convention reason. There simply is no evidence to support that the authorities would exact punishment for his desertion, in whole or in part, because of his political opinion.'

66 I have suggested that NAEU is in need of reconsideration. Even so, a Full Court would need to be prepared not to give full force and effect to statements, albeit in a different context, by High Court justices that conscious motivation by a persecutor is necessary. In the light of the High Court's recent decision in Appellant S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] HCA 71 however, a reading of the earlier cases confined to their own kinds of factual contexts appears appropriate.

67 The House of Lords has recently adopted an approach that, as it were, comes half-way to what I propose. It might also, as an alternative to my suggested formulation, assist the applicant. Their Lordships expressed the view that the relevant test is what 'operates in the mind of the persecutor' Sepet v Home Secretary [2003] 1 WLR 856 at 871. However, they added an important rider at [23]:

> 'However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. ... But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason. The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason for the persecutory treatment.' (emphasis added)

….

In this context it is relevant to note the dictum in Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 568, per Burchett J (with whom O'Loughlin J) agreed:

Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors."

On the subject of imputed political opinion see ***WAAJ v MIMIA*** **[2002] FCAFC 409.**

The Full Court said:

27…Mr Lindsay took his stand on imputed political opinion. The argument is that the Basij, or the Pasdaran, would conclude that, in having sex with the wife of an officer of the Pasdaran, he was showing defiance of the regime. He said the appellant's reference to "this dirty stain" demonstrates that this was the fear claimed by the appellant. Mr Lindsay cited a statement by Dr Grahl-Madsen quoted in Hathaway, The Law of Refugee Status at 177:

> "If actual or alleged perpetrators of political offences and other persons who for some reason or other have attracted the wrath of public officials are not brought to trial in judicial proceedings but subjected to 'administrative measures' ... it is hardly appropriate to try to distinguish between those who have actually committed a political offence ... and those who are completely innocent ... The same may apply if the courts have lost their independence and are in fact only a prolonged arm of the executive."

28 Mr Lindsay went on:

> "So too if there is repression through abuse of power by an instrumentality of government because of a perceived insult or affront to one of its number, it is submitted that this may ground a claim for qualification as a refugee on the grounds of persecution for a Convention reason."

29 We do not disagree with the view expressed by Dr Grahl-Madsen. However, we do not think it has any application to this case. The appellant did not attribute to any Basij or Pasdaran officer a statement that his adulterous relationship with Nager showed defiance of the regime or subversive intent. Nor was there any other evidence to suggest his relationship would have been so regarded. Adultery is a crime in Iran, as is rape… It may be that the Basij reacted particularly harshly to the appellant's criminal activity because of the effect of his activity upon the honour of an official. But that is not the same thing as imputation of a political opinion.

…

In ***NALZ v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2004] FCAFC 320** (Madgwick J.(dissenting) Emmett and Downes JJ.)

the majority held that persecution claimed as a result of imputed political opinion for selling goods suspected of ending up in the hands of an illegal political organisation and a fear of such persecution unless the applicant refrained from such behaviour so as to avoid persecutory consequencess did not have a Convention nexus. By refraining from or being asked to refrain from such conduct the appellant was not being subject to a threat of persecution for a Convention reason. The Tribunal made no finding that the appellant's selling of generators and other electrical goods to Sri Lankan nationals was behaviour that expressed a political opinion or which identified him as a member of a particular social group. As a consequence, the appellant was not expected to cease behaviour that caused the authorities to impute a political opinion to him or to identify him as a member of a particular social group. At most, he was expected to cease behaviour that

caused the authorities to impute illegal conduct to him. A proper claim for an Australian protection visa is not made out where the applicant is not a member of any protected class but is wrongly suspected of being a member, particularly where the applicant can take steps to avoid that perception by choosing not to trade unlawfully. Nothing in S 395 requires a finding to the contrary. The case was one step removed from S395. It does not contemplate changed behaviour to avoid persecution but to avoid creating a wrongful perception of membership of a protected class. Any fear was not fear of persecution because of membership of a protected class but fear of punishment by the state for dealing with an unlawful organisation.

The dissentient (Madgwick J.) held that the principle in S395 could not be confined to cases of actual as distinct from imputed membership of a Convention class. It was not a case where on the Tribunal's findings, a convincing distinction can be drawn between the applicant's being suspected of crime and having a political opinion imputed to him. The relevant question is whether, if returned to India he would – not could, reasonably could or should – give up an occupation, assumed ex hypothesi to be lawful, that suited him for some other work, in order to avoid imputation of a political opinion and the persecution he fears

Madgwick J. dissenting .

2 The appellant's case before the Tribunal was, as the Tribunal recorded, that 'he is unable or unwilling to return to India as he fears that he will be persecuted because of his suspected involvement with the LTTE'. That is capable of being understood as a claim that the police would impute to him a political opinion that it was right or acceptable to give aid and comfort to the LTTE, as well as that the police would suspect him of doing so, in consequence of which he would suffer persecutory harm.

2…It is important to note, however, that the appellant did not complain only of arrest and detention. He complained of being assaulted on the first two of the three occasions of arrest. On the third occasion he complained of the excessive length of the detention: 'I was kept for three weeks, till my father released me with the help of a politician'. Among his fears for the future, he included: 'I fear to get assaulted and tortured by the police any further'.

Conclusions

4 Despite my first impressions of the matter, it seems to me the submissions of counsel for the appellant must be sustained.

5 Although Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 ('S395') was directly concerned only with 'discreet' homosexuals, the reasoning of the majority judges was clearly expressed in deliberately broader, conceptual terms.

6 McHugh and Kirby JJ said (at 123):

> 'The notion that it is reasonable [emphasis added] for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.
>
> Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. This is the underlying assumption of the rule of law. [emphasis added]
>
> ...
> The Federal Court has recognised that taking steps to hide political opinions and activities is no answer to a claim for refugee status where the applicant claims he or she will be persecuted for those opinions or activities. [Their Honours cited Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132.] But in a series of cases concerned with homosexual applicants, the Federal Court and the Tribunal have assumed, decided or accepted that the capacity [emphasis added] of an applicant to avoid persecutory harm is relevant to whether the applicant faces a real chance of persecution.
>
> ...
> In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.
>
> ...
> Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. Similarly, whether a particular individual has been persecuted in the past usually assists in determining whether that person is likely to be persecuted in the future. But neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. Moreover, helpful as the history of the social group may

be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether this individual applicant has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group".'

7 Gummow and Hayne JJ said (at 131):

'The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how this applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made.
...
If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question.

...
Addressing the question of what an individual is entitled to do (as distinct from what the individual will do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning ... leads to error. It distracts attention from the fundamental question. ... [C]onsidering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution.
...
[The Tribunal] did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution [emphasis added]. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention.'

8 The potential impact of this reasoning is, no doubt, far-reaching. It may well, for example, require reformulation of the notion that, if avoidance of the feared persecution could be achieved by an applicant's internal relocation in his or her country of nationality, than in some circumstances that will disqualify that applicant from refugee status. The test has been stated in this Court as whether relocation would be a 'reasonable' option in all the circumstances: Rhandhawa v Minister for Immigration & Local Government and Ethnic Affairs (1994) 52 FCR 437. A sensibly generous approach to Prof Hathaway's formulation that the internal protection principle applies only to 'persons who can genuinely [as distinct from reasonably] access domestic protection' would appear to produce results little different from application of the Rhandhawa test: see Germov and Motta Refugee Law in Australia, Oxford University Press, 2003 pp 389-398 for a criticism of Rhandhawa made

before the decision in S395 but consistent with the latter case, and offering another means of accommodating the substance of at least some of the concerns underlying the decision in Rhandhawa.

9 What the decision in S395 implicitly does is to refocus attention on the correct, ultimate Convention question: is the putative refugee's fear 'well founded'? That is, is there a 'real chance' in the sense of 'a real substantial basis' for the fear: Chan Yee Kin v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379 at 429, as explained in Minister for Immigration & Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559, 572-3? If there is a real and substantial basis for thinking that an applicant will not alter his/her lawful activities or living patterns and, for a Convention reason, may suffer persecution on that account, he or she will be a refugee. If there is not such a basis, then the contrary conclusion will follow. As it appears to me, with respect, that this is correct in principle, that is an added reason to that discussed at [12] below for reading the observations of four members of the High Court in the way I do, and as not confined to cases of actual as distinct from imputed membership of a Convention class of persons.

10 In the present case, the Tribunal Member said:

> 'I am satisfied that the Applicant can avoid future arrests by not selling electrical goods to Sri Lankan nationals. I am not satisfied that it would be unreasonable for him to avoid arrest by so doing.'

11 The point, however, is what the appellant would lawfully do, not what he could or could reasonably do, although his capacities might well (and, indeed, ordinarily would) bear on the probabilities of what he actually would or would not do.

12 As indicated above, in my opinion, contrary to that of Emmett and Downes JJ, as a matter of principle and as a matter of authority, having regard to the passages cited from S395, the approach taken in S395 cannot be confined to cases of actual as distinct from imputed membership of a Convention class. Suppose a heterosexual man was in the habit of associating with homosexual men and claimed to fear persecution from a homophobic regime because homosexuality would be imputed to him. It is unthinkable, in the light of S395, that the case could correctly be approached by considering whether he could reasonably contain such association in future to 'discreet occasions', let alone refrain from it altogether.

13 The present applicant's case can reasonably be understood as a complaint that, on account of his capacity for selling electrical equipment to Sri Lankan customers and his desire to do so, and as a Tamil, he would be wrongly regarded or suspected of being an active Tamil Tigers supporter, and subjected to harm exceeding that reasonably attending legitimate processes of criminal investigation. In the circumstances he was asserting a claim that he would on his return resume what he claimed was his lawful occupation, that that was one of the factors that would lead to his alleged mis-labelling as a Tamil Tigers supporter and that that, in turn, was a reason why he would be wrongly suspected of criminal activity and abused. This is not a case where, on the Tribunal's findings, a convincing distinction can be drawn between the applicant's being suspected of crime and having a political opinion imputed to him. The relevant question is whether, if returned to India he would – not could, reasonably could or should – give up an occupation, assumed ex hypothesi to be lawful, that suited him for some other work, in order to avoid imputation of a political opinion and the persecution he fears. That question was neither asked nor answered. The Tribunal has, in principle, thereby committed the same kind of error as identified in S395, despite the very different factual setting. The Tribunal Member asked

himself the wrong question and, subject to questions of the operative effect, or lack of it, of such error, thereby committed an error of a jurisdictional kind: S395 at 125-126.
14 But for one matter, it might have been possible to say that such error had no consequence in the case: it was assumed in argument before us that the police were motivated to interfere with the appellant's liberty in the course of investigating the possibility that he was illegally aiding and abetting a proscribed terrorist organisation, the LTTE (or Tamil Tigers as they are commonly known). Such a motivation would surely reflect a legitimate State endeavour: harm legitimately caused in the course of pursuing a bona fide and defensible criminal law process is normally outside the scope of Convention 'persecution': Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 258-259; Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1. However, the appellant did not complain only of the harm necessarily or reasonably implicit in a criminal investigation, such as mere arrest or even short-term detention. He complained of actual past, and feared future, illegitimate maltreatment at the hands of the police consisting of torture and long detention (verging indeed on the indefinite). Where serious harm going beyond acceptable bounds of legitimate criminal prosecution or investigation is caused to an applicant, for a reason caught by the Convention, such will be regarded as persecution: Paramananthan v Minister for Immigration and Multicultural Affairs (1999) 84 FCR 28 at 39-40, 47, 57; Nagaratnam v Minister for Immigration and Multicultural Affairs (1999) 84 FCR 569, 577, 579. See also Applicant A at 258-259. The Tribunal made no findings about the truth of the appellant's past claims in that regard nor the prospect of any repetition of the claimed ill treatment. There is no warrant for us to attempt to supply conclusions on these matters adverse to the appellant. Likewise, although the appellant's story may suggest that he was reasonably suspected of knowingly aiding the LTTE, the Tribunal made no such positive finding and, even if it could be made on the available material (which I doubt), it is not the task of a court engaging in judicial review to make such a finding.
15 It follows that it cannot be said that the jurisdictional error of asking the legally wrong question as to the appellant's claims could not have affected the Tribunal's conclusion…
….
Emmett J. said:

28 The appellant claimed that he was next arrested in August 1999. The appellant states that, at that time, he was engaged in selling electrical goods and he was accused of selling electrical generators to the LTTE, with many of the goods confiscated by the coastal guard. He was detained for one week but was not charged because the police could not prove anything against him and because the manager of the shop where he worked made representations on his behalf.
29 In his written statement, the appellant also states that in January 2000, he supplied 20 generators and other electrical items to a Sri Lankan Tamil customer in Bangalore. The appellant stated further that he was 'not very concerned why these [generators] were bought in large numbers'. Most of the generators were found at the seashore along with arms and ammunitions to be 'transported to Sri Lanka by illegal boat'. In March 2000, the appellant was arrested for the third time. On this occasion, he was arrested in Bombay by CID police officers and was transferred to Madras for questioning. The appellant states that he was assaulted again and was accused of having LTTE dealings and providing arms and ammunitions to the LTTE. He was accused of acting as a middleman between the LTTE and businessmen to whom he supplied electrical equipment.
…

36 In the course of a hearing before the Tribunal, the appellant was asked if he would be safe from harm if he returned to India but refrained from selling electrical goods to Sri Lankan nationals. The appellant responded that that is the work that he likes. He said that extremist groups are banned in India and he could be arrested because attempts had been made to connect him to such groups. He said that because he had already been arrested, he would be a suspect for any other offences.
37…The Tribunal was satisfied that the appellant could avoid future arrests by not selling electrical goods to Sri Lankan nationals. The Tribunal was not satisfied that it would be unreasonable for him to avoid arrest by so doing.
38 Further, the Tribunal was not satisfied that there had been any serious attempts to link the appellant to extremist organisations or that any such links had been made.
….

40 The appellant contends that the Tribunal fell into jurisdictional error in finding that he can avoid further arrests by not selling electrical goods to Sri Lankan nationals. The appellant says that that finding contravenes the principles espoused by the majority of the High Court of Australia in S395/2002.
41 In S395/2002, McHugh and Kirby JJ said (at par [40]) that persecution does not cease to be persecution for the purposes of the Refugees Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. Their Honours also considered (at par [41]) that it would undermine the object of the Refugees Convention if signatory countries required persons holding particular beliefs or opinions or who are members of particular social groups or having particular racial or national origins to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention. Their Honours considered that it is a fallacy, where an applicant for asylum has modified his or her conduct and as a consequence has not been persecuted, to assume that the conduct of the applicant is uninfluenced by the conduct of a persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many cases an applicant acts in the way that he or she does only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm, with its menacing implications, that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly (par [43]).
42 McHugh and Kirby JJ also observed (at par [44]) that, subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. That is the underlying assumption of the rule of law. Their Honours express the view that it is incorrect to say that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm (par [50]).
43 Gummow and Hayne JJ, the other members of the majority in S395/2002, observed that, if an applicant holds political or religious beliefs that are not favoured in the applicant's country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. However, their Honours considered (at par [80]) that it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question.
44 The question to be considered, in assessing whether the applicant's fear of persecution is well-founded is what may happen if the applicant returns to the country of nationality; it is

not whether the applicant could live in that country without attracting adverse consequences (par [80]). Gummow and Hayne JJ considered (at par [82]) that addressing the question of what an individual is entitled to do (as distinct from what the individual will do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make, without entrenching on the right. Their Honours considered that that type of reasoning leads to error, in so far as it distracts attention from the fundamental question.

45 The conduct that was in question in S395/2002 was the pursuit of a homosexual lifestyle by the asylum seeker, who alleged fear of persecution for reasons of membership of a social group identified in terms of sexual identity, namely homosexual men in Bangladesh. Gummow and Hayne JJ said (at par [81]) that sexual identity is not to be understood in that context as confined to engaging in particular sexual acts or to any particular forms of physical conduct. It may extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private may say nothing about how those individuals would chose to live other aspects of their lives that are related to, or informed by, their sexuality.

46 Two factors must be borne in mind in considering whether the rationale in S395/2002 applies equally to this proceeding. First, an assumption that appears to underlie the approach of the majority in S395/2002 is that, wherever the relevant conduct under consideration might occur in Bangladesh, the consequences would be the same. The possibility that, by relocating, the asylum seeker would be able to pursue his lifestyle in another part of the country, without fear of persecutory conduct did not arise. It has long been accepted that, if it is reasonable for an asylum seeker to relocate within his or her country of nationality and, by relocating, avoids the possibility of persecution, Australia will not owe protection obligations to such a person. Requiring an asylum seeker to relocate, in circumstances where it is reasonable to do so, does not involve the asylum seeker modifying beliefs or opinions or hiding membership of a particular social group if such beliefs, opinions or membership is the source of persecution: see SFKB v MIMIA [2004] FCAFC 142 at [12]-[13].

47 Secondly, there was a clear finding in S395/2002 that homosexual men in Bangladesh constituted a particular social group for the purpose of the Refugees Convention. In the present case, there is no suggestion that the appellant fears persecution by reason of any opinion or belief that he holds. Nor is it suggested that he fears persecution by reason of his membership of a particular social group. The appellant was not selling generators because of any political opinion. There has been no suggestion that he is a member of a particular social group. There is no suggestion that any persecutory conduct was for reason of his race, religion or nationality. There was no suggestion that the appellant was selling generators or other electrical goods to Sri Lankans because of any particular political opinion or any belief arising by reason of his race, religion or nationality.

48 There was no suggestion that, if the appellant ceased dealing with Sri Lankans, he would be unable to earn a living as a salesman of generators or other electrical goods. While he is a Muslim, there was no finding by the Tribunal that there was any risk of persecution by reason of that circumstance. While the Tribunal accepted that the appellant feared that he may be harmed because of suspected connections to the LTTE, such a connection would be suspected only because he sold generators to Sri Lankan traders who were suspected of having a connection with the LTTE.

49 The appellant was arrested because of a suspicion that he was supplying generators that were to be used by an illegal organisation or were to be illegally exported. If there was a possibility of persecution, it was because of the insistence of the appellant in supplying generators and other electrical goods to Sri Lankans in circumstances that could give rise to

a suspicion that the goods were to be provided to the LTTE. By refraining from dealing with Sri Lankans in those circumstances, the appellant is not being subjected to a threat of persecution for any Convention reason.
50 The Tribunal made no finding that the appellant's selling of generators and other electrical goods to Sri Lankan nationals was behaviour that expressed a political opinion or which identified him as a member of a particular social group. The most that the appellant said, when asked why he should not stop selling electrical goods to Sri Lankan nationals, was that it was what he liked to do. As a consequence, the appellant is not expected to cease behaviour that caused the authorities to impute a political opinion to him or to identify him as a member of a particular social group. At most, he is expected to cease behaviour that caused the authorities to impute illegal conduct to him.
51 In those circumstances, I do not consider that the Tribunal's decision or its reasons for reaching the decision are inconsistent with the principles espoused by the majority in S395/2002.

Downes J. said:

54 The appellant claims that he has a well-founded fear of being persecuted if he returns to India because he is suspected of having connections with the Liberation Tigers of Tamil Eelam. He does not in fact have any connections with the LTTE. However, he has traded with them or their associates. The Tribunal found that he had been arrested and detained following his selling of electrical goods to Sri Lankan nationals. The Tribunal found that the appellant could avoid future arrest by not selling electrical goods to Sri Lankan nationals. The member continued: "I am not satisfied that it would be unreasonable for him to avoid arrest by so doing".
55 In Appellant S 395 of 2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 McHugh and Kirby JJ said (at 125; par 50): "In so far as decisions in the tribunal and the Federal Court contain statements that asylum-seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed". Gummow and Hayne JJ made similar remarks at 132; par 83.
56 The sole ground of the appellant's present appeal, which has not been raised before, is that the Refugee Review Tribunal erred in refusing to grant a protection visa because the appellant would not be subject to persecution if he refrained from selling electrical goods to Sri Lankan nationals. The appellant needs the leave of the Court to raise this ground.
57 In S 395 the Court was concerned with an expectation that homosexuals required to return to Bangladesh should act discretely and thereby avoid the risk of persecution. This case seems to me to be quite different. First, the appellant does not suggest that he is connected with the LTTE. His fear of persecution is associated with his appearing to be associated with the LTTE because he trades with Sri Lankans. Accordingly, the Tribunal's remarks addressed the question whether the appellant could avoid appearing to be within a class protected by the Refugee Convention and not whether, being a member of such a class, he could nevertheless avoid persecution. The present case is thus one step removed from S 395. It does not contemplate changed behaviour to avoid persecution but to avoid creating a wrongful perception of membership of a protected class. This seems to me to be significant even though perceived membership of a protected class can give rise to persecution (see Minister for Immigration and Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559 at 570 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ). Secondly, the appellant's problems stemmed from his dealings with persons apparently associated with an organisation, which was unlawful in India. The appellant's evidence

suggests that such trade was more profitable than other trade – possibly because of its unlawfulness.
58 It does not seem to me that a proper claim for an Australian protection visa is made out where the applicant is not a member of any protected class but is wrongly suspected of being a member, particularly where the applicant can take steps to avoid that perception by choosing not to trade unlawfully. It does not seem to me that anything in S 395 requires a finding to the contrary.
59 Any fear in the present case is not fear of persecution because of membership of a protected class but fear of punishment by the state for dealing with an unlawful organisation. The Refugee Convention protects persons from persecution for attributes over which they have no real control. Beliefs fall within its purview. Unlawful trading does not.
….

b) Prosecution

It is also important to note that what might otherwise be a non-Convention related prosecution for politically motivated acts might be characterised differently if the anticipated punishment is likely to be excessive, arbitrary or disproportionate (the distinction being between a fear of persecution as compared with a fear of prosecution and punishment) (Welivita v Minister [1996] 989 FCA 1). See also Cabal v MIMA [2000] FCA 1806 at [29][58-9]

In order to come within the terms of the Convention the prosecution would have to be selective on one of the Convention grounds or, for example, a person would have to be punished more harshly for a Convention reason than others convicted of the same offence: see Z v MIMA, Katz J, 11 December 1998; (1998) 90 FCR 51) i.e. that where a law of general application is selectively enforced or punished on the basis of a Convention ground, the application of that law could involve persecution for a Convention reason.

Note the distinction between prosecution pursuant to a law of general application and persecution implictily accepted by the Full Court (Lindgren, Tamberlin, Mansfied JJ.) in De Costa v MIMA [2001] FCA 1632 where the Court said:

11. ..We note in passing that the Tribunal recorded that if it had accepted Mr De Costa's claims and evidence, it would not have considered them to have established a Convention ground. In particular, the Tribunal said it would appear that if the authorities pursued Mr De Costa upon his return to Sri Lanka, they would be doing so by way of a prosecution for an offence under the Prevention of Terrorism Act - a law of general application.

c) Future expression of political opinion

The issue of whether spontaneous voluntary future expression of political opinion could give rise to a Convention claim, in circumstances where an applicant had not come to the attention of the authorities in the past, was dealt with in Omar v MIMA [1999] FCA 1843 per Heerey J. It was held that where the basis for a fear is the likely reaction to future conduct involving expression of political opinion, the fear in question does not come within the Convention (but note Duzkiker v MIMA [2000] FCA 391 at [19]) On appeal to the Full Federal Court (Black C.J.,Ryan & Moore JJ.) this judgment was overturned (Omar v MIMA (2000) 179 ALR 525, 104 FCR 187; 62 ALD 342 [2000] FCA 1430) and by reason of a failure to deal with the issue a breach of s430 was established. The Court stated the issue as, at [11] :

"…a contention that the appellant, if returned to Somalia, would be exposed to a risk of persecution on the basis of his expression of strongly held political views about the clan system, or, alternatively, would be forced to conceal or suppress his political views.

After setting out the factual basis for the claim [15-19] it went on at [24]:

The appellant submitted, however, that possible future conduct, in particular, "spontaneous voluntary future expression of political opinion" may form the basis for a presently existing and well-founded fear of persecution. By the expression we have italicised we took the appellant to include a future expression that was, in reality, insuppressible. The appellant also submitted that the relevant fear could be founded upon a present intention to express, quite voluntarily, a political opinion…

27 We were not referred to any authority which has determined that an asylum seeker can be treated as having a well-founded fear of persecution because that person will or may express political opinions in their country of nationality (exposing them to harm) in circumstances where there has been no finding of any previous expression of those political opinions by the person in that country…"

The Court proceeded to consider the issue of future conduct and English and Australian cases concerning bad faith in the context of sur place claims (e.g.MIMA v Mohammed [2000] FCA 576, (2000) 173 ALR 23, 61 ALD 1, 98 FCR 405) and held that these cases, which it said reflected a common approach to the interpretation of a convention to which Australia and the United Kingdom are both parties, were determinative of the issue for consideration. It went on :

They make it clear that questions such as those that are said to have arisen in the present matter are to be resolved by the practical operation of the words of Article 1A of the Convention. Putting to one side the issue of "bad faith" (which does not arise in this case and as to which differences of opinion have been expressed, particularly concerning the ratio of Somaghi and the related case of Heshmati v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 123), the recent cases in England and in this Court stand for the broader proposition that possible future conduct, including a so-called "spontaneous voluntary expression of political opinion", can provide an acceptable basis for a presently existing and well-founded fear of persecution for a Convention reason. As the judgments point out, claims based upon an asserted present fear consequent upon predicted future conduct will require very close scrutiny. They may well be treated with scepticism and may well fail at more than one critical point. But to accept that is to do no more than recognise the difficulty of the task that often faces those who have to assess a person's claims to be a refugee…42 A determination of issues that involve both the assessment of subjective beliefs and related prediction of future behaviour may well be especially difficult, although assistance may be found, as the cases show, in evidence of past behaviour. As Farquharson LJ observed in Ahmad (see para 29 above) much will depend upon the facts of the case and the evidence of the strength and history of the particular individual's political or religious (or other) conviction. Notions of "reasonableness" have a role to play too, but the proper role of "reasonableness" is, we consider, a role in the process of determining questions of future behaviour. In some cases - and perhaps in many - it may be entirely appropriate to proceed upon the footing that a person will in fact act "reasonably" to avoid harm and will, indeed "reasonably" modify his or her conduct so as to avoid the risk of persecution. Reasonableness may be used in an appropriate way and in appropriate cases to predict what may happen. It is altogether a different matter to work on the assumption that a person with a strongly held religious belief should act "reasonably" and compromise that belief to avoid persecution; such an approach would be quite contrary to the humanitarian objects of the Convention. To this extent we would depart from the primary judge's view that the Tribunal can assume that an applicant for refugee status would, on return to his or her home country, take reasonable steps for his or her own protection. While it may be appropriate to make such an assumption in some cases, it might well involve a breach of the obligation against refoulement to assume so in others. Again, much will depend on the circumstances of the particular case…

The Court said in conclusion on this point that:

45 It follows from what we have said that we disagree with any approach that would necessarily reject the possibility of a well-founded fear of persecution being based upon a future expression of political opinion.

(see also Win v MIMA [2001] FCA 1451 at [15] –[16])

Allsop J. in ***NAHW v MIMIA*** **[2004] FCA 399** held that the Tribunal had fallen into error by expecting some form of modification to the Applicant husband's future conduct by way of expression of political opinion to occur. The difficulty with positing any modification was that the full and unmodified expression of the

husband's political opinion and especially if he wished to go to illegal rallies, may lead him into persecutory contact with the security authorities.whom he feared because of his refusal to become an informer. The Tribunal did not examine the Applicant's position with Appellant S395 in mind; nor did it assess his position by reference to modified or unmodified expression of political opinion in the light of the possibility of encountering further persecution at the hands of the authorities. This is a failure to assess his position on the hypothesis of his conducting himself, as he should be seen to be "entitled" or "free" to do. His Honour said:

3 The appellants are husband and wife. They are citizens of the Ukraine. The Tribunal expressed the view in its reasons that the appellants "impressed as thoroughly genuine young people"; that "neither exaggerated their claims"; and that they "gave their evidence without evasion or equivocation"; that this "evidence was plausible and internally consistent"; and that the Tribunal had no reason to doubt the credibility of the evidence "of either applicant".

…

10 As to the husband's claims, it was clear before me that the appellants' primary concern is their fear of the SBU (the successor organisation in the Ukraine to the KGB). That matter was the focus of the argument before me.

11 The Tribunal accepted the husband's account of his experiences, but concluded:

> ...I am not satisfied that the sum of the Husband's experiences amount to the serious harm and systematic and discriminatory conduct now necessary to qualify as persecution in Australia.

…

18 The serious harm that is referred to by s 91R is that of which the applicant for protection claims to have a well-founded fear. It is not the harm which the applicant says that he has suffered in the past. Of course, as the High Court has stated, the past is very often a helpful guide to the future; but s 91R and Article 1A are directed to the future and the question whether the applicant for protection has a well-founded fear of persecution for a Convention reason should he or she return to the relevant country.

19 The Tribunal, when identifying its task in the early part of its reasons, correctly identified this question. However, when coming to apply the question, the passage referred to at [11] above indicates that the Tribunal looked at the past, said that those past events did not amount to serious harm of a kind "now necessary to qualify as persecution". This is to ignore what the husband said about the future. If all the husband said that he expected in the future was unpleasant, but essentially harmless, police harassment of the kind that happened in early December 2000 there could be little argument with the Tribunal's conclusion as a question of fact. But that is not what he said he feared. He feared (and his fears were found to be subjectively genuine) that the successors to the KGB would take retribution on him. He described those fears: see [13(m)] above. It is hard to see that as other than serious harm conceivably well within s 91R; though, of course, that is a question for the Tribunal.

20 This error in approach, however, might not perhaps be seen as causative of any ultimate error if the Tribunal's third reason recited at [45] of its reasons above is sound: see [14]

above. If one can discount the husband's fear of the SBU recrimination for refusing to become an informer as fear for a non-Convention reason one may, perhaps, set that fear to one side.

21 Section 91R(1)(a) requires that the reason is the essential and significant reason.

…

22 The phrase "for reasons of" was discussed in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225. The phrase connotes a causal nexus between the reason and the fear: see Applicant A at 232-4, 240, 257, 284. The causal nexus is related to the motivation for the infliction of the harm that is feared: Applicant A at 284; and Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, 568.

23 The third reason ascribed by the Tribunal in [45] of its reasons (see [14] above) has its difficulties. The second sentence appears to involve the proposition that because the police do not want to know about the husband's own political opinions then the feared harm for refusing to become an informer is not a Convention reason. That does not follow at all. The SBU's interest in illegal rallies may be because of its interest (as an agent of the government) in the politics at those rallies or merely as a law enforcement agency interested in knowing when the law (in respect of obtaining permission for the rallies or otherwise) might be broken. That enquiry was not made by the Tribunal. The Tribunal appeared to conclude that because the SBU was not interested in the husband's own political opinions, his fear of harm from the SBU could not be for a relevant Convention reason. The husband, however, was arrested because of a connection with his political opinions. His opinion caused him to be at these rallies. His politics and his attendance at rallies of this kind (probably generally illegal) made him a natural object of the major's request. He was being asked to be an informer because he had these opinions which took him to these kinds of rallies.

24 Even if the SBU were only interested in being informed about illegal rallies, that the SBU might take action against the husband for not wishing to become an informer could amount to harm for a Convention reason if he has been picked out as a recruit to be an informer for his political opinions and if he will or may suffer harm because, as someone so chosen and with those opinions, he refuses to co-operate.

25 By positing a conclusion that does not flow from the premise, the Tribunal has failed to consider fully the possible consequences of his refusal of the SBU offer and its relationship, in the sense that I have identified, to the husband's political opinions and the operation of Article 1A of the Convention. In that respect, the Tribunal has not completed its task to address Article 1A.

26 The fourth reason ascribed by the Tribunal in [46] of its reasons (see [14] above) also has its difficulties. As a free-standing group of factual propositions it may be, in a sense, unexceptional. The first sentence of [46] of the Tribunal's reasons, however, gives rise to a difficulty of the kind dealt with by the High Court in Appellant S 395 v Minister for Immigration and Multicultural Affairs [2003] HCA 71; 203 ALR 112. There, at least two, and possibly four, members of the Court appeared to conclude that a well-founded fear of persecution was made out if the claimant would modify his or her behaviour upon return to the country in question by reason of the fear of the threat of harm (even, it would appear, where that modification of conduct would lead to safety from the infliction of harm): Appellant S 395 at [43] and [48]-[50] per McHugh and Kirby JJ, and [78]-[83] per Gummow and Hayne JJ. Certainly, all four members of the majority, focussed upon the testing of the well-founded fear by reference to how each person is "free" to act or is "entitled" to act in the country in question: Appellant S 395[44] and [83]. The standard (domestic or international), by reference to which one is to judge this, was not identified by

their Honours, other than the fact that the standard was not the law or expectations of the country of nationality or its community.
27 The first sentence of [46] of the Tribunal's reasons would lead one to conclude that the Tribunal was expecting the husband to modify his behaviour. The second sentence of [46] would indicate that that is how the husband understood the Tribunal's comment at the hearing. It is unclear whether the balance of [46] is expressed on the premise of some form of modification to the husband's future conduct by way of expression of political opinion. On balance, it would appear that some modification was expected to occur, but not such as to amount to persecution. The difficulty with this positing of any modification is that the full and unmodified expression of the husband's political opinion and especially if he wishes to go to illegal rallies, may lead him into contact, once again, with the SBU. He fears them for his refusal to become an informer. The Tribunal has not examined the husband's position with Appellant S395 in mind; nor has it assessed the husband's position by reference to modified or unmodified expression of political opinion in the light of the possibility of encountering the SBU again.
28 Thus, in my view the Tribunal has not approached the husband's claims completing its jurisdictional task to analyse them according to the Convention. First, it has posited what I think is a non sequitur to conclude that his fear of the SBU is for a non-Convention reason. Secondly, it has failed to assess the husband's position on the hypothesis of his conducting himself, as he should be seen to be "entitled" or "free" to do. Thirdly, it has failed to take into account the consequences of that behaviour (being that which he is "entitled" or "free" to do or even the posited modified behaviour) and its relationship with the conduct or possible future conduct of the SBU.
….

d) Other

Note cases where despite the fact political persons are involved in alleged persecutory activity no Convention nexus is present because of the absence of the requisite motivation (***Buultjens v MIMA*** **[2001] FCA 1058**; ***Peiris v MIMA*** **(1999) 58 ALD 413**)

6. MULTIPLE CAUSES

A secondary issue concerns the circumstances in which persecution can be due to more than one reason, one of which is Convention-related. An example is acts of extortion with a criminal motive which are also due to the national origins of the victim (e.g. ***Chokov v Minister*** **[1999] FCA 823**). The existence of a non Convention-related factor is not necessarily inconsistent with a finding that the reason why the Applicant would suffer harassment was for reasons of political opinion or another Convention reason (see: ***Minister v Sarrazola*** **(1999)166 ALR 641 [1999] FCA 1134** affiming ***Sarrazola v Minister*** **[1999] FCA 101**; ***Jahazi v Minister*****(1995) 61 FCR 293** at 299-300 per French J.(and note the similar comments by the same judge in ***MIMA v Mohammed*** **[2000] FCA 576,(2000) 173 ALR 23** at [43] ; ***Mohamed v Minister*** **(1998) 83 FCR 234**; ***Chokov v Minister*** **[1999] FCA 823; *Thalary v Minister* (1997) 73 FCR 437**; ***Mendis v Minister*** **(2000) 59 ALD 84,[2000] FCA 114**; ***Kanagasabai v MIMA*** **[1999] FCA 205** at [20]; ***Hellman v MIMA*** **(2000) 175 ALR 149, [2000] FCA 645; *Rajaratnam v MIMA* (2000) 62 ALD 73 [2000] FCA 1111** (Moore J.)); ***Ahmed v MIMA*** **[2000] FCA 1571**. (note also ***Gersten v MIMA*** **[2000] FCA 855** at [31-2] concerning, inter alia, causation and the comments of Kirby J in ***Chen Shi Hai v MIMA*** **(2000) 170 ALR 553 74 ALJR 775 [2000] HCA 19** and those of Lord Hoffman in ***Islam*** that it is not necessary that the Convention reason relied upon be the sole reason for the persecution); ***Kathiravelu v MIMA*** **[2000] FCA 1279** at [37] in affirming the decision under review, ***Woen v MIMA*** **[2000] FCA 1912** at [22-3].

In appropriate circumstances it is necessary in order to correctly apply the refugee definition to at least address the question whether the persecution is due to more than one reason, and if so, does one of the reasons have a sufficient Convention nexus.

It should be noted that this requires looking at the nature of the claims made. An error by reason of failure to consider the possibility of multiple causes of harm will not arise where the suggested ground seen in this light does not provide an independent ground of attack on the RRT's decision ***Sowrimuthu v MIMA*** **[2001] FCA 300** at [44]-[45].

7. MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

a) General principles

The High Court case of ***Chen Shi Hai v MIMA*** **(2000) 170 ALR 553 ; 74 ALJR 775** revisited the core issues concerning the elements constituting a particular social group.

The majority judgment (Gleeson CJ, Gaudron, Gummow and Hayne JJ, (Kirby J. wrote a separate and full judgment agreeing with the result and substantially with their reasoning) stated:

> "It was held in Applicant A that the "common thread" which links "persecuted", "for reasons of" and "membership of a particular social group" in the Convention definition of "refugee" dictates that "a shared fear of persecution [is not] sufficient to constitute a particular social group…based on that consideration, it was held in Applicant A that persons who opposed China's "one-child policy" and feared enforced sterilisation did not, on that account, constitute "a particular social group" for the purposes of the Convention…
>
> The question whether "black children" can constitute a social group for the purposes of the Convention arises in a context quite different from that involved in Applicant A. That case was concerned with persons who feared the imposition of sanctions upon them in the event that they contravened China's "one-child policy". In this case, the question is whether children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind. To put the matter in that way indicates that the group constituted by children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear".

The majority stated further [at 19] that

> " Laws of policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - … - cannot properly be described in this way. Further, and notwithstanding what was said by Dawson J. in Applicant A, the fact that laws are of general application is more directly relevant to the question of persecution than to the question whether a person is a member of a particular social group ".

The Court went on hold that the applicant as a "black child" was a member of a particular social group and feared persecution by reason of his belonging to that group. (see also the discussion in Gersten v MIMA [2000] FCA 855 concerning, inter alia, causation and the comments of Kirby J; see also the comments by

Whitlam J. in Osman v MIMA [2000] FCA 1454 at [11] reinforcing the importance of the causative element of the Convention definition)

A subsidiary but important principle affirmed in ***Chen Shi Ha***i was that while the general principle was that an applicant must hold the relevant fear, in the case of an infant or mentally incapable person such fear may be attributed i.e. his parents fears on his behalf are sufficient [at 4, 77] or put in another way the child's fear can be derived from that held by his parents.

A clear and authoritative statement of what is involved in the notion of a "particular social group" was made in MIMA v Zamora (1998) 85 FCR 458. In that case, a Full Court of the Federal Court said at 464:

> "...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."

In Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 the judgments of the majority, Dawson J at 241-242, McHugh J at 263 and 266, and Gummow J at 285-286 establish that a particular social group cannot be defined solely by the persecution that is alleged.

In Harirchi v MIMA [2001] FCA 474 Marshall J. referred extensively to the judgments of Dawson and Mc Hugh JJ.:

10 Mr Ludlow submitted that the RRT failed to consider whether Mr Harirchi was the subject of persecution directed at him by virtue of his membership of a particular social group. The group was described as:

> "very able persons who had political views or affiliations opposed to those of the government of Iran."

11 The difficulty with this submission is that Mr Ludlow did not identify any evidence before the RRT which truly pointed to the existence of such a social group, set apart from

the rest of the community by some characteristic other than the fact of persecution uniting them.

12 What constitutes a "particular social group" for the purposes of the Convention was dealt with by the High Court of Australia in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 ("Applicant A"). Dawson J at 241 referred to "a particular social group" as:

> "a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large".

At 242 his Honour said:

> "...one important limitation which is, I think, obvious is that the characteristic or element that unites the group cannot be a common fear of persecution."

At 263 McHugh J said that:

> "The concept of persecution can have no place in defining the term "a particular social group"."

His Honour added shortly thereafter at 263 that:

> "... persons who seek to fall within the definition of "refugee" in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the "particular social group" of which they claim membership... If it were otherwise Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution."

Further at 264, McHugh J said that:

> "The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the "particular social group" category is the notion of "membership" expressly mentioned. The use of that term in conjunction with "particular social group" connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group."

13 His Honour concluded his discussion of the topic of what constitutes a particular social group at 266 by saying that:

> "It follows that, once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as "a particular social group" for Convention purposes."

In “VAM” v MIMA [2001] FCA 1809 Marshall J. quoting from authority dealt extensively with the general principles of what constiutes a particular social group and persecution by reason of membership of such a group (the group claimed to be ‘former policemen or disgraced policemen’) . He said:

(quoting the proposition in the Tribunal’s reasons:

…The persecution must be feared because of the person's membership or perceived membership of the particular social group: Applicant A per Dawson J (at 240); and Gummow J (at 285) agreeing with the statement of Burchett J in Ram v Minister for Immigratioin & Ethnic Affairs & Anor (1995) 57 FCR 565 at 569:
'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 persectutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group.'
…
Particular Social Group
18 It was contended on behalf of the applicant that

> "...in deciding whether the applicant was a person with a 'well founded fear of being persecuted for reasons of ... membership of a particular social group', the Tribunal failed to consider whether the applicant belonged to a group with a common uniting element - whether attributed to the group by members of the group or by outsiders: see Applicant A v Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225 at 241-242."

19 The applicant submitted that the Tribunal concentrated on the question of whether ex-policemen or disgraced former policemen constituted a 'particular social group'. The applicant submitted this constituted a failure to consider the question whether the "applicant belonged to a group with common uniting elements" by overlooking that the common uniting element of the group referred to by the applicant was the fact that members of the group had given information about Ringo…
20 At the hearing of the matter, counsel for the applicant contended that the Tribunal failed to identify a particular social group as defined by both:
* A shared occupation (The applicant relied on comments by the Full Court in Minister for Immigration & Multicultural Affairs v Zamora (1998) 85 FCR 458 ("Zamora") at 464 to the effect that a shared occupation may in some matters form a "cognisable group in their society"); and
* Particular activity (The applicant relied on comments by Chief Justice Black in Morato v Minister for Immigration and Multicultural Affairs (1992) 39 FCR 401 ("Morato") at 405, where his Honour states: "The doing of an act or acts of a particular character may, in some circumstances and together with other factors, point to the existence of a particular social group....").
21 In response, the respondent contended that the applicant's claim before the tribunal was based on an assertion that he was a member of a particular social group of ex-policemen. The Tribunal considered and rejected this specific claim. The respondent submitted that the applicant's contention before the Court that the applicant was a member of a social group defined by specific actions (namely giving information about Ringo), was not presented to the Tribunal. The respondent submitted that, in any event, such a social group was not a particular social group for the purposes of the Convention in that the only uniting feature of such a group would be a fear of persecution

…

Particular Social Group

25 I do not consider that the Tribunal failed to consider whether the applicant belonged to a group with a 'common uniting element'. The Tribunal considered this issue in some detail (see above at [13]). Not only did the Tribunal reject the proposition that the applicant was a member of a particular social group of former policemen or disgraced policemen, it rejected the view that the applicant was a member of a social group based on ex-policemen targeted for giving information about Ringo. The Tribunal found:

> "If any of the applicant's colleagues are targeted by Ringo or others it would in the Tribunal's view be as a result of their own actions and not because of any group membership. As a result even if the Tribunal is wrong and the applicant is targeted by Ringo it is not because he is a member of any particular social group."

26 However, even if the Tribunal did not specifically consider the group identified by the applicant as being defined by occupation and activity, I do not consider that this constitutes a material and/or a reviewable error in this matter. For reasons expressed below, I agree with the respondent that the group identified by the applicant in this matter does not constitute a 'particular social group' for the purposes of Art 1A(2) of the Convention.

27 The applicant relied on Zamora and Morato to support the claim that the Tribunal should have found the applicant a member of a social group identified by occupation and specific activity (see above at [20]).

28 In Zamora the Full Court makes it clear that only in very exceptional cases will an occupation form the basis for a particular social group. At 464 the Full Court held:

> "... one should be cautious in characterising an occupational group as a particular social group. Quite apart from the risk of using persecution or the fear of persecution as a defining feature, in many cases an occupational group will not satisfy the requirement that it be recognised within the society as a group, even though it may fairly be said that the members of an occupational group have common characteristics not shared by their society. Indeed, members of an occupational group will have characteristics in common simply by reason of the fact that they all follow the same occupation, but this does not of itself make those who follow the same occupation members of a particular social group."

29 Similarly, in Morato, Chief Justice Black warned against defining a particular social group by an act or actions. At 405 his Honour held:

> "It may well be that an act or acts attributed to members of a group that is in truth a particular social group provide the reason for the persecution that members of such a group fear, but there must be a social group sufficiently cognisable as such as to enable it to be said that persecution is feared for reasons of membership of that group.
>
> The need to show that persecution is for reasons of membership of a group, rather than for an act or acts done, tells against the argument that a particular social group may be defined by reference to the sole criterion that its members are all those who have done an act of a particular character...."

30 I recognise that the applicant did not submit that a 'particular social group' should be defined "solely" on occupation or the act of giving information to the authorities about Ringo. Rather, the applicant has urged the Court to find that the Tribunal should have held

that the applicant is a member of a particular social group defined by both occupation and actions.
31 However, even when these factors are combined, it is difficult to see how a group identified as "policemen or ex-policemen who have provided information to the authorities on the criminal activities of Ringo" are united by any feature other than fear of persecution. As Kirby J held in Chen Shi Hai v Minister for Immigration and Multicultural Affairs [2000] HCA 19, (2000) 201 CLR 293 at [67]:

> "The membership of a particular social group must precede the persecution and not solely be the result of it."

32 Identification of a group as being "policemen and ex-policemen who have provided information to the authorities about Ringo" is necessarily defined by reference to alleged persecution by Ringo and/or those who protect or work for him. Any persecution suffered by such a group occurs primarily because of the actions of individuals, not by virtue of being a member of a particular group. I accept the respondent's submission that the only uniting feature of the group would be a fear of persecution, and therefore the group identified by the applicant cannot be considered a 'particular social group' for the purposes of the Convention. (bold added) SEE Full court judgmetn below
33 In addition there was no evidence before the Tribunal that such a group was recognised within Malaysian society as "a group that is set apart from the rest of the community". See Zamora at 464.
34 In any event, I agree with the respondent's submission that the Tribunal's finding that any fear of persecution held by the applicant was not well-founded presents a fundamental hurdle for the applicant…

The Full Court "VAM" v MIMA [2002] FCAFC 125 (Black CJ.Drummond and Kenny JJ.) in affirming the judgment of Marshall J. inter alia quoted [31]-[32] of His Honour's judgment then stated:

11 It may not be right to say that a group constituted of policemen and ex-policemen who have provided information to the authorities about "Ringo" is necessarily defined by a common fear of persecution by "Ringo" and his protectors. The characteristic of being a policeman or an ex-policeman and the further characteristic of being such a person who has provided information to the authorities about "Ringo" might be possessed by a number of people without those two characteristics necessarily attracting persecution by "Ringo" or his protectors. That such persons might be exposed to persecution relevant to a claim to refugee status depends upon "Ringo" possessing sufficient influence with the authorities to persuade them to take action against members of the group or to allow him or his associates to take action against those persons without intervention by the authorities. Being a police or ex-police informant against "Ringo", if capable of setting such persons apart as an identifiable group in society are, in our opinion, separate characteristics from the persecution that was said by the appellant to be attracted to those persons.
12 But the learned primary judge considered that there was another basis for refusing to find error in the Tribunal's conclusion that the appellant was not a member of "a particular social group" within the Convention. His Honour said:

> "33. In addition there was no evidence before the Tribunal that such a group was recognised within Malaysian society as 'a group that is set apart from the rest of the community'. See Zamora at 464."

13 In Minister for Immigration and Multicultural Affairs v Zamora (1998) 85 FCR 458, the Full Court, after observing that the members of the High Court who constituted the majority in Applicant A's case did not adopt an entirely common approach to the issue of what constitutes a particular social group for the purposes of the Refugees' Convention (p 462), analysed the judgments in that case and concluded, at 464:

> "In our view 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; persecution or fear of it cannot be a defining feature of the group. 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."

14 The appellant did not challenge what the learned primary judge had to say about there being no evidence before the Tribunal that the group identified by the appellant by reference to this particular occupation and this particular activity, was recognised within Malaysian society as such a group. It is not surprising that there was no such evidence. All that the members of the group identified by the appellant have in common is that each is a former policeman or disgraced former policeman and each has provided information to the authorities about the gangster "Ringo". It would seem unlikely in the extreme that possession by each of a number of people of those two characteristics could give rise to a perception within Malaysian society that those people were a group set apart, as a social group, from the rest of the community in which they lived.
15 There is therefore no error in the learned primary judge's conclusion that, if the Tribunal's decision was open to judicial review in this Court, there was nevertheless no reviewable error in its refusal to accept that the appellant was a member of "a particular social group" within the meaning of that term in Art 1A(2) of the Convention.

The judgment at first instance in ***SCAL v MIMIA*** **[2003] FCA 548** of von Doussa J. was affirmed by the Full Court (Carr Finn and Sundberg JJ.) in SCAL v MIMIA [2003] FCAFC 301 See CHAPTER 21 LEGISLATIVE CHANGES). The Court also said regarding persecution the source of the applicant's fears :

Common fear of persecution

17 The second ground of appeal is that the primary judge erred in concluding that the re-cast social group comprised the whole community and would include everyone who for one reason or another had a well-founded fear of persecution. It is said that the Tribunal had before it evidence that the social group did not encompass the entire Albanian community, and that the group is limited by factors including geographical location, education and wealth. The primary judge did not so err. In his description of the Code his Honour recorded that with the collapse of communism in Albania the Code "re-emerged and was followed in the northern parts of Albania from which the applicant came". Later in his reasons he said the re-cast social group "embraces everyone in the geographic areas of Albania where the customary law is being applied". After referring to the parts of the Code that were in evidence, his Honour said at [19]:

> "The Kanun is to be treated, at least in the geographical areas from which the applicant comes, as a law or practice of general application. Whilst the whole community may be subject to it, it does not render the whole community a particular social group for the purpose of the definition of 'refugee'."

The appellant treats the "whole community" as meaning the whole Albanian community. However, in context, the primary judge's "whole community" is the community of the area in which the Kanun is applied, namely the northern parts of Albania from which the appellant came. …..

….

19…even assuming the primary judge wrongly described the recast group as one solely united by their fear of persecution, it is unrealistic to accept that the appellant fears persecution because of his membership of a group which adheres to a system of customary law which regulates many aspects of their lives and has a system of punishment for persecutory acts. Plainly he fears persecution either because of his membership of his family or because of a fear of reprisal because his father killed a member of the Laca family. Cf Skenderaj v Secretary of State for the Home Department [2004] 4 All ER 555 at 567-568. If he did not belong to that family, or if his father had not killed the intruder, he would have no fear of persecution. In Applicant A at 285 Gummow J said:

> "However, numerous individuals with similar characteristics or aspirations do not comprise a particular social group of which they are members. I agree with the statement in Ram v Minister for Immigration (1995) 57 FCR 565 at 569:
>
> > 'There must be a common unifying element binding the members together before there is a social group of that kind. 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 Full Court in STYB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 295 (Cooper Marshall and Mansfield JJ.) dismissed the appeal STYB v MIMIA [2004]FCA 705 Selway J.. The Court said approving the reasoning of the primary judge:

9 The RRT was satisfied that the appellant's family was a particular social group under the Convention. However, it found that the motivation of the other family to harm a member of the appellant's family would be revenge for a criminal act. It considered that revenge for a criminal act is not a Convention related reason for harm.

…

12 The RRT found that s 91S prevented the appellant's membership of his family from being used as a basis to bring him within the scope of the Convention, because his fear of persecution is motivated by a non-Convention reason.

…

15 Before the primary judge, the appellant submitted that the particular social group to which he belonged was "persons subject to Kanun (being the relevant customary behaviour practised in northern Albania) or persons subject to a blood feud."
16 His Honour noted that that was not the claim made before the RRT. In response to the submission that the RRT had an obligation to identify the particular social group of relevance to the appellant, his Honour was unable to identify any material before the RRT which showed that "persons subject to the Kanun or persons subject to a blood feud" might make up a particular social group.
17 The primary judge referred to the judgment of the High Court of Australia in Applicant S v Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCA 25; (2004) 206 ALR 242 and in particular to the following passage at [36] in the judgment of Gleeson CJ, Gummow and Kirby JJ.

> 'Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. 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. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.' (citations omitted)

18 His Honour held that there was no material before the RRT to suggest that persons subject to the Kanun or people subject to blood feuds met the three criteria referred to in Applicant S.
…
23 Counsel for the appellant submitted that the claim before the RRT was capable of being based on the wider social group of "those Albanians who are subject to the Kanun of Lek Dukajini and the subject of a blood feud" and that s 91S does not prevent a claim of persecution being made on account of the membership of that wider social group. Counsel contended that the RRT wrongly assumed that the concept of blood feud was family related when it is not so confined.
….
25…In our view, the primary judge correctly observed that no claim was made to the RRT on the basis of the alleged wider social group. We also consider that he was correct in saying that there was no evidence before the RRT which identified the wider group.
26 Before the delegate, the appellant claimed to fear persecution because of his membership of his family. That claim was again made before the RRT by the appellant's advisor. The only blood feud referred to by the appellant before the RRT was the feud between his family and one other family. There was no claim, or evidence to support a claim, that the appellant was at risk because of being subject to the Kanun and subject to a blood feud.
27… there is no claim made by or on behalf of the appellant in any of the material before the RRT that he was at risk because of the application of the Kanun. On the contrary, the claim related only to the possible activities of one family, which was hostile to his family.
…
30 Even if the existence of the suggested wider group was established, it would not constitute a particular social group for the purposes of the Convention. That is because all

members of Northern Albanian society would qualify for membership. Accordingly it would not satisfy the test referred to in Applicant S at [36]; In SCAL v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 301 at [17], a Full Court said:

> "The second ground of appeal is that the primary judge erred in concluding that the re-cast social group comprised the whole community and would include everyone who for one reason or another had a well-founded fear of persecution. It is said that the Tribunal had before it evidence that the social group did not encompass the entire Albanian community, and that the group is limited by factors including geographical location, education and wealth. The primary judge did not so err. In his description of the Code his Honour recorded that with the collapse of communism in Albania the Code "re-emerged and was followed in the northern parts of Albania from which the applicant came". Later in his reasons he said the re-cast social group "embraces everyone in the geographic areas of Albania where the customary law is being applied". After referring to the parts of the Code that were in evidence, his Honour said at [19]:

"The Kanun is to be treated, at least in the geographical areas from which the applicant comes, as a law or practice of general application. Whilst the whole community may be subject to it, it does not render the whole community a particular social group for the purpose of the definition of 'refugee'."

> The appellant treats the "whole community" as meaning the whole Albanian community. However, in context, the primary judge's "whole community" is the community of the area in which the Kanun is applied, namely the northern parts of Albania from which the appellant came. The appellant's submission is based on a misreading of the primary judge's reasons, and must be rejected."

See also STCB v Minister for Immigration and Multicultural and Indigenous Society [2004] FCAFC 266 at [30] to [31].

….

The appeal from STCB v MIMIA [2004] FCA 276 was dismissed in STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 266 (Spender Stone and Bennett JJ. The Court also upheld the finding that the group belonging to Kanun was not a particular social group within established principles:

20 The second ground of review concerns the identification of the group subject to the Kanun as a 'particular social group'. The Tribunal noted that:

> 'The potential social group of Albanian citizens who are subject to 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 good jobs and those who have neither.'

21 The Tribunal did not accept that such a 'heterogenous group of people could sensibly be said to be united, cognisable or distinguished from the rest of Albanian society' and therefore held that they did not meet the requirements for a particular social group within the meaning of the Convention. …

….

23 For this aspect of the definition to apply, there must be a 'particular social group', the applicant must be a member of the relevant group and the applicant must have a well-founded fear of being persecuted for reasons of his or her membership of that group.

24 The principles applicable to the identification of a particular social group have been developed by the High Court in an number of cases and have most recently been expounded in Applicant S v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 242 ('Applicant S'). Those principles, as articulated by Gleeson CJ, Gummow and Kirby JJ at 252, are:

> '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.'

25 In Applicant S, the High Court referred to the view expressed by McHugh J in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 264, that while shared fear of persecution cannot be the defining characteristic of the group, the fact of persecutory conduct 'may serve to identify or even cause the creation of a particular social group'. In their majority judgment in Applicant S, Gleeson CJ, Gummow and Kirby JJ held at 249-250 that, although the way in which the group is perceived by the community in the relevant country may be critical in most but not all cases, evidence as to this factor is not essential. Their Honours explained,

> '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 society.'

26 A claim to be a refugee based on membership of 'a particular social group' involves a claim that one has a well-founded fear of persecution for that reason. This raises the question whether it is necessary for the persecutor, at least, to perceive the group as a particular social group otherwise it might be thought there would be no basis for the claim that the putative refugee was targeted for reasons of his or her membership of that group.

27 In Applicant S however, McHugh J expressed the view, at 258-259, that it was not necessary even for the persecutor to have this perception:

> 'A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable – at least objectively – as a particular social group. The phrase "persecuted for reasons of ... membership" implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals. But it does not follow that the persecutor or anyone else in the society must perceive the group as "a particular social group".'

28 His Honour emphasised that the group must be a 'social' group and it must be a 'particular' social group and pointed out that not every demographic division in of the relevant society will meet these criteria. McHugh J continued at 259-260:

> ‘A demographic division of persons may constitute a group because, for statistical or recording purposes, those persons may be properly classified or considered together. Nevertheless, such a group of persons is not necessarily "a particular social group" within the meaning of Art 1A(2) of the Convention. Many demographic groups may constitute "a particular social group" for the purposes of the Convention. Aged persons, for example, are a demographic division and in many – probably most – societies are also generally regarded as a particular social group. However, that is because aged persons are perceived both within those societies and by those living outside those societies as having a recognisable and independent social presence.
>
> ...
> A "particular social group" may exist although it is not recognised or perceived as such by the society in which it exists. For example, those who form the "particular social group" may be perceived by the society in which the group exists as aberrant individuals and may even be described by a particular name, yet the society may not perceive these individuals as constituting a particular group. Nevertheless, those living outside that society may easily recognise the individuals concerned as comprising a particular social group.’

As an example, his Honour mentioned homosexuals in Bangladesh as a particular social group that is not recognised as such in the society in which it exists.

29 The above comments are, of course, directed to situations where there is no evidence of the relevant group being perceived by the society as a particular social group. Where there is evidence of such a perception his Honour accepted that it is ‘usually compelling evidence that the relevant group is "a particular social group" in that country’; at 259. It is on this basis that the appellant submits that it was a jurisdictional error for the Tribunal to reject the claimed group as a particular social group without considering whether it was recognised as such by the greater Albanian community.

30 As noted at [9] above, the Tribunal dismissed the appellant’s claim on the basis that Albanian citizens subject to the Kanun could not be ‘united, cognisable or distinguished from the rest of Albanian society’. The Tribunal stated this conclusion following a lengthy quotation from the reasons of von Doussa J in SCAL and clearly intended to apply the same approach as his Honour; see [13] above. We see no error in the Tribunal’s conclusion however other observations made by the Tribunal require comment.

31 The Tribunal said that the potential social group,

> ‘includes men, women and children 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.’

Although we agree that, in this case, that group is not distinguishable as a particular social group, it is not the presence of diversity that leads to this conclusion. Rather it is the absence of a common element that unites individuals and makes them a cognisable group within their society, and a target for persecution, that is the disqualifying factor. Left-handed people might also be wealthy or poor, rural or urban, well-educated or illiterate but if they are targeted for persecution because they are left-handed they may well become recognisable as a particular social group in their society; see Applicant A at 264. Von Doussa J’s comment in SCAL at [21] is equally applicable here:

> ‘The only particular social group that can be sensibly defined so as to include a common characteristic or element that is not the fear of persecution is the particular family group, that is the group whose members become subject to the risk of

> revenge because one of their number killed a member of another family. ...it was, in the circumstances of this case, the proper description of the particular social group to which the applicant belonged.'

32 That being so, the Tribunal did not err in failing to take into account the subjective perceptions of the Albanian community. In the absence of the common element that would make the group a cognisable group within Albanian society there was no occasion for the Tribunal to consider the issue.

Able-bodied Afghan males as a particular social group: see Applicant Z v MIMA [2001] FCA 881contra Mahmoodi v MIMA [2001] FCA 1090 at [4]-[8] [12]-[13] and the rejoinder by Carr J. in Applicant M v MIMA [2001] FCA 1412 at [65]-[69] overturned by MIMA v Applicant M [2002] FCAFC 253 ; Applicant S v MIMA [2001] FCA 1411 overturned by MIMA v Applicant S [2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256) (by a majority) judgment of High Court appeal allowed in ***Applicant S v MIMA*** **[2004] HCA 25 (2004) 206 ALR 242 77 ALD 541 78 ALJR 854** (note Applicant Z v MIMA [2001] FCA 881 overturned by MIMA v Applicant Z [2001] FCA 1823; ;(2001) 116 FCR 36)

The Full Court in MIMA v Applicant Z [2001] FCA 1823 ; ;(2001) 116 FCR 36 allowed an appeal from the judgment of Carr J. [2001] FCA 881 (see above).

Sackville J. said:

9 Kiefel J has explained that the characteristic or element which unites a "particular social group" in the Convention sense cannot be a fear of persecution: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, at 242, per Dawson J; at 263, per McHugh J; at 285-286 per Gummow J; Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, at 299, per Gleeson, Gaudron, Gummow and Hayne JJ; Islam v Secretary of State for the Home Department [1999] 2 AC 629, at 639-640, per Lord Steyn; at 656, per Lord Hope; at 662, per Lord Millett.

10 The respondent's contention, accepted by the primary Judge, was that the material before the Tribunal was capable of supporting a finding that all able-bodied Afghan men constituted a "particular social group". It is not apparent why the limited material before the Tribunal can be said to have raised a question as to whether the respondent was a member of a particular social group defined as "able-bodied Afghan men". If the material suggested that the applicant belonged to any social group at all, it might be thought that the group would be defined as "Afghan men who fear being forcibly conscripted by the Taliban to fight the Taliban's enemies". Of course, the difficulty with a social group identified in these terms is that it incorporates a fear of persecution as an element in the definition, a course inconsistent with Applicant A. On one view, the reference to "able-bodied" Afghan men, in the respondent's formulation of the "particular social group", is merely a euphemism for Afghan men at risk of forcible conscription by the Taliban. If the respondent's definition of

the group is to be seen in this way, it does not avoid the difficulties created by the decision in Applicant A.

11 Even if the particular social group identified by the respondent is taken not to incorporate a fear of persecution as part of the definition, there is nonetheless, in my view, an insuperable obstacle facing the respondent. There was simply no material before the Tribunal that would have justified it in finding that Afghan society, or some clearly identifiable section of it, perceived "able-bodied Afghan men" as a distinct social unit. As McHugh J observed in Applicant A (at 264), the existence of a particular social group

> "depends, in most, perhaps all cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group."

The only relevant material before the Tribunal was to the effect that forcible recruitment by the Taliban took place from time to time and that potential victims of such recruitment sought to avoid the Taliban's recruiters.

12 It is true that McHugh J in Applicant A accepted (at 264) that

> "while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed could create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group".

See also Chen v Minister at 302; Islam v Home Department, at 645, per Lord Steyn.

13 There was, however, nothing before the Tribunal that would have justified it in concluding that the forcible recruitment of some able-bodied men in Afghanistan had created a "public perception" that able-bodied Afghan men had become a distinct social group in that country. There was, for example, nothing to indicate institutionalised discrimination against able-bodied Afghan men independently of forcible conscription. It was evidence of institutionalised discrimination of this kind that influenced the majority of the House of Lords in Islam to hold that women in Pakistan could constitute a particular social group for Convention purposes: see at 644, per Lord Steyn; at 635, per Lord Hoffman; at 658, per Lord Hope.

14 In substance, the respondent in the present case faces the same dilemma as confronted the appellants in Applicant A. McHugh J approached that case on the basis that the Tribunal had identified two separate social groups of which the appellants were members: first, "those who, having only one child...do not accept the limitations placed on them [by the Chinese authorities]" and, secondly, "those who, having only one child...are coerced into being sterilised by the officials of their area of local government". His Honour held that the second group had been impermissibly defined by reference to persecutory conduct

and, for that reason, the appellants could not rely on it as a "particular social group". His Honour also held that the appellants could not rely on the first group identified by the Tribunal, because there had been no evidence upon which the Tribunal could have found that it satisfied the requirements of a "particular social group" for Convention purposes.
15 This conclusion does not necessarily imply that "able-bodied men" within a country can never constitute a "particular social group" for Convention purposes. There may be a question as to whether all the reasoning of the majority in Islam will be followed in Australia: see the analysis in the dissenting judgment of Hill J in Minister for Immigration and Multicultural Affairs v Khawar (2000) 101 FCR 501, at 513-518 (judgment is reserved on the appeal to the High Court: S128/2001, heard 13 November 2001). But if the reasoning in Islam were to be followed, it is conceivable, depending on the circumstances of a given country, that able-bodied men could be found to constitute a "particular social group". In Islam, women in Pakistan were held to constitute a particular social group because, as Lord Steyn said (at 644):

> "they are discriminated against and as a group they are unprotected by the 'State'".

Islam decided that the size of a group was not a barrier to its being recognised as a particular social group for Convention purposes, provided that members of the group were discriminated against by reason of a shared characteristic (not being the fear of persecution itself). It was also held not to be a barrier that the group was not "homogeneous and cohesive": see at 640-643, per Lord Steyn. If able-bodied men were discriminated against and unprotected by the State, they might perhaps satisfy the criteria laid down in Islam.

Kiefel J. stated:

17 This appeal raises the question whether the fear, on the part of able-bodied young Afghan male persons, of forcible conscription by the Taliban, can amount to a fear of persecution for reasons recognised by the definition of "refugee" in Article 1A(2)…
In Applicant M vMIMA [2001] FCA 1412). [Carr J.] expressed the opinion that "able-bodied males" could describe a social group. It did not matter that it encompassed a major section of the community. A contrary opinion has been expressed by Tamberlin J in Mahmoodi v Minister for Immigration and Multicultural Affairs [2001] FCA 1090, [7], his Honour there holding that there is "no common, unifying element" in the class contended for apart from having a sound body and being male. In his Honour's view it would encompass a major section of the community and it was a transient or fortuitous description which was inappropriate to define a relevant group for Convention purposes.
…

25…The question, then, is whether a general policy of recruitment directed at young able-bodied Afghan males can amount to persecution within the Convention definition. In the Minister's submission it cannot for the reasons that persecution cannot itself define a group; and "able-bodied Afghan males" does not refer to a recognisable social group in the sense referred to in Applicant A v Minister for Immigration and Multicultural Affairs (1997) 190 CLR 225 and Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565.
26 The phrase in the Convention definition of "refugee", namely "a well-founded fear of being persecuted for reasons of ... membership of a particular social group" is a "compound conception": per McHugh J in Applicant A (at 256). His Honour observed that:

> "It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations."

27 As Dawson J pointed out in the same case (at 240), there must be a causal nexus between actual or perceived membership of a particular social group and a well-founded fear of persecution. His Honour (at 242) quoted with approval the judgment of Burchett J in Ram (at 568) where his Honour described the "common thread" which links the expressions "persecuted", "for reasons of", and "membership of a particular social group" as:

> "a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of' and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group."

28 In the view of Dawson J an important limitation, however, is that the characteristic or element which unites the group cannot be a fear of persecution. As his Honour said (at 242):

> "There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)' [Chan v Canada [1993] 3 FC 675 at 692-693, per Heald JA.]."

(See also per McHugh J at 263 and 266.)

29 McHugh J in Applicant A (at 264) observed that, whilst persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or create a "particular social group". Much would depend upon whether they became recognisable in the society as such a group. The example given by his Honour was left-handed persons, which one would not usually think of as forming a social group. If they were persecuted for being left-handed there would be a public perception that they were. Importantly, however "it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group" (McHugh J at 264).

30 The critical feature of a social group which might be seen as persecuted is some shared attribute. McHugh J (at 264) referred to the group comprising a "social unit" which had "internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals". It was however unlikely, in his Honour's view, "that a collection of individuals will or can be perceived as being a particular social group". Gummow J (at 284-285) expressed a similar view. The emphasis, his Honour explained, is upon a "particular social group" and therefore "numerous individuals with similar characteristics" do not comprise such a group. His Honour agreed with the statement in Ram (at 569) that:

> "There must be a common unifying element binding the members together before there is a social group of that kind. 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."

31 Whether one speaks of the Taliban recruiting or conscripting it is plain from the reasoning of Dawson and McHugh JJ in Applicant A, and perhaps Gummow J (see at 284), that such an action cannot define the group. In my respectful view the group to which his Honour the primary Judge must be taken to refer was able-bodied Afghan males who

feared conscription or recruitment by the Taliban, or sought to avoid it. If one reduces the description of the group to "able-bodied Afghan males" the difficulty encountered is that they share no common attribute which links them and sets them apart from society as a recognisable group. As Tamberlin J pointed out in Mahmoodi (at [7]) the description is simply of characteristics based on gender or health or fitness, and I would respectfully agree. The description is of a collection of individuals with those characteristics. Members of Afghan society are likely to be aware of the Taliban's policy and some may take action to prevent its success, but awareness of the fact of recruitment or conscription does not in my view amount to a public perception of there being a social group comprising young Afghan males.

Hely J. agreed with both judges.

An appeal from ***Applicant S v MIMA*** **[2001] FCA 1411** was allowed by the Full Court in ***MIMA v Applicant S*** **[2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256**) (by a majority)

The High Court (Gleeson CJ. Mc Hugh Gummow Kirby and Callinan JJ. in ***Applicant S v MIMA*** **[2004] HCA 25 (2004) 206 ALR 242 77 ALD 541 78 ALJR 854** allowed the appeal from ***MIMA v Applicant S*** **[2002] FCAFC 244 (2002) 70 ALD 354 (2002) 124 FCR 256**) (by a majority) and in dismissing the appeal to the Full Court restored the orders of Carr J. setting aside the decision of the RRT. The majority judgments emphasised the general principle is not that a particular social group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of society. Its possession of a common attribute or characteristic must distinguish the group from society at large (at [36] per Gleeson CJ. Gummow and Kirby JJ. It is not necessary that the society in which the group exists must recognise the group as a group that is set apart from the rest of the community (at [67]) per Mc Hugh J.The Court upheld the submission that Afghan society's perceptions of whether there is a particular social group is relevant to the question of whether there is such a particular social group, but it is not a requirement The Tribunal failed to consider the correct issue which was whether because of legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society. Gleeson CJ Gummow and Kirby JJ. said:

1. This appeal turns upon the provisions of the Migration Act 1958 (Cth) ("the Act") respecting the issue of protection visas. It is common ground that the appeal is to be

determined by reference to the legislation as it stood before the commencement of the Migration Legislation Amendment Act (No 6) 2001 (Cth).
…
5.The issues in this appeal raise two questions respecting the construction and application of the Convention definition. First, the criteria to be applied in order to determine whether the appellant was a member of a particular social group; and, secondly, whether the appellant could be considered to have a well-founded fear of being persecuted. The second question was raised for the first time by the Minister before this Court.

Both questions, but particularly the first, involve consideration of what was decided in earlier decisions of this Court and the grounds for those decisions. The cases are Applicant A v Minister for Immigration and Ethnic Affairs[1], Chen Shi Hai v Minister for Immigration and Multicultural Affairs[2], Minister for Immigration and Multicultural Affairs v Yusuf[3] and Minister for Immigration and Multicultural Affairs v Khawar[4]…
…
9 Both the Minister's delegate and the Tribunal accepted that the appellant's reason for leaving Afghanistan was to avoid the Taliban who were recruiting for military service. The Taliban had tried twice forcibly to recruit the appellant. On the first occasion, the appellant avoided recruitment by paying off the recruiters. On the second occasion, the appellant told the recruiters that he needed to speak to his parents. He then departed immediately from Afghanistan with the assistance of a people smuggler.
10 Although not dealing expressly with whether the appellant had a well-founded fear of persecution, the Tribunal did find that the appellant "may face serious harm" as a result of conscription (it was also accepted that the appellant had a well-founded fear of harm)….
11 The Tribunal accepted that many young men in Afghanistan had been recruited by the Taliban. The Taliban practised ad hoc, random, forcible recruitment of young men, where the only apparent criterion for recruitment was that the young men be able-bodied. This was borne out by both the country information accepted by the Tribunal and the fact that the appellant's brother was not recruited because he was not able-bodied. The Tribunal also noted that thousands of young men had left Afghanistan to avoid recruitment by the Taliban.
12 The Tribunal's reasons for rejecting the appellant's claim appear from the following passage[6]:

> "The nature of the recruitment process is such that there are no criteria for selection save being able-bodied and, being in the wrong place at the wrong time.
>
> By his own account he was approached in an ad hoc recruitment drive and, I also find that the recruiters in that exercise were not seriously concerned whether he did fight or not as they were equally content with being paid to allow him to avoid the recruitment drive.
>
> When the second group came they took no action when he said he wanted to speak to his parents first and indicated that he may also pay them.
>
> Given the Taliban's rigid approach to compliance this action leads me to conclude they were not concerned about the Applicant who had no skills or any significant value to them apart from his youth and the fact he was able-bodied. No immediate follow-up occurred and he was not required to report to them.
>
> This leads me to conclude that he was not targeted to the extent that he was listed or registered for recruitment by the Taliban but was merely seen as a young man who

was available in that area at that time and, in the random manner of such an ad hoc drive he was able to avoid recruitment for a second time." (emphasis added)

13 The key to this passage is in the final paragraph, which discloses the Tribunal's conclusion that the appellant was not targeted by reasons of any political opinion or religious beliefs (ie, he was not "listed or registered for recruitment"). On review by the Federal Court[7], Carr J (with respect, correctly) understood the reasons to indicate that the Tribunal had not considered whether the appellant was a member of a "particular social group"[8], and whether he was persecuted by reason of his membership of that group[9]. His Honour said that the facts presented the potential for such a case, and thus the Tribunal should have considered whether able-bodied young men (or possibly able-bodied young men without the financial means to buy-off the conscriptors) comprised a particular social group within the meaning of the Convention[10]. Accordingly, Carr J ordered that the Tribunal's decision be set aside and the matter be remitted to it for redetermination according to law[11].

14 The Minister appealed to the Full Court of the Federal Court (Whitlam and Stone JJ; North J dissenting)[12] which allowed the appeal. Stone J, with whom Whitlam J agreed[13], concluded[14]:

> "In this case, however (unlike the position in Khawar), I can find no trace of any evidence before the Tribunal that would support a claim that Afghan society perceived young able-bodied men as comprising a separate group either as a result of the Taliban's recruitment process or for any other reason. In my view there is nothing to distinguish this case from that considered by the Full Court in [Minister for Immigration and Multicultural Affairs v] Applicant Z." (emphasis added)

15 In Applicant Z[15], the Full Court (Sackville, Kiefel and Hely JJ) was concerned with an Afghan applicant in a position substantially the same as that of the appellant in this case. Sackville J identified as an "insuperable obstacle" the absence of material before the Tribunal that would have justified it in finding that Afghan society, or some clearly identifiable section of it, perceived "able-bodied Afghan men" as a distinct social unit[16].

16 The appellant's primary ground of appeal in this Court is that the majority of the Full Court erred in requiring that there be evidence that Afghan society perceived young able-bodied men to comprise a particular social group, before the Tribunal was obliged to consider whether the appellant was a member of that group. The appellant contended that Afghan society's perceptions of whether there is a particular social group is relevant to the question of whether there is such a particular social group, but it is not a requirement. That submission should be upheld. We turn to indicate why this is so.

Perception of "particular social group"

17 The requirement that Afghan society must perceive young able-bodied men as comprising a particular social group is derived from the reasoning in an earlier unanimous decision of the Full Court of the Federal Court in Minister for Immigration and Multicultural Affairs v Zamora[17]. That case concerned a protection visa applicant from Ecuador who sought protection in Australia on the basis of harassment (including both threats and physical and sexual assault) suffered by her at the hands of criminal gangs in Quito, the capital of Ecuador. The Full Court (Black CJ, Branson and Finkelstein JJ) affirmed the decision of the Tribunal denying the protection visa application. The applicant had claimed that it was a common experience for criminal gangs to attempt to recruit tourist guides to help steal from tourists. After discussing the various reasonings adopted by the members of this Court in Applicant A, their Honours stated[18]:

> "In our view 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; persecution or fear of it cannot be a defining feature of the group. 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."

18 The second and third propositions appear to require an objective and then subjective assessment of the position of the group within the community. The third proposition is subjective in that it relies upon recognition by, or the perceptions of, the rest of the community.

19. The "third proposition" outlined by the Full Court in Zamora, and the subsequent holding in Applicant Z, reflects an understanding in the Full Court of remarks by McHugh J in his judgment in Applicant A. Accordingly, it is necessary to turn to that case.

Applicant A

20 The applicants in Applicant A, a married couple, arrived in Australia in 1993 and their child was born shortly thereafter. They claimed refugee status on the basis that, if they were returned to their country of nationality, China, they would face enforcement of the "one child policy" by sterilisation. They argued that this amounted to a fear of persecution by reason of membership of a particular social group, namely, persons desiring to be parents of more than one child.

21… The Full Court had treated the issue respecting the "one child policy" as posing a question of law of the construction of the expression "membership of a particlar social group" in the Convention definition[21] and this Court proceeded on the same basis.

22 A majority of this Court accepted what became the "first proposition" in Zamora, that a "particular social group" must be identifiable by a characteristic or attribute common to all members of the group, but that characteristic cannot be the fear of persecution itself[22]. This proposition can be split into two parts. The first part amounts to a general principle that there must be a common characteristic or attribute and the second part can be characterised as a limitation on the general principle. The limitation was explained by McHugh J as follows[23]:

> "[P]ersons who seek to fall within the definition of 'refugee' in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the 'particular social group' of which they claim membership. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution." (footnote omitted) (emphasis added)

The apparent circularity in the emphasised passage was further considered by Dawson J[24]:

> "There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the

statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)'." (footnote omitted)

It is worth noting that the limitation later was accepted and applied by the House of Lords in R v Immigration Appeal Tribunal; Ex parte Shah[25].

23 In Applicant A, after expressing the general principle and limitation, McHugh J went on[26]:

"Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."

It will be convenient later in these reasons to return to consider the example of left-handed men. McHugh J continued[27]:

"The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group." (italicised emphasis in original, bold emphasis added)

24 It was from this passage that the Full Court in Zamora extracted the third proposition to which reference has been made.

25 Two propositions are to be taken from McHugh J's remarks. First, in some circumstances it is possible for a particular social group to be created by the persecutory conduct such that it can no longer be said that the group is "defined" by the persecutory conduct. His Honour expressed this in a temporal sense. Secondly, given that the actions of the persecutors may identify or even create the group, what may be critical in most, and perhaps all, cases is the perception of the group by others ("external perceptions"). This is further explained by the example that if the group is perceived by the community in the relevant country as a particular social group, then usually, but not always, the particular social group can be taken to have been created.

26 By contrast, Brennan CJ (dissenting as to the outcome) and Dawson J appear to express a similar principle by construing the phrase "particular social group". After construing a "particular group" as a group identifiable by any characteristic common to the members of the group (ie, the general principle referred to above), Brennan CJ said[28]:

"[A] 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large". (emphasis added)

In the same vein, Dawson J stated[29]:

> "The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society." (footnote omitted) (emphasis added)

Kirby J made a similar point in Applicant A by pointing out that the text, its history and the many "groups" recognised as falling within the Convention in this and other countries denied any suggestion that there must be "an associational participation or even consciousness of such group membership"[30] 1997) 190 CLR 225 at 309.

27 Putting these statements together with the second proposition stated by McHugh J, it is apparent that his Honour was adopting no different approach to the Convention definition to that adopted by Brennan CJ and Dawson J, albeit expressing it in other terms. His Honour was expanding on the requirement that the existence of a particular social group requires that the group be distinguished or set apart from society at large. One way in which this 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.

Khawar

28 Another way of expressing the same principle, or the application of the same principle, is illustrated by a reading of Khawar[31] (2002) 210 CLR 1. The first respondent in that case, a married Pakistani woman, claimed to have suffered persecution by reason of her membership of the particular social group comprising married Pakistani women (other formulations were also offered). The persecution claimed was the failure of the Pakistani authorities to protect her from violence committed against her by her husband.

29 …The Minister in this Court submitted that the withholding of police protection to Mrs Khawar, as mere inactivity, could not itself amount to persecution, whatever the definition of the social group in Pakistan to which she belonged[32] [32] (2002) 210 CLR 1 at 3-4. That argument was not accepted. The outcome was that the matter was sent back to the Tribunal for the making of further findings[33] (2002) 210 CLR 1 at 14 [36], 29 [88], 44 [131

30 On first blush, the claimed particular social group in Khawar appears to be defined solely by reference to the persecutory conduct (ie, the failure of the Pakistani authorities to enforce the criminal law). However, a majority of the Court (Gleeson CJ, McHugh, Gummow and Kirby JJ; Callinan J dissenting) concluded that it would be open to the Tribunal to find that the first respondent was a member of a particular social group[34] (2002) 210 CLR 1 at 13 [32], 28 [83], 43 [127]. After acknowledging the limitation accepted by the majority of the Court in Applicant A, McHugh and Gummow JJ emphasised the operation of cultural, social, religious and legal factors, rather than any perceptions held by the community, as determining that married Pakistani women were a group that was distinguished or set apart from the rest of the community[35] The House of Lords in Shah were explicit, referring to the "institutionalised discrimination" of women in Pakistan: [1999] 2 AC 629 at 645 per Lord Steyn, 635 per Lord Hoffmann, 658 per Lord Hope. In other words, their Lordships concluded that, viewed from an objective perspective, discrimination against the social group appeared to be culturally and socially acceptable. Their Honours said[36] (2002) 210 CLR 1 at 28 [83]; see also at 44 [130] per Kirby J.

:

> "Those considerations [ie, the limitation] do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group." (emphasis added)

Left-handed men

31 The example of left-handed men given by McHugh J in Applicant A[37] (1997) 190 CLR 225 at 264.
indicates how it is possible that over time, due to the operation of social and legal factors prevailing in the community, persons with such a characteristic may be considered to hold a certain position in that community (his Honour's first proposition). Left-handed men share a common attribute (ie, they are left- handed), but, ordinarily, there is nothing to separate or to distinguish them from the rest of the community. However, to expand on his Honour's example, if the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.
32 The decision in Chen[38] (2000) 201 CLR 293 may also be understood in this way. Gleeson CJ, Gaudron, Gummow and Hayne JJ concluded that children born in contravention of China's "one child policy" could constitute a group defined other than by reference to the discriminatory treatment or persecution they feared[39] (2000) 201 CLR 293 at 302 [23]. To reach this conclusion, their Honours relied on the Tribunal's finding that a "child is a 'black child' irrespective of what persecution may or may not befall him or her"[40] 2000) 201 CLR 293 at 302 [22]. Kirby J[41] (2000) 201 CLR 293 at 318 [74] emphasised that the membership by the children of the particular social group was defined not by anything they had done but by the "wrongdoing" of their parents.
…
34 There is no reason in principle why cultural, social, religious and legal norms cannot be ascertained objectively from a third-party perspective. Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community[43] cf Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 78 ALJR. Those communities do not recognise or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.
35 The third-party perspective is a common feature in the decision-making by the Tribunal and by the delegates of the Minister. Decisions made by these decision-makers may rely on "country information" gathered by international bodies and nations other than the applicant's nation of origin. Such information often contains opinions held by those bodies or governments of those nations[44] The Tribunal in this matter referred to reports of international bodies, the Commonwealth Department of Foreign Affairs and Trade and the United States State Department. From this information it is permissible for the decision-maker to draw conclusions as to whether the group is cognisable within the community. Such conclusions are clearly objective. However, as accepted by McHugh J in Applicant A, subjective perceptions held by the community are also relevant.

Conclusions as to "particular social group"

36 Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. 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. Borrowing the language of Dawson J in Applicant A[45] (1997) 190 CLR 225 at 241 a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand[46] See, eg, Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 77 ALJR 1088 at 1099 [72] per Kirby J; 197 ALR 389 at 404.

…

50 The majority of the Full Court erred in law by requiring that there had to be evidence before the Tribunal that would support the claim that Afghan society perceived young able-bodied men as comprising a separate group. Further, however, the Tribunal failed to consider the correct issue. This was whether because of legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society. Given the correct issue was not considered, the evidence put before the Tribunal in respect of the position of young able-bodied men in Afghanistan was scant and related only to the Tribunal's finding that the Taliban appeared to be recruiting young men.

Mc Hugh J. said:

54 This …raises the question whether proof of "a particular social group" requires evidence that the relevant society in which the group exists perceives the group to be a collection of individuals who are set apart from the rest of that society.

…

56 The appellant claims that, if he were returned to Afghanistan, he would be persecuted for reasons of his membership of a particular social group. He identifies the social group as "young, able-bodied Afghan men" and claims that, as a member of that group in Afghanistan, he would be subject to forcible conscription by the Taliban and required to fight in the Taliban army

57… the majority judges decided the case on the basis that there was no evidence before the Tribunal which could support the appellant's claim that Afghan society perceived young able-bodied men as comprising "a particular social group".

…

Meaning of "a particular social group"

60 The appellant contends that the Full Court erred in requiring evidence that Afghan society perceived young, able-bodied Afghan men as comprising "a particular social group". In my opinion, this contention is correct. Although the Full Court did not expressly say so, its reasoning in the present case appears to be based on the reasoning in the earlier decision of Minister for Immigration and Multicultural Affairs v Zamora[81] (1998) 85 FCR 458. See also Applicant Z (2001) 116 FCR 36 at 40 per Sackville J. In Zamora, the Full Court of the Federal Court (Black CJ, Branson and Finkelstein JJ) extracted three propositions from the decision of this Court in Applicant A v Minister for Immigration and Ethnic Affairs. The Full Court said[82] Zamora (1998) 85 FCR 458 at 464:

> "First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. 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." (emphasis added)

61 In my opinion, the third of these propositions does not accurately state the effect of Applicant A. First, it is not necessary that "a particular social group" be recognised as a group that is set apart from the rest of society. Second, there is no requirement of a recognition or perception by the society in which the group exists, or some clearly identifiable section of that society, that the collection of individuals comprises "a particular social group".

62 To qualify as "a particular social group", the group must be a cognisable group within the relevant society, but it is not necessary that it be recognised as a group that is set apart from the rest of that society. In Applicant A, Dawson J said[83] (1997) 190 CLR 225 at 241:

> "A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society." (emphasis added, footnote omitted)

63 This passage indicates that, for a group of persons to be "a particular social group", it must be cognisable within the society in which the group exists. Nothing in the statement of Dawson J suggests, however, that the relevant society must itself recognise that the group is a group that is set apart from the rest of that society.

64 A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term "a particular social group" appears in Art 1A(2) of the Convention, the members of the group, claimed to be a particular social group, must be recognised by some persons - at the very least by the persecutor or persecutors - as sharing some kind of connection or falling under some general classification. That follows from the fact that a refugee is a person who has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group". A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable - at least objectively - as a particular social group. The phrase "persecuted for reasons of ... membership" implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals. But it does not follow that the persecutor or anyone else in the society must perceive the group as "a particular social group".

65 The group must in fact be a social group, however, and it must be a particular social group. It is not enough that its members form a demographic division of the relevant society, such as people aged 33 or those earning above or below a certain amount per annum. As Gummow J pointed out in Applicant A[84] (1997) 190 CLR 225 at 284-285, the words "particular" and "social" indicate that the term "a particular social group" "is not apt to encompass every broadly defined segment of those sharing a particular country of nationality." A demographic division of persons may constitute a group because, for statistical or recording purposes, those persons may be properly classified or considered

together. Nevertheless, such a group of persons is not necessarily "a particular social group" within the meaning of Art 1A(2) of the Convention. Many demographic groups may constitute "a particular social group" for the purposes of the Convention. Aged persons, for example, are a demographic division and in many - probably most - societies are also generally regarded as a particular social group. However, that is because aged persons are perceived both within those societies and by those living outside those societies as having a recognisable and independent social presence.

66 In formulating the third of three propositions in Zamora, the Full Court relied on a passage in my judgment in Applicant A, where I said[85] (1997) 190 CLR 225 at 264:

> "The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. (emphasis in bold added)

67 It would be a mistake to see the emphasised sentence in this passage as asserting that "a particular social group" does not exist unless it is always perceived as such by the society in which it exists. Evidence of such a perception on the part of that society is usually compelling evidence that the relevant group is "a particular social group" in that country. That does not mean, however, that for the purposes of Art 1A(2) of the Convention, the society in which the group exists must recognise the group as a group that is set apart from the rest of the community.

68 To require evidence of a recognition or perception by the society that the collection of individuals in that society comprises "a particular social group" is to impose a condition that the Convention does not require. A "particular social group" may exist although it is not recognised or perceived as such by the society in which it exists. For example, those who form the "particular social group" may be perceived by the society in which the group exists as aberrant individuals and may even be described by a particular name, yet the society may not perceive these individuals as constituting a particular social group. Nevertheless, those living outside that society may easily recognise the individuals concerned as comprising a particular social group. No doubt such cases are likely to be rare. That they exist, however, is shown by cases such as Appellant S395/2002 v Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v Minister for Immigration and Multicultural Affairs[86] (2003) 78 ALJR 180; 203 ALR 112. The evidence in those cases suggested that Bangladesh society prefers to deny the existence of homosexuality within that society[87] See, eg, the findings of Lindgren J at first instance: Kabir v Minister for Immigration and Multicultural Affairs [2001] FCA 968 at [17]. On the other hand, there was evidence that police, hustlers and others in that society singled homosexuals out for discriminatory treatment amounting to persecution because they were homosexuals[88] ee, eg, Kabir [2001] FCA 968 at [10] per Lindgren J. Both the Tribunal and this Court accepted in Appellant S395/2002 and Appellant S396/2002 that

homosexuals in Bangladesh are a particular social group[89] See, eg, (2003) 78 ALJR 180 at 190 [55] per McHugh and Kirby JJ, 192 [65] per Gummow and Hayne JJ; 203 ALR 112 at 126, 128. Objectively, homosexuals in Bangladesh society comprise "a particular social group", whether or not that society recognises them as such.

69 Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally within the society as a collection of individuals which constitutes a group that is set apart from the rest of the community. To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. As I have indicated, it is not necessary that the persecutor or persecutors actually perceive the group as constituting "a particular social group". It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a "uniting" feature or attribute, and the persons in that class are cognisable objectively as a particular social group.

"Young, able-bodied Afghan men" as a particular social group

70 In its reasons, the Tribunal accepted that the Taliban "does not have a regular conscription policy but has as a practice the recruitment, often forced, of young men regarded to have the potential to fight."[90] The Tribunal also referred to "the ad hoc practice of recruitment and press-ganging new recruits"[91]. The Tribunal also accepted that the appellant "is of fighting age and had faced conscription in Afghanistan and was at risk of facing it again."[92] However, the Tribunal made no finding as to whether this risk of conscription was for the reason that he was a member of "a particular social group" within the meaning of the Convention.

71 Carr J held that the Tribunal had erred in not considering whether "young able-bodied men" were a particular social group within the meaning of Art 1A(2) of the Convention[93]. His Honour said that the "particular social group (able bodied Afghan men) is not defined by reference to the discriminatory treatment that its members fear."[94] Consequently, the failure to make a finding as to whether the group of which the appellant claimed to be a member was "a particular social group" amounted to jurisdictional error[95].

72 In my opinion, Carr J was correct in finding that the Tribunal had erred in not considering whether "able-bodied young men" were "a particular social group" and that the error constituted jurisdictional error[96] Applicant S v Minister for Immigration and Multicultural Affairs [2001] FCA 1411 at [48]-[49]. In most societies "able-bodied young men" would no more constitute "a particular social group" than would "good swimmers" or "fit athletes". Such classifications are intellectual constructs, not social groups. As Tamberlin J pointed out in Mahmoodi v Minister for Immigration and Ethnic Affairs[97] [2001] FCA 1090 at [7]; cited with approval by Kiefel J in Applicant Z (2001) 116 FCR 36 at 45, descriptions such as "able-bodied Afghan males" are descriptions "of characteristics based on gender and health or fitness." However, it is possible that in Afghanistan the press-ganging of "able-bodied young men" has created a perception that they are "a particular social group". It is true that the appellant put no evidence before the Tribunal of any such perception in Afghan society or within some section of it or any evidence that would enable the inference to be drawn objectively that they were "a particular social group". Without such evidence, it seems difficult to see how "able-bodied young men" can constitute "a particular social group".

73 Carr J thought that "able-bodied Afghan men" were "not defined by reference to the discriminatory treatment that its members fear."[98] Applicant S v Minister for Immigration and Multicultural Affairs [2001] FCA 1411 at [45]. That proposition is true

only if young, able-bodied Afghan men are cognisable as a particular social group, independently of the conduct of their persecutors. As I have indicated, ordinarily, the description "able-bodied young men" is an intellectual construct, not "a particular social group". In the absence of evidence that at the relevant time young, able-bodied Afghan men were cognisable as such a group, the basis for the appellant's claim for refugee status must fail.

74 Carr J[99] Applicant S v Minister for Immigration and Multicultural Affairs [2001] FCA 1411 at [37] thought that the situation of the appellant was comparable to that of the "black child" in Chen Shi Hai v Minister for Immigration and Multicultural Affairs[100] (2000) 201 CLR 293.. In Chen Shi Hai, it was claimed on behalf of the asylum-seeker, a young child, that he faced a real chance of persecution in China in contravention of the Convention, because he was "what is known in China as a 'black child'."[101] (2000) 201 CLR 293 at 297 [6] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. In that case it was found that there was a clear societal perception that "black children" constituted a particular social group which could be defined independently of their persecutory treatment[102] Chen Shi Hai (2000) 201 CLR 293 at 297 [6], 301-302 [22]-[23] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.. This case is also unlike cases such as Appellant S395/2002 and Appellant S396/2002[103] (2003) 78 ALJR 180; 203 ALR 112. In those cases it was held that homosexuals, the alleged "particular social group", were not a mere intellectual construct; rather, it was held that the descriptor "homosexuals" identified a group of persons which shares a particular sexual preference that unites them, sets them apart, and makes them a cognisable group within their society.

75 Without evidence of some objective perception - which may be but is not necessarily required to be found in Afghan society or a section of it - that "able-bodied young men" comprise "a particular social group", in circumstances where the perception is capable of being identified independently of the persecutory treatment, the appellant's claim must fail. Without such evidence, the appellant and those like him are in no different a position from that of the appellant in Applicant A[104] (1997) 190 CLR 225. In that case it was found that the group, described as "parents in the reproductive age group" or "parents with one child", could only be defined by reference to the persecutory conduct. For the purposes of Art 1A(2) of the Convention, the group had no independent existence as "a particular social group".

76…If the Tribunal had considered the issue that it was legally required to consider, it was open to the Tribunal to investigate whether such a perception existed, whether within Afghan society or some section of it, or objectively. Indeed, arguably in the context of its inquisitorial process, the Tribunal had a duty to seek evidence concerning this vital matter. This may require the consideration of legal, social, cultural and religious norms prevalent in Afghan society to determine whether young, able-bodied Afghan men comprise a particular social group that may be distinguished from society at large. In Sanchez-Trujillo v Immigration and Naturalization Service, the United States Court of Appeals for the Ninth Circuit found that a "class of young, urban, working-class [El Salvadorian] males of military age who had maintained political neutrality" was not a "particular social group"[105] 801 F 2d 1571 at 1571, 1576 (1986). The decision in Sanchez-Trujillo has been criticised for adopting an unduly narrow interpretation of the phrase "a particular social group": see Applicant A (1997) 190 CLR 225 at 260-261 per McHugh J. But it does not follow that in Afghanistan young able-bodied men are not "a particular social group". Different legal, social, cultural and religious norms in different countries may bring about different results concerning similar groups or classes.

77 By failing to consider whether young, able-bodied Afghan men constituted "a particular social group", the Tribunal prevented itself from obtaining evidence concerning that issue,

evidence that might have determined the application in favour of the appellant. In the circumstances of this case, therefore, the failure of the appellant to put evidence before the Tribunal concerning the perception issue was not a ground for refusing to set aside the Tribunal's decision, once it is accepted that the Tribunal erred in not considering the issue of "a particular social group".
…

Selway J. in STXB v MIMIA [2004] FCA 860 summarised the effect of Applicant S:

25 The legal meaning of the phrase 'particular social group' has been recently considered by the High Court in Applicant S v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 242 ('Applicant S'). The High Court in that case held that the Tribunal had misunderstood the meaning of 'particular social group' in the Convention. In the joint judgment of Gleeson CJ with Gummow and Kirby JJ the correct test is discussed at [36] (see also McHugh J at [68]-[69], Callinan J at [97]-[98])

> 'Therefore, the determination of whether a group falls within the definition of 'particular social group' in Art 1A(2) of the Convention can be summarised as follows. 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. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'. As this Court has repeatedly emphasised, identifying accurately the 'particular social group' alleged is vital for the accurate application of the applicable law to the case in hand.' (citations omitted)

26 It can be seen that this test is similar to that identified by the Full Court of this Court in Zamora which was relied upon by the Tribunal in this case. There is one clear difference and another possible difference. The clear difference relates to the third proposition in both tests. The High Court rejected that aspect of the third proposition stated by the Full Court, that society must recognise that the group is 'set apart'. The High Court held that the group must be 'distinguished or set apart from society at large' - it must be 'a cognisable group within the community' (see at [27]). Whether or not it is so cognisable is a question of fact, to be 'ascertained objectively from a third party perspective' (at [34]). Obviously, if a group is set apart from the rest of society then the society itself and the members of the group are both likely to identify the group as a separate group. However, even if they do not the group can still be a 'particular social group' if, as a matter of fact, the relevant group fulfils the tests set out in the joint judgment.
27 The second possible difference between the High Court test and that proposed by the Full Court in Zamora is the use by the High Court of the word 'distinguish' whilst the Full Court used the words 'set apart'. It is possible that the meanings could be different. Any distinction which marks off a group might be said to 'distinguish' that group even if it would not be said to 'set it apart' from the rest of society. So, for example, if some 'left handed persons' in Australia (to use an example referred to in Applicant S at [31]) formed a club and then wore a 'club tie' it might be said that the wearing of the tie 'distinguished' the left handed persons within that club from the rest of society. However, it would seem plain that the High Court is not using the word 'distinguish' in this narrow sense. Rather it is clear from [27] of the joint reasons that the word 'distinguish' is used in the same sense as 'set apart', namely to 'divide into classes' (Macquarie Dictionary). Such 'classes' must

be understood in the context of a Convention concerned with the protection of human rights. On this view the relevant characteristic must be one that, in that context, sets the relevant group apart from the rest of society. It must be a real, distinct and relevant difference so that the members of the group can be said to be a 'class' within the society. Even if left handed persons formed a club and then wore the club tie this would not relevantly set them apart. In Australia neither left handed persons nor club members nor persons wearing club ties are relevantly 'set apart' from the rest of society so as to form a 'particular social group' even if they can be identified as members of a group. Although the test established by the High Court uses the word 'distinguish' rather than 'set apart' it is my view that the High Court used the word 'distinguish' in the same sense in which the Full Court used the word 'set apart'.

Merkel J. in ***VTAO v MIMIA*** **[2004] FCA 927 (2004) 81 ALD 332** held that the RRT fell into the same kind of error in relation to the reasoning in ***Applicant A*** as the Full Court of the Federal Court fell into in ***Chen. Applicant A*** was not concerned with, and did not decide, whether parents who have breached China's family planning laws can constitute a particular social group. Rather, it was concerned with whether the fear of the consequences of failing to abide by those laws can, alone, be relied upon as a uniting element or characteristic to define a particular social group. Further, the High Court has not treated Applicant A as deciding that parents who breached China's one-child policy, or that parents of "black children", are not capable of constituting a particular social group. In the RRT's reasoning here in respect of the applicant parents it treated the parents' reliance on their fear of the penalties they are likely to suffer under laws of general application as precluding them, on the basis of Applicant A, from being members of a particular social group. As a result of that conclusion the RRT did not consider the correct issue of whether the harm and disabilities parents of "black children" suffer have, as a result of the legal and social norms prevalent in Chinese society, over time resulted in such persons becoming a particular social group.

His Honour said:

1 The present application raises important questions concerning the application of the Convention Relating to the Status of Refugees 1951 as amended by the Protocol Relating to the Status of Refugees 1967 ("the Convention") to parents of children born in contravention of China's family planning laws (which implement China's one-child policy) and to the children whose birth resulted in their parents contravening the laws. If the parents or their children are members of a "particular social group" then they would be entitled to a protection visa…

2….the first applicant applied for a protection visa on behalf of her son. The applicant parents claim to have a well-founded fear of persecution if they return to China by reason of their membership of a particular social group, namely persons who have contravened China's family planning laws by having had more than one child. The first applicant claimed, on behalf of her son, that he faces a real chance of persecution by reason of his membership of a particular social group, being "black children", which she described as children born in contravention of China's family planning regulations. …

…

4 Before the RRT the applicant parents claimed that, as a result of their two contraventions of China's family planning laws (ie as parents of "black children") they would be subjected to persecution on their return to China. The persecution claimed to be feared included forced sterilisation of the first applicant; liability for payment of a substantial financial penalty (referred to as a "social subsidy fee") which the applicant parents claimed they were unable to pay; and limitations on the applicant parents' ability to find employment. In relation to the applicant child it was claimed that, as a "black child", he would not be able to obtain household registration unless the applicant parents paid the social subsidy fee and that without registration he would be unable to access public health and education services and would be unable to obtain work, particularly in the public sector, when older.

…

6 The RRT appeared to accept, although it did not expressly find, that, as a result of the decision of the High Court in Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 ("Chen"), the applicant child was a member of a particular social group, namely children born in breach of China's family planning policy who did not have household registration (ie "black children")…..

7 The RRT distinguished two decisions of other members of the RRT, which treated the financial burden imposed in respect of breaches of the family planning laws as sufficiently substantial to constitute persecution, and stated that:

> "55. ... the financial burden which the applicant parents have attracted by reason of their family planning choices, although serious, does not amount to persecution within the meaning of the Convention or of s.91R(2) of the Act."

….

The contentions

9 The applicants' contentions before the Court may be summarised as follows:

> • the RRT erred in concluding that the applicant parents, in their capacity as parents of "black children", were not capable of being members of a particular social group;
> • the RRT erred in concluding that the burdens and harm that fell upon the applicant child as a "black child" did not constitute persecution of that child by reason of his membership of the particular social group of "black children";
> • the RRT erred in treating the examples of "serious harm" set out in s 91R(2) of the Migration Act 1958 (Cth) ("the Act") as laying down the criteria for "serious harm", rather than merely providing examples of such harm.

10 The applicants' counsel contended that each of the errors was a jurisdictional error because it resulted in the RRT identifying a wrong issue; asking a wrong question; or failing to take into account relevant considerations; in a way that affected the exercise of its power: see Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 ("Yusuf") at 351 [82].

11 Although the applicants' counsel initially claimed that the primary error of the RRT was that it failed to take into account relevant considerations, rather than that it constructively failed to exercise its jurisdiction, the latter issue was raised with counsel for the applicants

in the course of the hearing who agreed that it was the more appropriate basis for the applicants' case. No objection was raised by counsel for the Minister for the matter to proceed on that basis.

12 Counsel for the applicants also claimed that the RRT's findings were irrational and illogical but he accepted that that ground was not open before a single judge of the Court in the light of decisions of the Full Court (see for example W404/01A of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 255 at [35] and NACB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 235 at [29]).

….

The issues for the RRT

14 Under the Act a person is entitled to be granted a protection visa if he or she is a person to whom Australia owes protection obligations: see ss 36(2) and 65(1). A person is owed protection obligations if he or she has, inter alia, a well-founded fear of persecution by reason of being a member of a particular social group: see Art 1A(2) of the Convention. However, s 91R of the Act provides that the Act and the Convention only apply to certain types of persecution. Relevantly, the section provides:

> "(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) ...
> (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."

15 The RRT appeared to accept that the applicants were citizens of China who were subject to its family planning laws. It also appeared to accept that they feared they would suffer some harm on their return to China as a result of those laws being breached by the applicant parents. It also appeared to accept that the harm feared by the applicant child was the harm feared by his mother. In those circumstances, in exercising its jurisdiction to determine whether the applicants had a well-founded fear of persecution for a Convention reason, three separate questions were required to be considered by the RRT. The first question was whether the harm feared amounts to persecution that involves "serious harm to the person" and "systematic and discriminatory conduct". The second question was whether the persecution feared is persecution by reason of membership of a particular social group. The third question is whether the fear of persecution by reason of membership of a particular social group is well-founded.

The applicant parents' claims

16 The RRT treated the reasoning in Applicant A as precluding the claim of the applicant parents that they are members of a particular social group. It is clear that the RRT reached that view irrespective of whether the particular social group is defined as persons who contravene China's family planning laws or as parents of "black children". As a consequence, the RRT did not address or consider the additional questions of whether the harm feared by the applicant parents amounts to persecution as limited by s 91R of the Act and, if so, whether the fear is well-founded.

17 In Applicant A the High Court held that persons who feared persecution by reason of their membership of the group, which was defined as "those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised" (see for example at 268 per McHugh J), were not members of a particular social group. The reason for the conclusion was that such a group cannot be defined solely by a well-founded fear of persecution or, put another way, the uniting characteristic or element of such a group cannot be solely a common fear of persecution. In Applicant A the appellants were nationals of China who had their first and only child in Australia. Their claim of having a well-founded fear of persecution by reason of their membership of a particular social group failed because the uniting characteristic or element upon which they relied was opposition to the one-child policy and their fear of persecution if they had a second child on their return to China (see for example at 268 per McHugh J).

18 Applicant A appears to have been regarded by many practitioners, and the RRT in the present case, as authority for the proposition that parents who breach China's one-child policy are not capable of constituting a particular social group, as they were perceived to be relying solely upon their fear of persecution as the uniting characteristic or element that defines the particular social group of which they claim to be members. Counsel for the Minister did not cite any case in Australia that had decided that parents who had breached the policy or the family planning laws or, put another way, parents of "black children" were not capable of constituting a "particular social group" for the purposes of the Convention (cf Chan v Canada (Minister of Employment and Immigration) [1995] 3 SCR 593). However, he claimed that that must follow from the High Court's decision in Applicant A.

19 Applicant A was not concerned with, and did not decide, whether parents who have breached China's family planning laws can constitute a particular social group. Rather, it was concerned with whether the fear of the consequences of failing to abide by those laws can, alone, be relied upon as a uniting element or characteristic to define a particular social group. Further, the High Court has not treated Applicant A as deciding that parents who breached China's one-child policy, or that parents of "black children", are not capable of constituting a particular social group.

20 In the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 571 their Honours stated:

> "in any event, the claim based, as it is, on membership of a social group consisting of 'parents of one child in the PRC' is answered by the Court's recent decision in Applicant A v Minister for Immigration and Ethnic Affairs, which held by majority that, for the purposes of the Convention, such persons were not a particular social group and that persecutory conduct cannot define 'a particular social group' Dawson J said:

'A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the

Convention straight quotation ‘completely reverses the statutory definition of Convention refugee in issue’.’" [Emphasis added]

21 Applicant A was also considered by the High Court in Chen in the context of whether a claim by a child born in breach of the China’s one-child policy (ie a "black child") can have a well-founded fear of persecution by reason of membership of a particular social group, namely "black children". In Chen the High Court, by a 4-1 majority, held that children born in breach of the policy can constitute a particular social group for the purposes of the Convention. Gleeson CJ, Gaudron, Gummow and Hayne JJ (at 300-301 [16]-[21]) explained why the Full Court of the Federal Court had erred in treating Applicant A as precluding "black children" from constituting a particular social group:

> "In the present matter, the majority in the Full Court held that ‘the principles explained in Applicant A preclude the identification of a relevant social group for Convention purposes, by recourse to the very laws and policies, being laws and policies directed to the whole population, which create the category of persons concerned’. Thus, in their Honours' view, ‘black children’ could not be identified as a particular social group. R D Nicholson J saw the issue as whether the laws which were likely to result in the appellant's adverse treatment in China were ‘such that [he] could not [be] a member of a particular social group of 'black children’’. Seemingly, in reaching those conclusions, their Honours were influenced by their understanding of what followed from the observation made by Dawson J in Applicant A with respect to laws and practices of general application. It was by reference to laws of general application that it was argued in this Court that the majority in the Full Court was correct in holding that, for the purposes of the Convention, the appellant could not be identified as a member of a particular social group. According to the argument, the laws or policies which are likely to result in the appellant's adverse treatment in China are laws of general application and, having regard to what was said by Dawson J in Applicant A, cannot create a social group for the purposes of the Convention.
>
> There are difficulties with the argument that, because of the nature of the laws which will impact on the appellant if returned to China, he is not a member of a social group for the purposes of the Convention. In particular and notwithstanding that China's ‘one-child policy’ may be reflected in laws of general application which limit the number of children that a couple may have, that does not mean that the laws or practices applied to children born in contravention of that policy are laws or practices of general application. Such children are, even within the sense of the distinction drawn by Dawson J in Applicant A, persecuted for what they are (the circumstances of their parentage, birth and status) and not by reason of anything they themselves have done by engaging in certain behaviour or placing themselves in a particular situation. The sins of their parents, if they be such, are being visited upon the children.
>
> Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - for example, ‘black children’, as distinct from children generally - cannot properly be described in that way. Further and notwithstanding what was said by Dawson J in Applicant A, the fact that laws are of general application is more directly relevant to the question of persecution than to the question whether a person is a member of a particular social group.

In Applicant A, McHugh J pointed out that '[w]hether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct [but] ... on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.' In that context, his Honour also pointed out that 'enforcement of a generally applicable criminal law does not ordinarily constitute persecution.' That is because enforcement of a law of that kind does not ordinarily constitute discrimination.

To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory. And Applicant A held that, merely because some people disagree with a law of that kind and fear the consequences of their failure to abide by that law, they do not, on that account, constitute a social group for the purposes of the Convention." [Emphasis added]

22 It is clear from their Honours' analysis that Applicant A is not to be taken as deciding that the harm that is likely to be suffered by a group of persons by reason of their having contravened a law of general application cannot be relied upon as a factor, among others, that might identify those persons as, or cause them to become, a particular social group. Rather, Applicant A merely decided that the fear of harm resulting from a failure to abide by such a law cannot be relied upon alone as the defining or uniting characteristic of a particular social group. Further, as was pointed out by their Honours (in Chen) the fact that the law is one of general application is more relevant to whether the harm feared as a result of breaching the law constitutes persecution than it is to whether persons that have breached the law constitute a particular social group.

23 Kirby J stated at 317-318 ([73]-[74]):

"Applying to these proceedings the analysis of Lord Hoffmann in Shah's Case, the 'reasons of' the well-founded fear on the part of a person such as the appellant is, it is true, in one sense, the laws and policies of the PRC targeted at people such as the appellant's parents. The laws and policies were designed to coerce the parents into conforming to the population control policies of the State. Such laws were avowedly adopted by the PRC to restrain the explosive growth of population of that country with its serious consequences for China and the world. Combined with the poor economic circumstances of the appellant's parents, such laws, and the practices adopted to enforce them, clearly deprive the parents of the ability to afford to pay for education, health care and other privileges that would otherwise be provided by the State to a lawful child. The way the PRC's laws and policies are enforced, according to the findings of the Tribunal, includes the targeting of children such as the appellant, categorised as 'hei haizi', as well as the parents. In a discriminatory way, such children are denied many of the basic needs of children. This is done although they personally are innocent of any wrongdoing. They suffer. Their suffering is the other side of the coin of the laws and programmes addressed to their parents. It was much the same in former times under our legal system in respect of laws on illegitimate children or 'bastards'. They suffered, and were shamed, in order to promote a policy of marriage of their parents over which, at their birth and in their childhood, the children concerned had no control whatsoever. In today's world, depending on the evidence, this could amount to persecution. Given the objects of the Convention and of Australian law providing it local effect,

> the persecution of the child is ‘for reasons of’ its membership of the particular social group of ‘black children’. The persecution is designed to punish the parents for their infractions of the law and to discourage potential parents from breaking that law. But it is done by discriminating against innocent children who are popularly described as ‘black children’. This is done for what may be conceived of as the higher State purpose of population control. But it is persecution nevertheless, as the Tribunal found. In the context, it is for reasons of the fact that the children are members of the particular social group, defined not by anything such children have done but by their parents' ‘wrongdoing’."

24 In both the joint judgment and that of Kirby J the point was made that the child had done no wrong and the visiting of the parents’ "sins" upon the child can plainly be discriminatory against, and persecutory of, the child, albeit that this allegedly occurs through a law of general application. While that factor distinguishes the situation of the children from that of their parents it does not follow that the parents cannot constitute a particular social group. As was explained in Applicant S v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 242 ("Applicant S") that depends on a combination of legal and social factors, rather than on whether the harm the parents fear, and are likely to suffer, arises as a result of their breach of laws of general application.

25 In Applicant S, in the course of concluding that able-bodied young men liable to be forcibly recruited by the Taliban in Afghanistan can constitute a particular social group for the purposes of the Convention, Gleeson CJ, Gummow and Kirby JJ (at 247-248 [22]-[23]) again considered the observations of McHugh and Dawson JJ in Applicant A. Their Honours stated that:

> "... a ‘particular social group’ must be identifiable by a characteristic or attribute common to all members of the group, but that characteristic cannot be the fear of persecution itself. This proposition can be split into two parts. The first part amounts to a general principle that there must be a common characteristic or attribute and the second part can be characterised as a limitation on the general principle. The limitation was explained by McHugh J as follows:

‘[P]ersons who seek to fall within the definition of 'refugee' in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the 'particular social group' of which they claim membership. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution.’

> The apparent circularity in the emphasised passage was further considered by Dawson J:

‘There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)'.’

It is worth noting that the limitation later was accepted and applied by the House of Lords in R v Immigration Appeal Tribunal; Ex parte Shah [[1999] 2 AC 629 at 639-640 per Lord Steyn, 656 per Lord Hope, 662 per Lord Millett (dissenting)].

In Applicant A, after expressing the general principle and limitation, McHugh J went on:

'Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.'" [Emphasis in original]

26 After referring to other observations of McHugh J in Applicant A, their Honours observed at 249-250 ([25]-[27]):

"Two propositions are to be taken from McHugh J's remarks. First, in some circumstances it is possible for a particular social group to be created by the persecutory conduct such that it can no longer be said that the group is 'defined' by the persecutory conduct. His Honour expressed this in a temporal sense. Secondly, given that the actions of the persecutors may identify or even create the group, what may be critical in most, and perhaps all, cases is the perception of the group by others ('external perceptions'). This is further explained by the example that if the group is perceived by the community in the relevant country as a particular social group, then usually, but not always, the particular social group can be taken to have been created.

By contrast, Brennan CJ (dissenting as to the outcome) and Dawson J appear to express a similar principle by construing the phrase 'particular social group'. After construing a 'particular group' as a group identifiable by any characteristic common to the members of the group (that is, the general principle referred to above), Brennan CJ said:

'[A] 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large'.

In the same vein, Dawson J stated:

'The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.'

Kirby J made a similar point in Applicant A by pointing out that the text, its history and the many 'groups' recognised as falling within the Convention in this and other countries denied any suggestion that there must be 'an associational participation or even consciousness of such group membership'.

Putting these statements together with the second proposition stated by McHugh J, it is apparent that his Honour was adopting no different approach to the Convention definition to that adopted by Brennan CJ and Dawson J, albeit expressing it in other terms. His Honour was expanding on the requirement that the existence of a particular social group requires that the group be distinguished or set apart from society at large. One way in which this 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." [Emphasis in original]

27 Their Honours then discussed Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1, in which the High Court held by a 4-1 majority that married women in Pakistan can constitute a social group, and observed at 250 [30]:

"On first blush, the claimed particular social group in Khawar appears to be defined solely by reference to the persecutory conduct (that is, the failure of the Pakistani authorities to enforce the criminal law). However, a majority of the Court (Gleeson CJ, McHugh, Gummow and Kirby JJ; Callinan J dissenting) concluded that it would be open to the Tribunal to find that the first respondent was a member of a particular social group. After acknowledging the limitation accepted by the majority of the Court in Applicant A, McHugh and Gummow JJ emphasised the operation of cultural, social, religious and legal factors, rather than any perceptions held by the community, as determining that married Pakistani women were a group that was distinguished or set apart from the rest of the community. Their Honours said:

> 'Those considerations [ie, the limitation] do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.'" [Emphasis in original]

28 At 251-252 ([31]-[36]) their Honours returned to the "left-handed men" example of McHugh J in Applicant A:

"The example of left-handed men given by McHugh J in Applicant A indicates how it is possible that over time, due to the operation of social and legal factors prevailing in the community, persons with such a characteristic may be considered to hold a certain position in that community (his Honour's first proposition). Left-handed men share a common attribute (that is, they are left-handed), but, ordinarily, there is nothing to separate or to distinguish them from the rest of the community. However, to expand on his Honour's example, if the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.

The decision in Chen may also be understood in this way. Gleeson CJ, Gaudron, Gummow and Hayne JJ concluded that children born in contravention of China's 'one child policy' could constitute a group defined other than by reference to the discriminatory treatment or persecution they feared. To reach this conclusion, their Honours relied on the Tribunal's finding that a 'child is a 'black child' irrespective of what persecution may or may not befall him or her'. Kirby J emphasised that the membership by the children of the particular social group was defined not by anything they had done but by the 'wrongdoing' of their parents.

In Chen, the tribunal had found that 'black children' were a 'particular social group' within the meaning of the Convention definition, but had held against the applicant on other grounds. In the Full Court, it had been held by the majority that such children could not, as a 'pure question of law', constitute such a group because they were defined by reference to the persecutory conduct liable to be suffered by their members. The effect of the orders of this court was that the matter was remitted to the tribunal to be dealt with on the basis that the appellant was entitled to refugee status.

There is no reason in principle why cultural, social, religious and legal norms cannot be ascertained objectively from a third-party perspective. Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognise or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.

The third-party perspective is a common feature in the decision-making by the tribunal and by the delegates of the minister. Decisions made by these decision-makers may rely on 'country information' gathered by international bodies and nations other than the applicant's nation of origin. Such information often contains opinions held by those bodies or governments of those nations. From this information it is permissible for the decision-maker to draw conclusions as to whether the group is cognisable within the community. Such conclusions are clearly objective. However, as accepted by McHugh J in Applicant A, subjective perceptions held by the community are also relevant.

Conclusions as to 'particular social group'

Therefore, the determination of whether a group falls within the definition of 'particular social group' in Art 1A(2) of the Convention can be summarised as follows. 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. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'. As this Court has repeatedly emphasised, identifying

accurately the ‘particular social group’ alleged is vital for the accurate application of the applicable law to the case in hand." [Emphasis added]

29 Their Honours applied the above principles at 255 [50]:

"Disposition of the appeal

The majority of the Full Court erred in law by requiring that there had to be evidence before the tribunal that would support the claim that Afghan society perceived young able-bodied men as comprising a separate group. Further, however, the tribunal failed to consider the correct issue. This was whether because of legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society. ...’ [Emphasis in bold added]

30 McHugh J stated at 260 [69]:

"Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally within the society as a collection of individuals which constitutes a group that is set apart from the rest of the community. To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. As I have indicated, it is not necessary that the persecutor or persecutors actually perceive the group as constituting ‘a particular social group’. It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a ‘uniting’ feature or attribute, and the persons in that class are cognisable objectively as a particular social group." [Emphasis in bold added]

31 And at 261 [73]:

"Carr J thought that ‘able-bodied Afghan men’ were ‘not defined by reference to the discriminatory treatment that its members fear.’ That proposition is true only if young, able-bodied Afghan men are cognisable as a particular social group, independently of the conduct of their persecutors. As I have indicated, ordinarily, the description ‘able-bodied young men’ is an intellectual construct, not ‘a particular social group’. In the absence of evidence that at the relevant time young, able-bodied Afghan men were cognisable as such a group, the basis for the appellant's claim for refugee status must fail."

32 I have set out the relevant passages from Chen and Applicant S at some length as they clearly explain and articulate the principles to be applied in determining whether a group of persons is a "particular social group" for the purposes of the Convention. Applying the reasoning of Gleeson CJ, Gummow and Kirby JJ in Applicant S and, in particular, their Honours’ observations at 252 [36] and 255 [50], the issue the RRT was required to consider in the present case was whether, because of the legal and social norms prevalent in Chinese society, parents of children born in breach of China’s family planning laws, or parents of "black children", comprised a social group that could be distinguished from the rest of Chinese society. In considering that issue the RRT was entitled to disregard the shared fear of persecution of the parents as an attribute common to all members of the group. Nonetheless, it was required to consider whether, over time, the singling out of parents of "black children" for discriminatory treatment under China’s family planning laws might have been absorbed into the social consciousness of the community with the consequence that a combination of legal and social factors (or norms) prevalent in the community

indicated that such parents form a social group distinguishable from the rest of the community: cf Applicant S at 251 [31].
33 While the RRT appears to have treated the possible social group the parents may fall into as either parents who breached the family planning laws or parents of "black children" (see, for example, pages 23-24 of the transcript of the RRT hearing) it appears from both Chen and the country information in the present case that the relevant group may be most appropriately characterised as parents of "black children" (ie children who do not have household registration because they are born in breach of family planning laws). That would be so if the attribute of being parents of "black children", rather than breaching family planning laws, identified the parents as a particular social group if such a group were found to exist. For present purposes nothing turns on that issue, which will be a matter of fact for the RRT on any remitter.
34 In my view the RRT fell into the same kind of error in relation to the reasoning in Applicant A as the Full Court of the Federal Court fell into in Chen. In the RRT's reasoning in respect of the applicant parents it treated the parents' reliance on their fear of the penalties they are likely to suffer under laws of general application as precluding them, on the basis of Applicant A, from being members of a particular social group. As a result of that conclusion the RRT did not consider the correct issue, as articulated above, of whether the harm and disabilities parents of "black children" suffer have, as a result of the legal and social norms prevalent in Chinese society, over time resulted in such persons becoming a particular social group.
35 It must follow that the RRT failed to apply itself to the question the law prescribes and therefore to address the correct issue with the consequence that there has been a constructive failure to exercise jurisdiction: see Ex parte Hebburn Ltd; Re Kearsley Shire Council (1947) 47 SR (NSW) 416 at 422 and Yusuf at 351 [82].
….

The Full Court in MIMIA v VFAY; MIMIA v SHBB [2003] FCAFC 191(2003) 134 FCR 402 allowed the Minister's appeals from VFAY v MI [2003] FMCA 35 SHBB v MI [2003] FMCA 82 (Driver FM) where the issue of children and unaccompanied minors of Hazara ethnicity as a particular social group had been considered (special leave granted 11 August 2004) :

The Court said:

2 Each of the respondents is a citizen of Afghanistan and was aged about 15 when he fled that country in order to escape the depredations of the Taliban, in particular the Taliban's practice of forcibly recruiting young males for military service. Each is an Hazara and a Shi'a Muslim. We refer to the respondents, respectively, as VFAY and SHBB.
…
6 It is nonetheless appropriate to make a general comment at the outset. The RRT in VFAY's case expressed the view that the prospect of these young men being returned to Afghanistan in the circumstances prevailing in that country was "deeply troubling" for VFAY himself and for those supporting him. A similar observation was made by the RRT in relation to SHBB, although it seems that both he and VFAY will soon reach the age of 18 which, in Australia at least, marks the attainment of adulthood. The role of the Court is not, however, to determine the appeals simply by reference to whether VFAY and SHBB

will face hardship or even serious harm if they are returned to Afghanistan. The only question for this Court is whether the Magistrate erred in law in holding that the RRT in each case had committed a jurisdictional error. It is the Minister who has a discretion under s 417(1) of the Migration Act to substitute decisions more favourable to VFAY and SHBB than those made by the RRT. The Minister may, if he so decides, exercise that discretion on compassionate or humanitarian grounds.

…

12 The Convention does not define "persecution". However, s 91R of the Migration Act, enacted by the Migration Legislation Amendment Act (No 6) 2001 (Cth), provides …

….

Convention on the Rights of the Child

17 The Magistrate referred in his judgments to Articles 20(1) and 22(2) of the Convention on the Rights of the Child done at New York on 20 November 1989 ("CRC"). They are in the following terms:

> "20(1) A child temporarily or permanently deprived of his or her family environment...shall be entitled to special protection and assistance provided by the State.
>
> ...
>
> 22(2) ...In cases where no parents or other members of the family can be found, the [asylum seeker] child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in [article 20 of] the present Convention."
>
> MINISTER v VFAY

….

23…the RRT accepted his claim that he was a citizen of that country and was an Hazara Shi'a Muslim. The RRT found that VFAY was 16 years of age and that he had left Afghanistan because of his fear of the Taliban, in particular his fear of being forcibly recruited for military service.

24 The RRT also accepted that VFAY had a "genuine, and readily understandable" fear of returning to Afghanistan in the prevailing circumstances. There was considerable uncertainty in the country and many people faced great hardship. The RRT acknowledged that VFAY could face danger if he were to return and that he was particularly vulnerable because of his age. However, the RRT identified the relevant question as follows:

> "the [RRT] must address whether there is a real chance that the applicant would be persecuted in Afghanistan for a Convention reason in the reasonably foreseeable future. As stated in the outline of the relevant legal principles which the Tribunal is required to apply, persecution involves systematic and discriminatory conduct. Moreover, the essential or significant reason for such treatment must be among the reasons specified in the Refugees Convention: these are the person's race, religion, nationality, membership of a particular social group or political opinion."

The reference to the "essential or significant reason" is plainly based on s 91R(1)(a) of the Migration Act, although that provision uses the expression "essential and significant reason".

25 On the basis of independent country information, the RRT found that there was no chance that the Taliban would re-emerge as a contender for power in the country, including VFAY's province of Bamiyan, in the reasonably foreseeable future. Circumstances in Afghanistan had changed in "a substantial and material way" since mid-2001. According to the RRT, there was no longer any real chance that VFAY would face persecution by the Taliban if he were to return to Afghanistan.
26 Nor did the RRT accept VFAY's submission that he faced persecution as an Hazara. The RRT was satisfied that the conditions in Afghanistan had changed sufficiently to mean that the past mistreatment suffered by Hazaras did not indicate a real chance that they would suffer persecution in the foreseeable future. Similarly, since the collapse of the Taliban regime there had been no restrictions on followers of the Shi'a branch of Islam in Afghanistan.
27 The RRT considered it likely that if VFAY returned to Afghanistan he would return to his home district of Waras where his family had lived for many years. The RRT acknowledged that, like VFAY himself, it did not know what had happened to his family. The RRT accepted that VFAY feared for his family and did not know what had become of them. It recognised that "as a young man returning unaccompanied to his country [VFAY] will be vulnerable". This was confirmed by advice from the United Nations High Commission on Refugees ("UNHCR"), which had referred to the precarious security and humanitarian situation in Afghanistan. The UNHCR had also advised that there were others who were vulnerable, such as the disabled and ill, women without effective male protection, the elderly and the landless.
…

29 The RRT noted that VFAY had claimed that he feared persecution in Afghanistan by reason of his membership of a particular social group. The RRT dealt with this claim as follows:

> "The particular social groups suggested by the applicant's adviser are children, separated children or unaccompanied Hazara minors and all of these formulations related to the vulnerability of such people. I have considered whether children, separated children or unaccompanied Hazara minors can constitute a particular social group as the term is used in Australian refugee law. I do not consider that it could be said that children or unaccompanied young people share characteristics which make them recognisable or cognisable as a social group set apart from the rest of the community unless their vulnerability and fear of coming to harm is also used as a defining factor and this is not permitted under the law. Even if such groups could be said to be particular social groups, I do not consider that it would be the applicant's membership of such groups which would be the essential and significant reason for what might become of him. Rather, the difficulty which the applicant could encounter upon return seems to me to be because of his youth and inexperience and so limited capacity to manage in a difficult environment and the generalised insecurity and hardship which prevails in his country." (Emphasis added.)

…

THE MINISTER'S SUBMISSIONS

39 The Minister submitted that the Magistrate had erred in five respects. The first four errors identified by the Minister concerned the Magistrate's holding that unaccompanied Hazara minors and children separated from their parents or guardians are "readily recognisable or cognisable" as social groups and that the RRT had committed a

jurisdictional error in finding otherwise. The fifth error was said to be the Magistrate's failure to accord appropriate significance to the RRT's finding that even if VFAY was a member of a particular social group, any harm that might befall him in Afghanistan would be the product of the generalised insecurity and hardship in that country and not his membership of a particular social group. The Minister's submissions were as follows.

40 First, the High Court in Chen Shi Hai v Minister had not laid down any general principle that children in general could be a particular social group. In order for a particular social group to be recognised, there had to be country-specific evidence of attitudes towards and the treatment of the putative social group. In the absence of evidence about the treatment of and attitudes towards unaccompanied minors or separated children in Afghanistan, it was not open to the RRT (let alone incumbent on it, as the Magistrate held) to find that VFAY's status as a separated child made him a member of a particular social group for the purposes of the Convention.

41 Secondly, the finding by the Magistrate that children separated from their parents or guardians are a particular social group because "[a]ll societies take special measures to deal with separated children" revealed a misunderstanding of the process of identifying a particular social group for the purposes of the Convention. That process requires evidence directed to such matters as the characteristic uniting the collection of individuals, the circumstances setting the group apart from the rest of the community in the relevant country (Afghanistan, not any other country) and the fact that the relevant society recognises the group as one set apart from the remainder of the community. In the present case there was simply no relevant evidence. There was, at most, a claim that an "unaccompanied minor of Hazara ethnicity" or a "separated child" constituted a well-recognised group which would be particularly vulnerable if returned to Afghanistan. However, that claim essentially relied on a shared fear of persecution as a unifying factor, which is an impermissible approach: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225.

42 Thirdly, the Magistrate had erred in regarding the CRC as determinative of the question whether separated children should be regarded as a particular social group for the purposes of the Convention.

…

43 Fourthly, the Magistrate erred in identifying a series of "relevant" considerations that the RRT should have taken into account. None of those matters was such a consideration. They were no more than pieces of evidence that would have placed VFAY in a particular social group, if such a group existed. Any failure to take such evidence into account would be an error within jurisdiction: Paul v Minister for Immigration & Multicultural Affairs (2001) 113 FCR 396, at 422 [76]-[79] per Allsop J.

44 Fifthly, in any event, even if the RRT was bound to consider whether VFAY was a member of a particular social group, it did not commit a jurisdictional error. Having found that VFAY's status as a separated child did not make him a member of a social group, the RRT went on to consider VFAY's claim on the hypothetical basis that separated or unaccompanied children in Afghanistan constituted a particular social group. It found that even if there was such a group, VFAY's membership of the group would not be the essential and significant reason for any harm that might befall him in Afghanistan. In making this alternative finding, as Mr Hanks pointed out, the RRT was following the language of s 91R(1)(a) of the Migration Act. Accordingly, so he submitted, any error made by the Tribunal was immaterial to the result.

VFAY'S SUBMISSIONS

45 Ms Mortimer, who appeared with Ms Karapanagiotidis for VFAY, acknowledged in her oral submissions that the appeal had to succeed unless the Minister's fifth and final

submission could be answered. Ms Mortimer further accepted that s 91R(1)(a) of the Migration Act defines the concept of persecution as used in the Convention, by requiring at least one of the reasons mentioned in Article 1A(2) to be "the essential and significant reason" for the persecution feared by an applicant for a protection visa.

…

REASONING

49 In Applicant A v Minister, at 242, Dawson J accepted, by reference to Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, at 568, per Burchett J, that there is a "common thread" which links the expressions "persecuted", "for reasons of" and "membership of a particular social group" in Article 1A(2) of the Convention. As was said in Ram v Minister, the link is

> "a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of the particular social group. He is persecuted because he belongs to that group".

50 Dawson J's approach was endorsed in Chen Shi Hai v Minister, at 299, 302, per Gleeson CJ, Gaudron, Gummow and Hayne JJ. The Honours added this observation:

> "As was pointed out in Applicant A, not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct."

51 McHugh J in Applicant A v Minister, at 257-258, made a similar point:

> "When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of international discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group. Discrimination - even discrimination amounting to persecution - that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be. The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return."

52 It is for these reasons that Dawson J in Applicant A v Minister observed that the humanitarian scope of the Convention is limited. His Honour commented (at 248) that:

> "[n]o matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees.

> ...It would...be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them".

53 Gummow J (with whom Gleeson CJ and Hayne J agreed) endorsed this passage in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1, at 49. Gummow J pointed out (at 49) that the Convention's definition

> "does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention."

54 The decision in Haji Ibrahim establishes that it is an error to employ the notions of "differential operation" or "differential impact" as criteria for determining whether an applicant has a well-founded fear of persecution for one of the Convention reasons. As Gummow J observed (at 51) such expressions are distractions from the text of the Convention definition.

55 Chen Shi Hai v Minister establishes that persecution for the purpose of the Convention (in that case of "black" children born in breach of China's one child policy) can proceed from reasons other than "enmity" or "malignity": at 305. That does not, however, deny the need for a fear of discriminatory infliction of harm amounting to persecution. The joint judgment endorsed (at 304) the proposition put by French J that

> "the apprehended persecution which attracts Convention protection must be motivated by the possession of the relevant Convention attributes on the part of the person or group persecuted".

56 Similarly, McHugh and Gummow JJ said in Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1, at 28, that the reason for the persecution must be found in the "singling out of one or more of the five attributes expressed in the Convention definition".

57 In our view, the RRT in the present case correctly appreciated the questions that it had to ask. It plainly accepted that VFAY was at risk of harm if he were to return to Afghanistan. The RRT also plainly understood, on the assumption that separated children or unaccompanied Hazara minors were particular social groups, that it had to consider whether the feared harm would be inflicted by reason of VFAY's membership of those social groups. The RRT answered this question in the negative, finding that any difficulty VFAY might encounter would be because of his limited capacity to manage in the generalised insecurity and hardship prevailing in Afghanistan.

58 In answering this question in the negative, the RRT drew a distinction that has been recognised in the authorities. In Haji Ibrahim, for example, the RRT found that the applicant's fear of harm in conditions of class warfare prevailing in Somalia was not by reason of his membership of a particular clan, but was the consequence of civil unrest (at 53). This finding was held by the High Court not to involve any error.

59 In effect, the RRT in the present case found that VFAY would not be subject to discriminatory conduct amounting to persecution by reason of his status as an unaccompanied Hazara minor or a separated child. Indeed, the RRT's finding that, in view of the changed circumstances in Afghanistan, Hazaras were not at risk of persecution necessarily led it to conclude that VFAY was not at risk of persecution by reason of membership of a social group comprising unaccompanied Hazara minors.

60 It is true, as Ms Mortimer pointed out, that the RRT recognised that as an unaccompanied child in Afghanistan, VFAY would be "vulnerable" to harm. But the RRT's

reference to the UNHCR advice shows that what it had in mind was that certain groups, such as children, the sick and the elderly, would be less able to cope with the "generalised insecurity and hardship". The fact that the general conditions in Afghanistan might have a differential impact on some groups does not show that the members of those groups will be subject to persecution because of their membership of a particular group. Nor was it an error for the RRT to find otherwise.

…

62…it is not necessary to consider whether the RRT should have found that separated children or unaccompanied Hazara minors constituted particular social groups in Afghanistan: cf Minister for Immigration and Multicultural Affairs v Zamora (1998) 85 FCR 458, at 464 per curiam; Minister for Immigration and Multicultural Affairs v Applicant S (2002) 70 ALD 354 (special leave to appeal granted by the High Court on 8 August 2003).

…

MINISTER v SHBB

…

67 The delegate acknowledged that it was not safe to assume that SHBB could easily be reunited with his family and recognised SHBB's current status "as a single child without familial support". The delegate noted that, although the UNHCR did not necessarily consider unaccompanied minors as a group requiring protection within the Convention definition of "refugee", they constituted a group of particularly vulnerable persons if returned to Afghanistan….

…

69…the submission said that, in addition:

> "[T]he applicant is a young Afghan boy without an effective protector or guardian hence he would be more vulnerable to being targeted for mistreatment."

The submission also claimed that SHBB was in a "far greater vulnerable position of being persecuted due to being a Hazara Shi'a and only 16".

70 In an attachment to the submission, the solicitors referred to the authorities dealing with the concept of "particular social group". They argued that SHBB was part of a cognisable group set aside from Afghan society, namely a "young male without a protector, guardian or any other means of support".

…

77 The RRT referred to SHBB's submission that he was a member of a particular social group defined as "young males without a protector, guardian, or any other means of support". On the available evidence, the RRT was not satisfied that this was perceived as a distinct group within Afghan society. It was therefore not satisfied that SHBB was at risk of being harmed because he was a member of a particular social group so defined.

…

THE MINISTER'S SUBMISSIONS

…

89 First, in the absence of evidence about attitudes to and treatment of separated children in Afghan society, children in Afghanistan separated from their parents are not per se recognisable as a particular social group. According to Mr Hanks, unless there is evidence of a unifying element binding them as members of a discernible group in Afghan society, the RRT had no basis for recognising separated children as a particular social group for the purposes of the Convention. Since there was no evidence about the treatment and societal or cultural attitudes towards separated children in Afghanistan, it was not open to the RRT

to find that SHBB's status as a separated child in that country made him a member of a particular social group for the purposes of the Convention.
90 In the present case, apart from evidence that SHBB did not know what had happened to his parents, the only claims were that
* a young Afghan boy without adult protection would be vulnerable to persecution;
* separated children were more vulnerable than other children; and
* young males without a protector were a cognisable group set aside from the rest of Afghan society.
However, none of these claims relied on evidence relating to attitudes in Afghan society towards children. Moreover, they relied on a shared fear of persecution as the unifying factor.
91 Mr Hanks submitted that the CRC does not oblige Australia to recognise separated children, per se, as a particular social group. Australia as a party to the CRC had general obligations to all separated children, but those obligations did not include recognition of separated children as a "particular social group" for the purposes of the Convention.
92 Mr Hanks acknowledged that if there were appropriate evidence pointing to children being identified in a particular society as a distinct group and treated as such (for example, the "black children" in Chen Shi Hai), it would be open to a child from a relevant country to claim membership of a particular social group for Convention purposes. But the success of that claim would depend upon specific evidence relating to social and cultural attitudes and practices in the particular country. In the absence of that evidence, there could be no basis on which a decision-maker could find that a child was a member of a particular social group or had a well-founded fear of persecution by reason of that membership.
93 Secondly, Mr Hanks submitted that, if SHBB was advancing a claim that he feared persecution by reason of his status as separated child, the RRT plainly dealt with that claim.
…
….
REASONING.
98 The difficulty facing SHBB in the present appeal is that Dr Churches did not point to the significance, for the purpose of identifying error on the part of the RRT, of the distinction between a social group comprising "young males without a protector; guardian or any other means of support" and a social group comprising "unaccompanied children". The RRT found the first group was not perceived as a distinct group within Afghan society and that was a finding not challenged by Dr Churches. The RRT did not address the existence of the second group.
….
100 Dr Churches accepted that it was not open to the RRT to find that unaccompanied children in Afghanistan constituted a particular social group unless there is a "recognition within the society that the collection of individuals is a group that is set apart from the rest of the community": Minister v Zamora, at 464, per curiam. (In this respect his position may have been somewhat different from the stance taken by Ms Mortimer in Minister v VFAY.) It was because the RRT was not satisfied that this requirement was met that it rejected the contention that young males without a protector or guardian constituted a particular social group.
101 Obviously enough, a group consisting of "unaccompanied minors in Afghanistan" is broader than the group identified by SHBB's advisers, since it includes girls as well as boys. But Dr Churches did not identify any findings made by the RRT that could have led it to find that the unaccompanied minors, as distinct from young males without a guardian or protector, were recognised within Afghanistan as a group set apart from the rest of Afghani

society. Nor did he identify any evidence before the RRT which, if accepted, could have led the RRT to make such a finding.
…
103…having regard to the matters accepted by Dr Churches in argument, the RRT was not in error in failing to consider specifically whether unaccompanied minors constituted a particular social group in Afghanistan. The learned Magistrate erred in law in so holding.
….

An issue of whether a particular social group constitured by outspoken journalists in Bangladesh or a group with similar defining characteristics, and if so whether the Applicant was a member of that group and held a well-founded fear of persecution by virtue of that membership was held by the majority of the Full Court (Moore Branson JJ. Emmett J (dissenting) allowing an appeal in NAPU v MIMIA [2004] FCAFC 193 to have been raised by the material presented to the Tribunal and not addressed by it. Moore J. said

2 The following is a summary of the appellant's claims before the Tribunal. It will be necessary to return, in due course, to the terms in which some of these claims were expressed by or on behalf of the appellant. The appellant is a citizen of Bangladesh by birth. He completed a Master of Arts degree at the University of Dhaka in 1993. He had been actively involved in politics in Bangladesh and supported the Jatiya Party and former President Ershad. While at university and while President Ershad was in power, he was active in politics and tried to protect the government's interests.
3 The appellant is a journalist by profession. He worked for the Daily Saikat as a sports reporter, the Monthly Mohammedan (Sports Magazine) as an executive editor and finally, before arriving in Australia, he worked as a sports editor for the Daily Ajker Kagoj, a national daily newspaper. He was an outspoken journalist. He criticised the government as well as officials who had government support.
…
5 The appellant's difficulties started in 1994 after he wrote an article accusing the Swimming Federation of harassing women swimmers and of not using their funds appropriately. Someone, who he believed was attached to the Federation, approached him in the street and warned him not to write any more articles criticising them. In 1995 he wrote about the treatment of women and handling of funds by the Handball Association. After that, no one from the Handball Association would talk to him. In 1998 he wrote about the Shooting Association selling bullets on the blackmarket. Someone later hit him with a stick. He was not hospitalised and nothing further happened to him.
6 On 6 October 2000 the appellant published a report concerning the misappropriation of funds by officials of the Bangladesh Football Federation ("the BFF") in which he said there had been no proper account for millions of dollars donated to the BFF by the Federation of International Football Association. The following week, on 13 October 2000, the appellant published a report accusing the General Secretary of the Mohammedan Sporting Club ("the MSC") of stealing money from the club. He named the individuals from the BFF and the MSC because the problems were ongoing and he believed he would be leaving the country soon. His sources of information for the articles were members of an opposition group within the BFF. He had no concrete evidence of any wrongdoing and the allegations were not reported to the authorities for that reason.

7 The appellant was threatened several times before leaving Bangladesh by members of a gang linked to those accused of misappropriating funds. Between the publication of the 6 October 2000 article and the 13 October 2000 article, he was told he would not be allowed to enter the BFF and if he were to return, he would be tortured. On 15 October 2000, the appellant received a telephone threat from someone associated with the MSC as a result of the 13 October 2000 article. This threat was reported to the police.

….

9 The Tribunal accepted that the appellant had published several articles critical of leading figures in the sporting world in Bangladesh. However the Tribunal concluded the appellant had exaggerated the extent of the problems associated with the publication of the articles…

…

12…It can be seen that the Tribunal accepted the difficult position of journalists in Bangladesh generally but apparently did not view it as necessary to hear his evidence on that issue.

…

Issue raised at the hearing of the appeal

17 The appellant …submitted that he had published articles exposing corruption in sporting organisations and that the Tribunal had not dealt with the issues of whether he was a member of a particular social group and whether he had a well-founded fear of persecution for a Convention reason relating to that membership.

…

REASONING IN THE APPEAL

26 The central issue in this appeal is whether the Tribunal addressed the case raised by the material advanced by or on behalf of the appellant. It is necessary to refer in a little more detail, to the basis upon which the appellant advanced his application for a protection visa.

…

29 The delegate, in the decision record, summarised what had been claimed in the statutory declaration and application as including:

> 2. He believes he is an outspoken sports journalist who is unafraid to speak his mind and write the truth. He believes his life is in jeopardy in Bangladesh because of this.

30 In the form applying for review by the Tribunal, the appellant said (in a section inviting explanation as to why the delegate's decision was wrong) that: 'I firmly believe that I have well founded fear of being persecuted on my return back to Bangladesh due to my professional responsibilities I performed during the period of my employment as journalist.' In a written submission by a migration agent (dated 16 November 2001) sent to the Tribunal on behalf of the appellant it was submitted that the appellant would 'experience persecution and lack of protection on his return back to Bangladesh due to his political affiliation and brave commitment to his profession' though the submission concluded by saying that the feared persecution arose from the Convention based ground of the appellant's political activities as a member of the Jatiya party in Bangladesh.

31 In its reasons, the Tribunal recorded the following:

> I asked [the appellant] what he feared would happen to him if he returned to Bangladesh. He said that he feared he would be attacked and killed by agents from the Football Club or the Mohammedan Sporting Club if he returned home. He also said that he would not be able to find work as a journalist because he had lost his job when he did not return after reporting on the Paralympics and he was banned from working by the Dhaka Journalist Union as a result of dispute between his paper and the union (sic) the paper's decision to work on a public holiday.

32 During the review by the Tribunal, the appellant's adviser forwarded certain documents to the Tribunal. They included newspaper and Internet articles about violence to particular Bangladeshi journalists or journalists in Bangladesh generally. One, an article from the Dhaka Courier of 4 May 2001, included:

> The fourth state of the country has come under violent attack, this time not by the state machinery but by organised gangs. The incidents of assault on press nowadays have risen alarmingly, making journalists the most vulnerable professionals than any other group. In most of the cases the attackers remain at large or under the shelter of powerful groups or in some cases under the umbrella of influential members of the ruling party.
>
> The violence has affected all sections of the media, be it print or broadcast, local or international, public or private, Bangla or English.
>
> Journalists have developed a sense of insecurity due to a sharp rise in the frequency of attacks on the journalists by political activists and police. In the first four months of the current year one reporter was killed and 35 others were injured, two of them still fighting for life in hospital beds.
>
> Killing, attacks, kidnappings, blackmail and death threats to journalist have become an order of the day. Two journalists were killed, more than 45 came under attack, nine arrested and about 20 others were threatened during the year 2000.

33 To similar effect was an undated article from the Internet which included what was described as a "Message from Noted Columnist Abdul Gaffar Choudhury

…

34 Having regard to this material, it is necessary to identify what was the case raised by the appellant having regard to what he said (both orally and in writing (including in submissions made on his behalf)) and the material he presented to the Tribunal.

….

35 The difficult question in this matter is whether on the facts found by the Tribunal (or not negated by its findings), it should have considered whether the appellant was a member of a particular social group and, if so, whether he feared persecution because of his membership of that group and whether that fear was well-founded. A consequential issue is whether if these issues were raised, were they addressed by the Tribunal.

36 The Tribunal found that the appellant had published several articles critical of leading figures in the sporting world in Bangladesh. It did not reject the material furnished by the appellant (mainly, but not exclusively, newspaper articles) which might have supported a conclusion that outspoken journalists in Bangladesh were at risk of harm. It made no findings one way or the other about this material. The Tribunal did not address the question of whether there was a particular social group constituted by outspoken journalists in Bangladesh or a group, differently described, with similar characteristics. That would have been the first step in considering whether the appellant had a well-founded fear of persecution by virtue of his membership of any such group.

37 The Tribunal's failure to consider whether there was a particular social group constituted by outspoken, or perhaps truthful, journalists in Bangladesh, has particular significance because of the Tribunal's acceptance that members of the Bangladeshi media were sometimes victims of violence or harassment from the government or powerful individuals or both and its determination that there was no need for Mr Rahman to give evidence. The evidence that Mr Rahman was apparently prepared to give, could have been relevant to the question whether the Bangladeshi media, or a section of it, was an identifiable group by

reason of a common characteristic or attribute and thus a particular social group: see Applicant S v Minister for Immigration and Multicultural Affairs [2004] HCA 25.

38 The Tribunal expressed a conclusion that the appellant had been threatened because the people he had written about wanted to silence him or seek revenge for the statements he had made and not because, inter alia, of his membership of a particular social group. On a narrow view of the case raised by the material provided by the appellant, this provided a sufficient answer to the claims made by the appellant. That is because the appellant, in identifying at various points during the consideration of his application (including its consideration by the Tribunal) the harm he would suffer were he to return to Bangladesh, focused on the harm he would suffer at the hands of those he had written critical articles about immediately before leaving Bangladesh. However the various descriptions by the appellant of himself as an outspoken journalist and the material he furnished about the fate of journalists in Bangladesh, fairly raised a broader case than the case dealt with by the Tribunal. There was no consideration of whether such a group existed, for Convention purposes, whether the appellant was a member of it, and, if so, whether he had a well-founded fear of persecution because of that membership. It was not sufficient for the Tribunal to deal with the question of membership of a particular social group in the summary way just outlined.

39 It may be accepted, as counsel for the Minister submitted, that one should be cautious in characterising an occupational group as a particular social group: Minister for Immigration and Multicultural Affairs v Zamora (1998) 85 FCR 458 at 464, though having regard to the recent judgment of the High Court in Applicant S v Minister for Immigration and Multicultural Affairs it is clear the Full Court took too narrow a view of what may constitute a particular social group. However, even if the view the Full Court expressed was too narrow, their Honours nonetheless recognised (at 464-465):

> There will no doubt be cases in which persons who have in common no more than a shared occupation do form a cognisable group in their society. This may well come about, as McHugh J recognised in Applicant A's case, when persons who follow a particular occupation are persecuted by reason of the occupation that they follow. The persecution for following a particular occupation may well create a public perception that those who follow the occupation are a particular social group. Human rights workers in certain nations subject to totalitarian rule come to mind as a possible example.

40 In Nouredine v Minister for Immigration and Multicultural Affairs (1999) 91 FCR 138 Burchett J accepted that beauty workers in Algeria were a particular social group as they were seen by religious extremists as purveyors of immorality and therefore as a group within society that should be eliminated. After referring to Zamora (supra) and Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, his Honour said (at [13]):

> But in neither case was it denied that an occupational group may, in particular circumstances, also be a social group. In my judgment in Ram at 568 I referred to the situation in Cambodia under Pol Pot, where "teachers, lawyers, doctors and others ... were regarded as potentially dangerous to the new order", as a textbook example of persecution for membership of a social group.

41 The passage in Ram referred to by his Honour bears repeating (at 568):

> The point can be illustrated from history. In the infamous Reign of Terror during the French Revolution, men, women and children were guillotined because they belonged to a class seen as dangerous to the emerging democratic State. Similarly, in Cambodia under Pol Pot, teachers, lawyers, doctors and others who were seen as

> having, by their education and status, a capacity to influence public opinion, were regarded as potentially dangerous to the new order, and were therefore eliminated. These were textbook examples of persecution for membership of a social group. In neither case was the motivation what a particular individual possessed or had done. Of course, many of the people murdered did have greater wealth than the average, but others did not. Some probably had greater capacity, if they chose, to act against the State than the average citizen, but many were quite helpless. The fact is that it was the whole class which, in each instance, was attacked. Individuals were not persecuted for what they had done as individuals, nor for what they possessed as individuals.

42 More generally, issues have arisen at least in Canada and the United States about whether journalists may be a particular social group for the purposes of the Convention. Persecution on the basis of membership of a particular social group, namely journalists in a particular country, has been raised together with persecution on the basis of imputed or actual political opinion. These grounds are either framed separately or as persecution on the basis of membership of a particular social group, journalists who speak out against government or particular government policy. As the United States Court of Appeal said in Hussain v Immigration and Naturalization Service 246 F 3d 647, 2000 WL 1523100, 2 (9th Cir. 2000):

> Persecution because of an "act that constitutes an overt manifestation of a political opinion" is "persecution because of a political opinion". Journalism is work that overtly manifests a political opinion". (citations omitted)

43 In Canada and the United States courts have not rejected claims advanced on the footing that the asylum seeker was a member of a particular social group constituted in some way by journalists, on the basis that journalists will never form such a group. Ultimately, whether journalists sharing some common characteristic form a "particular social group" will depend on the operation of cultural, social, religious and legal factors within a country: see Applicant S v Minister for Immigration and Multicultural Affairs (supra).

44 In the recent United States Court of Appeal case of Agada v Ashcroft 2004 WL 1076426 the petitioner sought relief under the Convention Against Torture and argued the relevant decision makers had failed to analyse his case 'as one involving a "pattern or practice" of persecution of a group..., namely journalists'. He claimed that his case arose as a result of adherence to the Nigerian Union of Journalists principle of objective reporting of news without fear or favour. The petitioner had also expressed political opinion as a journalist. The Immigration Judge noted that journalists were detained and imprisoned and that the government ignored its constitutional guarantees of freedom of speech and freedom of the press under Nigeria's then president. However, the Court agreed that country conditions in relation to freedom of the press had changed drastically since the petitioner's departure and denied his petition.

45 It will ultimately be for the Tribunal to determine whether there is a particular social group constituted by outspoken journalists in Bangladesh or a group with similar defining characteristics. However, if the Tribunal does conclude that there is a particular social group of the type just discussed, it will be necessary to consider whether the appellant is a member of that group and also whether, by virtue of that membership, he has a well-founded fear of persecution. These issues were raised by the material presented to the Tribunal and not addressed by it. Issues concerning persecution by the state or by non-state actors uncontrolled by the state may also arise (see, for example, the observations of Kirby J in Minister for Immigration and Multicultural Affairs v S152/2003 at [100]). The Tribunal did not deal with the case raised by the appellant's material and thereby fell into

jurisdictional error: see Dranichnikov v Minister for Immigration and Multicultural Affairs (supra).

…

Branson J. said:

48 I agree with his Honour, for the reasons which his Honour gives, that the claims made by the appellant required the Tribunal to give consideration to whether it was satisfied that the appellant had a well-founded fear of persecution in Bangladesh by reason of his membership of a particular social group within the meaning of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Convention').

49 In determining whether it was so satisfied, the Tribunal would first have had to determine whether it was satisfied that a group constituted by outspoken journalists in Bangladesh, or some other relevant sub-set of members of the Bangladeshi media, fell within the meaning of 'a particular social group' in Article 1A(2) of the Convention. It would seem that Mr Rahman, as a former journalist in Bangladesh, would have been able to give evidence relevant to this issue. The acceptance by the Tribunal that it was unnecessary for it to receive his evidence is a strong indicator that it did not consider it necessary to examine whether the appellant might have had a well-founded fear of persecution by reason of his membership of a social group constituted by journalists, or a sub-set of journalists, in Bangladesh.

50 If satisfied that a group constituted by outspoken journalists in Bangladesh, or some other relevant subset of members of the Bangladesh media, fell within the meaning of a 'particular social group', the Tribunal would next have need to determine whether it was satisfied that the appellant was a member of that group. If so satisfied the Tribunal would then have had to determine whether it was satisfied that the appellant had a well-founded fear of persecution by reason of his membership of that group. The Tribunal did not undertake any of the above steps.

Note the judgment of the Full Court in NAEB v MIMIA [2004] FCAFC 79 rejecting an argument based on S395. (see Chapter 8 below)

In ***SVTB v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCAFC 104** (Marshall Mansfield and Stone JJ.) dismissed the appeal from *SVTB v MIMIA* [2004] FCA 1610) Lander J.) in which membership of a particular social group accepted as single women in Albania without male protection. The issue was one of non-state agents of persecution and whether the appellant faced a real chance of being sexually assaulted or trafficked by reason of her membership of that group - RRT rejected her evidence as "most unconvincing" - it appeared not to accept that she faced a real chance of being sexually assaulted by reason of her membership of that social group - women in the particular social group were no more vulnerable to those consequences than other women

generally in Albania - it also did not accept appellant was at risk of being trafficked for sexual exploitation or in order to harvest her organs on the basis of country information. It was held on appeal that it was significant that the Tribunal did not expressly make a finding that it was not satisfied that the appellant subjectively had a fear of persecution for a Convention reason. The RRT did not accept past persecution. The fact that particular claimed events have not occurred in the past does not logically lead to the conclusion that there is no real chance of something occurring in the future, although it may be an indication of such a conclusion. It was held on appeal that the Tribunal simply assumed the appellant held the fears she claimed for the future, and addressed the other steps necessary to determine if the appellant was a refugee - it then found her assumed fears not to be well-founded

8 The Tribunal appeared not to accept that the appellant faces a real chance of being sexually assaulted by reason of her membership of that social group. Women in the particular social group, it found, were no more vulnerable to those consequences than other women generally in Albania. It concluded:

'While the level of violence directed at women is clearly a serious problem in Albania, there is no evidence before the Tribunal that single women without male protection are at greater risk of being subjected to sexual abuse, assault, or any other crime than Albanian women who are married and/or who have male protection. In fact, domestic violence appears to be an area of criminality which is of particular concern for Albanian women, with married women at risk of spousal abuse. Noting the information set out above, the Tribunal is satisfied that the Albanian authorities have acknowledged that violence towards women is a problem and they have created institutional structures and put in place proper police and judicial procedures to address gender-related violence. Single women without male protection are not excluded from accessing these services. The Tribunal finds that the Albanian authorities would be able and willing to provide protection sufficient to remove a real chance of persecution for the applicant if she feared she was at risk of being sexually assaulted or subjected to a criminal attack because she was a single woman without male protection.'

9 It also did not accept that the appellant is at risk of being trafficked for sexual exploitation or in order to harvest her organs. It noted the country information that the number of Albanians being trafficked is declining in response to government measures, and that 'increasingly, Albanians who are trafficked are children between the ages of 14 and 17'. It observed that persons who are abducted are often orphans who are sold by family members, or are recruited because their economic circumstances make them susceptible to the rewards promised by traffickers. It noted that the appellant is not in a position where she is at risk of her family selling her against her will, and that she is aware of the dangers posed by traffickers and is not likely to succumb to false inducements from traffickers. Consequently, it concluded there is no real chance of the appellant being trafficked because of her individual attributes or because of her membership of the particular social group.

….

16 It is axiomatic that, if the appellant were to be granted a protection visa, the Tribunal was required to be satisfied both that the appellant subjectively held a fear of persecution if

she were to return to Albania by reason of being a single woman in Albania without the support of male relatives, that is by being a member of the particular social group to which the Tribunal accepted she belonged, and secondly that her fear was well-founded. Those two elements are aspects of the definition of refugee: see *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379; *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 (*Appellant S395/2002*) e.g. per Gummow and Hayne JJ at 498-499, [72]-[74]. The Tribunal clearly understood that. It recorded its awareness of those two elements in the opening part of its reasons.

17 In that context, in our view, it is significant that the Tribunal did not expressly make a finding that it was not satisfied that the appellant subjectively had a fear of persecution for a Convention reason if she were to return to Albania. It found that single women in Albania who do not have the protection of male relatives do constitute a particular social group. It accepted that the appellant was part of that group from January 1997. To an extent, therefore, it accepted her evidence as to her family history, although it expressed dissatisfaction with her evidence overall. It found that gender violence and the trafficking of women are significant problems in Albania.

18 The Tribunal did not accept that the appellant had suffered the detriments which she claimed to have experienced in the past…

19 The reason why it was appropriate for the Tribunal to address the specific claims which the appellant made as to her experiences in the period up to when she left Albania is apparent. In *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 575 explained:

'Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.'

The fact that particular claimed events have not occurred in the past does not logically lead to the conclusion that there is no real chance of something occurring in the future, although it may be an indication of such a conclusion. As their Honours said at 574, past events are not a certain guide to the future, although in many areas of life they may provide a reliable basis for determining the probability of their recurrence. See also per Gummow and Hayne JJ in *Appellant S395/2002* at 499, [74].

20 The sequence of reasoning of the Tribunal also indicates that it took the separate step of considering whether the appellant faces a real chance of persecution for a Convention reason if she were to return to Albania after finding she had not been persecuted in the past. The question it posed, that is the real chance test, involves both subjective and objective elements. Its reasoning, after identifying the nature of the particular social group as claimed by the appellant, focused on the objective element of that question. It did not suggest that its findings adverse to the appellant in respect of her claimed past experiences made that inquiry unnecessary because it had rejected any claim she made to fear persecution if she were to return to Albania.

21 For those reasons, in our judgment the Tribunal did not find implicitly that the appellant did not fear being persecuted for a Convention reason if she were to return to Albania. To that extent, we respectfully disagree with the learned judge at first instance. We also do not agree with counsel for the appellant that, by implication, the Tribunal positively accepted

that the appellant subjectively feared persecution for a Convention reason if she were to return to Albania. It has simply expressed no view on the matter. Our reading of its reasons is that the Tribunal simply assumed that the appellant held the fears she claimed for the future, and addressed the other steps necessary to determine if the appellant is a refugee. It then found her assumed fears not to be well-founded….
….

In ***VNAG v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2005] FCA 555** Finkelstein J. dismissed an appeal from the Federal Magistrates Court concerning membership of a particular social group of businessmen or entrepreneurs./ active businessmen or entrepreneurs oo another ground **(see below Chapter 14)** but found jurisdictional error in the treatment of this issue. The principle that it is not that the group must be recognised or perceived within the society, but rather that the group is distinguished from the rest of society – ***Applicant S v Minister for Immigration and Multicultural Affairs*** **[2004] HCA 25 (2004) 78 ALJR 854** was applied. His Honur held that the RRT misinterpreted the effect of the Convention and fell into jurisdictional error on this aspect . If the RRT had applied the test laid down in ***Applicant S*** it would have been impossible for it to reject the existence of businessmen or entrepreneurs as a particular social group - at the very least RRT would have been required to find that there was a similar group to that which appellant had described – there was evidence before it was that there is in Russia a social group comprised substantially of what are referred to as "new entrepreneurs" or "merchants" - group is similar to 'capitalists'. His Honour said:

1 The appellant is a Russian citizen. He arrived in Australia on a tourist visa and shortly thereafter applied for a protection visa. He claims that if he were required to return to Russia there is a real chance that he will face persecution on account of his membership of a particular social group. The description of the social group has changed from time to time. At first the group comprised Russian businessmen or entrepreneurs. It then became a group of active businessmen or entrepreneurs. At any rate, neither the Minister's delegate, who refused his application for a protection visa nor the tribunal, which affirmed the delegate's decision, was satisfied of the existence of the particular social group. According to the tribunal "[t]he groups postulated do not meet the criterion of being cognizable social groups" for the purposes of the Refugee Convention.
…
3 On the appeal the principal criticism the appellant makes of both the tribunal's decision, and the magistrate's acceptance of that decision, is in relation to its finding about the particular social group. In large measure the criticism is based on the High Court's recent decision in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854. Prior to that decision, the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 85 FCR 458, 464 had laid down that under the

Refugee's Convention a particular social group had to display the following features: "First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. 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." In part this statement of the relevant characteristics was in error. The error was in the description of the third criteria. According to *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854 the principle is not that the group must be recognised or perceived within the society, but rather that the group is distinguished from the rest of society. The joint judgment of Gleeson CJ, Gummow and Kirby JJ puts the matter thus (at 861):

"Therefore, the determination of whether a group falls within the definition of 'particular social group' in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic of attribute common to all members of the group cannot be the shared fear or persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'. As this Court has repeatedly emphasised, identifying accurately the 'particular social group' alleged is vital for the accurate application of the applicable law to the case in hand."

See also McHugh J who (at 867) said:

"Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally ***within the society*** *as a collection of individuals which constitutes a group that is set apart from the rest of the community. To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle."* (Emphasis in the original).

4 In order to understand how the tribunal arrived at its decision, as well as to determine whether it committed jurisdictional error in arriving at that decision, it is necessary to say something about the facts. In this connection I will confine myself to the appellant's statement of the facts which the tribunal accepted as true or, at least by not having rejected what the appellant said, appeared to accept as true. There is no allegation, and nor could there be in this case, that the tribunal erred in the manner in which it rejected or did not accept evidence of other "facts" which the appellant asserted to be true.

5 The appellant is a businessman from Severodvinsk. He is a qualified engineer. Following his military service, he worked in the Russian Centre for Nuclear Shipbuilding. In about 1990 the appellant established his own business, known as Forum. The business operated a car service workshop, manufactured and repaired car batteries, published books and was both a wholesaler and retailer of consumer goods, food products and spare parts for motor vehicles.

6 In 1996 local criminal elements attempted to extort "protection money" from Forum but the appellant refused to make any payments. In November 1996 the appellant and his neighbour, who was the director of a large building and renovation cooperative were beaten by some "Caucasian people" which caused them serious injuries. The appellant was able to identify the ringleader and reported his conduct to the authorities. This produced further threats from the "bandits", who must have discovered that their activities had been reported.

7 The appellant contends that the authorities did not adequately investigate the bandits' actions. The appellant says that "my easy case was exceeded all possible terms and seven and the half months later was transferred to the Investigation Dept. On 17.06.1997 I was asked by the captain Tretyakov after which the file was closed without explanation and notification. By our request the file was open again and closed once again, and nothing was changed at all."
8 Among the documents which the appellant produced to the tribunal were communications from the authorities who were investigating his complaints. One document advised the appellant that the Arkhangelsk Regional Department of Internal Affairs would investigate the matter "[u]pon the establishment of [the perpetrators'] whereabouts." Another document advised that the "previously suspended" investigation "has been re-opened ... and is currently under [a particular individual's] supervision." It also appears from other documents that some kind of investigation was in fact carried out.
…
10 As I have said, the tribunal accepted, or should be taken to have accepted, that these events occurred. Yet it found against the appellant. Two reasons were given for rejecting the appellant's claim for refugee status. The first reason is encapsulated in the following paragraph of the tribunal's reasons:
"In summary, the Tribunal accepts that the applicant was beaten in the course of extortion episodes by the mafia. It finds that the harm suffered by the applicant does not fall within the ambit of the Convention as it was not motivated by one of the convention reasons. The Tribunal does not accept that the applicant belonged to a particular social group or groups as defined by the applicant's adviser. The groups postulated do not meet the criterion of being cognizable social groups."
11 In other words, the tribunal rejected the appellant's claim that he was persecuted for a Convention reason because it did not accept that "active businessmen" or "entrepreneurs" constitute a particular social group and that the appellant's membership of that social group was the reason for his mistreatment. It is clear that the tribunal rejected the existence of businessmen or entrepreneurs as a particular social group because (in its view) it did not meet the third requirement laid down in *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 85 FCR 458, 464, namely that the group be recognised within society as a group set apart from the rest of the community. We now know, however, that this is not a necessary requirement. It follows, therefore, that the tribunal, having misinterpreted the effect of the Convention, fell into jurisdictional error on this aspect, although through no fault of its own.
12 If the tribunal had applied the test laid down in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854 (a decision which of course was not available to the tribunal as it was published well after the tribunal's decision), it would have been impossible for it to reject the existence of businessmen or entrepreneurs as a particular social group. At the very least the tribunal would have been required to find that there was a similar group to that which the appellant had described. The evidence before the tribunal was that there is in Russia a social group comprised substantially of what are referred to as "new entrepreneurs" or "merchants". This group is similar to the capitalists recognised in *Lai v Canada (Minister of Employment & Immigration)* (1989) 8 Imm LR (2d) 245, 246.
…

b) Women

There is persuasive recent House of Lords authority consistent with the approach which has been taken by the Tribunal in appropriate cases depending upon the conditions in the country of origin, and with Federal Court statements on this issue, that women per se or more restrictive formulations such as single (or married) women can constitute a particular social group (see ***Islam v Secretary of State for the Home Department*** **[1999] 2 AC 629 [1999] 2 WLR 1015** , Lords Steyn, Hoffman, Hope of Craighead, Hutton; Lord Millett dissenting). Further support for this position is provided by ***Thalary v MIEA*** **(1997) 73 FCR 437**, 4 April 1997). In that case Mansfield J., without deciding the point, was clearly of the view that 'single women in India' could constitute a particular social group for the purposes of the Convention and that such a finding was not inconsistent with ***Applicant A v Minister*** **(1997) 142 ALR 331**. His assumption in this regard he stated "seems to reflect the wide interpretation of that expression generally reflected **in *Applicant A* and in *Morato v MIEA* (1993) 111 ALR 417** (see paras43-49 of Thalary).

In MIMA v Cali [2000] FCA 1026 the Minister did not contend that young Somali women could not constitute a particular social group, nor challenge the correctness of Islam, rather that the available evidence did not include any evidence that those meeting this description did constitute a particular social group. This argument was rejected. North J. found, inter alia, that the Tribunal correctly determined the existence of the particular social group first and then separately considered the nature of the persecution feared.

"The particular social group found by the Tribunal was young Somali women. It was in assessing the likelihood of harm that the Tribunal looked to the absence of male protection. The absence of male protection was not an element which the Tribunal saw as defining the particular social group. The absence of male protection was a factor the Tribunal used as part of the measure of the degree of risk faced by this member of the group" at [38].

As to the causal link between the feared persecution and belonging to the particular social group His Honour referred to passages from Chen Shi Hai at [25] [32] [70-1] of that judgment and went on:

"44 The approach of the High Court in Chen to the causation issue reveals that often the determination that conduct amounts to persecution cannot be divorced from the inquiry whether the conduct was undertaken for a Convention reason. The conclusion that conduct is persecutory will in those cases carry with it as a matter of "common sense" or will

"readily" lead to the conclusion that the conduct was done for a Convention reason. In the present case the Tribunal seems to have adopted such an approach.
45 In any event, in this case, there was clear evidence upon which the Tribunal was entitled to rely that as a young Somali woman the respondent had a well founded fear of rape. There was also evidence upon which the Tribunal was entitled to rely that women were singled out as targets of sexual violence. There was reference to the fact that the same danger of sexual violence did not apply to males. The evidence cited by the Tribunal that "women are systematically discriminated against" alone, or, at least, together with the nature of rape as a gender-based persecution, provided the basis upon which the Tribunal was entitled to find that the respondent had a well founded fear of rape for the reason that she was a young Somali woman".

In ***Weheliye v MIMA*** **[2001] FCA 1222** (Goldberg J.) the Tribunal's misunderstanding of the social group in Cali was held to be an error of law.

The Full Court in Khawar (see now the High Court judgment below (2002) 210 CLR 1 76 ALJR 667 67 ALD 577) in a majority judgment delivered by Lindgren J. (as well as in the dissenting judgment of Hill J) exhaustively dealt with all the issues going to establishing the existence of a particular social group where the applicant fears violence from her husband (a non-state agent who persecutes for a non-Convention reason) and this takes place in the context of institutionalised societal discrimination and a lack of effective protection by the State authorities. They upheld the contention that Convention-related persecution can exist in these circumstances (Hill J. dissented on this point). The majority at [112] of Lindgren J.'s judgment, agreed with Branson J. that:

"the RRT erred in thinking that a failure of the state to protect any particular social group of which Ms Khawar was a member was necessarily rendered irrelevant by the RRT's finding that she feared violence from her husband whose motivation resided in private, family considerations."

His Honour continued later:

123 If the authorities in Pakistan routinely withheld from "women in Pakistan", or "married women in Pakistan", protection against violence by men or by their husbands (the RRT did not make any finding in this respect), I find it difficult to see why that denial of protection could not be persecution by the state "for reasons of" membership of a particular social group.
124 According to this approach to the present case, the persecutory conduct would be the state's systemic failure to protect the members of the particular social group in certain classes of situation. It would be irrelevant that the state was not motivated by feelings of enmity or malignity. The husband's motivation would be irrelevant: his violence would not be the persecutory conduct and would be relevant only as providing the occasion of an instance of persecution by the state…

(This approach is at odds with that taken by Weinberg J. in Ndege see Khawar at [154-6); the position in Ndege can no longer be seen to be correct in view of the High Court judgment in MIMA v Khawar (2002) 210 CLR 1 76 ALJR 667 187 ALR 574 67 ALD 577 [2002] HCA 14 esp. at [87])

130 A second and alternative approach is to regard the persecutory conduct as the combination of the husband's violence and the lack of state protection. This is the approach that was accepted by a four to one majority in the House of Lords in Islam. ..
131 Their Lordships were more concerned with the Convention definition's concept of "a particular social group" than with the causal link required by its words "for reasons of", but on that issue, Lord Steyn said (at 646):

> "Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic. And that is so irrespective whether a 'but for' test, or an effective cause test, is adopted. In these circumstances the legal issue regarding the test of causation, which did not loom large on this appeal, need not be decided."

132 Lord Hoffmann thought there were two reasons for the persecution that the women feared. His Lordship stated (at 653):

> "First, there is the threat of violence to Mrs. Islam by her husband and his political friends and to Mrs. Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention. As the Gender Guidelines for the Determination of Asylum Claims in the U.K. (published by the Refugee Women's Legal Group in July 1998) succinctly puts it (at p. 5): 'Persecution = Serious Harm + The Failure of State Protection.'"

135 Accordingly, while not essaying a "definition" of the words "for reasons of" in the definition, the majority accepted that a "realistic" approach to causation would treat those words as satisfied by a pattern of violence for which the immediate motivation was personal, combined with denial of state protection.
136 With respect, I think that their Lordships' understanding of the kind of causal link called for by the definition is both "realistic" and in conformity with the purposes of the Convention. The definition does not, in terms, require identification of the persecutor or persecutors. Once it is accepted, as it has been (see, for example, Minister for Immigration and Multicultural Affairs v Sarrazola (1999) 166 ALR 641 (FCA/FC)), that the definition may be met even though a single persecutor has more than one reason for persecuting, there is no difficulty, I suggest, in accepting that persecution may consist of the effect of the conduct of two or more persons, only one of whom may be moved by a Convention reason.
137 In the present case, there are possibilities which, in my view, would have satisfied the Convention definition but which the RRT did not explore because it put the state's lack of protection to one side as irrelevant in favour of only the immediate motivation of the husband:

* That Ms Khawar feared violence from her husband and his brother for reason of exclusively personal, family considerations followed by the objective fact of lack of state protection for reason of her membership of a particular social group;
* That Ms Khawar feared violence from her husband and his brother for reason of personal, family considerations and the husband's and brother's knowledge that the state would not protect her from them for reason of her membership of a particular social group ("what did you think the police could do to us?").
138 According to this alternative identification of the persecutory conduct also, her Honour was right to set aside the RRT's decision and to remit the matter to the RRT for consideration according to law".

The judgment of the majority of the Full Court was affirmed in MIMA v Khawar (2002) 210 CLR 1 76 ALJR 667 187 ALR 574 67 ALD 577 [2002] HCA 14 Gleeson CJ., Mc Hugh, Gummow, Kirby JJ.; Callinan J dissenting.) The judgments deal as well with the issue of 11. PERSECUTION BY NON-STATE AGENTS WHICH THE STATE IS UNABLE OR UNWILLING TO PREVENT.

Gleeson CJ said:

4.The issues arise in the context of applications for a protection visa by a married woman, Ms Khawar, a citizen of Pakistan, and her three children. Ms Khawar's case is that she was a victim of serious and prolonged domestic violence on the part of her husband and members of his family, that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, and that such refusal is part of systematic discrimination against women which is both tolerated and sanctioned by the state[2] cf R v Immigration Appeal Tribunal, Ex parte Shah [1999] 2 AC 629 at 635 per Lord Steyn….
5. The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention.
6. The second issue is whether women (or, for present purposes, women in Pakistan) may constitute a particular social group within the meaning of the Convention.
…
10.First, Ms Khawar gave evidence of four occasions on which she approached the police, alone or together with a male relative, to complain of the violence from which she was suffering. On each occasion the police response, she said, was one of indifference and refusal to help. The Tribunal did not decide whether to accept that evidence.
11. Secondly, Ms Khawar's solicitor filed a submission that included, under the heading "Country Context", material concerning "the position of women in Pakistani society and culture generally." That included extracts from reports of the United States State Department, the Canadian Immigration and Refugee Board, Amnesty International, and the Australian Department of Foreign Affairs and Trade. Much of the information was to the same effect as the facts that were found, and were ultimately before the House of Lords, in R v Immigration Appeal Tribunal, Ex parte Shah[3] [1999] 2 AC 629. In that case, Lord Steyn said[4] [1999] 2 AC 629 at 635.:
"Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact

in the particular case. On the findings of fact and unchallenged evidence in the present case, the position of women in Pakistan is as follows. Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. Domestic abuse of women and violence towards women is prevalent in Pakistan. That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state."

12. Again, the Tribunal made no findings as to whether that information was true, because it considered that, even if it were true, the claim to refugee status must fail.

13. The Tribunal's decision was given before the House of Lords decided Ex parte Shah. The essence of the Tribunal's reasoning was that, even if Ms Khawar's claims as to her treatment by her husband and his family were true, those harming her were not motivated by her membership of any particular social group, but by purely personal considerations related to the circumstances of her marriage, the fact that she brought no dowry to the family, and their dislike of her as an individual. The reasoning proceeded on the assumption that the alleged persecution, if any, consisted solely of the conduct towards Ms Khawar of her husband and his relatives. That conduct was not for reasons of race, religion, nationality, political opinion, or membership of a particular social group, even if women constituted such a group. It was for personal reasons. On that approach, the attitude of the Pakistani police, or of the Pakistani state, was incapable of turning the inflicting of harm for reasons having nothing to do with any of the grounds set out in Art 1A(2) into persecution for one of the reasons stated.

…

15. In this Court, with reference to the first of the two legal issues earlier identified, the appellant's counsel argued, as his "central proposition", that persecution and protection are distinct concepts in the Convention definition of refugee, and that it is impermissible to treat absence of state protection as a factor capable of converting private harm, based upon a motivation other than one of the Convention 16. reasons, into persecution within the Convention definition…

16. Since the first issue turns largely upon the concepts of state protection and persecution, and upon whether, as the respondents contend, they are interrelated, or whether, as the appellant insists, they must be considered separately, it is necessary to examine those concepts.

Protection

17. There is a broader sense, and a narrower sense, in which the term "protection" is used in the present context.

18. An example of the broader sense is to be found in the following passage in the judgment of Brennan CJ in Applicant A v Minister for Immigration and Ethnic Affairs[7] (1997) 190 CLR 225 at 233:

"The feared 'persecution' of which Art 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to 'the country of his nationality' for protection of his fundamental rights and freedoms but, if 'a well-founded fear of being persecuted' makes a person 'unwilling to avail himself of the protection of [the country of his nationality]', that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent."

19.The relationship between persecution as the inflicting of serious harm in violation of fundamental rights and freedoms, and the responsibility of a country of nationality, or state,

as the primary protector of fundamental rights and freedoms, has been taken up in the interpretation of the Convention[8] See, for example, R v Secretary of State for the Home Department, Ex parte Adan [2001] 2 AC 477 at 491-492, and the cases there cited. It is reflected in what was said by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [9][2001] 1 AC 489 at 497-498:

"I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word 'persecution' implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme."

20. His Lordship went on to quote Dawson J in Applicant A[10] (1997) 190 CLR 225 at 248, who said that it was a well-accepted fact that international refugee law was meant to serve as a substitute for national protection where such protection was not provided due to discrimination against persons on grounds of their civil or political status.

21. The narrower sense in which "protection" is used is that of diplomatic or consular protection extended abroad by a country to its nationals…

22.It is accepted in Australia, and it is widely accepted in other jurisdictions[12] Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 415-416, that the serious harm involved in persecution may be inflicted by persons who are not agents of the government of the country of nationality referred to in Art 1A(2). However, the paradigm case of persecution contemplated by the Convention is persecution by the state itself. Article 1A(2) was primarily, even if not exclusively, aimed at persecution by a state or its agents on one of the grounds to which it refers. Bearing that in mind, there is a paradox in the reference to a refugee's inability or unwillingness to avail himself of the protection of his persecutor. But accepting that, at that point of the Article, the reference is to protection in the narrower sense, an inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection in the wider sense, or may be related to a possibility that seeking such protection could result in return to the place of persecution. During the 1950s, people fled to Australia from communist persecution in Hungary. They did not, upon arrival, ask the way to the Hungarian Embassy.

…

24. When a national of another country applies, under the Act, for a "protection visa", claiming that Australia "has protection obligations" under the Convention, and contends that his or her case falls within Art 1A(2), unwillingness to seek the diplomatic protection of the country of nationality may be self-evident. But on the questions whether persecution is a threat, (which usually involves consideration of what has occurred in the past as a basis for looking at the future), and whether such persecution is by reason of one of the Convention grounds, and whether fear of persecution is well-founded, the obligation of a state to protect the fundamental rights and freedoms of those who are entitled to its protection may be of significance. The reasons for this will be considered in dealing with the concept of persecution.

25. In the present case, Ms Khawar does not rely upon mere inability of the police and other authorities of Pakistan to protect her against personally motivated violence. She claims that the violence is tolerated and condoned; not merely at a local level by corrupt, or inefficient, or lazy, or under-resourced police, but as an aspect of systematic discrimination

against women, involving selective enforcement of the law, which amounts to a failure of the state of Pakistan to discharge its responsibilities to protect women. She may not be able to make good her claim. The Tribunal has not yet found the necessary facts. But, as the case of Ex parte Shah shows, it is possible that she might be able to establish the facts she alleges.

26. As her case is argued, and as a matter of principle, it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes. An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.

Persecution

27. Article 1A(2) does not refer to any particular kind of persecutor. It refers to persecution, which is conduct of a certain character. I do not see why persecution may not be a term aptly used to describe the combined effect of conduct of two or more agents; or why conduct may not, in certain circumstances, include inaction

…

29. If there is a persecutor of a person or a group of people, who is a "non-state agent of persecution", then the failure of the state to intervene to protect the victim may be relevant to whether the victim's fear of continuing persecution is well-founded. That would be so whether the failure resulted from a state policy of tolerance or condonation of the persecution, or whether it resulted from inability to do anything about it. But that does not exhaust the possible relevance of state inaction.

30. The references in the authorities to state agents of persecution and non-state agents of persecution should not be understood as constructing a strict dichotomy. Persecution may also result from the combined effect of the conduct of private individuals and the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm. As was noted earlier, this is not a case in which it is necessary to deal with mere inability to provide protection; this is a case of alleged tolerance and condonation. In Ex parte Shah[13] [1999] 2 AC 629, Lord Hoffmann, in giving the example of the Jewish shopkeeper set upon with impunity by business rivals in Nazi Germany, referred to the failure of the authorities to provide protection, based upon race, as an "element in the persecution"[14] [1999] 2 AC 629 at 654. The same expression was used by Lord Hope of Craighead in the passage from Horvath quoted above.

31. Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state. In relation to the case which Ms Khawar seeks to make out, the decision in Ex parte Shah in this respect is directly in point[15] [1999] 2 AC 629 at 646 per Lord Steyn. If her contentions, as to which no findings have yet been made, are correct, then Ms Khawar was being abused by her husband and his relatives for personal reasons, but her likely subjection to further abuse

without state protection is by reason of her membership of a particular social group, if it be the case that women in Pakistan may be so described.

A particular social group

32. In my view, it would be open to the Tribunal, on the material before it, to conclude that women in Pakistan are a particular social group.

33. 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. And cohesiveness may assist to define a group; but it is not an essential attribute of a group. Some particular social groups are notoriously lacking in cohesiveness.

34. In Applicant A[16] (1997) 190 CLR 225 at 263, McHugh J explained why the persecutory conduct itself cannot define the particular social group in question for the purposes of Art 1A(2), but went on to add that the actions of the persecutors may serve to identify or even cause the creation of such a group[17] (1997) 190 CLR 225 at 264. He held that couples in China who want to have more than one child, contrary to the one child policy, were not a particular social group, as there was no social attribute or characteristic which linked them independently of the alleged persecutory conduct.

35. Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely. The alleged persecution does not define the group.

Mc Hugh and Gummow JJ. said:

45…the[Migration] Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chs II, III and IV of the Convention. The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system.

46. Secondly, the drawing of the definition of "refugee" into municipal law itself involves the construction of that definition and that in turn may require attention to the text, scope and purpose of the Convention as a whole. In particular, it would be erroneous to construe the passage set out above from sub-s (2) of s A of Art 1 in isolation from the rest of the Convention

47. Thirdly, the Convention is not to be approached with any preconceptions as to the preference of a "broad" to a "narrow" construction, or vice versa…

48. Fourthly, the scope of the Convention was deliberately confined…

…

55…[Branson J.] found that the Tribunal had made "no findings of fact concerning [Mrs Khawar's] claim that she was unable to obtain police protection in respect of the violence experienced by her". Branson J also found that the Tribunal had failed to determine

whether Mrs Khawar was a member of a particular social group in Pakistan within the meaning of the Convention and said[31] 1999) 168 ALR 190 at 197:

"Had the [T]ribunal made a finding that [Mrs Khawar] was a member of a social group in Pakistan which was comprised of Pakistani women, or alternatively married Pakistani women, it may well have concluded, as Lord Steyn did on the evidence in [R v Immigration Appeal Tribunal; Ex parte Shah[32] [1999] 2 AC 629 at 646] that:
'Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of their membership of a social group but because of the hostility of their husbands is unrealistic.'"
Branson J expressed her conclusion as follows[33] (1999) 168 ALR 190 at 197:
"I conclude that in considering the question of the motivation of [Mrs Khawar's] husband in harming her, the [T]ribunal made an error of law involving an incorrect interpretation of the applicable law (ie the phrase 'a well-founded fear of being persecuted for reasons of ... membership of a particular social group'). First, the [T]ribunal failed to construe the phrase as a whole having regard to the purposes of the Convention and s 36 of the Act. Concomitantly, the [T]ribunal reached a conclusion on the question of whether [Mrs Khawar's] fear of persecution was for reason of her membership of a particular social group without first identifying the relevant social group, if any, of which [Mrs Khawar] was a member. The matter will be remitted to the [T]ribunal for further consideration according to law."
…
58.The Minister puts his case by urging a negative answer to what is framed as two issues. The first is whether the failure of the country of nationality of an applicant for a protection visa to provide effective police protection against domestic violence to members of a particular social group is capable itself of constituting persecution for reasons of a ground stated in sub-s (2) of s A of Art 1 of the Convention where the violence feared by the applicant is directed at that person for non-Convention reasons.
59. The second is whether fear of harm directed at the applicant by a non-State agent for non-Convention reasons, together with or in the knowledge of the failure of the State of nationality to provide effective police protection against such harm to members of a particular social group to which the applicant belongs, "is capable of giving rise to protection obligations" to the applicant. It will be apparent that the two issues are interrelated

<u>The Convention definition</u>
60.The references to "protection" and "protection obligations" invite attention to the construction of s A of Art 1 of the Convention and, in particular, to the passage "[any person who] owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group ... 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".
61. This passage presents two cumulative conditions, the satisfaction of both of which is necessary for classification as a refugee. The first condition is that a person be outside the country of nationality "owing to" fear of persecution for reasons of membership of a particular social group, which is well founded both in an objective and a subjective sense[35]. The second condition is met if the person who satisfies the first condition is unable to avail himself or herself "of the protection of" the country of nationality. This includes persons who find themselves outside the country of their nationality and in a country where the country of nationality has no representation to which the refugee may have recourse to obtain protection. The second condition also is satisfied by a person who

meets the requirements of the first condition and who, for a particular reason, is unwilling to avail himself or herself of the protection of the country of nationality; that particular reason is that well-founded fear of persecution in the country of nationality which is identified in the first condition.

62.The definition of "refugee" is couched in the present tense and the text indicates that the position of the putative refugee is to be considered on the footing that that person is outside the country of nationality. The reference then made in the text to "protection" is to "external" protection by the country of nationality, for example by the provision of diplomatic or consular protection, and not to the provision of "internal" protection provided inside the country of nationality from which the refugee has departed

…

66. it would be an error to inject the notion of "internal protection" into the first condition mentioned above, namely that the person in question be outside the country of nationality by reason of a fear of persecution which is well founded both in an objective and a subjective sense. Hence the statement by the Senior Legal Adviser to the Office of the United Nations High Commissioner for Refugees[41] Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548 at 564:

"[T]he inconsistency of the 'internal protection' theory with the inner coherence of the definition is evident from a tendency to misread or misunderstand the words of the Convention."

67. However, the assumption that the notion of "protection" is to be read back into the first condition underlies the following statement by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department[42] [2001] 1 AC 489 at 495:

"The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community."

68. In our opinion, the reference to "protection" in this passage is apt to mislead and to distort the construction of the first condition. The reference to "protection [by] the international community" is also apt to mislead. The Convention is concerned with the status and civil rights to be afforded to refugees who, relevantly, are outside the country of nationality and within the territory of a State Party to the Convention. The Parties to the Convention are a narrower class than the "international community" and, in any event, the Convention represents a significant but qualified limitation upon the absolute right of the member States to admit those whom they choose[43] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 45-46 [137].

69. Similar statements to that of Lord Hope have been made in the Canadian Federal Court of Appeal[44] Zalzali v Canada (Minister of Employment and Immigration) [1991] 3 FC 605 at 609-610. The New Zealand Court of Appeal (Richardson P, Henry, Keith, Tipping and Williams JJ) said in Butler v Attorney-General[45] [1999] NZAR 205 at 216-217:

"Central to the definition of 'refugee' is the basic concept of protection - the protection accorded (or not) by the country of nationality or, for those who are stateless, the country of habitual residence. If there is a real chance that those countries will not provide protection, the world community is to provide surrogate protection either through other countries or through international bodies. So both paragraphs of art 1A(2) define refugees in part by reference to their ability or willingness to avail themselves of the protection of their country of nationality or of habitual residence."

70.The source of the construction indicated by these Courts appears to be found in the writings of a Canadian scholar, Professor Hathaway concerning "surrogate" or "substitute" protection. In Horvath, Lord Hope said[46] [2001] 1 AC 489 at 495:

"As Professor James C Hathaway in The Law of Refugee Status[47] (1991) at 112 has explained, 'persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community'. [H]e refers[[48] The Law of Refugee Status, (1991) at 135] to the protection which the Convention provides as 'surrogate or substitute protection', which is activated only upon the failure of protection by the home state. On this view the failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals." (original emphasis)

71. Lord Hope also referred[49] [2001] 1 AC 489 at 497 to what he regarded as the "helpful and instructive" analysis of Art 1 by Lord Lloyd of Berwick in Adan v Secretary of State for the Home Department[50] [1999] 1 AC 293 at 304. His Lordship had there referred to sub-s (2) of s A of Art 1 as including as categories of refugee:

"(1) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country".

That classification which his Lordship said was common ground between the parties in Adan is, with respect, unobjectionable. The difficulty arises from the statement then made by Lord Lloyd that in each of the two categories[51] [1999] 1 AC 293 at 304:

"the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'".

72.The difficulties which are provoked by the reasoning in Adan and Horvath are discussed in a recent publication of the United Nations High Commissioner for Refugees[52] Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, (April 2001).. It is said in pars 35 and 36 of that publication:

"35. The meaning of this element of the definition has recently been much debated. According to one view, it refers to protection by the state apparatus inside the country of origin, and forms an indispensable part of the test for refugee status, on an equal footing with the well-founded fear of persecution test. According to others, this element of the definition refers only to diplomatic or consular protection available to citizens who are outside the country of origin. Textual analysis, considering the placement of this element, at the end of the definition and following directly from and in a sense modifying the phrase 'is outside his country of nationality,' together with the existence of a different test for stateless persons, suggests that the intended meaning at the time of drafting and adoption was indeed external protection. Historical analysis leads to the same conclusion. Unwillingness to avail oneself of this external protection is understood to mean unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur.

36. Despite this apparent clarity, there now exists jurisprudence that has attributed considerable importance in refugee status determination to the availability of state protection inside the country of origin, in line with the first view described above. This somewhat extended meaning may be, and has been, seen as an additional - though not necessary - argument in favour of the applicability of the Convention to those threatened by non-state agents of persecution." (footnotes omitted) (emphasis added)

73.The "internal" protection and "surrogacy" protection theories as a foundation for the construction of the Convention add a layer of complexity to that construction which is an unnecessary distraction. The preferable position is that indicated in the above publication of the United Nations High Commissioner for Refugees in the passage[53] Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, (April 2001), fn 81:
"As pointed out in the final paragraphs of [Fortin[54] "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548], it may surely be legitimate for a person who fears non-state agents not to accept diplomatic protection outside the country as this would provide the country of origin with the possibility of lawfully returning him or her to that country. This would expose the refugee to the feared harm and therefore would make his or her unwillingness to avail of such external protection both reasonable and 'owing to such fear' of persecution."
74. In opposition to the "protection" theory, there is what is called the "accountability" theory of interpretation of the Convention. In R v Secretary of State for the Home Department, Ex parte Adan, the English Court of Appeal said of the latter theory[55] [2001] 2 AC 477 at 491:
"Put shortly the 'accountability' theory limits the classes of case in which a claimant might obtain refugee status under the [Convention] to situations where the persecution alleged can be attributed to the state. German law requires an asylum seeker to show that he fears persecution (on a Convention ground) by the state, or by a quasi-state authority. If he relies on persecution by non-state agents, it must be shown to be tolerated or encouraged by the state, or at least that the state is unwilling to offer protection against it."
75. In Minister for Immigration and Multicultural Affairs v Haji Ibrahim, Callinan J[56] (2000) 204 CLR 1 at 80-81 [228] and Gummow J[57] (2000) 204 CLR 1 at 53-55 [151]-[155] left open the question whether the "accountability" theory should be accepted. The submissions by the Minister in this case, to which reference already has been made, to a degree seek an acceptance of that theory. However, it is again unnecessary to determine whether the theory should be accepted…

Persecution and discrimination
76. In Chan v Minister for Immigration and Ethnic Affairs[58] (1989) 169 CLR 379 at 388, Mason CJ pointed out that (i) the Convention necessarily contemplates in the definition of "refugee" that there is a real chance that the person in question will suffer "some serious punishment or penalty or some significant detriment or disadvantage" if that person returns to the country of nationality; (ii) some forms of selective or discriminatory treatment by a State of its citizens will not amount to persecution; (iii) harm or threat of harm "as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason"; and (iv) such harm or threat of harm may be constituted by the "denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned". In Haji Ibrahim[59] (2000) 204 CLR 1 at 18-19 [55], McHugh J again made the point that, whilst persecution involves discrimination that results in harm to an individual, not all discrimination will amount to persecution.
77. In a number of previous cases in this Court, in particular Chan, Applicant A v Minister for Immigration and Ethnic Affairs[60] (1997) 190 CLR 225 and Chen Shi Hai v Minister for Immigration and Multicultural Affairs[61] (2000) 201 CLR 293, the issues have turned significantly upon the application to the persons claiming refugee status of certain laws of the country of their nationality and the existence of well-founded fears as to the enforcement against them of those laws. Here, the situation is rather different. The laws of Pakistan which are involved have not specifically been identified but may be taken to be

criminal laws of a general application respecting serious assault by one individual upon another. Mrs Khawar complains not of her harassment by the selective enforcement against her of those laws but, to the contrary, of the significant detriment or disadvantage she suffers from the alleged failure by the Pakistani police authorities to enforce the criminal law against those who break those laws, in particular against those who inflict domestic violence upon her. In that sense, she complains of discrimination which amounts to persecution.

78. The selective enforcement of a law of general application may result in discrimination between complainants which produces, in the legal sense, discrimination against one group of complainants…

79. The substance of Mrs Khawar's complaint is that (a) she was unable to obtain police protection in respect of the domestic violence she suffered; (b) that state of affairs represented a denial of fundamental rights otherwise enjoyed by nationals in Pakistan; and (c) it was a form of selective or discriminatory treatment which amounted to persecution by the State authorities.

80.As legal propositions, these elements in Mrs Khawar's case may be accepted. The difficulty is, as Branson J pointed out, the Tribunal made no findings of fact upon Mrs Khawar's allegation that she could not obtain police protection in respect of the domestic violence she suffered. The Tribunal did not make a finding upon material put forward on behalf of Mrs Khawar which would tend to show a systemic failure by Pakistani police authorities to investigate or to lay charges in respect of complaints by women of domestic violence against them.

Particular social group

81.The harm amounting to persecution which has been identified above must be suffered for a Convention reason. The case put here is that Mrs Khawar was a member of a particular social group in Pakistan. Again, the Tribunal failed to make the necessary finding. It failed to determine whether Mrs Khawar was a member of such a group. It was open to the Tribunal on the material before it 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. Other formulations have been referred to earlier in these reasons and nothing said here is intended to foreclose a finding that a group so defined existed. This is a matter for the Tribunal on reconsideration of the case.

82. It may be that the members of a group under any of the above formulations are very numerous. However, the inclusion of race, religion and nationality in the Convention definition shows that that of itself can be no objection to the definition of such a class. Applicant A establishes that disagreement with a law of general application and fear of the consequences of the failure to abide by that law does not, on that account, constitute the persons in question a social group within the meaning of the Convention definition[63] See Chen Shi Hai v Minister for Immigration and Ethnic Affairs (2000) 201 CLR 293 at 301 [21]. That has no bearing upon the present case. Nor does the proposition, which also is to be derived from Applicant A[64] (1997) 190 CLR 225 at 258, that ordinarily the enforcement of a generally applicable criminal law will not constitute persecution of a social group constituted by those against whom that law is enforced.

83.Applicant A indicates that the particular social group cannot be defined solely by the fact that its members face a particular form of persecution so that the finding of membership of the group is dictated by the finding of persecution. Those considerations do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social,

religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.

Persecution

84. It should, in our view, be accepted that, whilst malign intention on the part of State agents is not required[65] Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 304 [33] , it must be possible to say in a given case that the reason for the persecution is to be found in the singling out of one or more of the five attributes expressed in the Convention definition, namely race, religion, nationality, the holding of a political opinion or membership of a particular social group. If the reason for the systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities, that, if it can be shown with sufficient cogency, would be a different matter to the selective and discriminatory treatment relied upon here.

85. That selective and discriminatory treatment, if shown on facts found by the Tribunal, would appear to answer Mason CJ's criterion mentioned in Chan of harm amounting to persecution by denial of a fundamental right otherwise enjoyed by Pakistani nationals, namely access to law enforcement authorities to secure a measure of protection against violence to the person.

86. Whilst the Tribunal appears to have treated the violence of non-State actors of which Mrs Khawar complained as sufficiently severe to amount to "persecution", that classification is not determinative for several reasons. First, in any event, there would be the further requirement of a Convention reason; victims of domestic violence would meet the Convention definition only by showing more than the harm of which they complain.

87. Secondly, and this is crucial for the basis propounded above, the persecution in question lies in the discriminatory inactivity of State authorities in not responding to the violence of non-State actors. Thus, the harm is related to, but not constituted by, the violence (bold added) . It is for this reason that it has been unnecessary to consider whether the "accountability" theory mentioned in Haji Ibrahim and reflected in the Minister's submissions on this appeal should be accepted.

…

Kirby J.

The defect in the Tribunal's approach

99.The Tribunal concluded that the respondent was not harmed because she was a member of a "particular social group" but because of her husband's family's anger about the shame that she had caused her husband by getting him to marry her instead of a bride chosen by the family and because she brought no dowry with her to the marriage. On that basis, the Tribunal found that, even if the harm which it accepted for the purpose of its decision were otherwise "persecution" within the Convention definition, it was not "for reasons of" the respondent's membership of a "particular social group". It was on that basis that the Tribunal confirmed the delegate's rejection of the respondent's application.

100. Taken in isolation such a finding might seem to be one of fact - assigning the harm that was accepted to have been proved to a cause based on a particular family's domestic disputes. If that were all, the decision would have to be affirmed by the courts, confined as they are in this respect to correcting errors of law on the part of administrative decision-makers. But when the significant factual material tendered by the respondent is taken into account, the material before the Tribunal arguably takes on a different character. It is then

possible, indeed essential, to consider the family dispute concerning the respondent in the light of the material about the serious legal, social and practical disadvantages suffered by the respondent and women in her position which she presented to the Tribunal. The Tribunal might still conclude that the respondent did not fall within the Convention definition. But it could scarcely do so lawfully without considering, and making essential findings of fact about, the case that the respondent had propounded to bring herself within the Convention definition. In short, it was open to the Tribunal to reject the respondent's application. But in light of the substantial, apparently reliable and consistent material that she had produced concerning the situation in Pakistan affecting her and persons like herself, it was not open to the Tribunal to ignore the respondent's claim that her case was a paradigm instance of the discrimination of Pakistani law and official practice against women in her position, which amounted to persecution, justifying her fear about returning to Pakistan.

…

Persecution: dictionary and contextual meanings

103. The key components of the definition of "refugee" applicable to the respondent's case are:

"owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group ... [she] is outside the country of [her] nationality and ... owing to such fear, is unwilling to avail [herself] of the protection of that country".

104. The essential concepts in the definition that arise for consideration in the context of this appeal are those of persecution, membership of a particular social group and whether the necessary causal relationships are established. Those causal relationships are indicated by the repeated references to "owing to" and the single reference to "for reasons of". Unless the character of the persecution alleged is properly identified, it is comparatively easy to misapply the causal criteria, as the Tribunal did in this case. When that occurs the Convention definition has not been applied to all of the facts propounded but only to some of them.

…

106. To assign meaning to "persecuted" in this context, courts, including this Court, have had resort to dictionaries[83] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 284.

This is a natural enough course to adopt, common in elucidating the meaning of statutes and other written instruments expressed in words. I have myself followed the same course in this context[84] Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 312 [62].. According to such dictionary meanings "persecute" means "to pursue with harassing or oppressive treatment; harass persistently" and "to oppress with injury or punishment for adherence to principles"[85] The Macquarie Dictionary, 3rd ed (1997) at 1601. See also The Macquarie Dictionary Federation Edition, (2001), vol 2 at 1423.

107. The application of these and similar definitions to the facts of the present case presents two questions. The first is whether it is permissible, and relevant, to have regard to the harmful conduct towards the respondent of non-state agents (such as her husband and his family) or whether only the conduct of the state and its agents is relevant in this context. The second is whether, if it is relevant to look at the conduct of non-state agents in this case, their conduct, as described by the material adduced before the Tribunal by the respondent, could qualify as "persecution".

…

Persecution and harm by non-state agents

112. Against this background it might be supposed that the Refugees Convention is concerned solely with activities of agents of the state as constituting the kind of "persecution" with which the Convention is concerned. Certainly, the most usual forms of persecution that give rise to claims to refugee status under the Convention are by state agents. However, neither in the language of the Convention nor in the decisions of municipal courts and tribunals has such a narrow meaning been adopted. Thus the Convention does not say (as it might have done) "fear of being persecuted by the country of nationality". Non-state agents of persecution may fall within the definition. So much was expressly recognised by the Supreme Court of Canada in Canada (Attorney General) v Ward[95] [1993] 2 SCR 689 at 709:

"The persecution alleged by the appellant emanates from non-state actors, the INLA; the Government of Ireland is in no way involved in it. This case, then, raises the qu estion whether state involvement is a prerequisite to 'persecution' under the definition of 'Convention refugee' in the Act. The precise issues are phrased differently by the parties, but can be summarized in the following fashion. First, is there a requirement that 'persecution' emanate from the state?"

113. To the question stated in the foregoing passage, the Supreme Court of Canada gave the following answer[96] [1993] 2 SCR 689 at 716-717 per La Forest J. with which I agree:

"The international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution. The former is, of course, comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection.

I, therefore, conclude that persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens."

114.This conclusion, which was not really contested in the present appeal, has led to a classification of the cases in terms of the involvement of state agents in the persecution complained of[97] Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [60] (decision of R P G Haines QC and L Tremewan). I have derived much assistance from the analysis contained in this decision]:

"(a) Persecution committed by the state concerned.

(b) Persecution condoned by the state concerned.

(c) Persecution tolerated by the state concerned.

(d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection."

115. The respondent presented a case that (she said) fell at least into category (d) and possibly (c) or even (b). The suggestion, derived in part from dictionary definitions of "persecution" taken in isolation from the context, that persecution requires affirmative harassment by state agents fired by enmity and malignity, must be firmly rejected. It is sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person concerned. As a practical matter in most cases, save those involving a complete breakdown of the agencies of the state, decision-makers are entitled to assume (unless the contrary is proved) that the state is capable within its

jurisdiction of protecting an applicant[98] Ward [1993] 2 SCR 689 at 724-726. Certainly, that assumption will be made where, as in the present case, the affront to the person concerned is objectively very serious and would appear to involve discrimination by state agents based on an inadmissible ground, namely the respondent's sex. In the context of the many reports of "stove deaths" in Pakistan and earlier threats to burn her alive, the incident in March 1997 in which the respondent was doused with petrol by her husband and his brother was objectively only capable of being treated as gravely criminal. It is impossible to believe that a similar act directed to the husband or another male victim would have been treated by police in Pakistan in such a dismissive fashion.

116. The response of the state agents in the present case could therefore only be fully understood and characterised after the Tribunal had proceeded to view it in the context of the materials which the respondent had placed before the Tribunal, relevant to the legal and other disadvantages faced by women in her situation in Pakistan. It follows that there was point in the Tribunal's proceeding to make factual findings on the materials provided by the respondent and to reach conclusions about whether the serious risk of harm together with the failure of state protection amounted to "persecution" as she alleged.

117. Without identifying the relevant acts claimed to be persecution it was impossible to consider their causative effects. Thus, if the serious harm were merely intra-family cruelty to the respondent that, of itself, would not attract the Convention definition so as to give rise to the relevant "fear" and to justify classification of the harm as "persecution" for a Convention ground. But if the serious harm were found to exist together with state inaction or inability to offer adequate protection, a completely different characterisation of the events would be open to the Tribunal. In such circumstances, the Tribunal could indeed conclude that the "fear" of the respondent of being "persecuted" was not simply her husband and his family's wrongs to her but that she was in a hopeless and intolerable situation where she had no-one to look to for effective protection, even of her life. Such a situation, if the other elements of the Convention definition were satisfied, would arguably fulfil the final step of the definition and explain why, in the circumstances, the respondent was unwilling to avail herself of the protection of her country of nationality.

118. At a risk of some oversimplification, with Lord Hoffmann in Shah[99] [1999] 2 AC 629 at 653 and Lord Clyde in Horvath v Secretary of State for the Home Department[100] [2001] 1 AC 489 at 515-516. The same formula has been adopted and applied in New Zealand: Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [67], [73], I would express the foregoing analysis in the concise formula:

"Persecution = Serious Harm + The Failure of State Protection."[101] (bold added) Lord Hoffmann in Shah [1999] 2 AC 629 at 653 attributed the source of the formula to the Gender Guidelines for the Determination of Asylum Cases in the UK (published by the Refugee Women's Legal Group in July 1998) at 5

Persecution "for reasons of" a Convention ground

119. When this concise formula is kept in mind it becomes easier to approach with legal accuracy the "nexus issue" presented by the Convention definition's requirement that the persecution be (relevantly) "for reasons of ... membership of a particular social group". It is insufficient that the claimant for refugee status be a member of a particular social group and also have a well-founded fear of persecution. That fear of persecution must be for reasons of the claimant's membership or perceived membership of such group[102] cf Applicant A (1997) 190 CLR 225 at 240 per Dawson J referred to and applied in Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [111].

120. In my opinion the New Zealand Refugee Status Appeals Authority explained the position accurately[103] Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [112]:
"Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided either by the serious harm limb or by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (eg husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because 'persecution' is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is 'for reason of' a Convention ground, the summative construct is itself for reason of a Convention ground[104] See Shah [1999] 2 AC 629 at 646, 648, 653, 654."
121. Thus, even if the Tribunal in the present matter were of the opinion that one ingredient in the Convention definition of persecution, namely the family threats and violence against the respondent by non-state actors, was not (as it concluded) committed for reasons of the respondent's actual or perceived membership of a particular social group, that would not be an end of the matter. If the respondent could show that her well-founded fear of being persecuted was "for reasons of" her being a member of a particular social group because state protection was unavailable to her, that would be enough to meet the Convention requirement.
122. This analysis demonstrates why the failure of the Tribunal in the present case to address, and make factual findings on, that question constituted an error that effectively meant that it had not fulfilled its legal responsibilities. It was not, with respect, a failure to address an unnecessary element in the respondent's claim for relief. Rather, it was a failure to address one of two grounds where the respondent was entitled to succeed if she made either of them good[105] cf reasons of Callinan J at [156]. On its own, the failure of state protection is not capable of amounting to persecution. There must also be a threat or the actuality of serious harm, including from non-state agents. This is because "persecution" is constituted by the two elements described in the concise definition. But if either is "for reasons of" the claimant's membership of a particular social group, that is sufficient. The definition and the causal nexus will then be satisfied. To that extent, the claimant will have fulfilled the requirements of the Convention definition.
123. In the instant case, it may be accepted for the purposes of argument that the respondent's fear of serious harm at the hands of her husband and his family had no causal nexus to her membership of a particular social group - whether as a woman, a married woman in conflict with her husband, or a married woman without male support seen as having broken the customs and mores of Pakistani society or otherwise. The Tribunal so found. There seems no reason on legal grounds to question its finding in this respect. However, the causal relationship of the failure of state protection - by police and other agencies of the Pakistani state - is in a different category. There, arguably, on the materials placed by the respondent before the Tribunal, the reason for the failure of state protection is the fact that the respondent is a woman in conflict with her husband. At least, the Tribunal could, on the materials placed before it, so find. If it did, that would be sufficient. The causal nexus required by the Convention definition between the persecution propounded and the respondent's membership of the particular social group, as suggested by her, would be established.

…
124…[the Respondent's] … case [was] compatible with the language of the Convention and the manner in which it has been understood and applied in a number of jurisdictions, overseas[106] as well as in Australia[107].
125. In my respectful view, the approach urged in this appeal by the Minister departs from the foregoing substantial body of international practice. No basis for such departure was suggested except that it was said to be mandated by what the majority of this Court held in Applicant A[108] (1997) 190 CLR 225; see Khawar (2000) 101 FCR 501 at 518 [60] per Hill J.] … when Applicant A is read with Chen, I do not see any necessary inconsistency between the approach adopted by the House of Lords in Shah and the approach of this Court to the meaning of the Convention definition of "refugee". In Chen[110] (2000) 201 CLR 293 at 307 [46], 315 [69], 317 [73], 320 [81], I was party to the orders of the Court. I specifically invoked a number of passages from what had been said in the House of Lords in Shah[111] cf Bacon and Booth, "The Intersection of Refugee Law and Gender: Private Harm and Public Responsibility", (2000) 23(3) University of New South Wales Law Journal 135 at 153.

The arguable application of a "particular social group"
126.These conclusions leave only the Minister's final suggestion that no relevant "particular social group" could exist with application to a person such as the respondent. There is force in the submission that, whilst attention is focussed on women in Pakistan in domestic conflict with their husbands, the causal nexus necessary to the Convention definition of "refugee" is missing because of the very great width of the "social group" postulated. But once the focus shifts to the failure of state protection, that suggested problem recedes in importance. The "group" is capable of being properly defined in a principled manner, specifically by reference to the ground upon which the state concerned has withdrawn the protection of the law and its agencies.
127. In some overseas jurisdictions it has been held[112] Shah [1999] 2 AC 629; Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [104]-[106], or postulated[113] Ward [1993] 2 SCR 689 at 739; Fatin v Immigration and Naturalization Service 12 F 3d 1233 at 1240 (3rd Cir 1993) citing In re Acosta 19 I&N Dec 211 at 233 (BIA 1985)], that women in a particular country may, as such, constitute a "particular social group" for the purposes of the Convention definition…
128…the sheer number of persons potentially involved in a group such as "women in Pakistan" or even "married women in Pakistan" is such that some commentators have expressed doubt that this is the kind of "particular social group" that the Convention was referring to[115] Ward [1993] 2 SCR 689 at 716-717; Applicant A (1997) 190 CLR 225 at 232-233, 257; Shah [1999] 2 AC 629 at 639, 651, 656, 658; Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [96]; Hathaway, The Law of Refugee Status, (1991) at 135-141; Anker, Law of Asylum in the United States, 3rd ed (1999) at 377…
129However that may be, the "particular social group" propounded by the respondent in the present case was capable of being expressed in terms that were considerably narrower and more specific. The materials presented by the respondent to the Tribunal suggest that there may be a particularly vulnerable group 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. In the present case, because of the approach which it took, the Tribunal did not embark upon a consideration of

whether there was a specific, and thus identifiable, "social group" of such a "particular" character and, if so, whether the respondent was a member of it.
…

The Full Court (Hill Branson and Stone JJ.) in SDAV v MIMIA; MMIA v SBBK [2003] FCAFC 129 (2003) 199 ALR 43 (2003) 75 ALD 40 dismissed the Minister's appeal from SBBK v MIMIA [2002] FCA 565 and allowed the Appellant's appeal from SDAV v MIMIA [2002] FCA 1022 following Plaintiff S157/2002 on the basis that there were jurisdictional errors in both cases of the same kind - of failing to consider a central element of the Applicant's claims and a misconstruction of a criterion – an element of the Convention definition – about which the Tribunal must be satisfied. The Court said:

1 The Court has before it two appeals, each from a judge of this Court, that essentially raise the same issues…
2…The primary judges both found that the Tribunal had made an error of law by not considering whether the relevant applicant was a member of a particular social group within the meaning of article 1A(2) of the Refugees Convention as amended by the Refugees Protocol ('Convention'). …
BACKGROUND
SDAV
3…The Tribunal accepted the factual assertions made by SDAV in support of her claims. It identified three grounds on which she asserted that she had a well-founded fear of persecution in Iran for a Convention reason but did not accept that she had a well-founded fear on any of these grounds.
4…[The Applicant's challenge] … related to her position as a woman who had suffered domestic violence in the course of her marriage and who desired to live apart from her husband and obtain a divorce and the persecution she had suffered because of this.
5… Her husband subjected her to physical and psychological abuse, including rape, and also physically assaulted her eldest son. SDAV also asserted that she was assaulted by her husband's employer who, when her husband was away with work, would sexually assault her, succeeding in raping her on two occasions. She made two complaints to the Monkerat (Iranian authorities)…
6… She gave extensive evidence about the systematic legal and social discrimination experienced by women in Iran. This was supported by independent country information that pointed to widespread and persistent discrimination.
7 Before the Tribunal SDAV contended that were she to return to Iran she would be persecuted for reason of her membership of one of the following social groups:
* Iranian women who have transgressed the social mores of Iranian society;
* Iranian women who have transgressed the religious tenants and/or social mores of fundamentalist Islamic society;
* Iranian women who reject fundamentalist Islam;
* single mothers in Iran;
* divorced women in Iran and/or women subjected to domestic violence in Iran.

8 The Tribunal stated that it was not satisfied that women in Iran, whether married, single, divorced or with or without children share 'a characteristic or element which unites them and distinguishes them from society at large'. It similarly rejected all of the suggested groups as cognisable groups within Iranian society and found that they were not identifiable as social units.
9 Despite this conclusion the Tribunal proceeded to consider whether the ill-treatment that SDAV suffered in the past, or the harm she feared in the future, was because she fell into one or other of the groups referred to in [7] above. The Tribunal concluded that although SDAV's gender and marital status had some connection with the mistreatment she suffered, it had not occurred because of her membership of a particular social group…..
…
The primary judge's decision - SDAV
10 The Tribunal's decision was made before the decision of the High Court in Minister for Immigration and Multicultural Affairs v Khawar [2002] 187 ALR 574 ('Khawar'). On the basis of that decision, the country information before it and the Tribunal's acceptance of SDAV's account of the domestic abuse she had suffered and the lack of police protection the primary judge held that the finding that the applicant did not belong to a particular social group is 'plainly wrong in law'. His Honour also held that the Tribunal's findings referred to in [8] above:

> '...indicate a misunderstanding of the claim which was being advanced by the applicant, namely a claim that she could not obtain appropriate State protection from mistreatment by her husband and her employer. The motives which caused the husband and the employer to mistreat the applicant were irrelevant to this claim.'

11 In relation to SDAV's failure to obtain protection from the State, the Tribunal concluded that her account indicated that some of the State officials were corrupt but not that she was denied protection for a Convention reason. On this point the primary judge commented, at [21]:

> 'The discussion of the [Tribunal] on this issue, in my opinion, indicates a failure on its part to recognise the relevance of the applicant's evidence to her wider overarching claim that the State protection offered through the agencies of the authorities and the law failed to protect women in her position, as a social group, from abuse by their husbands and other males with whom they had contact by reason of their domestic situations. The [Tribunal] failed to properly address a central element of the applicant's claim.'

…

SBBK
…
18 The Tribunal did not accept that there is a particular social group, within the meaning of the Convention, that would apply to SBBK. It noted that social groups suggested to it included women or divorced women in Iran or either of these groups with the additional qualification as being subject to domestic violence. It rejected all these suggestions noting that a social group cannot be defined by the harm feared.
19 The Tribunal did not accept that the family problems that SBBK said she would face on return to Iran would amount to persecution. While accepting that the position of women and her own position would concern her, the Tribunal did not accept that the social restrictions and the problems she would face in this respect could be considered persecution under the Convention…
…

The primary judge's decision - SBBK

21 The primary judge summarised the claims made by the applicant and continued:

> 'It is clear from the claims before the RRT, that the applicant's principal claim was that she had been unable to obtain protection from the authorities or State agencies from physical abuse and rape by her husband. Furthermore, she claimed she was unable to obtain the protection of the law against anticipated violence from her husband and from her husband's denial of her rights. She feared that her son was at serious risk of harm and neglect. She said that because of cultural influences, including religion, the laws, and the court system discriminated against women in her position to such an extent that she was without State protection. This can properly be described as a claim of discriminatory inactivity on the part of the State or State authorities.'

22 The primary judge referred to the Tribunal's rejection of the suggested social groups to which the applicant might be said to belong (see [18] above). His Honour stated that the Tribunal had made the same error as that identified in Khawar, where the High Court held that 'discriminatory inactivity' of State authorities in responding to the violence of non-State actors could amount to persecution. His Honour found that the Tribunal's reasoning was contrary to the reasoning in Khawar and that the Tribunal had erred in law, namely in that it dismissed, without any consideration, the possibility that the respondent could be a member of a particular social group which may be either women in Iran or divorced women in Iran. The primary judge further commented:

> 'The reasons for decision focus only on the question whether the added references to possible harm could define a social group. In so doing the decision fails to come to terms with the central issue of group identity. Until this issue has been addressed and determined it is not possible for the decision-maker to determine whether there is a real chance of persecution as a consequence of being a member of that group. Furthermore, the [Tribunal] decision does not make a determination as to the availability of protection by the State or State agencies against violence or threatened violence to women in Iran.

…

23 In relation to the Tribunal's decision that the general position of women in Iran could not amount to persecution the primary judge also referred to Khawar, where the High Court held that 'discriminatory inactivity' of State authorities in responding to the violence of non-State actors could amount to persecution. His Honour found that the Tribunal's reasoning was contrary to the reasoning in Khawar and that the Tribunal had erred in law

…

REASONING

…

…

Was there jurisdictional error on the part of the Tribunal?

…

41 The visa applicants claim that the Tribunal erred in the manner identified by the two primary judges, namely that in each case the Tribunal failed to address properly a central element of their claims. These errors, as identified by the primary judges, are described in

[11] above in relation to SDAV's claim and in [22] above in relation to SBBK's claim. The visa applicants claim that the nature of the Tribunal's error is the same as that of the Tribunal in Khawar.

42 The applicant in Khawar was a citizen of Pakistan who claimed that she was the target of domestic violence at the hands of her husband. The Tribunal accepted her claims about the violence she has suffered but held that her husband's motivation for harming her was personal rather than because she was a member of a particular social group. Because the Tribunal came to this conclusion it failed to make findings of fact on two important aspects of the applicant's claim namely that the Pakistani authorities failed to assist her in respect of her husband's violent behaviour and that this violence was tolerated and condoned by the authorities as 'an aspect of systematic discrimination against women, involving selective enforcement of the law'; per Gleeson CJ, at [25]. The Chief Justice accepted that if the applicant could make out this claim then she would be able to establish persecution. His Honour continued at [31]:

> 'Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state. ... If her contentions, as to which no findings have yet been made, are correct, then Ms Khawar was being abused by her husband and his relatives for personal reasons, but her likely subjection to further abuse without state protection is by reason of her membership of a particular social group, if it be the case that women in Pakistan may be so described.'

43 The High Court held that it was open to the Tribunal to find that the applicant was a member of a particular social group whether women in Pakistan or some narrower social group; Gleeson CJ at [32], McHugh and Gummow JJ at [81]-[83] The Tribunal's error was that, because it had rejected this possibility, it had failed to make the necessary findings of fact.

44 As described above SDAV and SBBK both claimed to be members of a particular social group within the meaning of the Convention; see [7] and [18] respectively. Both complained of the systematic and discriminatory failure of the State authorities to protect them. We agree with the primary judges that the Tribunal misunderstood the nature of the claims being advanced and consequently failed to consider essential aspects of the claims actually made. The Tribunal made the same error as was identified in Khawar and Dranichnikov; it failed to consider a central element of the visa applicants' claims.

….

48 …Although the Tribunal specifically addressed the question of whether the appellants could belong to a particular social group it based its decision on reasoning that the High Court has held, in Khawar, to be flawed and which it held in Dranichnikov to amount to jurisdictional error. Indeed, in considering each of SDAV and SBBK the Tribunal appears to have made exactly the 'error of law involving an incorrect interpretation of the applicable law' identified by Branson J at first instance in Khawar v Minister for Immigration and Multicultural Affairs (1999) 168 ALR 190 at 197.

49 The Minister has submitted that the decision of the primary judge in SDAV amounted to a conclusion 'that the Tribunal ought to have found that the appellant was a member of a particular social group'. Although in light of Khawar any other finding may be virtually impossible to support, that is a matter for the Tribunal…..

…

In ***SYLB v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCA 942** Branson J. held that there had been a jurisdictional eror in the treatment by the RRT of the internal flight alternative. On the issue of a particular social group of **women** Her Honour stated that the dictum that **Applicant S v Minister for Immigration and Multicultural Affairs [2004] HCA 25 (2004) 206 ALR 242** means that it is hard, if not impossible, to imagine a society in which women do not constitute a particular social group within the meaning of Article 1A(2); the same may, of course, be said with respect to men.

Particular Social Group

32 In the circumstances it is also unnecessary for me to determine whether, as the applicants contend, the Tribunal erred in its consideration of whether the stigma that would attach to the applicants in Kosovo were it to become known that the female applicant had been raped meant that the applicants have, or alternatively that the female applicant has, a well-founded fear of persecution in Kosovo for reason of membership of a particular social group.

33 However, I note that the Tribunal expressed the view that women are not a particular social group in Kosovo. It seems to me that the decision of the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 206 ALR 242 means that it is hard, if not impossible, to imagine a society in which women do not constitute a particular social group within the meaning of Article 1A(2) of the Refugee Convention (see Gleeson CJ, Gummow and Kirby JJ at [36] and McHugh J at [69]). The same may, of course, be said with respect to men. It is appropriate to record that *Applicant S v Minister for Immigration and Multicultural Affairs* was published after the decision of the Tribunal.

c) Victims of crime

In situations where the fear of harm expressed by the applicant arose out of concerns that the applicant and his family might become victims of crime it has been held that, if the criminal conduct is not motivated by a Convention reason, the claims have no nexus with the Convention (see Dranichnikov v MIMA (2000) 60 ALD 482, [2000] FCA 63 and the decisions cited at [34] of that decision (Thalary v MIEA (1997) 73 FCR 437; [1997] FCA 201, Magyari v MIMA [1997] FCA 417 (1997) 50 ALD 341and Velmurugu v MIMA (1997) 44 ALD 253 (but now see below Dranichnikov v MIMA:Re Minister for Immigration [2003] HCA 26. (2003) 197 ALR 389) as well as Maningat v MIMA [1998] FCA 443 where Tamberlin J. stated that fear of reprisal or being harmed or silenced because a person might be able to give evidence against the perpetrators of of a violent or criminal act without more is

not fear of persecution for a Convention reason;Jarrin v MIMA [1998] FCA 765. and Chand v Minister for Immigration and Multicultural Affairs [1999] FCA 383).

On the other hand a formulation of “businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime in Vladivostok and to protect Russian businessmen who protested’’ was a particular social group whose existence was required to be addressed in Dranichnikov v MIMA:Re Minister for Immigration [2003] HCA 26 (2003) 197 ALR 389.

Gummow and Callinan JJ

…

12 Both Mr Dranichnikov and his wife gave credible accounts of their experiences in Vladivostok in Russia. They described, accurately it follows, several instances of police inaction after crimes had been committed and of oppression by police officers.

…

13 Before February 1994, Mr Dranichnikov had tried to interest the authorities in ways and means of preventing attacks, including murderous ones, on entrepreneurs…

…

15 The Tribunal also accepted Mr Dranichnikov's evidence that there was an inability and unwillingness on the part of the security forces within Russia to deal with crime…

16. Mr Dranichnikov has a subjective fear of returning to Russia: that fear is of physical harm from criminal activities by unknown persons.

…

18 In its reasons the Tribunal stated what it apparently thought to be Mr Dranichnikov's case, that the particular social group to which he claimed to belong was of "businessmen in Russia". He contends however that in fact he submitted to both the Minister's delegate and the Tribunal that the relevant class was a narrower one, of businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime in Vladivostok and to protect Russian businessmen who protested. It is apparent that Mr Dranichnikov placed emphasis in his initial application upon his membership of that narrower group…

…

22 Mr Dranichnikov wished to raise a number of different matters, but by reason of earlier rulings of the Court, argument was confined to the following question only:

> "[W]hether the Tribunal erred in law in treating the applicant as a member of the social group of entrepreneurs and/or businessmen and not of a more limited group consisting of entrepreneurs and/or businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals".

23 Mr Dranichnikov contends in this Court that the Tribunal misstated and failed to deal with the case presented to it. We accept this to be so. The passage that we have quoted from the decision of the delegate shows clearly the emphasis that Mr Dranichnikov placed upon his membership of a special group, not just of business people, but of business people in

public protest, in effect, about state sanctioned corruption including, on occasions, violence. There is no reason why he would have presented his case any differently before the Tribunal. And in fact he did not… It is clear that the Tribunal misunderstood and failed to deal with this important aspect of Mr Dranichnikov's case.
24. To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice…
…
26 At the outset it should be pointed out that the task of the Tribunal involves a number of steps. First the Tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention[2]. That determination in part at least involves a question of law. If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well founded, and if it is, whether it is for a Convention reason.
27 The Tribunal failed to decide the first question. It decided another question, whether Mr Dranichnikov's membership of a social group, namely, of "businessmen in Russia" was a reason for his persecution and relevantly nothing more. The Tribunal should have decided the matter which was put to it, whether Mr Dranichnikov was a member of a social group consisting of entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals.
28 It seems to us that had that question been addressed it would in all likelihood have permitted of one only answer, an affirmative one. ..
29 In Minister for Immigration and Multicultural Affairs v Khawar Gleeson CJ said[3] (2002) 76 ALJR 667 at 671 [26]; 187 ALR 574 at 581:

> "As her case is argued, and as a matter of principle, it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes."

30 The Dranichnikovs' case as presented to the Tribunal has in common with Ms Khawar's case, an apparent deliberate abstention by the authorities from the affording of protection to a member of an identified group. Indeed in Mr Dranichnikov's case, it appears that the authorities may have facilitated criminal conduct by forcing him to withdraw his complaint. The group to which he belongs is one which is smaller than the group in Khawar and accordingly is easier to identify and define.
31 The reasoning of McHugh and Gummow JJ in the same case is to a similar effect to that of Gleeson CJ. Their Honours said[4]:

> "It should, in our view, be accepted that, whilst malign intention on the part of State agents is not required, it must be possible to say in a given case that the reason for the persecution is to be found in the singling out of one or more of the five attributes expressed in the Convention definition, namely race, religion, nationality, the holding of a political opinion or membership of a particular social group. If the reason for the systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities, that, if it can be shown with sufficient cogency, would be a different matter to the selective and discriminatory treatment relied upon here."

…

Kirby J. said:

35…These proceedings concern a suggested error made by the Refugee Review Tribunal established by the Act[9] ("the Tribunal") in identifying the category upon which it was claimed a protection visa should issue. This mistake, so it is said, led to an error on the part of the Tribunal in reaching its conclusion which was adverse to the applicant.
…
46 It is clear from this letter that the case that the applicant was propounding before the Tribunal was something more than fear of return to Russia by reason of his membership of the particular social group of businessmen or entrepreneurs in that country. The added elements were that the applicant claimed to be a businessman who could not accept the increasing levels of corruption and violence in Russia, denounced the suggested complicity of the authorities in it and took a public stance against such developments.
…
49 …[the Tribunal] … approached the issue before it as one of determining "whether the harm feared is grounded in the Convention".
50 Unfortunately, in answering that question, the Tribunal also mis-stated the "social group" that was relied on by the applicant. It said[19]:

> "The Applicant's adviser had posited in his submission that the Applicant was a member of a particular social group, namely, businessmen in Russia. Even if the Tribunal were to accept this proposition, there is no indication that the persecution is 'for reasons of' membership of this group. Following the attempt on the Applicant's life in 1994 the Applicant does not report anything other than dissatisfaction with the society and the political system as a whole; there have been no further attempts to harm him or his family, nor are there indications of behaviour on the part of the Applicant which would attract the adverse attention of anyone for reasons of being a businessman in Russia."

…
55 In the Full Court, presumably in response to a complaint raised by the applicant, the judges considered whether the Tribunal had erred in failing to address whether the applicant's "involvement in protest meetings about corruption and illegality" was a "manifestation of political opinion"[23]. Their Honours determined that "such involvement was not central to [the applicant's] case"[24] which was put in "the context of his exposure to risk of harm as an 'entrepreneur'"[25], thereby invoking the Convention ground of "particular social group" rather than political opinion.
…
58 By the time the proceedings reached this Court, enlarged by the application for constitutional writs, the focus of argument … was that the Tribunal (and the Federal Court) had misunderstood and mis-stated the applicant's case grounded in the Convention… the applicant complained that the "particular social group" upon which he had relied had been expressed too broadly. He submitted that the mis-statement was critical to the Tribunal's rejection of his claim that the "fear" that he had successfully established was "for reasons of ... membership of [the] particular social group" specified.
The issues arising are therefore:
1) Did the Tribunal mis-state the "particular social group" upon which the applicant relied?
(2) If so, did that mis-statement affect the decision of the Tribunal?
…
<u>The Tribunal mis-stated the class relied upon</u>

60 When regard is had to the history of the applicant's endeavours to express the basis of his entitlement to a protection visa under the Act[27], by reference to the definition of "refugee" appearing in the Convention, it seems clear that the applicant's case was not based, relevantly, on "political opinion" but on his "membership of a particular social group". It seems equally clear that the "particular social group" that the applicant was propounding was not one limited to "entrepreneurs" or "businessmen in Russia". There were added ingredients that refined the "group" relied upon and that sharpened the focus of the claim. The principal ingredients involved the participation by the entrepreneurs or business people concerned in the making of representations to the authorities in Vladivostok; in attending public meetings to "highlight the plague of corruption and lawlessness"[28]; and in appealing to the authorities for protection which the authorities were either unwilling or unable to provide.

…

62…when the Tribunal came to define the "particular social group" for the purposes of the Convention, it described it as "businessmen in Russia"[29]. It then proceeded to assume that this "social group" was the one by which the other considerations in the Convention definition had to be measured in the applicant's case.

63…Whilst various formulations were used by him, it is sufficiently clear that the applicant was explaining his subjective "fear" by reference to the peculiar circumstances that had impinged on his life in Vladivostok. These included his involvement with a group of businessmen who had felt sufficiently concerned to participate in discussions at the City Council; who had expressed concern about the lack of effective action by the authorities; whose members had suffered dangers of death and injury (as the applicant in February 1994 was to do) and who had sought intervention by the authorities, only to be disappointed.

64 The applicant's case was therefore much more precise than a claim of fear for "being a businessman in Russia"[30] - a huge class, inferentially including many persons who would have no fear and no foundation for protection as refugees. By expressing the applicant's claim as it did, the Tribunal mis-stated the case before it.

<u>The mis-stated class affected the Tribunal's decision</u>

65 The decision of the Tribunal indicates that the claim by the applicant was rejected on the basis of causation[31]. The Tribunal did not accept that the persecution was "'for reasons of' membership of [a particular social] group"[32]. The claim was held to "have no nexus with the Convention"[33]. The Tribunal's mis-statement of the class of social group was central to these conclusions.

66 This is not an occasion to review the explanation, given by this Court in earlier cases[34], of the origins, purpose and meaning of the residual category of "particular social group" expressed in the Convention….

It was adopted to ensure that "the Convention would protect persecuted groups of people outside of the bounds of ethnic, religious, or political identity"[36]. The Swedish delegates, in their argument, adverted to well-known examples of social group persecution that had occurred in Eastern Europe following the rise of Communist regimes[37]. Cases in the courts of European nations, parties to the Convention, recognised as falling within the "social group" category quite large classes, many of whose members had resorted to countries of Western Europe in flight from countries of Eastern Europe. Thus, members of the "capitalist class", "independent businessmen" and their families were treated as valid "social groups" for the grant of refugee status to persons fleeing from Eastern Europe[38]. Such categories appear to be precisely what the originators of the "particular social group" category had in mind, although, in later years, the class has developed and been applied more broadly.

67 Illustrations of the potential breadth of the class invoked in this case can be found in recent decisions of this Court, such as Applicant A v Minister for Immigration and Ethnic Affairs[39]; Chen Shi Hai v Minister for Immigration and Multicultural Affairs[40]; Minister for Immigration and Multicultural Affairs v Haji Ibrahim[41]; and Minister for Immigration and Multicultural Affairs v Khawar[42]. The class has received a wide reading in other countries with legal systems similar to our own[43] eg R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629; Canada (Attorney General) v Ward [1993] 2 SCR 689; Sanchez-Trujillo v Immigration and Naturalization Service 801 F 2d 1571 (9th Cir 1986) and in countries with quite different legal traditions[44] eg cases cited in Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 260-263, 280-283, 299-308. See also cases collected in Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar - Sanchez-Trujillo v INS, 801 F 2d 1571 (9th Cir 1986)", (1987) 62 Washington Law Review 913 at 927-928.

68 Specifying with precision the "social group" that an applicant propounds as the one applicable to his or her case is important for at least two reasons. First, it ensures that the decision-maker addresses accurately the case that is put in respect of which the relevant jurisdiction and powers are invoked. But there is a second, practical reason for precision in this regard. It is one relevant to the present application.

69 As the submissions for the Minister in this Court correctly pointed out (invoking the influential opinion of McHugh J in Applicant A[45] (1997) 190 CLR 225 at 256-257), an applicant faces a paradox in identifying the "particular social group" that he or she relies on in cases of this kind. Defining the group widely increases the ease of establishing membership of that group and, to that extent, of fulfilling a requirement of the Convention definition. However, the wider the definition of the "group" propounded, 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. If the category is defined too narrowly, the decision-maker might be justified in considering that the "particular social group" claimed is not a "social group" at all when that phrase is read as an element of an international treaty intended to have operation at the level of the obligations imposed upon nation states.

70 A good illustration of the latter point may be seen in a recent English decision where it was submitted that a family could be a "particular social group" for the purposes of the Convention definition. The claim was made upon the basis that, as a male in a family which was involved in a blood feud in Albania, the applicant in that case had a well-founded fear of persecution if he returned to Albania. The English Court of Appeal accepted that particular social groups could be very large or very small, depending on the circumstances. It acknowledged that, in particular cases, the phrase could even comprise a clan or a family[46] Skenderaj v Secretary of State for the Home Department [2002] 4 All ER 555 at 561 [18], 565 [29]. To decide whether, in the individual case, this was so, it would be necessary to consider whether the propounded "group of people" was recognised by society as a distinct "group" with particular characteristics[47] R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 at 657-658.

71 In that case, the English Court did not accept that the applicant's family could be regarded "as a distinct group by Albanian society any more than, no doubt, most other families in the country"[48] Skenderaj v Secretary of State for the Home Department [2002] 4 All ER 555 at 566 [30]. In a sense, the narrow category claimed for the applicant destroyed his argument that a "particular social group" within the meaning of the Convention existed.

72 Such considerations may, on occasion, be determinative of an applicant's entitlement to protection under the Convention. So it was here. To the extent that the "social group" was

defined broadly as "entrepreneurs" or "business people" in Russia, it became easier for the applicant to satisfy the element of membership in the definition. But it became commensurately more difficult for the applicant to satisfy the other elements of the Convention, most especially proof of a "well-founded fear"; proof that such "fear" was of being "persecuted"; and proof that the "fear" was "for reasons of ... membership of a particular social group" as so defined.

73 Before the Tribunal in the present case, the applicant failed on the last of these considerations (that is, the reason for the fear which he proved). It was therefore unnecessary, in the event, for the Tribunal to consider the other two remaining elements of the definition. But to the extent that the "social group" in question was defined over-broadly, the applicant faced severe difficulties in establishing his case. It became more likely that his "fear" would be ascribed to personal considerations relating to criminal activities directed against him and his family than to "persecution" within the Convention, which arose "for reasons of ... membership of a particular social group".

74 The mistake of the Tribunal in expressing the "social group" as it did was therefore critical for the foundation upon which it rejected the applicant's claim. It cannot be dismissed as an immaterial error.

….

91 I do not consider that the lack of focus, confusion, poor judgment about arguable issues and failure earlier to specify the basis on which he now succeeds constitute reasons, on discretionary grounds, for refusing the applicant constitutional relief[64]. Accordingly, a writ of prohibition in the first instance should issue out of this Court addressed to the Minister (the first respondent) to prohibit him from acting on the purported decision of the Tribunal concerning the applicant and his family. A writ of certiorari should issue to quash the decision of the Tribunal. A writ of mandamus should issue to oblige the Tribunal to consider the applicant's application for review of the decision of the delegate and to determine that application according to law.

92 This outcome does not ensure that the applicant will ultimately succeed in his claim for protection for himself and his family as refugees. There remain the questions of whether he can establish that the subjective fear that has been found to exist in his case is "well-founded", relates to "persecution" and exists "for reasons of" his membership of a particular social group. However, the starting point for the correct consideration of these inter-related questions is the correct identification of the "particular social group" that the applicant propounded. In this case, this was the group of businessmen or entrepreneurs in Vladivostok in the Russian Federation who grouped together in response to serious civic lawlessness and to the failure of the authorities to uphold the law and to address the grave violence to which the members of the group, including the applicant, were subjected.

93 The decision on the merits will be one for the Tribunal. But if the correct "social group" is identified, it cannot be said that the return of the matter to the Tribunal is futile.

…

Hayne J.

95. I agree that, for the reasons given by Gummow and Callinan JJ, the Refugee Review Tribunal failed to exercise its jurisdiction, and did not give the applicant natural justice in conducting its review, because it did not consider the claim which the applicant was then making, and had earlier made, for protection. I also agree that certiorari, mandamus and prohibition should issue and that the first respondent should pay the applicant's costs of that application.

…

d) Family

A family may constitute a particular social group within the meaning of the Convention (Sarrazola v MIMA [1999] FCA 101 (Hely J. at first instance), Parra v MIMA [2000] FCA 85; Ali v MIMA [1999] FCA 650). Moreover, a family possessing a recognisable characteristic distinguishing itself from society at large (e.g families rebuffing invitations to join the mafia/ resisters of corruption) may in appropriate circumstances constitute such a group (see MIMA v Sarrazola (1999) 166 ALR 641 at [27-8]) In C & S v MIMA (1999) 59 ALD 643, 94 FCR 366 [1999] FCA 1430 Wilcox J. expressed agreement with the trial judge in Sarrazola (no 1) that membership of a family is a characteristic which distinguishes members of that family from society at large and himself commented that family is something that exists independently of any persecution the members may suffer. There is no additional requirement that the family must be well known in the society in question (Sarrazola v MIMA (No 3)[2000] FCA 919

The authorities were thoroughly canvassed in Giraldo v MIMA [2001] FCA 113 by Sackville J.:

The applicant's argument was :

(i) A particular family or extended family is capable of constituting a particular social group for the purposes of the Convention.
(ii) A member of such a family who is at risk of persecution by reason of his or her association with another family member may have a well-founded fear of persecution for a Convention reason.
(iii) The family member may have such a well-founded fear notwithstanding that
* the persecutors may have more than one motive for persecuting him or her; and
* the other family member could not claim to be a refugee within the meaning of the Convention.
(iv) In this case, the RRT found that the motivation for the threats made against the applicant was FARC's desire to put pressure on his relatives to accede to the guerillas' demands.
v) Notwithstanding this finding, the RRT failed to consider whether the applicant's extended family (his own family and that of his parents-in-law) constituted a particular social group in Colombia and, if so, whether he feared persecution by reason of his association with other members of that family, especially his parents-in-law.

(vi) This failure constituted an error of law by the RRT, being an incorrect application of the law to the facts as found by it (Migration Act, s 476(1)(e)).

His Honour said:

44 In my opinion, the first three steps in the argument are supported by the present state of authority in this Court, in particular by Sarrazola v Minister for Immigration and Multicultural Affairs [1999] FCA 101 (Hely J) ("Sarrazola (No 1)"), aff'd Minister for Immigration and Multicultural Affairs v Sarrazola (1999) 95 FCR 517 ("Sarrazola (No 2)"). Sarrazola was a case similar to the present. The applicant claimed to fear harm from Colombian criminals who were responsible for the death of her brother. The brother had himself been a criminal. His former criminal associates had threatened to kill the applicant's children if she did not pay money the brother was said to owe them.
45 The RRT was prepared to assume that the applicant's family constituted a particular social group. Nonetheless, the RRT rejected the applicant's claim to a protection visa, on the ground that the harm feared by her did not arise for a Convention reason. It reached this conclusion for two reasons. First, it held that the Convention was not intended to protect family members from persecution where the family is not linked to a broader group recognised by a Convention definition. Secondly, the RRT found that the threats directed to the applicant were not motivated by a purpose or desire to harm her by reason of her relationship to her brother as such. Rather, the criminals were motivated by self-interest, a non-Convention reason.
46 On the application for review, the Minister did not attempt to support the first of the RRT's reasons for its conclusion. Hely J expressed the view that the Minister's concession was well-founded. His Honour observed that neither the text of the Convention, nor its context or purpose, requires an applicant for a protection visa to establish not only a well-founded fear of persecution by reason of membership of a family group but also that another family member is affected by conduct within the scope of the Convention.
47 Hely J then considered whether the applicant's fear of persecution was by reason of her membership of a particular social group. His Honour expressed the opinion that the principal authorities ("Applicant A" v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 255; Chan Yee Kin v Minister; Minister for Immigration and Multicultural Affairs v Zamora (1998) 85 FCR 458; Guo Wei Zhi v Minister for Immigration and Multicultural Affairs (unreported, Full Federal Court, 10 December 1998) seemed to favour the conclusion that a family is capable of forming a particular social group. He continued (at [36]):

> "In view of the preceding discussion, and in the absence of decisive authority to the contrary, in my opinion, a family can constitute a particular social group within the meaning of Article 1A(2) of the Refugees Convention. A family is cognisable as a group in society such that its members share something which unites them and sets them apart from the general community. Membership of a family is a characteristic which distinguishes members of that family from society at large. In other words, family members possess a common unifying element which binds them together as a particular social group."

48 Hely J found that in the circumstances of the case before him the "family" was to be identified by reference to the perceptions of the persecutors. Accordingly, the family constituted the applicant, her husband and two children and the applicant's deceased brother. His Honour noted that the RRT, in effect, had found that part of the reason for the

applicant's well-founded fear of persecution was her familial tie with her brother. Since family membership did not have to be the sole reason for a well-founded fear of persecution, it followed that the RRT had erred in law in deciding that her fear of persecution was not for reason of family membership without at least considering the extent to which family membership was a factor in the risk of persecution.

49 On appeal, the Minister relied on two contentions. First it was said that the identification of the motivation of the prosecutors was entirely a matter of fact to be determined by the RRT. Secondly, while the Minister accepted that it was possible for a family to constitute a particular social group, he submitted that Hely J should not have found that the particular family identified in this case answered that description.

50 The Full Court held, in Sarrazola (No 2) (at 521-522), that the RRT had erred by failing to recognise that a person may be motivated to persecute another for more than one reason. Thus the RRT's conclusion as to the criminals' motivation could not be regarded as an unassailable factual finding.

51 The Full Court also agreed with Hely J that the RRT had erred in acting on the basis that the Convention is not intended to protect family members from persecution unless the family is linked to a broader group recognised by the Convention definition. The Full Court considered that there is nothing absurd in the proposition that the family members of a person who is the main target of persecutors can be found to be refugees even though the "target person" cannot…

52 In C v Minister for Immigration and Multicultural Affairs (1999) 94 FCR 366, the female applicant (S), a Colombian citizen, claimed to fear retribution at the hands of the "Cali cartel" by reason of her husband's activities in reporting criminal behaviour. Wilcox J referred to the judgments at first instance and on appeal in Sarrazola. His Honour considered that Hely J's observation, that family members possess a common unifying element which binds them together as a particular social group, was "plainly correct". Wilcox J continued as follows (at 377-378):

> "That which binds together the members of a family is not the suffering of persecution but a relationship of blood and marriage; membership of a family is something that exists independently of any persecution the members may suffer. Moreover, in almost every society, familial links are recognised and families are identifiable. Unless one subscribes to the view, taken in Applicant A only by McHugh J, that the term 'a particular social group' was 'probably intended to cover only a relatively large group of people', there is no reason to exclude its application to a family. Such an application is surely well within the spirit of the Convention. Family members may be targeted for persecution simply because of that membership, and not because of their own actions.... It follows I conclude the Tribunal member erred in holding in this case that 'family membership will only be relevant for the purposes of the Convention where there is a link to a broader relevant group'. There apparently being no question but that S, her children and C's mother were within a particular social group that might properly be described as C's family, the critical question for the Tribunal was whether the persecution they feared arose out of their membership of that group. The Tribunal failed to consider that issue."

53 For the sake of completeness, I note that in Sarrazola v Minister for Immigration and Multicultural Affairs (No 3) [2000] FCA 919, Madgwick J set aside the decision of the RRT made after the proceedings had been remitted in accordance with the orders of Hely J that had been affirmed by the Full Court. The RRT found that, on the evidence, the applicant and her family (however perceived) had not been perceived as a cognisable group

in Colombia. Madgwick J considered that the RRT had fallen into error in reaching that conclusion. His Honour also held that the RRT had erred in finding that the threatened persecution was for reasons unconnected with the family status of the applicant. His Honour followed the reasoning in the earlier cases, although he also addressed other issues. As Sarrazola (No 3) is subject to appeal, I say no more about it.

The judgment of Madgwick J. in Sarrazola (no 3) was upheld by the Full Court Minister for Immigration & Multicultural Affairs v Sarrazola (2001) 107 FCR 184, [2001] FCA 263.

The case has relevance both for the particular social group ground and for the causation issue i.e. the issue of multiple effective causes one of which is Convention related.

Heerey J. agreed with Merkel J.'s reasons (as did Sundberg J.)and added:

On the causation issue the Tribunal's conclusion, in the light of the findings it made, shows that it incorrectly applied the principle that it is sufficient if one of the reasons for which persecution is feared is a ground specified in Art 1A(2) of the Refugees Convention. History shows that persecution has often been motivated by racial, religious and political motives admixed with other reasons such as opportunistic avarice. The criminals who threatened the respondent were not seeking to extort money indiscriminately from anyone in Colombia who happened to own assets.

Merkel J. began:

4 The present appeal concerns the circumstances in which membership of a particular family can constitute "membership of a particular social group" for the purposes of Art 1A(2) of the Convention

…

17 The RRT accepted that the threats the respondent had experienced and the harm she feared in the future if the threats were carried out constituted serious harm which might be capable of amounting to persecution. However, the RRT rejected the respondent's claim for refugee status on two grounds. First, the RRT found that the respondent's family, however defined, did not constitute a particular social group. Second, the RRT found that even if the respondent's family did constitute a particular social group, the harm which she feared was not "for reasons of" membership of that group.

Having dealt with the Tribunal's findings at [18]-[22] he referred to the primary judge's decision :

23 Madgwick J found that the RRT fell into legal error for two reasons. First, because it was clear that the RRT member formed the view that the respondent's family could not be a "particular social group" unless the particular family was well known as such in the society in question. His Honour said that there is no obstacle to viewing "the usual family" as a "particular social group". In particular, his Honour agreed at [29] with the following observations of Wilcox J in C v Minister for Immigration and Multicultural Affairs (1999) 94 FCR 366 ("C"):

> "It was unnecessary for the Full Court in [Sarrazola No 2] to deal with the correctness of the statements of Hely J in [Sarrazola No 1] that '[m]embership of a family is a characteristic which distinguishes members of that family from society at large. ... family members possess a common unifying element which binds them together as a particular social group'. However, it seems to me the statements are plainly correct. That which binds together the members of a family is not the suffering of persecution but a relationship of blood and marriage; membership of a family is something that exists independently of any persecution the members may suffer. Moreover, in almost every society, familial links are recognised and families are identifiable. Unless one subscribes to the view, taken in Applicant A only by McHugh J, that the term 'a particular social group' was 'probably intended to cover only a relatively large group of people', there is no reason to exclude its application to a family. Such an application is surely well within the spirit of the Convention. Family members may be targeted for persecution simply because of that membership, and not because of their own actions."

Madgwick J concluded:

> "In the present case, there was no reason to think that the [respondent's] family, on both proffered definitions of it, lacked the usual aspects of a family to which Wilcox J referred, and a good deal of overt material to suggest that it did. Among other things, it was clearly the perception of the persecutors that it did. The perception of persecutors can be relevant in a variety of ways. As Burchett J said in Ram in a somewhat different context:
>
> '[a] social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality.'
>
> In my view it follows that [the RRT] fell into legal error. Reading the Tribunal-Member's reasons fairly, it seems quite clear that she took the view that a family could not be a 'particular social group' unless the family was well known in the society in question. Once the legitimacy of claims of persecution by non-State agents when allied with the relevant State's inaction or incapacity to prevent it is granted, and it is well settled that such claims are legitimate, there is in my opinion no foundation for this superadded requirement."

24 The second error Madgwick J found the RRT had made related to its application of the test for causation. His Honour stated that the feared persecution arose from the persecutors' wish for the respondent to pay her brother's debt and from the persecutors' perception that a way of forcing the respondent to pay the debt was to threaten her and someone dear to her, such as her children. Madgwick J said that it is impossible to escape the centrality of the family connection to the respondent's fear of persecution. Accordingly, an essential element in the respondent's persecution was based upon a Convention attribute, being membership of a particular social group, namely her family. Madgwick J said that in the light of the

RRT's factual findings it was not possible for it to have applied the correct legal tests and arrived at the conclusion that it rejected:

> "...as a matter of fact any possibility that the interest in the [respondent] was owing to her membership of the family as defined in the submissions by the [respondent's] adviser or by any other configuration of the family".

His Honour stated the substance of the Minister's arguments at [25]-[27] then said:

28 It is clear that the respondent's claim for refugee status is premised upon her family constituting a particular social group for the purposes of the Convention. It seems to now be accepted in the Court that a family can constitute a particular social group. In Sarrazola No 1, after observing that there is no decisive authority to the contrary, Hely J concluded that "...a family can constitute a particular social group within the meaning of Article 1A(2)". His Honour said at [36]:

> "A family is cognisable as a group in society such that its members share something which unites them and sets them apart from the general community."

29 Wilcox J observed in C at [33] that it was unnecessary for the Full Court in Sarrazola No 2 to deal with the correctness of the above statement of Hely J but said, however, that the statement was "plainly correct". Wilcox J also found that there is no reason to exclude the Convention's application to a family. Madgwick J at first instance, agreed with Wilcox J's observations in C, saying they were "a logical development of what Hely J said in Sarrazola No 1".

30 More recently, in Giraldo v Minister for Immigration & Multicultural Affairs [2001] FCA 113 Sackville J (at [42] and [44]) accepted that the following propositions are supported by the present state of authority in the Court:

> "(i) A particular family or extended family is capable of constituting a particular social group for the purposes of the Convention.
>
> (ii) A member of such a family who is at risk of persecution by reason of his or her association with another family member may have a well-founded fear of persecution for a Convention reason.
>
> (iii) The family member may have such a well-founded fear notwithstanding that
>
> * the persecutors may have more than one motive for persecuting him or her; and
>
> * the other family member could not claim to be a refugee within the meaning of the Convention."

…

33 In my view there can be little doubt that persecution by reason of being a member of a particular family can constitute persecution for reasons of membership of a particular social group for the purposes of Art 1A(2). That conclusion does not, however, answer the question of what is the relevant "social" group, albeit that it is a family, in a particular case. A "family" in its ordinary and natural meaning can mean, inter alia, parents and their children; a group of persons closely related by blood; all persons descended from a common progenitor; or other meanings which may be appropriate to the particular cultural, or any other relevant, context in which the question arises.

34 Plainly, the identification of that group by the RRT will depend upon the circumstances of the case. Although Madgwick J stated that there was no reason to think the respondent's

family, however configurated, lacked "the usual attributes of a family" referred to by Wilcox J in C, I do not take his Honour to have concluded that it follows that any particular configuration of the respondent's family was therefore a "particular social group". Rather, his Honour was indicating (at [37]-[38]) that it was open to the RRT to so conclude but, instead of directing itself to that issue, the RRT erroneously imposed an additional requirement that the particular family must be "well known in the society in question".

a) A particular social group

35 The Full Court in Sarrazola No 2 at [22]-[25], in discussing the criteria to be applied to the identification of the existence of a particular social group, stated:

> "22. In Zamora at 464...the Full Court expressed the view that Applicant A is authority for the following proposition:
>
> '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; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Thirdly, 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.'
>
> 23. It is only after the relevant particular social group, if any, has been identified that a decision-maker can sensibly give consideration to the question whether the applicant has a well-founded fear of persecution for reason of his or her membership of that particular social group. As was pointed out by Dawson J in Applicant A at 240:
>
> 'The words 'for reasons of' require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution'.
>
> 24. In the context of family members being persecuted for reason of one family member having refused to join the mafia (the factual circumstances considered in Martinez), the first question for an Australian decision-maker would be whether, independently of the persecution being experienced by the family members, the family was recognised within society as a group, or as part of a group, set apart from the rest of society.
>
> 25. It may be that such a case might be found in a society in which the recruitment activities of the mafia were publicly known, and in which the retaliatory actions of the mafia against persons who rebuffed invitations to join it were so notorious, that the families of those persons had become recognised in the society as together constituting a particular social group (see the hypothetical consideration by McHugh J in Applicant A at 264 of persecuted 'left-handed men'). If an applicant in such circumstances had a well-founded fear of persecution for reason of being a member of the particular social group constituted by the families of persons who had rebuffed invitations to join the mafia, it would be illogical and wrong, in our view, to engage in the further refinement of asking whether the applicant was fearful of being persecuted by reason of a personal link with an individual who had rebuffed the mafia or by reason of his or her membership of the social group."

36 In order to determine the existence of the second and third factors in Zamora the RRT was required to address whether the characteristics of the family configuration raised by the material and evidence before it (see Minister for Immigration and Multicultural Affairs v Singh (2000) 98 FCR 469 at 482) set the group apart as a social group from the rest of the community, and whether the group was recognised by the relevant section of Columbian society as a group that is so set apart. The characteristics that usually unite a family as a collection of individuals and that which will set it apart from the rest of the community will be familial links of the kind described by Wilcox J in C. The determination of which of those links apply in a particular case will identify, and thereby define, the relevant group as the particular social group for the purposes of Art 1(2A).
37 Importantly, in addressing the third factor in Zamora the question is whether the family unit considered to be a social group is publicly recognised as being set apart as such. It is not whether the particular family (ie the members of the family however configured) is well known as such (emphasis added).
38 If the latter question were the relevant question it is difficult to perceive how any particular family could be viewed as a social group other than a family that had, fortuitously or otherwise, gained fame or notoriety, or a family which had a special or institutionalised position in society, such as a Royal family. I do not accept that the application of the Convention in relation to a family as a social group is so limited. In particular, I do not accept that only the fundamental familial rights and freedoms of members of well known families are to be assured under the Convention, rather than the fundamental familial rights and freedoms of members of a family unit as such.
39 In the present case there was material before the RRT upon which it could have concluded that the respondent's family, on either configuration relied upon, has characteristics (relationship of blood, marriage etc) that satisfied the three factors stipulated in Zamora.
40 Whether the factors were satisfied and, if so, how the family was to be defined, was a question of fact for the RRT: see Giraldo at [56] per Sackville J and Sarrazola No 1 at [37]-[41] per Hely J. However, the RRT did not address the characteristics that might identify and thereby define the family that, on the facts of the present case, might be set apart from the general community as a social group. Rather, the RRT addressed the separate and additional question of whether the particular family was recognised, in the sense of being well known, by Columbian society as a group that is set apart from the rest of the community.
41 The Minister said that some support for the RRT's approach could be found from the manner in which the Full Court in Sarrazola No 2 dealt with the relevant family unit as a social group in the "mafia" example it gave at [25]. The example given was of retaliatory actions by the Mafia against the family of persons who refused to join the Mafia becoming so notorious that the families of those persons might become recognised in the society as together constituting a particular social group. Subject to the definition of membership of the relevant families (ie blood, marital relationships etc) the example given might constitute a social group. I do not agree, however, that the example was given on the basis of the Full Court accepting that a particular family subjected to such retaliatory actions cannot constitute a particular social group for the purposes of Art 1A(2). If that were intended to be suggested by way of dicta by their Honours, implicitly if not explicitly, for the reasons already given I would respectfully disagree.
42 If I am wrong in that view then the RRT in the present case may have erred in any event in failing to address whether, on the material and evidence before it, the relevant social group was the families held responsible for the obligations of persons alleged to owe outstanding debts or obligations to underworld groups in Columbia. The fact that the

respondent's claim was not put by the claimant in that way does not necessarily relieve the RRT, as an inquisitorial body, from the duty of addressing it: see Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 at 62-63; Satheeskumar v Minister for Immigration and Multicultural Affairs [1999] FCA 1285 at [15]; Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 at 293; Chen v Minister for Immigration and Multicultural Affairs [2000] FCA 1901 at [114] and Giraldo at [58]-[59].

43 Finally, I would observe that there is nothing anomalous about the Convention operating to protect innocent members of individual families from retaliation or retribution (amounting to persecution) for the reason that they are members of a family, one of whose members has committed an actual or a perceived wrong. In that regard I agree with the observation of Hely J in Sarrazola No 1 at [22]:

> "Nor is it obvious to me why it would make a nonsense of the Refugees Convention to treat its operation as attracted even though fear of persecution by the brother, were he alive, would be outside its scope. Neither the text of the Refugees Convention, nor its context, object or purpose supports such an approach. There is no reason in principle why the actions of an individual cannot act as a catalyst to bring the wrath of potential persecutors down upon a race, members of a religion, or members of a particular social group."

(b) Causal nexus

45 The RRT also rejected the respondent's claim on the basis that she was not at risk by reason of membership of her family. Rather, it concluded that she and her husband were being pursued and threatened because of an outstanding debt which they, as owners of their house, had the means to pay. As was pointed out by Madgwick J, Hely J rejected an almost identical approach to causation on the part of the RRT that first heard the claim: see Sarrazola No 1 at [42]-[51]. In discussing the RRT's finding that the reason for the respondent's well founded fear of persecution was extortion associated with the recovery of her deceased brother's debt, Hely J observed:

> "44. This reason for the [respondent's] fear of persecution necessarily incorporates three notions:
>
> * A debt is owed to the criminals,
>
> * The debtor is the [respondent's] deceased brother,
>
> * The attitude of the persecutors...is that his relatives are now responsible for payment of the brother's debt.
>
> 45. These notions are inextricably linked. It is only when regard is had to the combination that the reason for the [respondent's] fear of persecution emerges. Once this is accepted, it was not open to RRT to conclude that:
>
> 'the Tribunal is...not satisfied that the harm feared by the applicant and her husband on return to Colombia arises (even in part) for a Convention reason.'...
>
> In effect RRT found that part of the reason for the [respondent's] well-founded fear of persecution was her familial tie with her brother. Then, RRT proceeded to find that the [respondent's] fear was not for reason of that familial tie 'even in part'.

46. As earlier indicated, the applicant need not demonstrate that her family membership is the sole reason for her well-founded fear of being persecuted: Jahazi. As Hill J said in Mohamed v Minister for Immigration & Multicultural Affairs (unreported, Hill J, 11 May 1998) at p 13:

'... 'race, religion, nationality, membership of a particular social group or political opinion' may be but one of several reasons for persecution'.

47. It follows that once RRT found that part of the reason for the [respondent's] well-founded fear of persecution was the fact that she was the sister of her deceased brother, RRT erred in law in deciding that the [respondent's] fear of persecution was not for reason of her family membership without at least considering the extent to which membership of the family is a factor in the risk of persecution.

48. It should be noted that this is not simply a case of extortion; which would not come within the terms of Article 1A(2) of the Refugees Convention. In other words, it would be inaccurate to suggest that the persecutors' motivation in this case is merely the exaction of money. Rather, the motivation of the persecutors is properly stated as recovery of the [respondent's] deceased brother's debt. The persecutors are not interested in extracting money per se. They seek recovery of a debt, the debtor is deceased, they fix upon the [respondent] for repayment and the reason for doing so is her membership of the same family as the deceased. So much is accepted by RRT. RRT's conclusion that the [respondent] is in fear of persecution simply because she is 'an obvious target of opportunity' is contrary to the facts which RRT has found or accepted.

49. A useful contrast can be drawn between this matter and the case of Guo Wei Zhi v Minister for Immigration & Multicultural Affairs (unreported, Full Federal Court, 10 December 1998). In Guo Wei Zhi the brother of a criminal was suspected by Chinese authorities of involvement in illegal activities. He sought refugee status under Article 1A(2) of the Refugees Convention on the ground that he had a well-founded fear of persecution for reason of his membership of a particular social group. That social group was said to be his family. The issue on appeal to the Full Federal Court was whether the brother's well-founded fear of being persecuted was for reason of his blood relationship with the criminal. At p 5 of his Honour's judgment, Emmett J held:

'The attention of the authorities [the persecutors] was not attracted because of the appellant's association with Guo Wei Rong [the criminal] qua brother. That attention was attracted by reason of his association with Guo Wei Rong qua criminal.'

50. Accordingly, the [respondent] was held not to fear persecution for a Convention reason and was denied refugee status.

51. If one were to apply the terminology employed by Emmett J to the present case, the attention of the persecutors is attracted by reason of the [respondent's] association with the deceased qua brother. Dissimilarly to the facts of Guo Wei Zhi, the [respondent] has no other association with the deceased. This highlights the reason for the persecutors fastening upon the [respondent]: she is the sister of her indebted brother. It follows that the [respondent's] well-founded fear of being persecuted is for a Convention reason; namely, her family membership."

46 Although Hely J identified the error of law made by the RRT as a failure to consider the extent to which family membership is a factor in the risk of persecution, it is clear that his Honour was in no doubt that, had the RRT done so, it must have concluded that the "applicant's well founded fear of being persecuted is for a Convention reason; namely, her family membership".
47 The Full Court in Sarrazola No 2 dealt with the causation issue on the basis that the RRT failed to recognise that a person may be motivated to persecute another for more than one reason. It concluded at [17]:

> "In adopting the approach that a finding that the criminals were motivated by a desire to recover the money that they believed was owing to them by the respondent's brother was inconsistent with a finding that the criminals were motivated by a desire to harm the respondent by reason of her relationship to her brother, the Tribunal, in our view, made an error of law of the kind referred to in s 476(1)(e) of the Act."

48 I have set out the reasoning of Hely J, which I find to be persuasive, in some detail as, save for the error of law issue discussed by his Honour at [47], the same observations can be made in respect of the reconstituted RRT's decision. The evidence accepted by the RRT (see [4]-[12] above) may be summarised as follows:
* a debt is owed to the criminals;
* the debtor is the respondent's deceased brother;
* the attitude of the persecutors is that his relatives are now responsible for payment of the debt;
* the respondent was selected for payment of the debt as the only surviving immediate member of the brother's family;
* the means of forcing the respondent to pay the debt was to threaten the respondent and her family.
49 For the reasons given by Hely J it might have been expected that upon evaluation of those facts the RRT would conclude that one of the reasons for the respondent's well founded fear of persecution is her family membership.
50 The RRT accepted that the respondent was selected for payment as the surviving immediate relative. It later stated that that factor "was entirely subsidiary". It then stated that she and her family were pursued and threatened because of an outstanding debt and not because of membership of any family group. The RRT concluded that the family connection formed no part of the motivation, purpose or reasons for the persecution by the "agents of harm" and rejected "any possibility that the interest in the respondent was owing to her membership of the family". Rather, the RRT said the interest was "purely personal".
52 On the facts found by the RRT the respondent was being persecuted both by reason of her family membership and because her brother had failed to pay the debt due to the criminals threatening her. To find, as the RRT did, that she was later pursued and threatened because it was believed she has the means to pay, cannot negative the significance of the fact that she was selected as the target to pay because of her family membership. To elevate having the means to pay to be the only reason motivating the respondent's persecutors is, bearing in mind "the broad policy of the Convention" (see Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 170 ALR 553 at 570 per Kirby J ("Chen")) as illogical and wrong (see Sarrazola No 2 at [25]) as selecting the brother's act of failing to pay as the only reason motivating the persecutors.
53 The RRT cannot immunise itself from review by correctly stating the tests to be applied in order to determine whether the causal nexus requirements of Art 1(2A) are satisfied. It must also correctly apply the tests. Ultimately, "the question whether facts fully found fall

within the provisions of a statutory enactment properly construed is a question of law": see Hope v The Council of the City of Bathurst (1980) 144 CLR 1 at 7 ("Hope") per Mason J. In the present case, for the above reasons and the reasons given by Hely J in Sarrazola No 1, the RRT's conclusions cannot reasonably be supported by the meaning to be ascribed to the words "for reasons of membership of a social group" in Art 1A(2) on the facts fully found by it: cf Hope at 10 per Mason J. Thus, the conclusions of the RRT necessarily involved an error of law.

54 The RRT purported to evaluate the postulated connection between the asserted fear of persecution and the ground suggested to give rise to that fear (see Chen at 570 and Gersten v Minister for Immigration and Multicultural Affairs [2000] FCA 855 at [28]-[29]). However, I agree with Madgwick J, for the reasons his Honour gives at [45]-[48], that the RRT in undertaking that evaluation could not have applied the correct legal tests in relation to determining whether the requisite causal nexus existed and conclude, as it did, that there was an absence of any connection between the persecution feared by the respondent and her family membership.

55 The only reasonable explanation for the RRT's conclusion is that it has treated the reasons for the persistence of the persecutors in threatening the respondent and her family (having the means to pay) as separate or severable from the reason why she was selected and held to be responsible for her brother's debt (her family connection). It is not open to the RRT to disregard the latter reason, which is inextricably linked to the former reason, without ignoring or disregarding evidence that it has accepted, which is impermissible. The situation is analogous to an Administrative Appeals Tribunal, which is also an inquisitorial body, impermissibly ignoring some of the facts contained in the material relied upon by one of the parties before it in determining a matter: see Repatriation Commission v Owens (1996) 70 ALJR 904 and Inderjit Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 73 at [51].

56 The errors to which I have referred involved an incorrect interpretation of the applicable law and an incorrect application of the law to the facts as found by the RRT. Accordingly, for the above reasons, the RRT erred in law within the meaning of s 476 1)(e) in arriving at its conclusion on the absence of a causal nexus.

(see Now relevantly limiting the effect of Sarrazola s91S of the Migration Act)

Finkelstein J. dealt in MIMA v Shtjefni [2001] FCA 1323 with a particular social group, of which the applicant daughter, who was found by the Tribunal to have a well-founded fear of persecution, claimed to be a member – “her immediate family, that is, her father, mother, brother and herself” (at [5]). His Honour said:

6 The tribunal held that a family can be a "particular social group" for the purposes of the Refugees Convention. It referred to a number of decisions in the Federal Court where this proposition has been accepted. For example, in Sarrazola v Minister for Immigration and Multicultural Affairs [1999] FCA 101 Hely J said (at para 36): "A family is cognisable as a group in society such that its members share something which unites them and sets them apart from the general community". In Giraldo v Minister for Immigration and Multicultural Affairs [2001] FCA 113, Sackville J said (at para 42): "A particular family or extended family is capable of constituting a particular social group for the purposes of the

Convention." In Minister for Immigration and Multicultural Affairs v Sarrazola (no. 4) [2001] FCA 263 Merkel J, with whom Sundberg and Heerey JJ agreed, said (at para 31): "[I]t is entirely consistent with the Convention that a person's freedom from persecution on the basis that he or she is a member of a particular social group, namely a family, can be one of the fundamental rights and freedoms assured to refugees."
7 The Minister does not challenge this finding. This is not surprising. Not only are there the authorities to which I have referred, the view that a family can be a "particular social group" has been accepted by some justices of the High Court. For example, in Applicant A v Minister for Immigration and Multicultural Affairs (1997) 190 CLR 225 Dawson J said (at 241): "I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group".

He referred to the fact that the same view has been expressed by Courts in Canada and the USA and cited relevant authorities (at [7]-[8]) and noted the terms of the Tribunal's finding (at [9]) that her fear of harm was on account of her membership of her family i.e .her status as a member of her family prompted both the threats of kidnapping and her actual kidnapping.

He continued:

10 While the Minister accepts that it was open to the tribunal to find that a family is a "particular social group", the Minister says that the tribunal's finding in relation to this particular family was in error because the tribunal did not apply the correct test to arrive at its decision. The Minister says that the relevant test is that laid down in Minister for Immigration and Multicultural Affairs v Zamora (1998) 85 FCR 458 [at p 464 setting out the tripartite test].
11 The tribunal reached the conclusion that Leonia's family was a "particular social group" based on the following findings: (a) "[I]n the Albanian context, the family can be considered to be a group which is unified by relationships of blood and marriage"; (b) "Albania is a ... clan-oriented society"; (c) There is a "prevalence of family-based 'blood feuds' in Albania" and this evidences the significance of the family unit in Albanian society; and (d) "[I]n Albania a family unit is considered to be a social group which is publicly recognised as being set apart."
12 The Minister says that these findings are not sufficient to meet the requirements of the third limb of the criteria stated in Zamora. In particular, the Minister says that before the tribunal could find that a family constitutes a "particular social group", the particular family must be publicly recognised as a group, and it is not sufficient that families generally are recognised as a separate group within the relevant community.
13 There are two answers to this argument. The first is that the Minister's "construction" of the third requirement in Zamora is not correct. A proper reading of the third requirement does not suggest that it is necessary for a particular collection of individuals to be regarded by the community as a separate group, such as a family group, before it will qualify as a "particular social group". There are many examples of potentially relevant social groups. They include groups defined by kinship, ethnicity, territory, age, sex, language, place of residence, class, occupation, recreation, business, education, and so on. What is important is that the relevant group be recognised as separate from the general community. Then there will be a "particular social group" for the purposes of the Refugees Convention. That is all that is required to meet the third limb of the Zamora "test". It would be too limiting to

impose a further requirement that a particular social group must also be defined by reference to the identity of its particular members (emphasis added).
14 The second reason for rejecting the Minister's contention is that it is contrary to authority. In Sarrazola (no. 4), the Full Court considered the three factors mentioned in Zamora. Merkel J, with whom Heerey and Sundberg JJ agreed, said in relation to the second and third factors (at para 36 and para 37):

> "In order to determine the existence of the second and third factors in Zamora the RRT was required to address whether the characteristics of the family configuration raised by the material and evidence before it (see Minister for Immigration and Multicultural Affairs v Singh (2000) 98 FCR 469 at 482) set the group apart as a social group from the rest of the community, and whether the group was recognised by the relevant section of Columbian society as a group that is so set apart. The characteristics that usually unite a family as a collection of individuals and that which will set it apart from the rest of the community will be familial links of the kind described by Wilcox J in C. The determination of which of those links apply in a particular case will identify, and thereby define, the relevant group as the particular social group for the purposes of Art 1(2A).
>
> Importantly, in addressing the third factor in Zamora the question is whether the family unit considered to be a social group is publicly recognised as being set apart as such. It is not whether the particular family (ie the members of the family however configured) is well known as such."

It is not for me to take up the Minister's invitation to decide whether everything that was said in these two paragraphs is correct. It is clear the case stands as authority for the correctness of the tribunal's approach.
15 The Minister also challenges the tribunal's finding that Leonia's fear of harm was "for reasons of" her membership of her family. The Minister says that according to the facts as found by the tribunal, Leonia was only being targeted by criminals because of her family's wealth and that is not sufficient in law to create a causal nexus between the feared harm (kidnapping, etc) and the claimed Convention reason (membership of a "particular social group").
16 It may be accepted that if Leonia was at risk merely because she was wealthy, she could not claim to be a Convention refugee. But that is not the reason why Leonia fears persecution in Albania. Her father is, or is perceived to be, a wealthy individual. Criminal elements in Albania know that he will pay money to protect his children. In other words, Leonia's father is a perfect target for extortion because of the relationship that subsists between himself and his children, especially his daughter. When threats are made to kidnap Leonia, those threats are not made because of her personal characteristics. She is a target because of her position in the family group. If her father, the head of the family group, was not a wealthy man (or believed to be wealthy), Leonia would not be a target for the criminal conduct.

The appeal from STCB v MIMIA [2004] FCA 276 was dismissed in STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 266 (Spender Stone and Bennett JJ.). It stated that In analysing the motivation of the other family, concerning the possible application of s91S because a relative of the applicant has been targeted for a non-convention reason, there are two

elements to consider, first the reason why that family would want to do harm and second the criterion for selecting a victim. The Full Court judgment in SCAL was applied. The Court said:

6 The Tribunal found that there is a tradition of blood feuds in Albania. It held that the Albanian authorities have recognised this problem and have shown that they are willing to address it. The Tribunal accepted the appellant's claim that his family is involved in a blood feud because the appellant's grandfather killed a member of the other family.
7 The Tribunal held, however, that pursuant to s 91S of the Migration Act it must reject the appellant's initial submission that he feared persecution because of membership of a social group consisting of his family. The Tribunal considered that s 91S required it to disregard the appellant's fear because it arose from his being a relative of a person targeted for a non-Convention reason…..
8 In coming to this conclusion the Tribunal relied on a decision of Merkel J in SDAR v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 72 ALD 129 ('SDAR') and a decision of von Doussa J in SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 ('SCAL') in which his Honour agreed with the conclusions of Merkel J in SDAR.
9 In considering the wider social group of which the appellant claimed to be a member, the Tribunal said that the potential social group of Albanian citizens who are subject to the laws of the Kanun could be said to comprise at least one third of the Albanian population, including men, women and children, people who live in rural or urban areas, people who are rich or poor, and people who are well-educated or not. The Tribunal observed:

> 'such a heterogeneous group of people could [not] sensibly be said to be united, cognisable or distinguished from the rest of Albanian society'

and concluded that the appellant did not have a well-founded fear of persecution for a Convention reason.
DECISION OF THE PRIMARY JUDGE
10 After the Tribunal made its decision on 15 September 2003, a Full Federal Court dismissed an appeal from the decision of von Doussa J in SCAL. The decision of the primary judge in this case was that the Full Court decision in SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 301 ('SCAL FC') was determinative of the issues in this matter and he was bound to follow that decision. His Honour noted that this was 'candidly conceded' by the appellant and continued:

> 'The present matter, like SCAL, involves an alleged fear of persecution arising from an Albanian blood feud, in this case, the blood feud resulting from the killing by the applicant's grandfather of a member of the aggrieved family in 1944 or 1945. That family has declared its intention to take revenge.
>
> For present purposes, I am obliged to conclude that if the applicant did not belong to his family or if his grandfather had not killed a member of the aggrieved family he would have no fear of persecution. The particular social group to which he belongs is his family, and s 91S of the Migration Act 1958 (Cth), in the circumstances, precludes reliance upon fear of persecution by reason of his membership of that group for the purposes of an application for a protection visa.'

For those reasons, his Honour dismissed the application.
11 Given the concession made before the primary judge and the course taken by his Honour, the decision in SCAL and SCAL FC warrant further consideration.

The Full Court decision in SCAL FC

12 The case also involved an Albanian citizen who claimed that his family was the target of a blood feud arising under the Kanun; this was as a result of his father shooting and killing an intruder who broke into the family shop in Shkoder. The Full Court noted at [7] that the Tribunal did not accept the applicant's claim to be the victim of a blood feud and for that reason concluded that there was no real chance he would face persecution on account of any blood feud or any other Convention reason if he were to return to his home village. In view of this finding it is surprising that, both at first instance and on appeal, there was detailed discussion of s 91S and its application to claims of persecution based on the existence of a blood feud. Referring to the Tribunal's finding that the applicant was not the victim of a blood feud, the Full Court commented at [19], 'So long as that finding stands the appeal must fail, even if there is an error in the primary judge's treatment of the particular social group'.

13 Despite this, the Full Court considered the primary judge's treatment of the particular social group. Before von Doussa J in SCAL, the applicant had initially relied on his membership of a particular social group consisting of his family group. In oral argument, he relied on a wider social group namely, 'citizens of Albania who are subject to the operation of the customary law Code of Lek[lparentop] Dukagjini' or the Kanun. Von Doussa J said that this broad definition embraced everyone in the areas of Albania where the Kanun applied and held that, in those areas, it was a law of general application that extended to matters such as 'the boundaries of land, the seasonal movement of stock and the uncompromising protection of a guest'; SCAL at [19]. Von Doussa J held that although the whole community might be subject to the law it did not render the whole community a particular social group for the purposes of the definition of a 'refugee'. His Honour therefore rejected the wider social group referred to in oral argument as well as the narrower group of 'males in the general population who have become the target of a blood feud because some family member has killed a member of another family.' His Honour found that the proper social group was that first put forward by the applicant, that is the family group, and held that s 91S precluded the applicant from relying on that ground.

14 In SCAL FC the Full Court held that the applicant's attempt to outflank s 91S failed for a number of reasons. First, the applicant had not put the wider social group formulated in oral argument before von Doussa J to the Tribunal. Second, their Honours rejected the submission that von Doussa J had erred in concluding that the wider social group 'comprised the whole community and would include everyone who for one reason or another had a well-founded fear of persecution'; SCAL FC at [17]. Their Honours held that this submission was based on a misreading of von Doussa J's reasons. Third, even if, as the applicant suggested, von Doussa J erred in describing the wider social group as one solely united by a fear of persecution. His Honour said, at [19], that it was:

> 'unrealistic to accept that the appellant fears persecution because of his membership of a group which adheres to a system of customary law which regulates many aspects of their lives and has a system of punishment for persecutory acts. Plainly he fears persecution either because of his membership of his family or because of a fear of reprisal because his father killed a member of the Laca family. ...If he did not belong to that family, or if his father had not killed the intruder, he would have no fear of persecution.'
>
> [Emphasis added]

….

17 In relation to the first ground of appeal the appellant admitted that the mere inability of the state to protect its citizens is not enough to support the claim of persecution. This issue

was addressed in Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 13 where Gleeson CJ remarked that a State's failure to protect a victim from harm might be relevant to whether the victim's continuing fear of persecution is well-founded irrespective of whether it resulted from the state tolerating or condoning the behaviour or merely being unable to prevent it. The Chief Justice continued,

> 'Persecution may also result from the combined effect of the conduct of private individuals and the state or its agents ...
>
> Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.'

18 The appellant accepted as correct the Tribunal's statement that, under s 91S, where a person's fear arises because he or she has a relative who is or has been targeted for a non-Convention reason, the fear must be disregarded. Obviously this involves a finding that the relative's fear arises from a non-Convention reason. Mr Ower submitted, however, that the Tribunal did not make a finding as to whether the appellant's grandfather's fear was for a non-Convention or a Convention reason and its failure to do so is a jurisdictional error….

19 In analysing the motivation of the other family there are two elements to consider, first the reason why that family would want to do harm and second the criterion for selecting a victim. It cannot be doubted that, irrespective of the identity of the potential victim, the motivation to do harm stemmed from the murder of a member of the other family. In fact this motivation was put to the Tribunal as an element of the appellant's claim. The Tribunal's finding, quoted at [7] above, shows that it accepted that the other family's motivation is 'revenge' for a murder committed by the appellant's grandfather. Similarly, the Tribunal accepted that the reason the appellant's family was involved in a blood feud was that the appellant's grandfather had killed a member of the other family. Implicit in this is an acceptance of the fact that the appellant might be targeted because of his relationship to his grandfather. Given those findings it beggars belief to suggest that the appellant's grandfather would be vulnerable for any reason other than that he was the killer. No analysis is required; the conclusion is inherent in the appellant's claim. It is obvious that this is a finding made by the Tribunal or perhaps more accurately, this is a fact that the Tribunal accepted as an element of the appellant's account. The argument that the grandfather might be targeted because he is a member of his own family is not only far fetched but also circular….

e) Homosexuals

It should be noted that all the judgments which precede the judgment of the Full Bench of the High Court in ***Appellant S395/2002 v MIMA; Appellant S*** **[2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8 (**Gleeson CJ (diss), McHugh, Gummow, Kirby, Hayne, Callinan (diss) Heydon (diss) JJ. which allowed

the appeal from Kabir v MIMA [2002] FCA 129 [2002] FCAFC 20 should now be read subject to the reasoning of the majority in that case. The majority held that it was an error of law to reject an applicant's claim because he can avoid harm as a homosexual by acting discreetly. It was re-stated that persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.

The Full Bench of the High Court in Appellant S395/2002 v MIMA; Appellant S [2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8 ((Gleeson CJ (diss), McHugh, Gummow, Kirby, Hayne, Callinan (diss) Heydon (diss) JJ. allowed the appeal from Kabir v MIMA [2002] FCA 129 [2002] FCAFC 20. The majority held that it was an error of law to reject an applicant's claim because he can avoid harm as a homosexual by acting discreetly. It was re-stated that persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.

Mc Hugh and Kirby JJ. said:

17 The Refugee Review Tribunal ("the Tribunal") found that homosexual men in Bangladesh constituted a "particular social group" for the purpose of the Convention. But in that country, it is not possible to live openly as a homosexual. If a homosexual male - and perhaps a homosexual female - does so, that person runs the risk of suffering serious harm including the possibility of being bashed or blackmailed by police officers or "hustlers". The Tribunal found[5] that, while living in Bangladesh, the appellants had conducted themselves discreetly with the result that they had escaped serious harm in the past. The Tribunal held that, if they were returned to Bangladesh and continued to conduct themselves discreetly in the future, they would not suffer serious harm by reason of their homosexuality.

18 The questions in these appeals are whether the Tribunal erred in law:

. by impliedly dividing homosexual men into two particular social groups - discreet and non-discreet homosexual men;

. by failing to consider whether the need to act discreetly to avoid the threat of serious harm constituted persecution; and

. by failing to consider whether the appellants might suffer serious harm if members of the Bangladesh community discovered that they were homosexuals.

…

21 The Tribunal found that the appellants were homosexuals and that in Bangladesh homosexual men are a particular social group for the purpose of the Convention. It also

found that, while living in Bangladesh, the appellants had suffered no serious harm by reason of their homosexuality. The Tribunal said they had "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now." Accordingly, the Tribunal held that the appellants had no well-founded fear that they would be persecuted if they returned to Bangladesh and that therefore they were not refugees within the meaning of the Convention entitled to a protection visa under the Migration Act.

22 The Federal Court (Lindgren J) dismissed[6] an application made by the appellants under s 476(1) of the Migration Act for a review of the decision of the Tribunal. Lindgren J held that, given the finding that the appellants had lived together discreetly, they "are able to return to Bangladesh and to resume living there in a homosexual relationship as they did previously without a well-founded fear of being persecuted for reason of their homosexuality". His Honour also noted that the appellants "did not complain that they had to modify their behaviour so as not to attract attention".

23 The Full Court of the Federal Court (Black CJ, Tamberlin and Allsop JJ) dismissed[7] an appeal against the order of Lindgren J. The Full Court held that, with one exception, the questions raised by the appellants were not matters that could be the subject of an application for review under s 476(1) of the Migration Act. The Full Court refused to allow the appellants to raise the remaining question - "whether modifying behaviour in order not to attract attention and so to prevent persecution would itself constitute persecution such as to found a claim under the Convention." The Full Court said:

> "They did not put this case forward to the Tribunal and it would be wrong to allow it to be raised now in an appeal from an application for judicial review."

….

25….The Tribunal found:

> "[H]omosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police. However, Bangladeshi men can have homosexual affairs or relationships, provided they are discreet. Bangladeshis generally prefer to deny the existence of homosexuality in their society and, if possible, will ignore rather than confront it. It is also clear that the mere fact that two young men held hands or hugged in the street would not cause them to be seen as homosexuals, and that being caught engaging in sexual activity on one occasion would be most unlikely to cause a young single man to be labelled a homosexual."

26 However, the Tribunal rejected various claims by the appellants that they had suffered persecution or any serious harm as the result of their homosexuality. The Tribunal "found much of the evidence given by both men regarding the problems which they faced during their time together to be lacking in credibility."

….

29….the Tribunal accepted that the appellants:

. were shunned by their families because of their homosexuality; and

> . may have been the subject of gossip and taunts from neighbours who suspected they were homosexuals.

30. The Tribunal found that the shunning and any gossip or taunts did not constitute "serious harm amounting to persecution". The Tribunal said that the appellants:

> "did not experience serious harm or discrimination prior to their departure from Bangladesh and I do not believe that there is a real chance that they will be persecuted because of their sexuality if they return. As discussed above, while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now." (emphasis added)

Persecution

31 In a case like the present, defining the particular social group and the type of harm feared is fundamental in determining whether a member of that group has a well-founded fear of persecution. Only by defining the group and its characteristics or attributes, actual or imputed, can a tribunal of fact determine whether the harm feared is well-founded and is causally related to the particular social group[8]. Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 77 ALJR 1088 at 1092-1093 [26]-[27], 1099 [69]-[72]; 197 ALR 389 at 394-395, 403-404. So in determining whether there is a real chance that a discreet or non-discreet homosexual man in Bangladesh will suffer persecution, consideration must be given to:

> . the characteristics and attributes of the particular social group;
>
> . the nature, severity and likely repetitiveness of the harm feared;
>
> . the extent to which, if at all, the individual will encounter the harm feared;
>
> . the existence of a causal relationship between the harm feared and one or more of the characteristics or attributes, real or imputed, of the social group; and
>
> . the extent to which the individual can be expected to tolerate the harm without leaving or refusing to return to the country of nationality[9] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 18-19 [55].

The claims of the appellants

32 In the statements that they filed in support of their claims for protection visas, each appellant said:

> "We realized Bangladesh is not a safe place for us at all. Our ideology and perceptions were wrong in the eyes of the 99% people in Bangladesh. We were captives in our homeland. There are no rights for us in the state Constitution.
>
> ... I have a real fear of persecution. If I return to Bangladesh I will be killed. My life is not safe. I will be killed not only by the fundamentalists but also by the general masses."

33 Each appellant supported these claims with assertions of harm and discrimination that he had suffered while living in Bangladesh. With the exception of matters that the Tribunal regarded as minor, it rejected these claims. Although rejecting the appellants' claims of past acts of persecution, the Tribunal nevertheless considered what might happen to them if they

returned to Bangladesh. It concluded that there was no "real chance that they will be persecuted because of their sexuality if they return." Central to that conclusion was the assumption or implicit finding of the Tribunal that homosexual men in Bangladesh will not be subjected to persecution if they act discreetly.

The need to act discreetly

34 Much of the appellants' argument in this Court was directed to the claim that the Tribunal had required them "to be 'discreet' about their membership of a group." In answer, the Minister submitted that the Tribunal had imposed no such requirement. He contended that it merely found that the appellants would live discreetly in the future, as they had done in the past, because "there is no reason to suppose that they would not continue to do so if they returned home now." It was for that reason, so the Minister contended, that the Tribunal found the appellants had no well-founded fear of persecution. In our view, these contentions of the Minister are correct.

35 The reasons of the Tribunal show, however, that it did not consider whether the choice of the appellants to live discreetly was a voluntary choice uninfluenced by the fear of harm if they did not live discreetly. It did not consider whether persons for whom the government of Bangladesh is responsible condone or inculcate a fear of harm in those living openly as homosexuals, although it seems implicit in the Tribunal's findings that they do. Nor did the Tribunal's reasons discuss whether the infliction of harm can constitute persecution where an applicant must act discreetly to avoid that harm. Nor did they discuss whether, if the appellants wished to display, or inadvertently disclosed, their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution. If the Tribunal could not have properly exercised its jurisdiction without considering these matters, it has fallen into jurisdictional error and the Federal Court should have set aside the Tribunal's decisions.

36…. the Minister argued that the appellants cannot raise in this Court any of the matters referred to in the previous paragraph….

….

38….the Tribunal went further than rejecting the appellants' claims on credibility grounds. It examined the general issue of homosexuality and persecution in Bangladesh by using "country information" from the Department of Foreign Affairs and Trade, by making enquiries of various people and organisations and by taking into account various publications concerned with the subjects of homosexuality and persecution. It was this information, and not the evidence or arguments of the appellants, that led the Tribunal to conclude that "it is not possible to live openly as a homosexual in Bangladesh." It was this information that also led the Tribunal to conclude that "[t]o attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police." And it seems likely that it was this information that led the Tribunal to conclude that the appellants would not be persecuted if they acted discreetly in the future.

39 On a number of occasions this Court has said that proceedings before the Tribunal are inquisitorial in nature. The arguments and evidence of applicants or the Minister cannot narrow the Tribunal's jurisdiction to investigate the generality of a claim for a protection visa. Whatever the arguments or evidence of an applicant, the Tribunal is entitled, but not bound, to look at the issue generally. If the Tribunal elects to exercise its jurisdiction more widely than the applicant or the Minister has asked, however, it must do so in accordance with law. Given that the appellants claimed that Bangladesh was "not a safe place for [them] at all" and that they had "a real fear of persecution", the Tribunal was entitled to go beyond examining whether the appellants faced persecution because of their personal history. Notwithstanding that it rejected the particular claims of the appellants, it was

entitled to investigate the matter more fully and determine whether the appellants' more general fear of persecution was well-founded. Rejection of an applicant's specific claims of persecution and the failure to identify other forms of harm provide a reason for holding that the applicant has no fear of persecution. But that is all. In the present case, for example, although the appellants did not raise any issue of modifying their behaviour because they feared persecution, it seems highly likely that they acted discreetly in the past because they feared they would suffer harm unless they did. If it is an error of law to reject a Convention claim because the applicant can avoid harm by acting discreetly, the Tribunal not only erred in law but has failed to consider the real question that it had to decide - whether the appellants had a well-founded fear of persecution.

Living openly as a homosexual

40 The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.

41 History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention. As Simon Brown LJ stated in Secretary of State for the Home Department v Ahmed[14] Unreported, United Kingdom Court of Appeal, 5 November 1999 at 8.

> "It is one thing to say ... that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would not refrain from such activities - if, in other words, it is established that he would in fact act unreasonably - he is not entitled to refugee status." (original emphasis)

42 Simon Brown LJ went on to say:

> "[I]n all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention

reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable."

43 The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.

44 Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. This is the underlying assumption of the rule of law. Subject to the law of the society in which they live, homosexuals as well as heterosexuals are free to associate with such persons as they wish and to live as they please.

45 If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality[15] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 258? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters. If the first of these questions is answered: Yes, and the second: No, the claim of refugee status must be upheld even if the applicant has conducted him or herself in a way that is likely to attract prosecution.

46 In some countries, there may be little or no chance of a law against homosexual conduct being enforced. In Bangladesh, for example, s 377 of the Penal Code makes it an offence to have "carnal intercourse against the order of nature with any man, woman or animal". The offence carries various penalties, one of which is "imprisonment for life". However, a person who had practised law for 20 years told the Tribunal that prosecutions under the section were "extremely rare". That person had never known or heard of a person being prosecuted under the section during that time in practice. No doubt for that reason, the appellants did not suggest that the existence of s 377, and its potential application to them, constituted persecution for a Convention reason.

47 Even where a law such as s 377 is not enforced, however, there may be a real chance that a homosexual person will suffer serious harm - bashings or blackmail, for example - that the government of the country will not or cannot adequately suppress. That appears to be the position in Bangladesh. If the harm is inflicted for a Convention reason and is serious enough to constitute persecution, the homosexual person is entitled to protection

under the Convention. It is immaterial that the conduct of the applicant for refugee status disclosed his or her identity as a homosexual and attracted the attention of the persecutors.
48 The Federal Court has recognised that taking steps to hide political opinions and activities is no answer to a claim for refugee status where the applicant claims he or she will be persecuted for those opinions or activities[16] Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132. But in a series of cases concerned with homosexual applicants, the Federal Court and the Tribunal have assumed, decided or accepted that the capacity of an applicant to avoid persecutory harm is relevant to whether the applicant faces a real chance of persecution[17] RRT Reference V96/05496; RRT Reference N97/14489; RRT Reference N98/21362; RRT Reference N98/24718; RRT Reference N98/23955; Khalili Vahed v Minister for Immigration and Multicultural Affairs [2001] FCA 1404 - on appeal SAAF v Minister for Immigration and Multicultural Affairs [2002] FCA 343; Nezhadian v Minister for Immigration and Multicultural Affairs [2001] FCA 1415; WABR v Minister for Immigration and Multicultural Affairs (2002) 121 FCR 196. Thus, in WABR v Minister for Immigration and Multicultural Affairs[18] (2002) 121 FCR 196 at 205 [27, the Full Court of the Federal Court said:

> "[I]t was open to the Tribunal to conclude, on the material that was before it, that there was no active program for the prosecution of homosexuals in Iran, so long as they were discreet and conducted their affairs privately. It was also open to the Tribunal to conclude that it was reasonable to expect that the appellant would accept the constraints that were a consequence of the exercise of that discretion."

49 Whether or not WABR was rightly decided on its facts, this statement of the Full Court should have played no part in the Court's reasoning process. In WABR, the appellant, an Iranian, alleged that he was a homosexual and claimed that he feared persecution because homosexual conduct was illegal in Iran and that penalties ranged from death to flogging to imprisonment. Thus, the issues were whether there was a real chance of the appellant being prosecuted for homosexuality and, if so, whether the prosecution and any potential penalty were so inappropriately adapted to achieving a legitimate object of Iranian society as to amount to persecution[19] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 258. The reasonableness of the appellant's conduct was not relevant to either issue. In determining whether the appellant faced a real chance of prosecution, the Tribunal was entitled to consider not only the prosecuting policies of the Iranian authorities, but also the likelihood that inadvertently or deliberately the appellant might attract their attention. But the reasonableness of his conduct did not bear on the issue.
50 In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.
The Tribunal misdirected itself on the issue of discretion
51 Central to the Tribunal's decision was the finding that the appellants had not suffered harm in the past because they had acted discreetly. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, the Tribunal failed to determine whether the appellants had acted discreetly only because it was not possible to live openly as a homosexual in Bangladesh. Because of that failure, the Tribunal, unsurprisingly, failed to give proper attention to what might happen to the appellants if they lived openly in the same way as heterosexual people in Bangladesh live.
52 The Tribunal did find, however, that to attempt to live openly as a homosexual in Bangladesh "would mean to face problems ranging from being disowned by one's family

and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police."….

53 The Tribunal's findings on the attitude of Bangladesh society and the statements of the appellants indicate that they were discreet about their relationship only because they feared that otherwise they would be subjected to the kinds of discrimination of which Mr Khan spoke. If the Tribunal had found that this fear had caused them to be discreet in the past, it would have been necessary for the Tribunal then to consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the Tribunal was bound to consider if it found that the appellants' "discreet" behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the Tribunal disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh.

….

Particular social group and persecution

55 In our opinion, the Tribunal also fell into jurisdictional error by failing to consider the issue of persecution in relation to the correct "particular social group"[20] Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 77 ALJR 1088 at 1092-1093 [26]-[27], 1099 [69]-[72]; 197 ALR 389 at 394-395, 403-404. As we have indicated, the Tribunal found that homosexual men in Bangladesh constituted a "particular social group" for the purpose of the Convention. As a matter of law, this finding was open to the Tribunal[21] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 265, 293-294, 303-304; MMM v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 324 at 330; R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 at 652. Indeed, if the Tribunal had held otherwise, its decision would arguably have been perverse. However, by declaring that there is no reason to suppose that the appellants would not continue to act discreetly in the future, the Tribunal has effectively broken the genus of "homosexual males in Bangladesh" into two groups - discreet and non-discreet homosexual males in Bangladesh. This inevitably invited error. It leads to the Federal Court and the Tribunal examining a claim for refugee status in the way that Ryan J did in Applicant LSLS v Minister for Immigration and Multicultural Affairs[22] [2000] FCA 211 at [24] when his Honour said:

> "I have therefore confined my examination of this issue to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in Sri Lanka, disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result." (emphasis added)

56 Similarly, in this case, consciously or unconsciously, the Tribunal directed its mind principally to the consequences of the sexual behaviour of the non-discreet members of the particular social group. Certainly, it made only passing reference to other forms of harm to members of the social group generally. And it failed to consider whether the appellants might suffer harm if for one reason or another police, hustlers, employers or other persons became aware of their homosexual identity. The perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise.

57 If the Tribunal had placed the appellants in the non-discreet group, it appears that it would have found that they were likely to be persecuted by reason of their membership of that group. Conversely, by placing the appellants in the discreet group, the Tribunal automatically assumed that they would not suffer persecution. But to attempt to resolve the case by this kind of classification was erroneous[23] cf R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 at 663. It diverted the Tribunal from examining and answering the factual questions that were central to the persecution issues.
58 Even if the Tribunal had classified the appellants as non-discreet homosexual men, it did not necessarily follow that they would suffer persecution. Conversely, it did not follow that discreet homosexual men would not suffer persecution. Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. Similarly, whether a particular individual has been persecuted in the past usually assists in determining whether that person is likely to be persecuted in the future[24] Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559. But neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. Moreover, helpful as the history of the social group may be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether this individual applicant has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group".
59 It follows that whether or not a Bangladeshi male homosexual applying for a protection visa has a well-founded fear of persecution cannot be determined by assigning him to the discreet or non-discreet group of homosexual males and determining the probability of a member of that group suffering persecution. An applicant claiming refugee status is asserting an individual right and is entitled to have his or her claim considered as an individual, not as the undifferentiated member of a group.
60 By declaring that there was no reason to suppose that the appellants would not continue to act discreetly in the future, the Tribunal effectively broke the genus of "homosexual males in Bangladesh" into two groups - discreet and non-discreet homosexual men in Bangladesh. By doing so, the Tribunal fell into jurisdictional error that renders its decision of no force or effect.
….

Gummow and Hayne JJ. said:

65…the Tribunal found, and it has not since been disputed, that each appellant was a member of a particular social group identified as homosexual men in Bangladesh. The fundamental question which then arises is: did the Tribunal address the correct question in relation to well-founded fear of persecution?
66 The term "persecution" is not defined in the Convention, and in the decisions of this Court there has been no precise tracing of the metes and bounds of its meaning in the Convention definition of "refugee" applied in the Act. It is not of great assistance and is apt to mislead to approach the matter by saying, as did an English court, that "persecution" is a "strong word"[29] v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi [1989] Imm AR 595 at 599 per Kennedy J. However, it is clear from the decision of this Court in Minister for Immigration and Multicultural Affairs v Haji Ibrahim[30] (2000) 204 CLR 1 at 4 [1], 7 [16], 20 [60], 30 [95], 44 [133], 67 [192], 72 [203], 79 [223].

that a systematic course of conduct is not required. Further, in the joint judgment of six members of this Court in Minister for Immigration and Ethnic Affairs v Guo[31] (1997) 191 CLR 559 at 570, an approving reference was made to the proposition stated by McHugh J in Chan v Minister for Immigration and Ethnic Affairs[32] (1989) 169 CLR 379 at 430 that measures in disregard of human dignity may, in appropriate cases, constitute persecution. In the present appeals, there was no challenge to those propositions.

The Tribunal

67 The Tribunal concluded that there was not a real chance that the appellants would be persecuted because of their sexuality if they were to return to Bangladesh. It did not accept a number of particular contentions which the appellants made. In particular, it did not accept that a judgment by a local religious council (a fatwa) had been issued condemning the appellants to death. Nonetheless, the Tribunal accepted that "homosexuality is not accepted or condoned by society in Bangladesh and [that] it is not possible to live openly as a homosexual in Bangladesh". The consequences of attempting to do so were said to be "to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police".

68 The material before the Tribunal included reference to s 377 of the Penal Code of Bangladesh. That section provided that:

> "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

….neither the appellants in their submissions to the Tribunal, nor the Tribunal in its reasons, mentioned the possible enforcement of s 377 as an adverse consequence feared by the appellants.

69 Central to the Tribunal's reasoning rejecting the appellants' claims were three propositions: (i) that although homosexuality is not acceptable in Bangladesh, Bangladeshis "generally prefer to ignore the issue rather than confront it"; (ii) the appellants had lived together in Bangladesh for over four years "without experiencing any more than minor problems with anyone outside their own families"; and (iii) the appellants "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now".

70 The appellants submitted both in the courts below, and in this Court, that the Tribunal's error lay in the third of these three propositions. They contended that the Tribunal had, in effect, required that they act discreetly in order to avoid what otherwise would be persecution….

….

76…It is perhaps inevitable that those, like the Tribunal, who must deal with large numbers of decisions about who is a refugee, will attempt to classify cases. There are dangers in creating and applying a scheme for classifying claims to protection. Those dangers are greatest if the classes are few and rigidly defined. But whatever scheme is devised, classification carries the risk that the individual and distinctive features of a claim are put aside in favour of other, more general features which define the chosen class.

77 Further, there is a serious risk of inverting the proper order of inquiry by arguing from an a priori classification given to the applicant, or the applicant's claim, to a conclusion about what may happen to the applicant if he or she returns to the country of nationality, without giving proper attention to the accuracy or applicability of the class chosen. That is, there is a real risk of assuming (wrongly) that a particular applicant will be treated in the

same way as others of that race, religion, social class or political view are treated in that country. It would, for example, be wrong to argue from a premise like "homosexuality is generally ignored in Bangladesh" to a conclusion that "this applicant (a homosexual) will not be persecuted on account of his sexuality", without paying close attention to the effect of the qualification of the premise provided by the word "generally". Thus it would be necessary in the example given to consider whether, on return to Bangladesh, the applicant would stand apart from other homosexuals in that country for any reason.

"Discretion" and "being discreet"

78 The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how this applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made[34] R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840 at 841 [2] per Lord Bingham of Cornhill, 843 [7] per Lord Steyn, 854 [42] per Lord Rodger of Earlsferry; [2003] 2 All ER 1097 at 1099, 1101, 1112.

79 The dangers of arguing from classifications are particularly acute in matters in which the applicant's sexuality is said to be relevant. Those dangers lie within the notions of "discretion" and "being discreet": terms often applied in connection with some aspects of sexual expression. To explain why use of those terms may obscure more than they illuminate, it is useful to begin by considering Convention reasons other than membership of a social group defined in terms of sexual identity.

80 If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

81 It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense "discreetly") may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.

82 Saying that an applicant for protection would live "discreetly" in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker "expects" that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant must do….if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its

consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.

83 Addressing the question of what an individual is entitled to do (as distinct from what the individual will do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the Tribunal in other cases, cited by the Federal Court in Applicant LSLS v Minister for Immigration and Multicultural Affairs[35] [2000] FCA 211 at [20]-[21], leads to error. It distracts attention from the fundamental question. It leads to confining the examination undertaken (as it was in LSLS) merely "to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in [the country of nationality], disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result"[36] [2000] FCA 211 at [24]. That narrow inquiry would be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged. On its face it appears to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. Whether or not that is so, considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution.

….

86 Nowhere in the reasons of the Tribunal is any consideration given explicitly to whether there was a real chance that the appellants would be subjected to any of the "more serious forms of harm" to which the Tribunal alluded. Nowhere in the reasons is any consideration given explicitly to whether the appellants would be subjected to ill-treatment by police. Nowhere is there consideration of whether subjection to any of these "more serious forms of harm" would amount to persecution.

87 …the primary judge and the Full Court both read the Tribunal's reasons as finding that the appellants were likely to live in a way that would not cause Bangladeshi society to confront their homosexual identity.

88 This reveals the error made by the Tribunal. The Tribunal did not ask why the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is not possible to "live openly as a homosexual in Bangladesh"; secondly, that "[t]o attempt to [live openly] would mean to face problems"; and, thirdly, that "Bangladeshi men can have homosexual affairs or relationships, provided they are discreet". Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly.

89 The Tribunal did not deal with the question presented by s 36(2) of the Act - did Australia owe protection obligations to the appellants? It either did not correctly apply the law to the facts it found, or its decision involved an incorrect interpretation of the applicable law. ..

90 Further, as the reasons of McHugh and Kirby JJ demonstrate, the Tribunal can also be seen as falling into error by dividing the genus of homosexual males in Bangladesh into

two groups - discreet and non-discreet homosexual males in Bangladesh. That false dichotomy also appears to have provided a basis for the reasoning of Kennedy J in R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi[41] [1989] Imm AR 595 at 598-599

…..

Gleeson CJ. (dissenting) said:

11 In this Court, the appellants fasten onto the Tribunal's reference to discreet behaviour as indicating that the Tribunal fell into the error of concluding, or assuming, that persecution does not exist if a person, by concealing opinions or behaviour likely to attract retribution and serious harm, can avoid such retribution. In truth, a fair reading of the reasons of the Tribunal shows that it made no such assumption, and reached no such conclusion. Indeed, any such assumption or conclusion would have had nothing to do with the claim advanced by the appellants. The appellants' argument, in my view, depends upon a misreading of the Tribunal's reasons. In particular, it depends upon taking the reference to discreet behaviour entirely out of context.

12 It was never part of the claim advanced by the appellants to the Tribunal that the persecution they had experienced in the past, and apprehended in future, took the form of repression of behaviour about which they desired to be more open, and that they escaped harm only by concealing their relationship. If such a claim had been made, it would have raised factual and legal questions beyond the scope of the case put to the Tribunal. For example, the Tribunal had before it background information noting that the Penal Code of Bangladesh makes homosexual intercourse a criminal offence (s 377). A Bangladeshi lawyer was quoted as saying that he was not aware of any prosecutions of homosexuals in Bangladesh. This does not necessarily mean that the law is a dead letter[2]. If the case had been about enforced and unwilling conformity to external pressure to be discreet, the fact that there is a law against the behaviour in question would need to be taken into account. The Penal Code also makes adultery, and enticement, illegal (ss 497, 498). Presumably this affects the openness of some heterosexual behaviour. Standards of openness, and discretion, in sexual matters vary with time and place, and are influenced by a variety of legal and cultural factors.

13 There was no argument in this Court about whether the existence and potential enforcement of s 377 of the Penal Code might itself constitute persecution. If a view is to be expressed on that matter, it should await a case in which the point is raised and argued.

14 All this is far removed from any contention that was raised for decision by the Tribunal. The appellants did not claim that the law of Bangladesh itself involves persecution of homosexuals. They did not claim that they wanted to behave less discreetly about their sexual relationship, and that their inability to do so involved persecution. Their claim was that they had been subjected to extreme violence, and sentenced to death, and, for that reason, they feared that if they returned to Bangladesh they would be killed or seriously injured. That claim was rejected, and the Tribunal's reference to their discreet behaviour was no more than a factual element in the evaluation of their claim.

….

Callinan and Heydon JJ. (dissenting) said:

92 The question in this case was not, as the appellants contended, whether, absent imposed or enforced discretion as to their homosexuality, they would be likely to be persecuted in

their country of nationality and residence, but whether their mode of conduct was voluntarily chosen, and had and would not provoke persecution of them.

…

103 The appellants' argument may be shortly stated. It is that the Tribunal found that the group to which the appellants belonged was of homosexuals who were disposed, perhaps required - it is not entirely clear whether their argument went so far - to conduct themselves so discreetly as not to attract the attention of the authorities, or other persons who would persecute them with the acquiescence of the authorities. This, it was submitted, was tantamount to the imposition of a requirement of discretion on the part of the appellants. The submission continues that if an applicant is required to be "discreet" about his or her membership of a relevant group, and there is present even the slightest chance that the applicant is able to comply with such a requirement, then effectively that applicant would be disqualified from achieving the status of a refugee in Australia. That test, the appellants claim, would effectively reverse the Convention requirement that a state give protection from persecution: in practical terms it would require an applicant to ensure his or her safety personally by concealing the fact of membership of the social group. The appellants contend that the Federal Court repeated the errors that were made by the Tribunal.

…

106 The respondent submits, contrary to the assertion of the appellants, that the Tribunal did not impose a requirement of discretion: that neither in form nor in substance did the Tribunal find that the appellants were bound to, or must, for their own protection, live discreetly in Bangladesh. The appellants had in fact, and would in all likelihood continue to live, as a matter of choice, quietly without flaunting their homosexuality. These were not men who wished to proclaim their homosexuality. Living as they did, they were not oppressed. Discretion, it was put, was purely a matter of choice and not of external imposition. No one required them, as Lindgren J pointed out, ever to modify their behaviour.

…

107 The submissions of the respondent should be accepted. It is clear that the appellants did not seek to make a case that they wished to express their homosexuality in other than a discreet, indeed personal, way. There may be good reason, divorced entirely from fear, for this. They may have wished to avoid disapproval of the, or a significant section of the, society in which they lived, perhaps even marked disapproval. There is a great difference however between persecution and disapproval, even strongly expressed disapproval. As Kennedy J in R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi[61] [1989] Imm AR 595 at 599. On the other hand, it has been accepted in the United States that the harm inflicted on homosexuals in some other countries has been so damaging that it clearly amounts to persecution. See the summary in Anker, Law of Asylum in the United States, 3rd ed (1999) at 394-395 points out, persecution is a strong word. In 1951 those who drafted the Convention were not seeking to guarantee all human rights. Rather they were seeking to deal with refugees in the context of the immediate aftermath in Europe of the Second World War[62] See the original definition of "refugee" in Art 1 of the Convention. More likely, as is the case with many, the appellants here regarded their sexual preference and activities as personal and not public matters, and ones therefore that required no public or overt expression.

108 The appellants were unable to satisfy the Tribunal that there were any expressions or manifestations of their homosexuality which had, or were likely to provoke persecution of them… It is not necessarily beyond argument that sexual inclination or practice necessarily defines a social class[65] In R v Secretary of State for the Home Department; Ex parte Zia

Mehmet Binbasi [1989] Imm AR 595 at 599, Kennedy J neither rejected nor accepted an argument to that effect., a matter which was not raised here but seems to have been assumed.
109 Nor, as we have said, did the appellants contend that the presence on the statute books of Bangladesh of s 377 of the Penal Code mean that they were, in consequence, members of a persecuted social group. … The distinction between criminal sanctions and persecution is not yet a settled one[70] See the discussion in Hathaway, The Law of Refugee Status (1991) at 169-179. See also Canada (Attorney General) v Ward [1993] 2 SCR 689. These are not questions which need to be more than noted. Pursuit of them should be left to another case in which the actual issues in suit cause them to arise.
110 On the Tribunal's findings, no fear of such harm as could fairly be characterized as persecution imposed a need for any particular discretion on the part of the appellants: such "discretion" as they exercised, was exercised as a matter of free choice. The outcome of these proceedings might have been different - it is unnecessary in this case to decide whether that is so - if that position were different.

111 This case then turns on its own facts. The appellants' case was not improved by the stories of homosexual rape which one of them, the elder, recounted. On the version which he gave of it, that he escaped criminal sanction entirely, despite the extended knowledge of its occurrence, the appellants could not possibly have maintained that there was persecution of a homosexual social group of which they were members.
112 The great difficulties for the appellants were that the accounts of their experiences in Bangladesh and the attitude of society and officials there to homosexuality, were not only full of inconsistencies but also of improbabilities. That is why the Tribunal found against them. The occasion for an imposition of "discretion" upon their return to Bangladesh simply did not arise. It was an irrelevance to the issue actually decided against them, whether they had a well-founded fear that their homosexual way of life had, or was likely to provoke persecution
113. …. If they had wished to, the appellants could have advanced a claim that their decision to live as they had been living and would live on their return to Bangladesh was influenced by a fear of harm if they did not; or that persons for whom the government of Bangladesh is responsible induce or inculcate a fear of harm in those living openly as homosexuals; or that they are at risk of suffering serious harm constituting persecution if they wished to display, or inadvertently disclosed, their sexuality or relationship to other people. They did not advance any claims of this kind beyond those connected with the factual accounts advanced by them to the Tribunal and rejected in large measure by the Tribunal…
….

A failure by the tribunal o deal wih the issue of the persecutory consequences of succumbing to pressure to marry or being forced into a heterosexual marriage as a homsexual was a failure to consider an integer of the applicant's claims ; it was part of his claims, not only that he faced a well-founded fear of persecution by reason of the pressure upon him to marry, but also that he faced persecution by being potentially forced into a heterosexual marriage. The error was to re-cast the applicant's claims on a more limited basis than it was put. See SZANS v MI [2004]

FMCA 445 per Driver FM. These consequences were persecutory for the purposes of s91R. Whether he would obtain efective protection from the State would need to be considered.Minister For Immigration And Multicultural And Indigenous Affairs v SZANS [2005] FCAFC 41 (Weinberg Jacobson and Lander JJ.) allowed the appeal from SZANS v MI [2004] FMCA 445 (Driver FM) The claim by the respondent was that as a homosexual his family would impose a heterosexual marriage upon him and he did not wish to marry . The RRT held that any pressure upon the respondent to marry was not for a Convention reason. There was a further finding that respondent was discreet about his homosexuality and had made no claims that he suffered because of it . It held that as a discreet man whose pattern of behaviour would not change there was no real chance that he would be exposed as a homosexual if he returned . No contention that RRT committed error identified in Respondent S395/2002 v MIMA; Respondent S [2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8 . The argument was that the Tribunal overlooked element of claim that he faced serious harm from the consequences of a heterosexual marriage - Federal magistrate found that RRT failed to consider consequences whether respondent would be persecuted if he succumbed to pressure of marriage and that consequences of being forced to enter into a heterosexual marriage constituted persecution for a Convention reason

It was held on appeal - no basis for issue of whether respondent would succumb to pressure to marry - RRT did not consider claim - application had been dismissed purely on ground of absence of Convention nexus - respondent did not claim that he would succumb to any such pressure - RRT not obliged to deal with a hypothesis not raised - Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 [2003] HCA 1 (2003) 211 CLR 441 applied.

Furthermore any consideration of this hypothesis would involve speculation as to what the consequences may be – a well-founded fear cannot be based upon speculation.

On the central issue of Convention nexus MMM v Minister for Immigration and Multicultural Affairs{1998] 1664 FCA (1998) 90 FCR 324 (‘MMM”) was correct and

provided clear support for the approach of RRT - “pressure not exerted for reasons of membership of the social group of homosexuals” – The Federal Magistrate was not correct in refusing to follow MMM - . use of words “applied differentially" in MMM did not reflect error identified by Gummow J in Minister for Immigration and Multicultural Affairs v Haji Ibrahim [2000] HCA 55 (2000) 204 CLR 1 . The intended meaning in MMM was that there was no "singling out" of homosexuals as persons on whom pressure to marry is applied. Minister for Immigration and Multicultural and Indigenous Affairs v VFAY [2003] FCAFC 191 (2003) 134 FCR 402 pointed out that High Court authorities establish that reason for persecution must be found in the singling out of one or more of five attributes in Convention definition - there was no such singling out on the facts in MMM. Nor was there in the present case.

It was also difficult to see how there was any subjective fear – the appellant’s evidence was of social and familial pressure on him to marry, and the effect of marriage on any prospective wife.Concern for the welfare of another was not relevant when considering whether the respondent had the relevant fear of persecution.

The RRT’s findings that respondent would not change his pattern of behaviour, that he would not come to the adverse attention of people in Bangladesh and that there was no Convention nexus, effectively disposed of claim. There was no jurisdictional error in finding an absence of any Convention nexus. The Court said:

16 The RRT found that Bangladeshi society, while not open to homosexuality, does not oppress gay men; rather it pretends that homosexuality does not exist.
17 The RRT’s finding was that the only homosexual men who are at risk of persecution are those who are openly gay. It was for this reason that the RRT then proceeded to determine the manner in which the respondent lived as a gay man.
18 The RRT noted that on the respondent’s evidence no one in Bangladesh, including his immediate family, is aware that he is gay. ….
…
20 The RRT accepted that the expectation that offspring will marry is universal and non-discriminatory. It made the following findings:-

> "I find that any efforts on the part of the Applicant’s family to get him to marry would be for this universal societal expectation and for no other reason.
>
> By his own account no one in the country is aware that he is Gay and this includes all members of his own family.

> As discussed above I find he would not at any time in the reasonably foreseeable future either act in a manner which would identify him as being Gay, nor would he open up to his family and tell them he is.
>
> This being the case, I find that the expectation or pressure for him to marry is not an act of harm or detriment based on any Convention reason, nor is there any discriminatory element to it."

The Federal Magistrate's Decision

….

24 His Honour referred at [25] to a decision of Madgwick J in MMM v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 324 ("MMM") which appears to provide clear support for the approach taken in the RRT. Nevertheless, the Federal Magistrate said that the decision was not binding on him. He appears to have considered that the decision of the High Court in Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 ("Ibrahim") involved a departure from the principle stated by Madgwick J in MMM; see at [27] – [28]. The learned Magistrate said at [28] that the question was not whether the relevant harm has a differential impact on an individual but whether the individual faces persecution. This, his Honour said, leads inexorably to the question of what is persecution, to which he then turned.

…

….whether the RRT considered the claim that the respondent would succumb

30 In our view there is no substance in this ground. It is clear that the RRT did not consider this claim. The passages from the decision of the RRT to which we have earlier referred make it plain that the application was dismissed purely upon the ground of absence of Convention nexus.

31 The appellant placed particular emphasis on the RRT's finding that the respondent would not change his pattern of behaviour. But this is plainly a reference to the discreet way in which he lives as a homosexual person. It does not address the question of whether he would succumb to the pressure from his family to enter into a heterosexual union.

….– failure to find that the claim was "logically excluded" by other findings of the RRT

32 The Minister submitted that nothing turned on the failure of the RRT to consider the question whether the respondent would succumb to the social or familial pressure to marry. This was because in order for the Minister to reach the necessary state of satisfaction under s 36(2) of the Migration Act 1958 (Cth) ("the Act"), she had to be satisfied that two conditions existed. The first was a well-founded fear of persecution. The second was that this fear was held for a Convention reason. If one of the two elements did not exist, the claim failed. Here, the RRT found that there was no Convention nexus. It was therefore unnecessary to consider the other element.

33 This was the approach which Madgwick J took in MMM. There his Honour said at 414:-

> "While the impact of familial pressure to marry would likely fall harder on an unwilling homosexual than an unwilling heterosexual, it seems to me to be correct, as the Tribunal held, that the pressure is nevertheless not exerted "for reasons of" membership of the social group of homosexuals. In Bangladsesh, the pressure falls on all single men, and it did not appear that it was applied differentially as between homosexuals and others. For that reason, fear of Convention persecution was correctly held not to have been shown."

34 In our view, Madgwick J's analysis of the question was correct and ought to have been followed by the learned Magistrate

….

40 As stated above, the learned Federal Magistrate apparently considered that there was a conflict between the decision of Madgwick J in MMM, and the decision of the High Court in Ibrahim. If that view were correct, his Honour would have been bound to follow Ibrahim in preference to MMM.

41 However, in our view the reasoning of the High Court in Ibrahim casts no doubt whatever on the correctness of MMM. It is true that Madgwick J used the words "applied differentially" in the passage set out above. However, his Honour did not fall into the error identified by Gummow J in Ibrahim at [146] – [147]. All that Madgwick J intended by those words was that there was no "singling out" of homosexuals as persons on whom pressure to marry is applied.

42 In Minister for Immigration and Multicultural and Indigenous Affairs v VFAY [2003] FCAFC 191, a Full Court (French, Sackville and Hely JJ) pointed out at [55] – [56] that High Court authorities establish that the reason for the persecution must be found in the singling out of one or more of the five attributes expressed in the Convention definition. There was no such singling out on the facts in MMM. Nor was there in the present case. That was the finding made by the RRT. There was no error in that finding, let alone jurisdictional error.

43 Indeed, upon an examination of the respondent's claims, it is difficult to see how there was any claim of a subjective fear of persecution put before the RRT for consideration. This can be seen from the respondent's application for a protection visa and the supporting statutory declaration.

44 The application for a protection visa contained the following statement:-

> "This will create an impossible situation for me and the poor woman forced to marry me. How can I be forced to live this miserable existence? See statement to follow."

45 The statutory declaration referred to the social and familial pressure on the respondent to marry, and to the effect of marriage on any prospective wife. The respondent said he was concerned about the effect on such a person of his not being able to fulfil her needs, and said that his conscience would be troubled by such an arrangement . It was correctly conceded by counsel for the respondent that concern for the welfare of another was not relevant when considering whether the respondent had the relevant fear of persecution.

46 Counsel for the respondent urged upon us the proposition that once there was a finding that the respondent would be pressured to marry, it was necessary for the RRT, in order to complete the exercise of its jurisdiction, to consider whether he would succumb to that pressure.

47 There are two answers to this. First, the respondent did not claim that he would succumb to any such pressure. Thus, the RRT was not obliged to deal with a hypothesis that was not raised; see Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441 at [31] – [32]. Second, any consideration of this hypothesis would involve speculation as to what the consequences may be. A well-founded fear cannot be based upon speculation. The evidence must indicate a real ground for believing that an applicant is at risk of persecution; see Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

48 The RRT's findings that the respondent would not change his pattern of behaviour, that he would not come to the adverse attention of people in Bangladesh and that there was no Convention nexus, effectively disposed of the respondent's claim. There was no jurisdictional error in finding an absence of any Convention nexus. The learned Magistrate could not properly have determined that the judgment of Madgwick J in MMM was plainly wrong, and ought to have followed that decision.
….

Stone J. in ***SZEOE v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2005] FCA 694** held that unlike the Tribunal in *S395/2002,* the Tribunal in the present case did not divide the class of homosexuals into discreet and non-discreet groups and then fail to explore the implications of this division. Her Honour referred to the High Court judgment in ***Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2005] HCA 29** ('*NABD*'), which confirmed the necessity to focus on the individual claim as opposed to the fate of the class of which the applicant is a member. Her Honour said:

38 Although it is not easy to discern the Tribunal's precise findings, it is tolerably clear that the Tribunal accepted:
- that homosexuality, or at least its practice, is illegal in Morocco; and
- the independent country information, which suggested that, although illegal, homosexuality is generally tolerated; and
- at least for the purpose of assessing the likelihood of harm should he be returned to Morocco, that the appellant was actively homosexual (as distinct from merely having homosexual inclinations).

I am satisfied that the Tribunal did not accept the appellant's claims to have been threatened by his sister's boyfriend or his girlfriend's brothers or his evidence about the video tape allegedly stolen from the rented house. It did not accept that he had ever come to the adverse attention of the Moroccan authorities because of his sexual practices. It did not accept that he had been arrested and escaped from captivity or that he had left Morocco illegally having bribed an official to assist him.
39 Whether an applicant has a well-founded fear of persecution for a Convention reason must be determined as at the time of the determination; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288. The determination involves making a prediction about an applicant's likely fate if returned to his or her country of nationality. In making this prediction the applicant's past experiences in the relevant country are important evidence but they are not determinative. The situation in the country may have improved or may have deteriorated so as to weaken the predictive value of past experiences or significance of the lack of such evidence. The fact that the Tribunal totally rejected the appellant's account of his experiences of harassment, arrest and escape does not answer the appellant's fundamental claim that he feared persecution, as he stated in his application, 'Because I am a homosexual and this is against the law in Morrco [sic]'.
40 In circumstances where, as here, the Tribunal totally rejects a visa applicant's account of his experiences then, as far as the personal experiences of the visa applicant are concerned, the determination must be made in an evidentiary vacuum. As the Tribunal did not accept

that the appellant had left the country illegally or had ever come to the attention of the Moroccan authorities by reason of his homosexuality or otherwise, it did not accept his claim to fear persecution for these reasons as well-founded; see the comments of Tribunal quoted at [25] above.

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

42 The High Court recognised these limitations in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ('*S395/2002*'). In evidentiary terms the situation pertaining in *S395/2002* is similar to that presently under consideration. There, two male citizens of Bangladesh claimed to have a well-founded fear of persecution because of their homosexuality. The Tribunal accepted their claim to have been ostracised by their families and accepted that they may have been subjected to 'gossip and taunts from neighbours who suspected they were homosexuals'; per McHugh and Kirby JJ at [29]. However, the Tribunal rejected other aspects of their account including that they had been subject to threats and violence over many years and had been sentenced to death by a religious council; it explicitly found that the applicants did not experience serious harm or discrimination in Bangladesh.

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

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

[Emphasis added by McHugh and Kirby JJ]

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

'[N]*either the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. Moreover, helpful as the history of the social group may be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether* ***this individual applicant*** *has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group".'*

[Emphasis added by McHugh and Kirby JJ]

45 As Gummow and Hayne JJ pointed out, at [75], 'the critical question is how similar are the cases that are being compared'. Their Honours referred to the dangers attendant on

classifying claims for protection, as for example, claims based on homosexuality, stating at [76]-[77]:
'[C]*lassification carries the risk that the individual and distinctive features of a claim are put aside in favour of other, more general features which define the chosen class. ...*

...That is, there is a real risk of assuming (wrongly) that a particular applicant will be treated in the same way as others of that race, religion, social class or political view are treated in that country. It would, for example, be wrong to argue from a premise like "homosexuality is generally ignored in Bangladesh" to a conclusion that "this applicant (a homosexual) will not be persecuted on account of his sexuality" without paying close attention to the effect of the qualification of the premise by the word "generally". Thus it would be necessary in the example given to consider whether, on return to Bangladesh, the applicant would stand apart from other homosexuals in that country for any reason.'

46 In *S395/2002*, the Tribunal's failure to 'pay close attention' to the qualification to which their Honours refer, was critical to its division of homosexual men into those who live discreetly and those who do not and its consequent failure to explore the implications of its finding that the applicants had lived discreetly and would do so in the future.
47 The High Court (McHugh, Gummow, Kirby and Hayne JJ; Gleeson CJ, Callinan and Heydon JJ dissenting) held that the Tribunal had made a jurisdictional error by effectively dividing homosexual males in Bangladesh into two groups: those who lived discreetly and those who did not. This led the Tribunal into the further error of failing to explore why the applicants had lived discreetly and whether it was a voluntary choice uninfluenced by a fear of harm.
48 More recently, in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29 ('*NABD*'), the High Court has confirmed the necessity to focus on the individual claim as opposed to the fate of the class of which the applicant is a member. In relation to the claim of a Christian who had converted to Christianity after leaving Iran, Gleeson CJ commented at [8]:
'The ultimate concern of the Tribunal, of course, was with the appellant, not with Christians as a class.'

See also Hayne and Heydon JJ at [158].
49 In this case the appellant made an explicit claim to fear persecution by the authorities because of his sexuality. In considering the appellant's claim, the following propositions were central to the Tribunal's reasoning: (a) that, although he had lived in Morocco for most of his life, the appellant had never experienced discrimination or harassment from the authorities or anyone else because of his homosexuality; and (b) that, although homosexuality is illegal, it is generally tolerated.
50 The appellant submitted that, either the Tribunal did not address the issue of persecution based on the appellant's membership of a particular social group, namely those with homosexual inclinations, or it addressed it on the basis that the appellant had avoided harm in the past because he lived discreetly. In this way, it is submitted, the Tribunal fell into the errors that the High Court identified in *S395/2002.*
51 I do not accept this submission. The Tribunal referred to inconsistencies in the appellant's evidence of his homosexuality but it did not reject the claim at least, as I indicated in [38] above, for the purpose of assessing the appellant's claims. Similarly, the Tribunal's discussion of the independent information about the treatment of homosexuals in Morocco shows that it considered those claims on the basis of the appellant being a member of a particular social group. That discussion was in the context of the Tribunal's

acceptance that homosexuality was illegal in Morocco; see the Tribunal's statement quoted at [26] above.
52 Similarly, I do not accept that the Tribunal found that the appellant had lived discreetly in Morocco or that he could avoid persecution in the future only if he lived discreetly. The Tribunal obtained a variety of information from the reports it consulted. As indicated at [27] above, some of the reports referred to covert homosexuality being 'not uncommon' and to the more recent aggression towards homosexuals from fundamental Islam. However, the Tribunal also had information that homosexuality was 'generally tolerated' and that prosecution 'does not occur frequently'. Given that information the Tribunal was obliged to consider the implications of this information for the appellant as an individual not just as a member of a class.
53 In my view the Tribunal gave the matter the appropriate consideration. It must be remembered that this decision was made in 1997 without the benefit of the High Court's decision in *S395/2002* and therefore it does not explicitly draw attention to its avoidance of the error identified by the High Court in that case as one finds in Tribunal reasons since that decision. However, it is the substance of the Tribunal's reasons that is crucial; there is no requirement for formulaic expression nor is it appropriate to subject the Tribunal's expression to over-zealous scrutiny.
54 The Tribunal accepted the country information summarised at [26]-[27] above. I am satisfied that the Tribunal then assessed the significance of that information for the appellant an individual not just as a member of a group. It explored the qualifications in the information that homosexuality was 'generally tolerated' and that prosecution 'does not occur frequently' by examining the few references it had found to prosecutions for homosexuality or other sexual offences. Such references as it found were related to paedophilia, offences with young boys, pornographic films made by the police chief sentenced to rape etc and his accomplices. The Tribunal did not make any finding that the appellant had been discreet about his sexuality in the past nor was it obliged to do so. There was no claim that this had been the case. In view of the conduct that was the subject of the prosecutions discussed by the Tribunal, it is not surprising that the Tribunal failed to conclude, explicitly or implicitly, that the appellant would need to live discreetly to avoid such prosecutions. Given that the Tribunal:
(a) made a positive finding that the appellant's expression of his sexuality had never caused him to suffer persecution, although he had lived most of his life in Morocco, and
(b) made no finding that the appellant had a practice of being discreet about his homosexuality,
it was open to the Tribunal to conclude that the appellant's fear of persecution should he be returned to Morocco was not well-founded.
55 Unlike the Tribunal in *S395/2002,* the Tribunal in the present case did not divide the class of homosexuals into discreet and non-discreet groups and then fail to explore the implications of this division. It did not qualify its conclusion that the appellant could live in Morocco without adverse consequences by reference to any requirement to live discreetly or otherwise distort his expression of his sexuality. As Hayne and Heydon JJ pointed out in *NABD* at [162], the fundamental error made by the Tribunal in *S395/2002* was that 'it had not made the essentially individual and fact-specific inquiry which is necessary: does the applicant for a protection visa have a well-founded fear of persecution for a Convention reason?' Their Honours (as well as Gleeson CJ) found that the Tribunal whose reasons were being reviewed in *NABD* had not made this error and said, at [168]:
'At no point in its chain of reasoning did the Tribunal divert from inquiring about whether the fears which the appellant had were well founded. It did not ask (as the Tribunal had asked in Appellant S395/2002) *whether the appellant could* avoid *persecution; it asked*

what may happen to the appellant if he returned to Iran. Based on the material the Tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way he *chose to do so, there was not a real risk of his being persecuted.'*

…

8. RELIGION

***Woudneh v MILGEA*, unreported , Gray J. G86 of 1988, 16 September 1988** still stands for the proposition that in the absence of evidence that an applicant could conceal his faith, consistently with practising it (where, for example, proselytising or public worship were essential tenets of that faith), it was not open to conclude that he would not be persecuted because his faith was unknown to the authorities. The mere fact of the necessity to conceal to avoid actual or threatened infliction of punishment would amount to support for the proposition that the applicant had a well-founded fear for reasons of religion.

BUT NOTE The Full Bench of the High Court in *Appellant S395/2002 v MIMA; Appellant S* [2003] HCA 71 (2003) 78 ALJR 180 203 ALR 112 78 ALD 8 ((Gleeson CJ (diss), McHugh, Gummow, Kirby, Hayne, Callinan (diss) Heydon (diss) JJ. allowed the appeal from Kabir v MIMA [2002] FCA 129 [2002] FCAFC 20. The majority held that it was an error of law to reject an applicant's claim because he can avoid harm as a homosexual by acting discreetly. It was re-stated that persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.

It was held in ***VFAC v MIMIA* [2004] FCA 367** that the Tribunal, at no stage, addressed the effect that an act of apostasy might have upon the applicant if he were required to return to Iran. It avoided that issue only by finding that he could conceal his apostasy by practising his Christian faith in a discreet manner. S395 establishes that this is the very thing that the applicant is not required to do in order to avoid persecutory harm. The Tribunal's approach to this issue was essentially the same as that which was held to constitute jurisdictional error in that case.Weinberg J. said:

THE APPLICANT'S CLAIMS

7 The applicant claimed that, whilst living in Iran, he undertook various political activities in opposition to the government and, by reason of those activities, suffered persecution at the hands of the Iranian authorities.

8 The applicant also claimed that whilst in Iran, he had befriended a Christian who introduced him to the teachings of Christianity. His friend had lent him a Bible, which he claimed to have read, and which enabled him to feel "at peace". He claimed that he had told

another Christian acquaintance that he wished to become a Christian, but said that he had been warned of the risks associated with apostasy.
9 Following his arrival in Australia, the applicant underwent a formal conversion to Christianity. He claimed that since that time, he has practised his faith both privately, and publicly.
10 Before the Tribunal, the applicant's legal adviser submitted that the applicant had made a commitment "to spread the word that he is no longer intending upon keeping a low profile and concealing his religious beliefs". The applicant claimed that, by reason of his having become an apostate of Islam, he feared persecution, and possibly death, if required to return to Iran.
11 The material before the Tribunal included certain country information that appeared to support the applicant's claim regarding the treatment of apostates in Iran….
12 The Tribunal also referred to the United States Department of State Country Report on Human Rights Practices in Iran for 2001 which contained the following statement:

> "Members of all religious minorities, including Christians, Jews, Zoroastrians, and Baha'is, suffer varying degrees of officially sanctioned discrimination, particularly in the areas of employment, education and housing. Applicants for public sector employment are screened for their adherence to Islam. The law stipulates penalties for government workers who do not observe "Islam's principles and rules" ... Apostasy, or conversion from Islam to another religion, is punishable by death. Muslims who convert to Christianity also suffer discrimination.
>
> One organization in 1999 reported eight deaths of evangelical Christians at the hands of the authorities in the previous 10 years ...
>
> A Christian group reported that between 15 and 23 Iranian Christians disappeared between November 1997 and November 1998 ... Those who disappeared were reportedly Muslim converts to Christianity whose baptisms had been discovered by the authorities. The group had reported the figure believes that most or all of those who disappeared were killed ..." (emphasis added)

The applicant told the Tribunal that he agreed with what was set out in these passages.
13 However, the Tribunal also had regard to other reports, including one prepared by the Department of Foreign Affairs and Trade ("DFAT"). That report stated:

> "Iranians who had based their asylum applications on their conversion from Islam to Christianity would, in almost all cases not suffer particular problems if returned, unless they declared to the authorities on return their new religious affiliation". (emphasis added)

The DFAT report also observed that converts to Christianity who maintained "a very low profile" were generally tolerated.
…
15 The Tribunal then turned to the applicant's claims based upon his conversion to Christianity. It accepted that his conversion had been genuine. However, it rejected his claim that his "involvement with Christianity and the Christian Church in Australia" was "of a type which would give rise to a real chance of persecution". That finding was based, in part, upon its conclusion that the Iranian authorities would not "be aware of his baptism", which had occurred after his arrival in this country.
16 The Tribunal went on to say:

"... as a recent Christian convert, with only a limited knowledge of the faith and no formal involvement with the Christian faith prior to his departure from Iran for Australia, the Tribunal does not accept that the applicant would undertake Christian-related activities at a level which would attract adverse attention from Iranian authorities. In this regard the Tribunal refers to the DFAT country information cited already which states that "Iranians who had based their asylum applications on their conversion from Islam to Christianity would in almost all cases not suffer particular problems if returned, unless they declared to the authorities on return their new religious affiliation ... The evidence is that those converts who go about their devotions quietly are generally not disturbed (it is either those who actively seek attention, or who are engaged in conspicuous proselytization, who have run into difficulties, usually with the local mosque rather than state authorities)". Based on his history and level of involvement, the Tribunal does not accept that the applicant would engage in proselytising or otherwise actively seek attention." (emphasis added)

17 The Tribunal concluded that:

"... the applicant would not practice his faith in Iran in a way which would give rise to a real chance of persecution at the hands of the Iranian authorities for reasons of either conversion or apostasy."

…

19…[counsel for the applicant] submitted that the Tribunal, having accepted that the applicant was a practising Christian, and that it would not be possible for him to engage in the open and free practice of his religion in Iran without the risk of discrimination and harassment, ought to have granted him a protection visa. The only reason that the Tribunal had declined to do so was its finding that, provided a convert to Christianity did not declare his conversion publicly, but rather went about his devotions discreetly, he would not generally be disturbed.

20 Mr Hanks submitted that this approach was at odds with the reasoning of the High Court in S395. He referred, in particular, to the following statement of principle in the joint judgment of Gummow and Hayne JJ at [80]:

"If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences." (emphasis added)

21 Mr Hanks also referred to the following passage in the joint judgment of McHugh and Kirby JJ at [39]:

"In the present case, for example, although the appellants did not raise any issue of modifying their behaviour because they feared persecution, it seems highly likely that they acted discreetly in the past because they feared they would suffer harm unless they did. If it is an error of law to reject a Convention claim because the

applicant can avoid harm by acting discreetly, the tribunal not only erred in law but has failed to consider the real question that it had to decide – whether the appellants had a well-founded fear of persecution." (emphasis added)

22 Their Honours went on to say at [40]:

"... But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality." (emphasis added)

23 Mr Hanks submitted that the Tribunal in the present case had not considered whether any choice, on the part of the applicant, to practise his Christian faith discreetly in Iran would be voluntary, uninfluenced by the fear of harm if he were to go about his devotions openly. Nor did it consider whether that fear of harm could amount to persecution. By rejecting the applicant's claim merely because he could avoid harm by acting "quietly", the Tribunal had failed to consider the real question that it had to decide – namely, whether he had a well-founded fear of persecution.

24 Mr Hanks acknowledged that the Tribunal had found that the applicant would not feel compelled to proselytise, or otherwise seek attention, on his return to Iran. He accepted that this finding could not be challenged on judicial review. However, he submitted that the Tribunal had not considered whether the applicant was at risk of suffering serious harm merely by practising his new faith freely and openly. It had simply assumed that it was reasonable to expect that he would be discreet in his observance. In doing so, it had not properly considered his claim that he had a "real fear of persecution if he returned to Iran".

25 Mr Hanks submitted that the applicant fell squarely within the principles laid down in S395, and in particular, the following passage in the joint judgment of McHugh and Kirby JJ at [43]:

"... It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly."

26 Mr Hanks also relied upon an earlier decision of Allsop J in Farajvand v Minister for Immigration and Multicultural Affairs [2001] FCA 795. There, his Honour set aside a Tribunal decision that confused the avoidance of adverse consequences with the fear of persecution. His Honour observed at [34]-[35]:

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

35. To fail to undertake that analysis is not the leaving aside of a mere factual piece of probative evidence. It is to fail to complete the analysis of the position of the

applicant as a refugee sur place. This is so even if it is not to be accepted from the findings that the Tribunal did find that the applicant would limit his religious practice because of a recognition or fear of State action in Iran."

27 Finally, Mr Hanks relied upon the decision of a Full Court of this Court in SGKB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 44 ("SGKB"). There, an Iranian national claimed to fear persecution under the Convention, by reason of his religion. On review, the Court held that the Tribunal had failed to evaluate the objective basis of the appellant's fear because it had failed to appreciate the distinction between the likelihood of his suffering persecution, and the objective justification of his fear. In particular, the Tribunal had failed to take into account the potential seriousness of the consequences to the appellant of exposure of the fact of his conversion, or to consider his fear in that context. In so doing, the Full Court held that the Tribunal had erred in law by applying the wrong test – that is, it had failed to complete the required analysis.

28 Mr Hanks noted that the Minister had sought special leave to appeal to the High Court from the decision of the Full Court. Special leave had been refused on the basis that the Full Court had approached the matter correctly.

29 In conclusion, Mr Hanks submitted that the same criticisms could be levelled at the Tribunal in the present case. He submitted that it had "failed to complete the analysis", and in doing so, had failed to ask the question posed by both the Act, and the Convention. In particular, the Tribunal had failed to ask whether the applicant's ability to fully develop his religious beliefs, and to freely practice his new faith, would be restricted by the fear of persecution upon return to Iran.

…

CONSIDERATION

32 In my view, Mr Hanks' contentions regarding the scope and effect of S395 are correct. I am unable to see any significance in the fact that the judgment in that case was delivered by a sharply divided Court. There is a clear majority view although there are subtle differences in the manner of expression in the two joint majority judgments. The unifying principle underlying those judgments can be readily discerned. Asylum seekers are not required, nor can they be expected, to take reasonable steps to avoid persecutory harm. Nor are they expected to live "discreetly" to avoid such harm. The very vice that was identified in the Tribunal's reasoning in S395 is also to be found in its reasoning in the present case.

33 The Tribunal, having found that the applicant would not engage in proselytising, or otherwise actively draw attention to himself, then concluded that it was unlikely, assuming that he kept a low profile, that the Iranian authorities would come to learn about his apostasy. It may well be that this factual finding was open, though it might be regarded by many as implausible. Nonetheless, it provides no answer to the proposition that the Tribunal has imposed upon the applicant, as an asylum seeker, an obligation that S395 holds that he is not required to assume.

34 The country information to which the Tribunal referred, and which it appeared to regard as reliable, suggested that those who had committed apostasy could be subjected to various forms of discrimination. Although there were few recorded instances of apostates having been executed, there were many instances of lesser harm having been inflicted upon such individuals. Plainly, nothing in the country information supported the conclusion that an apostate, whose conversion became known, could not have a well-founded fear of persecution.

35 The applicant's case seems to me, if anything, stronger than the case of the appellant in SKGB. There, the asylum seeker did not exhibit any interest in Christianity until some time after his arrival in Australia. In the present case, however, the applicant developed links

with Christianity whilst still in Iran, and underwent a formal conversion shortly after he arrived in this country. He thereby committed the crime of apostasy under Iranian law.
36 The Tribunal, at no stage, addressed the effect that this act of apostasy might have upon the applicant if he were required to return to Iran. It avoided that issue only by finding that he could conceal his apostasy by practising his Christian faith in a discreet manner. S395 establishes that this is the very thing that the applicant is not required to do in order to avoid persecutory harm. The Tribunal's approach to this issue is essentially the same as that which was held to constitute jurisdictional error in that case.
…

Note the judgment of the Full Court in ***NAEB v MIMIA*** **[2004] FCAFC 79** rejecting an argument based on S395.

North and Lander JJ said:

19 The appellant's argument derived from the majority judgments in S395/2002. The Tribunal, in that case, determined that an homosexual man in Bangladesh fell within a particular social group. It found that homosexuals in Bangladesh could not live openly without the risk of serious harm. But the appellant had lived discretely, and had therefore not suffered harm in the past. The Tribunal found that he would live discretely in the future if returned to Bangladesh. Consequently, it reasoned, the applicant would not suffer serious harm and, thus, did not have a well-founded fear of persecution in Bangladesh if he were returned. McHugh and Kirby JJ said at [43]:

> 'The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.' (emphasis added)

20 And at [53] and [54] their Honours said:

> 'The Tribunal's findings on the attitude of Bangladesh society and the statements of the appellants indicate that they were discreet about their relationship only because they feared that otherwise they would be subjected to the kinds of discrimination of which Mr Khan spoke. If the Tribunal had found that this fear had caused them to be discreet in the past, it would have been necessary for the Tribunal then to

consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the Tribunal was bound to consider if it found that the appellants' "discreet" behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the Tribunal disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh.

It follows that the Tribunal has constructively failed to exercise its jurisdiction and its decision must be set aside.'

21 Gummow and Hayne JJ said at [87] to [88]:

'The primary judge and the Full Court understood the Tribunal as finding that "[i]t is only if a homosexual couple force Bangladeshi society to confront their homosexual identity that they will encounter problems". That may be accepted. Both the primary judge and the Full Court held further, however, that the finding about how the appellants were likely to live on their return to Bangladesh supported the Tribunal's finding that the appellants' fears of persecution were not well founded. That is, the primary judge and the Full Court both read the Tribunal's reasons as finding that the appellants were likely to live in a way that would not cause Bangladeshi society to confront their homosexual identity.

This reveals the error made by the Tribunal. The Tribunal did not ask why the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is not possible to "live openly as a homosexual in Bangladesh"; secondly, that "[t]o attempt to [live openly] would mean to face problems"; and, thirdly, that " Bangladeshi men can have homosexual affairs or relationships, provided they are discreet". Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly.' (emphasis added)(footnotes omitted)

22 In relation to political and religious persecution, Gummow and Hayne JJ had earlier said at [80]:

'If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences

could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.'

(emphasis added)

CONSIDERATION

23 Resolution of this appeal depends upon the proper reading of the Tribunal's reasons. If the Tribunal accepted that the appellant would modify his conduct, but failed to ask whether that would have occurred as a result of the threats of serious harm to the followers of Falun Gong, the case would fall within the reasoning of the majority judgments in S395/2002.

24 But in our view, the Tribunal did not follow such a path of reasoning. The Tribunal introduced its reasoning by acknowledging that some Falun Gong practitioners face serious human rights abuses. It then embarked on an examination of the commitment to Falun Gong which the appellant had established. The Tribunal generally formed an adverse view of the appellant's reliability. Then, it examined the extent of the appellant's practice of Falun Gong in Australia. It found that he had exaggerated his attendances at Falun Gong exercise sessions. It also found that the appellant's explanations of Falun Gong beliefs were vague, although it discounted his responses on the subject because of the difficulty which he faced in explaining abstract concepts through an interpreter. The Tribunal also found that the appellant had not been arrested in the PRC for practising Falun Gong, and had not been asked by the PSB to attend a police station in relation to his practice of Falun Gong. Nor, the Tribunal found, were his difficulties in obtaining a passport to do with his practice of Falun Gong.

25 All of these considerations led the Tribunal to the view that the appellant was not a committed follower of Falun Gong. The Tribunal found that he was not very familiar with Falun Gong, and his practice was limited. It found only that he had "some involvement".

26…The substance of these reasons were that he so lacked commitment to Falun Gong that it would not trouble him to renounce his belief. Similarly, his limited commitment to Falun Gong meant that if he were confined to the practice of Falun Gong in private, his beliefs and practices would not be compromised in a significant way. Viewed in this way, the Tribunal did ask why the appellant would renounce Falun Gong, or practice Falun Gong in private if returned to the PRC. Whilst he may not have done so if the authorities in the PRC did not impose the requirements, the Tribunal found that his compliance with those requirements resulted from his lack of commitment to Falun Gong, not from a fear of the consequences threatened by the authorities. Thus understood, the reasoning in this case does not exhibit the error identified in the majority judgment in S395/2002.

it might be thought that there would be few cases in which the Tribunal could find that a person had an 27…involvement with Falun Gong yet that involvement was so limited that the person would comply with the requirements imposed by the authorities of the PRC without suffering persecution. It may be that the better analysis of such cases is that the person's level of commitment is so low that they simply do not fall within the relevant particular social group

Dowsett J. said:

FACTS

28 I have read the reasons prepared by North and Lander JJ. As to the facts of the case, I wish to add a reference to one further passage from the Tribunal's reasons at AB 82-83 as follows:

> 'The Australian Department of Foreign Affairs and Trade (DFAT) assessed in 2001 that "known Falungong [sic] activists" were likely to be subjected to monitoring by authorities on return to [China]. It added that whether they were further penalised by the Chinese authorities was largely determined by the extent of their compliance with Chinese law, which banned Falungong-related [sic] activities ... .
>
> ... According to DFAT, the current situation for Falun Gong practitioners is as follows:
>
> > Although Chinese authorities officially consider falungong [sic] to be an 'evil cult' ... which promotes 'anti-human, anti-social and anti-scientific' superstition, they are more concerned by the ability of falungong [sic] members to organise themselves and to propagate falungong [sic] beliefs. Laws banning falungong [sic] are aimed at preventing the formation and public assembly of groups and the use of public means (books, videos, leaflets, mass media etc.) to promote falungong [sic]. The authorities are less likely to consider an individual member who practises alone and in private (should such a person come to their attention), and who does not actively propagate falungong [sic] as a 'core' or 'diehard' member. As we have previously reported, 'core' members are more likely to be subject to legal penalties.
> >
> > Treatment of falungong [sic] practitioners is likely to differ from province to province, and even from city to city, as a consequence of the considerable discretion available to law enforcement and judicial authorities across China. As a broad generalisation, treatment of detainees across the board is likely to be worse in those provinces where the legal system is weakest and/or levels of economic development are low." '

29 I make the following observations concerning this extract:

- The reference to 'monitoring' of 'known Falungong [sic] activists' presumably relates to Falun Gong activists who 'return' to China and fear persecution on account of their activities whilst outside of China.
- The passage implies that returning persons will not be penalized in China for activities outside of China but will be penalized if they practise Falun Gong in China, such practice being banned.
- The passage referring to persons being 'less likely' to be considered by the authorities to be 'core' or 'diehard' members (who are 'more likely to be subject to legal penalties') does not address the objective likelihood that a practitioner of either kind will suffer persecution. The passage merely compares the relative likelihood of such persecution as between persons practising in private on the one hand and 'core' or 'diehard' practitioners on the other.

THE TEST

…

appellant claimed to fear persecution by reason of his membership of a social group, namely those practising, or wishing to practise Falun Gong. The original departmental

decision to refuse a protection visa was based upon the conclusion that the appellant had no fear of persecution or that, if he did, any such fear was not well-founded. The decision-maker did not consider whether any fear was of persecution for a Convention reason. The Tribunal appears to have accepted that the appellant had a subjective fear but concluded that it was not well-founded, again without considering which of the Convention reasons might be engaged. The material suggests that Falun Gong, at least in some manifestations, has characteristics typical of a religion. It seems also to have a political dimension, at least in China. I proceed upon the basis that fear of persecution for reason of religion, political opinion or membership of a social group may be in issue.

THE APPEAL

33 The appellant's argument on appeal focused almost entirely upon a distinction allegedly drawn by the Tribunal between the consequences of the private practice of Falun Gong and those of the public practice thereof. This focus appears to have been designed to demonstrate that the reasons of the majority of the High Court in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 78 ALJR 180 ("Appellant S395") dictate resolution of the appeal in favour of the appellant…..

…

38 The majority view in that case must be seen in light of the evidence which was before the Tribunal and its findings. It found that the appellants were homosexuals and that in Bangladesh, homosexual men are a particular social group for the purposes of the Convention. The evidence indicated that members of such group are subjected to discrimination and violence. However Bangladeshi men may have homosexual affairs or relationships 'provided they are discreet'. In other words, the evidence established:

- conduct capable of being characterized as persecution;
- directed against members of a particular social group, namely homosexual males;
- which persecution might be avoided by being discreet.

39 The evidence was not that persecution was limited to "indiscreet" homosexual males, nor was it established that "discreet" homosexuality would not lead to persecution.

40 The views of the majority in Appellant S395 demonstrate that care must be taken in seeking to determine refugee status where the evidence discloses that the likelihood of persecution may depend upon whether relevant future conduct by an applicant will occur in public or private. It is therefore necessary to examine closely the way in which the Tribunal dealt with that aspect of this matter.

41 The private/public dichotomy may be relevant to a number of aspects of claimed fear of persecution by reason of membership of a social group. Firstly, as is demonstrated in Dranichnikov, public conduct may be a criterion of such membership. Secondly, the need to conceal one's conduct as a group member may itself be persecutory. Thirdly, the discriminatory conduct said to constitute persecution may only be incurred, or its nature may vary, if the applicant's conduct as a member of that group is public rather than private or "discreet". Fourthly, private conduct may be less likely than public conduct to attract the attention of potential persecutors. These observations also apply, mutatis mutandis, to claims based on religion or political opinion.

FEAR OF PERSECUTION

42 Two aspects which were dealt with by the Tribunal were not pursued before us. Firstly, the Tribunal considered whether the appellant would, if he returned to China, be persecuted for conduct which occurred prior to his departure from China. Secondly, the Tribunal addressed the question of whether, if he returned to China, there was a risk of persecution on account of his conduct in Australia. Much of the discussion at AB 85-86 concerns these matters. The Tribunal concluded that for factual reasons, persecution on account of either aspect of the appellant's conduct was unlikely. I do not understand the appellant to rely

upon either aspect for the purposes of this appeal. As I understand it, he now asserts only fear of persecution should he, upon his return, practise Falun Gong in China. Nonetheless his past behaviour may be relevant to that claim.

43 I do not understand the appellant to assert that it would constitute persecution if he were denied the opportunity to practise Falun Gong in public in China. In the appellant's written submissions (par 12) it is conceded that Falun Gong teachings permit practice in private. However it is submitted that the Tribunal erred in holding that forced renunciation would not amount to persecution, that such a conclusion is 'inappropriate cheese paring' because '... being required to give up one's beliefs is at the core of the definition of persecution'. This submission again raises the question of which Convention reason is engaged. It also blurs the distinction between forced public renunciation and private practice. The Tribunal disposed of the matter at AB 86. It identified the possibility that, if his adherence to Falun Gong were discovered, the appellant might be compelled to renounce his beliefs. It then concluded that as he was not a dedicated follower of Falun Gong, such a requirement would not constitute persecution.

44 In Appellant S395 at [40], McHugh and Kirby JJ said:

> 'Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it.'

45 Thus the Tribunal was obliged to determine whether the treatment which the appellant faced would amount to persecution. The Tribunal concluded that it would not. That was a factual matter. The conclusion does not demonstrate jurisdictional error.

CONVENTION REASONS

46 The appellant claims to have been a practitioner of Falun Gong since 1995. As I have said, the appeal proceeded upon the basis that the relevant Convention reason was membership of a social group. The evidence seems not to have established any formal system for identifying membership of any group of Falun Gong practitioners or adherents, other than by practice or perhaps, adherence to its teachings without practice. It is not clear whether the appellant asserted that he wished to practise in public, but if so, the Tribunal rejected his claim. It considered that his history of practice in Sydney (where there was no penalty for public practice) demonstrated that he did not wish to practise in public. This view was fairly open.

47 Given the Tribunal's rejection of much of the appellant's evidence and its conclusion that he was not a dedicated, committed or regular practitioner of Falun Gong, one might doubt whether he was in fact a member of any identifiable group. However the Tribunal accepted that he '... had some involvement with Falun Gong, either in [China] or in Australia, or both ... ', suggesting that he was, at least, a member of an amorphous "group" of Falun Gong adherents, which group included persons having only peripheral interest in the subject and/or practising in a sporadic way. I will proceed upon the basis that he claimed fear of persecution for such group membership. On that basis, it is probably unnecessary to say anything more about Falun Gong as a religion or as involving political opinion.

EVIDENCE OF PERSECUTION

48 The evidence summarized in the reasons of North and Lander JJ and the passage from DFAT cited above demonstrate that persons practising Falun Gong have been persecuted in China over many years, and that since July 1999 such practice has been banned. Practitioners have been punished pursuant to the criminal law or 'administratively', that is,

by periods of re-education in labour camps or other compulsory 'rehabilitation' programs. There is evidence of the use of torture against Falun Gong adherents and of their deaths in custody. The Tribunal observed at AB 81 that:

> 'By the end of 2001, the government had essentially eliminated public manifestations of the movement.'

49 The evidence does not suggest that any particular degree of commitment to Falun Gong is necessary in order to attract the adverse attention of the Chinese authorities, although the DFAT material suggests that 'core' members are 'more likely' to be subject to legal penalties than individual members who practise alone and in private. As I have said, that comparison says nothing about the objective chance of persecution of a member who practises in private.

50 The Tribunal's views as to the way in which the appellant would practise Falun Gong upon his return to China, or refrain from so doing, were relevant to its assessment of both his claim to fear persecution for a Convention reason if returned to China and whether that claim was well-founded. The Tribunal concluded that the appellant had not practised Falun Gong in public in China after it was banned in 1999. The Tribunal also noted that whilst resident in Sydney, he had, in effect, forgone public practice. He claimed that he could not afford the cost of public transport to and from the Chinese Gardens at Darling Harbour where he had previously participated in such practice. "Public practice", in this regard, seems to have involved participation with other practitioners. The Tribunal concluded that he could have participated in public practice groups at locations closer to his home, had financial considerations been the real reason for his not going to Darling Harbour. This view led the Tribunal to conclude that the appellant was satisfied to practise in private in Sydney and would be similarly satisfied if he returned to China. This conclusion was not based upon any assumption that the appellant would or should behave "reasonably" in China, having regard to the risk of persecution, but upon his conduct in Sydney. The possibility that he would choose private practice in China because he feared persecution if he practised in public did not arise.

…

52…The Tribunal appears to have concluded that the appellant has a subjective fear of persecution should he practise Falun Gong in China. As much is implicit in the final sentence of the above extract. However it concluded that his fear was not well-founded because:

- He would probably practise in private.
- The authorities would probably not be aware that he was a Falun Gong follower.
- The evidence suggested that the appellant would be able to practise in private in China as he had done for the three months prior to the Tribunal's decision.
- Should the authorities become aware of his private practice, the most serious consequence would be a request that he renounce his belief in Falun Gong. This would not amount to persecution for reasons which I have previously outlined.

53 Both the third and fourth conclusions are based upon the assumption that private practice of Falun Gong will not attract adverse consequences save that, in the event of exposure, it may lead to forced renunciation. The evidence seems not to have supported such assumptions. The country information suggested that private practice is banned and has been punished when detected. Private practice will certainly be less likely to lead to persecution than public practice, but as I have observed, that says nothing about whether fear of persecution for private practice is well-founded.

"WELL-FOUNDED FEAR" – "A REAL CHANCE"

54 In Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 389 Mason CJ said:

> 'I agree with the conclusion reached by McHugh J. that a fear of persecution is "well founded" if there is a real chance that the refugee will be persecuted if he returns to his country of nationality. ... But I prefer the expression "a real chance" because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it is an expression which has been explained and applied in Australia. ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 percent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.'

55 In the same case, McHugh J said at 429:

> '... a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. ... an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 percent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fears should be characterized as "well-founded" for the purpose of the Convention and Protocol.'

56 In Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 572-3, Brennan CJ and Dawson, Toohey, Gaudron, McHugh and Gummow JJ said:

> 'Chan is an important decision of this Court because it establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 percent. But to use the real chance test as a substitute for the Convention term "well-founded fear" is to invite error. 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. ... 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. ... 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 percent 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.'

57 In Appellant S395, McHugh and Kirby JJ said at [58]:

"Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. Similarly, whether a particular individual has been persecuted in the past usually assists in determining whether that person is likely to be persecuted in the future. But neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. Moreover, helpful as the history of the social group may be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether this individual applicant has a "well-founded fear of being persecuted for reason of ... membership of a particular social group".' (Original emphasis.)

58 Similarly, Gummow and Hayne JJ observed at [72]:

'It is well established that the Convention definition of "refugee" has subjective and objective elements. Does the applicant fear persecution for a Convention reason (the subjective element)? Is that fear well founded (the objective element)? The fear will be well founded if there is a real chance that the applicant would face persecution for a Convention reason if the applicant returned to the country of nationality.'

THE CORRECT QUESTION

…

61 It seems to me that the Tribunal addressed the possibility that the appellant might suffer persecution if he practised in private. It concluded that the consequences to him, if he did so and was exposed, would not amount to persecution. One may doubt the factual correctness of the Tribunal's analysis of the evidence. In particular, the evidence seems to demonstrate at least the chance of more serious consequences for those who practise in private. Nonetheless it cannot be said that the Tribunal asked itself the wrong question.

The Full Court in ***WAJW v MIMIA*** **[2004] FCAFC 330** (RD Nicholson Jacobson and Bennett JJ.) noted the scope of S395 in the context of a claim of persecution on one of the Convention grounds :

22 The appellant's ground of appeal states that the general persecution constituted by limited rights at law; restriction on religion, education, employment, on a free press; being spat on and being unable to touch food were all accepted by the Tribunal. In support, attention was directed to the following passage in the reasons:
'I asked her if she had participated in any Mandaean religious activities in Kuwait. She responded that she had not because the couple had to pretend not to be Mandaeans, as did the other Mandaees, because there were so many "religious Muslims" in Kuwait.'

Attention was also directed to another passage:
'I asked her if she had ever been in paid employment. She responded that she had never applied for a job. Her husband thought she might be "hassled" if she was identified as a Sobbi. Also Sobbis were not allowed to get a public sector job, and her husband did not like the idea of her working in the private sector.'

Other evidence recited in the reasons was also relied upon as well as further evidence in the papers before the Tribunal. The appellant asserted this was enough to bring her within Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (2003) 203 ALR 112 ("S395/2002") at [43] and [50] per McHugh and Kirby JJ and [82] per Gummow and Hayne JJ.
23 We do not agree. To come within S395/2002 the appellant would have to demonstrate that the Tribunal's view of persecution was that persecution does not exist where an asylum seeker can be expected to take reasonable steps to avoid adverse consequences by hiding the fact that he or she is of a particular religious, ethnicity or social group. The Tribunal did not make such a finding. Its only relevant finding was that relating to discrimination in education and employment generally. Its further finding that the appellant had not been exposed to such discrimination was not predicated on a finding of avoidance. Such findings cannot, as the appellant urged, be inferred from the absence of a denial by the Tribunal of evidence recited. Furthermore, the opening sentences in the passage quoted at [9] above is a positive finding that the Tribunal did not accept that the evidence had the effect the appellant contends should have been found.

The earlier reference is to the reasons of the RRT :" As to the treatment of Sabean Mandeans generally I am satisfied that mere adherence to to this religion does not give rise to a well-founded fear"

In ***Wang v MIMA*** **[2000] FCA 511**, Lindgren J., despite misgivings about what he felt was an artificial distinction between 'religion' and 'governance of religious institutions' [at 39-42], considered himself bound to follow [at 37-8] the Full Federal Court in MIMA v Zheng [2000] FCA 50 (per Hill J., with whom Whitlam & Carr JJ., agreed at [41- 43]) on the issue of whether restrictions on worship in an unregistered church in the form of detention, reprimand and release constituted persecution for reasons of religion. He found instead that this would constitute the enforcement of a system of regulation of church governance that was not persecutory of religion. It should be noted (which distinguishes the situation from Woudneh) that the RRT made specific findings that the Applicant could practise as a Protestant Christian in both official and unofficial churches, did not hold any significant religious belief that would prevent him from doing so and his level of understanding of his Protestant faith was not such that he would encounter religious difficulty in worshipping in an official church. Finally it found, correctly according to His Honour, that if the Applicant were to resume worshipping in an unregistered church, difficulties that he might again encounter with the authorities would be due to the enforcement of the régime of governmental control over the

organisation of religious institutions, not the inhibition of his religious beliefs and practices.

An appeal from the decision of Lindgren J. was upheld by the Full Court in ***Wang v MIMA*** **(2000) 179 ALR 1, 105 FCR 548 ; 62 ALD 373; [2000] FCA 1599** and ***Zheng*** was distinguished (or not followed if it could not be properly distinguished). The central issue was the failure to recognise that participation in communal religious rights could be an essential element of worship and deprivation of this by state authorities be persecution Both Wilcox J. and Gray J. agreed with the reasons for judgment of Merkel J. but added observations of their own.

Wilcox J. opined that:

[5]…the concept of "religion", in Article 1A(2) of the Convention on Refugees, anyway includes the element of manifestation or practice of a religious faith in community with others..

[10]… in this case the Tribunal adopted an unduly narrow interpretation of the word "religion". As Merkel J points out, the Tribunal posed for itself the appropriate question: "whether the treatment (Mr Wang) has faced in China was persecutory or whether he could expect to face persecution if he returned there in the future". However, the Tribunal never answered that question; instead it transposed the critical question into "whether the applicant has been or would be deprived of his right to worship by acceding to the government regulations". That substitution might have been acceptable if the word "worship" had been accorded its full meaning, so as to include participation by Mr Wang in communal religious rites that were acceptable to him in form, and performed by people to whom he had no objection. But the Tribunal did not apply the word in that way. Mr Wang told the Tribunal member that "he could not attend government-sanctioned churches because they were unable to teach all the necessary doctrines and because the State controlled the church. He could not worship faithfully in a registered church which was there to serve the purposes of the Communist Party". The Tribunal member did not express doubt about Mr Wang's sincerity in making those claims, but found "he would be able to resume his religious practices and beliefs, subject to some state controls but insufficient to deprive him of his right to religious freedom". What type of "religious" freedom is it, that limits the practice of communal rites to a service conducted by State-approved persons who substitute government propaganda for elements of theological doctrine?

Gray J. at [16] commented that:

…It is inconceivable that every member of the RRT is properly equipped to assess each such applicant on the basis of the applicant's knowledge of the faith that he or she professes. Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being

regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion. Compare Mashayekhi v Minister for Immigration & Multicultural Affairs [2000] FCA 321, (2000) 97 FCR 381, at [11] - [16].

He went on to say in finding a breach of S476(1)(e) that:

"…the RRT appeared to accept the genuineness of the intention of the appellant to practice his religious faith at an unregistered church if he should return to the People's Republic of China. In my view, it is implicit in the reasoning of the RRT that it reached the view that, if the appellant were to be returned to the People's Republic of China and to carry out his intention of practising his religion at an unregistered church, he would suffer persecution. The RRT took the view that the appellant could avoid this persecution by not carrying out his intention, and instead by practising his religion at a registered church. In following its path to this conclusion, the RRT erred in law, within the meaning of s 476(1)(e) of the Migration Act 1958 (Cth) ("the Migration Act"). The error involved an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the RRT.

Unlike the other two judges, His Honour held that the applicant should have the benefit of an express finding that accords with the implicit finding already made, therefore the matter should be returned to the Tribunal to be constituted by the same member who made the original decision (at [21-7])

Merkel J. with whom on the issues of law in their separate judgments both Wilcox J. and Gray J. agreed, said:

30. The application by the appellant for a protection visa was based upon his claim that he is a refugee within the meaning of Art 1A(2) of the Convention relating to the Status of Refugees 1951 as amended by the Protocol Relating to the Status of Refugees 1967 ("the Convention"). The appellant claims that he is a refugee as he is outside China, the country of his nationality, and is unwilling to return to it because of a well founded fear of being persecuted by reason of the practice of his religion as a Protestant Christian at a church which is not registered in accordance with the requirements of the law of China.
31 The RRT concluded that, as the appellant can practice his religious beliefs as a Protestant Christian in China at churches which are registered as official churches, as required under the law of China, any punishment or mistreatment of him by the authorities for practicing his religious beliefs at an unregistered church would not constitute persecution "for reasons of religion" for the purposes of the Convention. The RRT appeared to regard the appellant as fearing the consequences of violating a generally applicable law prohibiting the practice of religion at an unregistered church, rather than persecution because of his religion.
32 The trial judge expressed concerns at the reasoning of the RRT but concluded that giving effect to those concerns would intrude upon a consideration of the merits of the application for a protection visa. Accordingly, his Honour dismissed the application for review with costs.
33 The appeal raises the question of whether a person's fear of practising religion in a manner rendered unlawful by the laws of that person's country of nationality is a fear of

persecution by reason of the person's religion or by reason of the person having broken the law. Of course, if the fear is for both reasons then the fact that only one of the reasons is a Convention reason is sufficient to attract the protection of the Convention: see for example Chokov v Minister for Immigration and Multicultural Affairs FCA 823at [29]-[30] and the cases referred to therein.

…

40 The RRT posed for itself the question of whether the appellant had been or would be deprived of his right to worship by acceding to the government regulations. It answered the question in the negative, being satisfied that the appellant could practise as a Protestant Christian in China at an official church. The RRT noted a growth in registered Protestants, the fact that the government continues to approve the printing of Bibles, and the fact that many Protestants move between official and unofficial churches.

…

The trial judge concluded that it was reasonably clear that the RRT's reasoning was that, even assuming in the appellant's favour that he was detained as mentioned and that there was a real chance that if he were to return to China his experience would be repeated, this would not constitute persecution "for reasons of ... religion". Rather, it would constitute the enforcement of a system of regulation of church governance that was not persecutory for religious reasons.

43 The trial judge stated the RRT refused the appellant's claim because inter alia:

* he was able to practise his faith as a Protestant Christian in an official church; and

* if he were to resume worshipping in an unregistered church, difficulties that he might again encounter with the authorities would be due to the enforcement of the regime of governmental control over the organisation of religious institutions, not the inhibition of his religious beliefs and practices.

44 The trial judge regarded as indistinguishable the recent decision of a Full Court in Minister for Immigration & Multicultural Affairs v Zheng [2000] FCA 50…

The appeal

46 The appellant relied upon a number of grounds which were refined in the course of argument. In substance, the appellant contended that the RRT failed to address his claim of having a well founded fear of persecution for reasons of religion. Rather, so he said, it addressed the quite separate question of whether, under the laws of China, the appellant was prohibited from practising his faith as a Protestant Christian. It was submitted that in addressing the second question rather than the first, the RRT erred in law. Further, the second question was said to be irrelevant as it related to the practice by the appellant of his religion, in a registered Protestant Church, which is different to the manner in which he intends, and is entitled, to practice his religion. Thus, it was submitted that the RRT fell into error in addressing questions relating to the nature and extent of state control of religion, rather than whether the practice by the appellant in China of his religious beliefs in the manner to which he was entitled justified his claim of a well founded fear of "persecution for reasons of religion" if he were to return to China. (added)

…

49 Although the submissions raise the question of whether conduct of a claimant that is unlawful under a general law can, as a consequence, fall outside the protection of Art 1A(2) of the Convention, the RRT did not appear to consider or refer to case law on that question.

Laws of general application

50 The High Court first discussed this issue in Applicant A v Minister for Immigration and Multicultural Affairs (1997) 190 CLR 225. Dawson J (at 244-245) approved the comments of the Full Court (Beaumont, Hill and Heery JJ) (1995) 57 FCR 309 at 319:

" . . . a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention".

51 His Honour (at 243) added:

"[w]here a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms".

52 Brennan CJ also discussed the relationship between breach of laws of general application and persecution for a Convention reason. His Honour (at 233) stated:

"...the feared persecution must be discriminatory. . . . The persecution must be 'for reasons of' one of those categories. . . . The qualification also excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of 'refugee'."

53 McHugh J (at 258) stated:

"Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution."

54 His Honour (at 259) elaborated on this point, stating that it is "[o]nly in exceptional cases ... that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving [some] legitimate government object and not amount to persecution".

55 The High Court also considered the issue of laws of general application in Chen Shi Hai v Minister for Immigration and Multicultural Affair (2000) 170 ALR 553. The applicant in Chen was a three and a half year old third child of Chinese parents born out of wedlock. The Court unanimously found that the applicant belonged to a particular social group, colloquially known as "black children", and would be persecuted for that reason if he returned to China. The majority of the Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) observed at 558 that the Full Court had defined "laws of general application" as laws and policies "directed to the whole population". In determining whether the laws or practices in question were laws of general application, their Honours noted at 558:

"Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - for example, 'black children', as distinct from children generally - cannot properly be described in that way."

56 Further, their Honours commented at 559:

"To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to

overlook the possibility that selective enforcement of a law of general application may result in discrimination."

57 Thus, the majority found that "black children" could constitute a social group for the purposes of the Convention. Their Honours further found that "black children" are treated differently in China and that this different treatment amounted to persecution.

58 Kirby J, in a concurring judgment, stated at 571:

"The mere fact that the law is a criminal law or one of general application in a particular society does not withdraw from those who have a well-founded fear of being persecuted, the protection of the Convention definition. The Nazi State in Germany was generally a Rechtsstaat. Laws of general application in such a State can sometimes be the instruments which reinforce and give effect to the antecedent persecution and help to define the persecuted and to occasion their urgent search for foreign refuge."

59 Kirby J also warned:

"Care must, in any case, be taken against blindly assuming that because a law is one of general application it can play no part in identifying, consolidating and motivating a particular social group as one falling within the protection of the Convention."

60 In Applicant A the court was concerned with the circumstances in which a contravention of a law of general application can create a social group for the purposes of the Convention. A different issue arises where a court is concerned with the discriminatory impact of a law on members of a pre-existing group. Even where such laws are of general application, as was observed by the majority in Chen at 559, "general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily".

…

63 While, generally, punishment for breach of a criminal law of general application will not constitute persecution for a Convention reason, the proposition contended for by the Minister that prosecution under generally applicable laws cannot amount to persecution for a Convention reason is erroneous. Before such a conclusion can be reached in a particular case the circumstances of the individual concerned must be considered. That consideration will usually occur in the context of an inquiry into the nature of the law, the motives behind the law, whether the law is selectively or discriminatorily enforced or impacts differently on different people. Further, where the punishment is disproportionately severe, that can result in the enforcement of the law in that case being persecutory for a Convention reason: see Namitabar v Canada (Minister of Employment & Immigration) (1994) 2 Can. F.C. 42 and Fathi-Rad v. Canada (Secretary of State) (1994) 77 F.T.R. 41.

64 In the present case the RRT gave only scant attention to the above matters. In inquiring into the nature of the laws in question I would have expected the RRT to have specified, in greater detail than it did, the source and detail of the laws and the penalties that attend their breach.

65 A law that targets or applies to persons by reason of their political opinions, religion, race or membership of a pre-existing social group, is not properly described as a law of general application. Such laws "target or apply only to a particular section of the population": see Chen at 558.

…

66 Consequently, a law regulating the practice of religion, requiring that it be practised or observed in a particular way or targeting or applying only to persons practicing religion, is not a law of "general application". Thus, a fear of prosecution or punishment by the authorities for the breach of such laws can, of itself, give rise to a well-founded fear of persecution for a Convention reason.
…

68 Thus the Chinese laws in question appear to prohibit religious practice other than by "authentic" religious groups (that is, the five officially recognised religions) and regulate the practice of religion by those groups by requiring that they be registered in accordance with Chinese law. Plainly, such laws are not laws of general application as that term has been used in the cases.
Persecution by reason of religion
(a) In community with others
69 The present case is concerned with the appellant's fear of the consequences of practising his religion as a Protestant Christian in community with others at an unofficial church, if he returns to China. As I shall explain, for the purposes of the Convention, the courts have generally taken a broad view of what constitutes the practice of religion.
70 The fact that persecution as a result of religious practice might occur indirectly through a government regulatory regime does not result in it falling outside the protection of the Convention….
71 Further, religious practice has not been treated as being confined to personal religious worship. ..
…
73 Further, as was observed by the trial judge at [39] of his reasons, while religion is primarily a manifestation of a personal faith and of doctrine it also has a congregational or community aspect…
75 Although primacy is to be given to the written text of the Convention, the context, object and purpose of the Convention is also to be considered: see Applicant A (at 254) per McHugh J. More specifically, Kirby J (at 296-297) observed that the term "refugee" in the Convention:

> "is, in turn, to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights (esp Arts 3, 5 and 16) and the International Covenant on Civil and Political Rights (esp Arts 7, 23)."

76 In Minister for Immigration & Multicultural Affairs v Mohammed (2000) FCA 405 French J stated at 421:
77 "Given the freedoms guaranteed under the Universal Declaration of Human Rights and other international conventions it could not have been consistent with the purpose of the Refugee Convention to require that persons claiming to be refugees be deprived of their fundamental human rights and freedoms in the country from whom they are seeking protection."
78 See also Omar v Minister for Immigration and Multicultural Affairs [2000] FCA 1430 at [35]. ..
81 Accordingly, it is appropriate to consider Art 18 of the Universal Declaration and the objects of the Convention in interpreting Art 1A(2). When regard is had to those matters it is clear that there are two elements to the concept of religion for the purposes of Art 1A(2): the first is as a manifestation or practice of personal faith or doctrine, and the second is the manifestation or practice of that faith or doctrine in a like-minded community. I would add

that that interpretation is consistent with the commonly understood meaning of religion as including its practice in or with a like-minded community.
(b) Persecution by reason of future conduct
82 In the present case the claimant's fear is based on past persecution by reason of his religious practice and also upon future conduct, namely the intended practice of his religion at an unofficial church in community with others after his return to China. In determining whether there is a "real chance" of persecution for a Convention reason, evidence as to past events of such persecution is often the best evidence as to what is likely to occur in the future: see Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 574-575. However where, as in the present case, the fear is also based on conduct in which a claimant intends to engage upon return to the country of nationality, a question arises as to whether the claimant ought to desist from engaging in that conduct (in the present case, by practising religion at an official rather than an unofficial church) and thereby not create the circumstance that will give rise to the fear of being persecuted.
83 A number of cases have considered the question of whether a claimant ougt to desist from engaging in conduct that will create the circumstance that results in that person's fear of persecution for a Convention reason. In Moh0ammed v Minister for Immigration & Multicultural Affairs [1999] FCA at [28] Lee J stated that recognition of refugee status (in that case, sur place) cannot be denied to a person because the person's voluntary acts in Australia have created a real risk that the person will suffer persecution occasioning serious harm if returned to the country of nationality. On appeal in Minister for Immigration & Multicultural Affairs v Mohammed (2000) 98 FCR 405, a Full Court, by majority, upheld the decision of Lee J, holding that it was an error for the RRT to regard the question whether the claimant "acting solely out of desire to put himself in a position where he could claim to be endangered" as determinative of the question of whether that person was a refugee: see Spender J at 409 and French J (at 419-422). French J at 419-420 stated that the question to be answered, for example in the case of a political refugee, always remains the same: is there, at the time of determination of refugee status, a well-founded fear of political persecution? See also Spender J at 408.
84 Most recently, in Omar, the Full Court held that the likely future conduct of a Somali national, who feared that he would be persecuted if he returned to Somalia as he was a committed intellectual who would speak out against the local militias, could give rise to a well founded fear of persecution on Convention grounds. After reviewing the authorities, including Mohammed, the Court stated at [38] that:
"the recent cases in England and in this Court stand for the proposition that possible future conduct, including a so-called 'spontaneous voluntary expression of political opinion', can provide an acceptable basis for a presently existing and well-founded fear of persecution for a Convention reason."
85 The Court added at [39] that there is nothing fanciful about the idea of persons with strong religious or political convictions having a fear of persecution founded upon "apprehensions of what they may do and what may happen to them if they come face to face with repression". Thus, the Court at [42] stated that an assumption that a person with a strongly held religious belief should act reasonably, and compromise that belief to avoid persecution, would be contrary to the humanitarian objects of the Convention. 86 The decision of Lee J in Mohammed was also cited with approval in Danian v Secretary of State for the Home Department[2000] Imm AR 96 at 119-120. The Court of Appeal in Danian held that in all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then the claimant is entitled to asylum. In Mohammed and Danian that

entitlement was held not to be forfeited because the risk arises from the claimant's own conduct, however unreasonable.

…

88 Omar, Mohammed, Danian and Ahmed are authority for the following propositions:
* the question must always be whether the appellant has a well founded fear of being persecuted for a Convention reason;
* the Convention, in seeking to protect fundamental rights and freedoms of individuals does not superimpose upon that protection a requirement that it is only available in respect of those rights and freedoms which are exercised reasonably.
89 Of course, whether past conduct, or the proposed future conduct, is accepted by the fact finding tribunal as being genuinely in pursuit of a claimant's political or religious beliefs or convictions is a separate question. If it is not, the claimed fear of persecution for a Convention reason may be found not to be genuine or well founded and, as a consequence, the claimant will fall outside the protection of the Convention. Thus, conduct engaged in for the purpose of claiming the protection of the Convention or deliberate conduct to create the risk of persecution claimed to be feared, although not disqualifying factors, may be indicators that the subjective fear does not exist or is not well-founded: see Mohammed at 407 per Spender J and at 420 per French J.
90 However, as persecution can occur by reason of an imputed political or religious belief, the genuineness (or lack thereof) of a religious or political belief is not always determinative…
…
92 The RRT, in finding that the appellant had suffered a "stiff penalty" as a result of having been detained and mistreated by the authorities on account of his religious practices and activities as a Protestant Christian at an unregistered church, must be taken to have substantially accepted the appellant's version of events that led him to fear further religious persecution for the same reasons on his return. However, the RRT also found that the authorities will tolerate the practice by the appellant of his religion provided it accords with government regulations that required that religious activities be practiced only at churches registered according to Chinese law. Thus, although the registration process is administered by a Government Bureau through which the government "monitors membership in religious organisations, locations of meetings selection of clergy, publication of religious materials and funding for religious activities" and failure to register can result in fines, requisition of property and "forcible dispersal of religious gatherings, and, occasionally short term detention" the RRT stated that "registration as such" is not of itself persecutory of people of religious persuasion…
93 The RRT found that the appellant did not hold any "significant belief" that would prevent him from acceding to government regulations and practising as a Protestant Christian in China by participating in religious worship services at a registered Church. Accordingly, it concluded that the appellant would not face persecution in the future on account of his religion as "he would be able to resume his religious practice and beliefs, subject to some state controls but insufficient to deprive him of his right to religious freedom".
94 Early in its reasons the RRT posed the question for it as:

> "whether the treatment [the appellant] has faced in China was persecutory or whether he could expect to face persecution if he returned there in the future."

95 Plainly, the RRT was using "persecution" in the sense of persecution for a Convention reason. As was observed by the trial Judge, although the RRT posed the question it was

required to answer, it did not answer that question. His Honour considered that the RRT implicitly answered the question by concluding that enforcement of a system of regulation of church governance in China, which involved government control of religion through the registration process, was not "of itself" persecutory, therefore enforcement of that system against the appellant does not constitute persecution of him by reason of religion.

96 In my view the RRT did not answer the question it posed for itself. Rather, it answered the separate question of whether the laws regulating religious practice were persecutory. The answer to the latter question might, in some cases, constitute an implicit answer to the former question if the laws in question were laws of general application. However, as explained above, they were not.

97 The appellant's claim was that his fear of persecution by reason of his religious practice was well founded. It was not determinative of that claim for the RRT to conclude, as it did, that as the laws regulating religious practice were not persecutory, enforcement of those laws against the appellant could not constitute persecution. The RRT's approach was erroneous as a fear of prosecution, punishment or mistreatment for breaching those laws was capable of constituting a well-founded fear of persecution for a Convention reason. Whether in the appellant's case it does constitute such a fear was a matter required to be, but was not, addressed as a result of the RRT's erroneous approach.

98 The RRT also concluded that, as the appellant can practice his religion on his return to China at a registered church, any consequences flowing from the intended practice of his religion at an unregistered church is not persecution by reason of religion. The RRT's reasoning appears to have been that as the appellant can practice his religious faith at a registered church it is unnecessary for the appellant to practice his religious faith at an unregistered church. Thus, if he practices at an unregistered church his voluntary acts, rather that those of the authorities will be the cause of the persecution feared by him.

99 However, as was made clear in Omar, Mohammed, Danian and Ahmed, the fact that the appellant has brought into existence, or intends to bring into existence, the circumstances that give rise to the fear of persecution by an unnecessary, or even an unreasonable, voluntary act may be relevant to predict what may happen and to the genuineness of a claimant's claimed beliefs and convictions that are said to give rise to a fear of persecution for a Convention reason, but are not determinative of whether the fear is well founded. As explained above, the question which the RRT posed, but did not answer, must always be whether the claimant has a well founded fear of persecution for a Convention reason. If that question is answered in the affirmative the protection of the Convention is not forfeited or lost by a determination that the fear has arisen as a result of unnecessary, or even unreasonable, conduct by the claimant. It is therefore not forfeited or lost by a determination that the appellant could exercise his religious practices and beliefs in a manner, and at a church, that is different from the manner and church in which he intends and wishes to practice his religion.

100 In the present case the RRT did not find that the appellant is not genuine in his intention to practice his religion at an unregistered church or that his wish to do so is merely a pretext for claiming refugee status. Rather, the RRT appeared to accept the genuineness of the intention of the appellant to practice his religious faith at an unregistered church, but that acceptance was to no avail as it found he could practice his religious faith at a registered church.

101 Further, the RRT considered the religious practices, beliefs and freedom of the appellant solely by reference to the first element of religion as that word is to be interpreted in Art 1A(2), being the personal manifestation or practice of religious faith and doctrine. The RRT erred in law in failing to regard the second element, being the manifestation or practice of that faith or doctrine in community with others, as falling within Art 1A(2). The

RRT posed for itself the question of "whether the applicant has been or would be deprived of his right to worship by acceding to the government regulations". By answering that question in the affirmative by saying he can practice as a Protestant Christian at a registered church it is plain that the RRT, erroneously, was disregarding the community or congregational element of religious practice. As a result of the RRT's erroneous approach it did not consider whether persecution of the appellant by reason of his past and intended practice of his religion at an unregistered church, being the practice of his religion in a like-minded community, constituted persecution for reasons of religion.

…

103 For the above reasons I have concluded that the trial judge's concerns about the RRT's decision were well founded but his Honour erred in not concluding that the reason for his concerns were the errors of law to which I have referred. The errors are reviewable errors under Pt 8 of the Act as they involve an incorrect interpretation of the applicable law (s 476(1)(e)); an incorrect application of the law to the facts found by the RRT (s 476(1)(e)); and a failure by the RRT to apply itself to the question prescribed by law (Ex parte Hebburn Ltd; Re Kearsley Shire Council (1947) SR (NSW) 416 at 420 and ss 476(1)(b) and 476(1)(c)).

104 I am also of the view that his Honour erred in concluding that he was bound to follow Zheng. The Full Court decision in Zheng was based on the finding of fact by the RRT that the essential differences between registered and unregistered churches related not to religious belief or practices but to "the governance of the church" and that the government regulation of the church was not persecutory. The Full Court concluded that as the RRT found there was no difference in religious practice between the two churches it was open to the RRT to conclude, as a matter of fact, that the claimant's fear of persecution, based on his wish to attend an unregistered church, was not for reasons of his religion.

105 The evidence and material before the RRT in the present case, which was not rejected by the RRT, points to significant differences between practicing religion at an unregistered and a registered Protestant Church…

107 While I accept that, as in Zheng, the RRT must be taken to have found that the appellant has no significant religious belief that would prevent him from practicing as a Protestant Christian at a registered church, it does not follow that it also found that there is no difference, as far as the appellant was concerned, between practicing religion, as that term is to be interpreted in Art 1A(2), at a registered and an unregistered church.

108 It follows from the foregoing that Zheng was a decision based on facts and material that, in part, overlapped with, but were distinct from, those before the RRT in the present case. The issue for the Court in Zheng was a question of fact, being whether the finding of the RRT that Mr Zheng was not prohibited from practicing his religion was open on the material before it. In The Little Company of St Mary (SA) Incorporated v The Commonwealth (1942) 66 CLR 368 at 378-379 Latham CJ observed that while it was open to a trial judge to be assisted by a precedent on a question of law, "on a question of fact precedents are not authority". Thus, although the trial judge observed, correctly in my view, that Zheng did not require a particular result in the present case, he was incorrect in his conclusion that nevertheless he was bound to apply or follow Zheng.

109 In any event, Zheng is not only a decision on a question of fact, but the Court in Zheng did not consider, let alone address, the issues of law arising in the present case cf: Minister for Immigration and Multicultural Affairs v Li [2000] FCA 1456 at [81]-[82]. In fairness to the Full Court in Zheng, those issues of law did not appear to have been raised or argued.

110 For the above reasons I have concluded that the trial judge erred in concluding that Zheng was an authority that he was bound to follow with the consequence that the review sought by the appellant must fail. For the same reasons I do not regard the decision in

Zheng as a previous authority which should lead this Full Court to dismiss the appeal. If, contrary to my view, Zheng is authority for the proposition that church governance by registration, as such, is not persecutory as explained above, that does not resolve the issues arising for determination in the present matter.
111 Further if, contrary to my view, Zheng is an authority that is inconsistent with my decision on the issues of law arising on the present appeal, for the reasons I have given I am clearly satisfied that Zheng was wrongly decided on those issues: see Nguyen v Nguyen (1990) 169 CLR 245 at 268-270.

In Farajvand v MIMA [2001] FCA 795 Allsop J. set aside a decision on s476(1)(b((c) and (e) grounds following Wang. His Honour's reasoning was as follows:

12 While not by any means an exhaustive statement of the applicable law, the Tribunal made, in my view, no particular error in its recitation of the limited set of principles to which it chose to make reference. I say limited set of principles because importantly, I think, it indicated no express consideration of, and familiarity with, decisions concerning the nature of religion as a Convention term and the relationship between that term and the notion of persecution inherent within the composite phrase within the Convention in Article 1A(2). In the light of the detailed reference to authority made by the Tribunal, but recognising that the Tribunal does not have a burden to refer to all cases to which it might have consideration, I do note that the Tribunal does not refer to Minister for Immigration and Multicultural Affairs v Zheng [2000] FCA 50 or Wang v Minister for Immigration and Multicultural Affairs (2000) 179 ALR 1. I do not identify these omissions as an error of law as such and it should not be taken as a criticism of the Tribunal that an exhaustive legal treatise on the notions of persecution and the Convention were not set out. That is not the purpose of the comment. It will become evident shortly, in examining the Tribunal's reasons, as a factor to be weighed in the balance in seeking to understand the true purport and meaning of what the Tribunal has otherwise said in its reasons and in seeking to understand the extent to which the Tribunal has fulfilled its obligations in considering all relevant considerations mandated by the Act. …
15 If the claim for asylum rested at this point in the decision, that is at the point of assessment as to what had happened prior to leaving Iran, there would be little doubt that any claim for review would be a vain attempt to re-agitate the merits of comprehensive adverse factual findings. However, the claim to be a refugee sur place was thereafter dealt with in somewhat less adverse fashion. The Tribunal accepted the following facts:
(a) The applicant had been baptised into the Christian faith after leaving Iran.
(b) The applicant is now "a genuine Christian". In the light of the evidence it must be taken, and I do not understand the Minister, through Mr Markus, to contest it, that this acceptance was as a genuine Christian member of an evangelical church.
(c) The applicant shares his Christianity at the detention centre with "people who show an interest".
(d) It was possible that he had persuaded a couple to come to services at the detention centre.
(e) The available country information indicated that although apostasy is punishable by death according to Islamic law, "in practice, converts who keep a low profile and worship quietly are unlikely to be subjected to adverse attention from authorities. However, if converts are publicly denounced and accused by their enemies they could face interrogation

by the authorities, and those who actively proselytise, and, in particular, become agents of conversion, face potentially severe punishment". ..
f) The applicant has continued to explore his new religion and wishes to share it with like minded people.
(f) The applicant shares his interest and enthusiasm only with Muslims who have shown a similar interest. That is, "he is relatively cautious, even in Australia, where he does not have to fear State authorities" [emphasis added].
16 These findings must also be set in the context of matters which can be seen as adverse findings to his claims.
…
17 At this point it is convenient to note …the Tribunal made the following finding:

> He can practice his Christianity and share it with other people who show a similar interest without a real chance of attracting adverse attention from the Iranian authorities.

18 I should add at this point that there was no finding by the Tribunal that the applicant did not have a subjective fear of persecution. The whole tenor of that part of the reasons dealing with the claim of the applicant to be a refugee sur place was dealt with on the basis of a lack of a well-founded fear of persecution; that is, examining the matter substantially objectively speaking. In summary, the Tribunal found that the applicant could return to Iran and practice his Christianity and share it with people who show a similar interest without a real chance of attracting adverse attention from the authorities. It was this that founded the conclusion that his fears of persecution were not well-founded
…
[the] approach [in Wu] requires, not so much a bias one way or the other as to what is meant, but a fair and commonsense-based understanding of what the Tribunal was attempting to get at in the light of what was being put to it. ..
20.What was the essence of the fact-finding (remembering that the relevant fact-finding is the claim for refugee status sur place after the rejection of much of the evidence which the applicant had given)? ..
(a) He was a Christian.
(b) He was a Christian of an evangelical congregation or church.
(b) He wished to share his faith with like-minded people.
(d) He was not a derider of Islam or someone likely actively to proselytise.
(e) Public manifestation of belief and worship in Iran could well lead to adverse attention from authorities.
(f) However, if "a low profile" were to be kept and worshipping were to be done "quietly" it was "unlikely" that adverse attention from the authorities would be drawn.
(g) If he were to be "cautious" and "circumspect" in how he practised his faith, it would be unlikely that he would face adverse consequences or adverse attention.
(h) He would practise his faith in this way.
21 This essential fact finding, in my view, must be set in the context of a proper grasp of the notion of "religion" within the Convention and with a proper grasp of the relationship between religion and persecution within Article 1A(2), read as a composite phrase. I respectfully agree with, and adopt, the views of Wilcox J in Wang, and in particular paragraphs [5] to [7]
22 It should be noted that Gray J agreed with Wilcox J in this regard. I note that Wilcox J preferred (in paragraph [5] set out above) not to deal with the question of the Universal Declaration of Human Rights in the context of the understanding of religion for the purposes of the Convention definition. For the same reasons identified by Wilcox J, I

would likewise prefer, for today's purposes, not to base my decision on that, though I recognise that a majority of the Court in that decision (Merkel J and Gray J, Gray J agreeing with both Wilcox J and Merkel J) lent support to the utilisation of the Universal Declaration in that fashion.

23 As well as the decision in Wang, I think that the views of Kirby J in Chen Shi Hai (2000) 201 CLR 293, at pages 307 to 308, should be borne in mind. These are not views which I would understand to be contentious in the High Court. I think the disposition of this case calls for a brief recognition of the force of what his Honour said:

> As this Court has earlier demonstrated and as many decisions in Australia and in Courts of other countries of refuge show, the language of the Convention is opaque. Perhaps it is deliberately so given that it must apply to the great variety of acts of oppression, despotism, fanaticism, cruelty and intolerance, of which humanity is capable. In these circumstances only a broad approach to the text and to the legal rights which the Convention affords will fulfil its objectives. As Sedley J remarked, in terms endorsed in the House of Lords by Lords Steyn and Hoffman, adjudication upon this branch of the law:
>
> "Is not a conventional lawyers exercise of applying a litmus test to ascertain facts, it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu judged by a test which, though it has legal and linguistic limits has a broad humanitarian purpose".
>
> Whilst courts of law, tribunals and officials must uphold the law, they must approach the meaning of the law relating to refugees with its humanitarian purpose in mind. The Convention was adopted by the international community, and passed into Australian domestic law, to prevent the repetition of the affronts to humanity that occurred in the middle of the twentieth century and earlier. At that time Australia, like most other like countries, substantially closed its doors against refugees. The Convention and the municipal law giving it effect, are designed to ensure that this mistake is not repeated. [Footnotes omitted.]

24 The views expressed by Wilcox J in Wang are entirely in conformity with the approach referred to by Kirby J in Chen.

25 It follows from this that the applicant's faith, recognised by the Tribunal by his membership of an evangelical congregation on a genuine basis, carries with it necessarily, unless there is evidence or, perhaps more accurately, findings, to the contrary, the elements of manifestation and practice in community with others. To say that if he keeps a "low profile" and worships "quietly" or "cautiously" or "circumspectly", is, I think, with respect, to deny the applicant a dimension to his faith, even accepting that he is not an enthusiastic proselytiser or derider of Islam. Further, on my reading of pages 16 to 18 of the decision, and the balance of the reasons of the Tribunal, it appears to me that the Tribunal recognised in its findings that the applicant would keep a low profile or be cautious or circumspect and that he would do so out of recognition of the likely consequences from State authorities in Iran if he did not do so. ..

28… the Tribunal was saying that the applicant's conduct in the future in Iran would be such, (that is low-profile worship and quiet worship), because of a recognition of the view, attitude and likely actions of the authorities, and if he did conduct himself in that way it was unlikely that any harm would come to him.

29 In my view, if the above be a correct understanding of the reasons of the Tribunal, it has in effect made a finding that the applicant does not have a well-founded fear of adverse consequences because he can avoid, and he recognises that he can avoid, those adverse

consequences, which would flow from his apostasy and public manifestation of his faith, by, in effect, keeping a low profile. That is to say, in my view, no more than that he can avoid persecution by restricting the disclosure of his religion and by restricting the conduct of his religion in anticipation or, if one likes, in fear of the consequences if he did otherwise. This, in my view, recognises the likely existence of persecution unless his religion is practised in a limited way. Or, put more accurately, for the purposes of the Convention, that he perceives and has a well-founded appreciation that a limitation on his activities is necessary to avoid consequences from State authorities; and if he does so, which the Tribunal has found he will, he will then not face harm (emphasis added).

30 On this basis, in my view, the Tribunal failed to interpret correctly the applicable law, in particular the elements implicit in the word 'religion', and its inter-relationship with the likely perceived results in the country of nationality upon return; and the Tribunal, in my view, failed to correctly apply this understanding of religion and its intersection with persecution to the facts as found. If I may add, this is why I identified earlier that there is no displayed appreciation in the reasons of the width and content of 'religion' for the purposes of the Convention.

… it confused the avoidance of adverse consequences with the fear of persecution. For it was the avoidance of adverse consequences which it concentrated on when, in fact, that successful avoidance arose, necessarily, from a perception of the consequences of the alternatives in practising the religion.

31… the Tribunal did not make a finding that the applicant's Christianity was of a limited character or capable of being described as a private faith. That concession [by the Minister] , most properly made, I think is borne out in the evidence. The finding was that he was a genuine Christian and of an evangelical congregation. However, Mr Markus said that the applicant would recognise that going to Iran would mean some limitation upon his faith and practice but that when one looks at the applicant, his claims, and the findings about him, the Tribunal has in effect come to a view that such limitations that could be perceived by the applicant in Australia did not amount to well-founded fear of persecution, because to this applicant those limitations were not of sufficient gravity or nature truly to amount to persecution. .. [counsel] and I discussed a limitation on someone going back to his or her country of nationality and being limited to two or three visits to church a week instead a usual three or four. That might be, technically speaking, in a particular case, a limitation on the practice of the faith but not one which might be seen as persecution. ..

32 If the Tribunal had found that, there would be much to support what Mr Markus submitted, that is, there would be a factual finding that for this person not only could the practice of religion in the country of nationality not attract any adverse consequences but that any reduction in what was a habitual or desired extent of practice was minor in respect of that particular person and that particular person's faith. I agree that there would be much said for the proposition both that that was not persecution and that the foresight of it would not be a well-founded fear of persecution. However, as I have said, I do not read the Tribunal as making those findings. ..

In Tang v MIMA [2000] FCA 986 Branson J. found that it was open for the Tribunal to find that the Applicant would not be at risk of persecution were she to return and continue to attend an unauthorised church. She went on at [20] to express her doubts about the legitimacy of the distinction between “the governance of a church” and “underlying religious faith” so far as all denominations of the Christian

religion are concerned but like Lindgren J in Wang's case, considered that the decision of the Full Court in Zheng's case authoritatively decides that the distinction between the governance of a church and religious faith is a valid one in the context of the Convention.

On appeal the Full Court in Tang v MIMA [2000] FCA 1746 upheld the correctness of Her Honour's findings on the facts of the case.

The threat of persecution under a law whose purpose is to preserve or protect the values of a particular religion , which was expressly found by the Tribunal to be one of universal application, is not enough to bring an applicant within the definition on the grounds of religion (Lama v MIMA [1999] FCA 1620)(but note Branson J. in Tang found it was unnecessary to determine whether a legal prohibition of general application, whether enforced or not, which would prevent a person from lawfully practising his or her religion, would amount to persecution…(at [20]).

In MIMA v Jang (2000) 175 ALR 752; 63 ALD 661; [2000] FCA 1075 the Minister's appeal raised the question whether it is appropriate to apply the relocation principle to feared persecution on the grounds of religion arising from enforcement of a national law. Wilcox J. commented at [27]:

…where the feared persecution arises out of action taken by government officials to enforce the law of the country of nationality, or to implement a policy adopted by the government of that country, it will be much more difficult for an Australian decision maker to reach satisfaction that there is no real risk of the refugee applicant being persecuted if returned to that country. In such a case, if there is a safe area, this must be because the responsible officials have failed to discharge their duty to enforce the relevant law or policy...

He held at [33]:

"As findings of fact are a matter for the Tribunal, not the Court, the only other question is whether it was open to the Tribunal to make a finding that embraced the whole country. It seems to me there can be no doubt about the answer to that question. The law requiring registration of religious institutions, and proscribing religious activities outside registered institutions, is a national law, applicable throughout the whole country. The practices followed by Ms Jang in Jilin Province contravened that law. She feels committed, by conscience and religious conviction, to resuming those practices if she is returned to China. It follows she is committed to resuming the contravention of Chinese national law. The

country information considered by the Tribunal indicates that, although the degree of risk of punishment for such contravention varies from province to province and from time to time, nowhere in China are such practices permissible. Accordingly, it must have been open to the Tribunal to hold that, anywhere in China, there would be real risk of punishment. " Consequently the relocation principle had no application.

(as to the issue whether persecution for non-adherence to religion comes within the Convention see the obiter comments of Branson J. in Hellman v MIMA (2000) 175 ALR 149, [2000] FCA 645 [at 26-7]; in Prashar v MIMA [2001] FCA 57 Madgwick J. said:

18 Further, the Tribunal member did not accept that the applicants would face persecution "as a result of their decision to renounce their religion", that is, by choosing to ignore the cast rules and "marry" into a prohibited relationship. The family rejection was not regarded as amounting to persecution, and if they were facing persecution because of living together, their choice of a lifestyle in this regard could not "be characterised as an expression of a religious belief".
19 I interpolate that there may well be an error in the way this matter was approached. The Convention speaks of a "well-founded fear of being persecuted for reasons of ... religion ...". In my opinion, if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves. If there is anything in Shahzad Gul Awan v Minister for Immigration & Multicultural Affairs [1998] FCA 435 to the contrary, with respect I disagree with it, believe it to be clearly wrong and would not follow it.

(see possible relevance of W244/01A v MIMA [2002] FCA 52 at [37])

NAQJ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 946 a judgment of Branson J. includes the dictum that <u>subject to s91R</u> it may be open to a Tribunal to conclude that in not wishing to comply with all of the rites and customs relating to a particular religion such as not accepting a ban on living in de facto relationships any persecution that an appellant faced as a consequence would be persecution for reason of religion. He Honour doubted that persecution on the ground of religion <u>must</u> involve 'a clash of religious doctrines or of persons of one religion seeking to persecute those of another',

15 The reasons for decision of the Federal Magistrate include the following passage:

'....

The claim was not made on the basis of a fear of harm because of the applicant's

religious beliefs or practices but rather because of her actions, which others would think were wrong or inappropriate because of their religious beliefs. It was not suggested that this was a case of a clash of religious doctrines or of persons of one religion seeking to persecute those of another. The applicant's claim was that she would be subject to harm because of something she had done in the past. Similarly, in relation to the claim of fear of persecution by reason of membership of a particular social group raised in the written submissions, as the respondent submitted, the applicant's fear flowed not from what she was but from what she had done. (see Applicant A v MIEA (1997) 190 CLR 225, at 242, 243 per Dawson J in which His Honour referred approvingly to what Black CJ had said in Morato v MILGEA (1992) 111 ALR 417, to the effect that the ground of membership of a particular social group requires that persecution be on account of "what a person is – a member of a particular social group – rather than upon what a person has done or does." As both Dawson J and Black CJ acknowledged, this distinction cannot be taken too far as there could well be cases where what someone had done became part of the definition of what or who they are. However it indicates a distinction in general terms between laws or practices which single out members of a social group and generally applicable laws or practices that apply to persons who engage in particular behaviour or place themselves in a particular situation. Furthermore, in this case the applicant had articulated a reason why Islamic people in Bangladesh may disapprove of her but there is no material to which the court's attention has been drawn put before the Tribunal to give it reason to think that the State would be complicit in harming the applicant or that it would be or unable to prevent harm. The Tribunal found that it was not satisfied that any harm the applicant may experience would be serious harm amounting to persecution.'

16 I respectfully suggest that the reasoning intended to be encapsulated in the above passage from the reasons for decision of the Federal Magistrate is not entirely clear. To the extent that the passage might suggest that persecution on the ground of religion must involve 'a clash of religious doctrines or of persons of one religion seeking to persecute those of another', I doubt that it is accurate. In Prashar v Minister for Immigration and Multicultural Affairs [2001] FCA 57 at [19] Madgwick J observed:

'In my opinion, if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves.'

17 Paragraph 7.2 of the Joint Position paper prepared by the Council of the European Union on the basis of article K.3 of the Treaty on European Union states:

'Persecution on religious grounds may also occur where such interference targets a person who does not wish to profess any religion, refuses to take up a particular religion or does not wish to comply with all or part of the rites and customs relating to a religion.' (cited in M Symes & P Jorro: Asylum Law & Practice, LexisNexis UK, London, 2003, p 149, fn 7)

18 In this case it may have been open to the Tribunal to find that the appellant does not wish to comply with all of the rites and customs relating to the Islamic religion in that she does not accept a ban on living in de facto relationships. Had the Tribunal made such a finding, it may have been open to it, subject to s 91R of the Act, to conclude that any

persecution that the appellant faced as a consequence would be persecution for reason of religion.
19 The critical issue, however, is whether the Magistrate erred in not finding that the decision of the Tribunal was affected by jurisdictional error arising from its consideration of the appellant's claims to have a well-founded fear by reason of having lived in a de facto relationship in Australia. If the decision of the Tribunal was not affected by jurisdictional error in this regard, the analysis of the Federal Magistrate need not be subjected to more careful scrutiny.
20 Although the Tribunal's reasons are not in this regard expressed with clarity, it seems that the Tribunal concluded that the appellant's planned marriage would ameliorate the Bangladeshi community's, and the Islamic religion's, adverse view of her earlier de facto relationship. On the basis of this conclusion the Tribunal seems to have concluded that she would not suffer harm that was sufficiently serious to amount to persecution because she herself had lived in a de facto relationship in Australia.
21 The reasons for decision of the Tribunal do not reveal the evidence or other material that informed the Tribunal's finding that marriage would ameliorate the way in which the Bangladeshi community and Islamic religion view the appellant's conduct of living in a de facto relationship in Australia. As I observed in SZABS v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 852 at [17]:

> '...it is appropriate for the Tribunal to bear in mind that what is improbable in one place or cultural setting might be unremarkable in another place or in a different cultural setting. ... The Tribunal is under a duty to do all that it can to ensure that its decisions are not affected, whether consciously or unconsciously, by difficulties that it might experience in empathising with the life experience of the applicants that come before it. ....'

…

23 The finding by the Tribunal that the appellant would not suffer serious harm amounting to persecution in Bangladesh by reason of having lived in a de facto relationship in Australia amounted, in the circumstances, to a finding that she would not suffer persecution by reason of religion. The Tribunal found that her marriage would, in effect, protect her from serious harm on religious grounds.
…

25 I observe incidentally that, had the Tribunal taken the view that there was a real chance that the appellant would suffer persecution in Bangladesh for reason of her religion or membership of a particular social group, it would have been necessary for it to give consideration to s 91R of the Act. In particular, the Tribunal would have been required to determine whether either religion or membership of a particular social group was 'the essential and significant reason' for the persecution, whether the persecution would involve 'serious harm' to the appellant and whether the persecution would involve 'systematic and discriminatory conduct' (s 91R(1)). Additionally, as the appellant lived in the de facto relationship in Australia, the appellant would have been required to satisfy the Tribunal that she engaged in the conduct of living in a de facto relationship otherwise than for the purpose of strengthening her claim to be a refugee (s 91R(3)).
…

In ***Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2005] HCA 29** (Gleeson CJ McHugh (diss)Kirby(diss) Hayne

and Heydon JJ) dismissed an appeal from ***Applicant NABD v MIMIA*** **[2002] FCAFC 249 (**Sackville Hely Stone JJ.) dismissing appeal from ***NABD v MIMA*** **[2002] FCA 384** (Emmett J.) . The appellant's argument was that RRT by attaching significance to a supposed difference between discreet and confrontational behaviour, fell into jurisdictional error. His account of persecution in Iran had been rejected by the RRT but it accepted he had joined and participated in church activities subsequently. It relied upon country information which distinguished between "converts to Christianity who go about their devotions quietly and maintain a low profile [who] are generally not disturbed" and persons involved in the "aggressive outreach through proselytising by adherents of some more fundamental faiths" Per Gleeson CJ - held on appeal the distinction thus drawn while far from clear-cut was not meaningless nor irrelevant. It was open to the Tribunal to accept the distinction offered by the information - it noted that Uniting Church was not one of the "fundamental faiths" that require proselytising - it did not regard appellant's conduct since he had converted to Christianity as involving "aggressive outreach – it found that any decision by him to avoid proselytizing in Iran or of actively seeking attention on matters of religion was not inconsistent with his beliefs and practices and he would not be constrained in the practice of his avowed faith in Iran, due to a perception that to behave more openly or aggressively would leave him at risk of persecution. Once the Tribunal accepted, as it was entitled to do on the basis of the country information, that not all Christians in Iran suffer a real chance of persecution, then it was required to consider the individual circumstances of the appellant in the light of the available information. Its process of factual reasoning was open on the evidence.

Per Hayne and Heydon JJ. – the determinative issue was whether the Tribunal addressed the fundamental question did the appellant have a well-founded fear of persecution on the ground of religion? . Their Honours held on appeal that RRT did consider whether appellant had a well-founded fear – it did not ask (as had been the case in *Appellant S395/2002*) whether it was possible for the appellant to live in Iran in such a way as to avoid adverse consequences. The reasoning adopted by the Tribunal in that case revealed that it had not made the essentially individual and fact-specific inquiry which is necessary - it had erred by dividing the genus of homosexual males in Bangladesh into two groups - discreet and non-discreet

homosexual males - that led to the Tribunal assigning the appellants to the former group, without it considering how the appellants wished or intended to behave if returned to Bangladesh. In the present case the nature of the country information provided and the factual findings made and reasoning recorded show it did not argue from an a priori classification of Christians in Iran to the particular conclusion it reached. The RRT was not diverted from inquiring about whether the fears which the appellant had were well founded - it asked what may happen to the appellant if he returned to Iran - based on the material RRT had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way *he* chose to do so, there was not a real risk of his being persecuted.

Gleeson CJ. said:

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

...

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

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

appellant, and it was necessary for the Tribunal to deal with it as best it could or, alternatively, dismiss it as entirely unhelpful. That was a choice to be made by the Tribunal in its role as a finder of fact.

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

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

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

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

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

[1] (2003) 216 CLR 473.

Mc Hugh J. said (dissenting)

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

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

…

Manner of sharing faith

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

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

20 Likewise, no criticism can be made of the Tribunal's discussion of the test for a "well-founded fear of persecution". …

…

The Tribunal's reasoning

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

…

26 The appellant submits that the primary error that is revealed in this reasoning process is the failure to assess the appellant according to his individual characteristics and

circumstances, that is, a failure to consider whether *this appellant* faced a real chance of persecution if he was returned to Iran. The error came about, the appellant says, because the Tribunal began by first wrongly positing two categories of Christian - quiet evangelist and aggressive proselytiser. Only the latter, according to the Tribunal, were attended by a risk of persecution; the former were not at risk. It then considered only whether the appellant belonged to one or other category, concluding that the appellant either faced a chance of persecution or he did not depending on the category assigned. Consequently, the appellant was assessed not according to his individual features and claims but according to an arbitrary classification.

The problem with the categorisation approach

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

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

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

> "[B]y declaring that there is no reason to suppose that the appellants would not continue to act discreetly in the future, the tribunal has effectively broken the genus of 'homosexual males in Bangladesh' into two groups - discreet and non-discreet homosexual males in Bangladesh.
>
> ... consciously or unconsciously, the Tribunal directed its mind principally to the consequences of the sexual behaviour of the non-discreet members of the particular social group. Certainly, it made only passing reference to other forms of harm to members of the social group generally. And it failed to consider whether the appellants might suffer harm if for one reason or another police, hustlers, employers or other persons became aware of their homosexual identity. The perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise.
>
> If the Tribunal had placed the appellants in the non-discreet group, it appears that it would have found that they were likely to be persecuted by reason of their

membership of that group. Conversely, by placing the appellants in the discreet group, the Tribunal automatically assumed that they would not suffer persecution. But to attempt to resolve the case by this kind of classification was erroneous. It diverted the tribunal from examining and answering the factual questions that were central to the persecution issues.

... Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. ... But neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. ... It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether *this individual applicant* has a 'well-founded fear of being persecuted for reasons of ... membership of a particular social group'." (emphasis in original, footnote omitted)

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

"There are dangers in creating and applying a scheme for classifying claims to protection. Those dangers are greatest if the classes are few and rigidly defined. But whatever scheme is devised, classification carries the risk that the individual and distinctive features of a claim are put aside in favour of other, more general features which define the chosen class.

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

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

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

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

33 Whether or not the Tribunal was right about the appellant's beliefs, or had any evidence

for its conclusion (a matter I will consider later), it did consider whether the appellant would refrain from certain forms of practice of Christianity out of a fear of persecution. Having rejected the appellant's claims of past persecution, the Tribunal was entitled to proceed on the basis of its acceptance or rejection of the appellant's claims about his current and intended practice of Christianity.

When does classification lead to error?

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

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

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

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

38 Where, as in this case, the "country information" is in summary form at a medium level of generality - as may be expected in departmental reports - and there is no past persecution relied on or accepted by the Tribunal, it will be necessary to make a judgment as to whether

the anticipated behaviour of the applicant is enough to raise a real chance of persecution. This assessment may involve consideration of a spectra of the practice, conduct or outward display that might attract persecution for a Convention reason. But the assessment must be grounded in the actual situation of the applicant and the evidence he or she presents to the Tribunal. And, as Gummow and Hayne JJ noted in *Appellant S395/2002*, the fewer the categories of kinds of behaviour employed for making this assessment, the greater the likelihood of falling into the error of merely classifying the applicant according to a false dichotomy and ignoring the gradations within both the evidence of country conditions and the applicant's behaviour[14].

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

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

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

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

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

The error in this case

40 As I have explained, the error involved in categorisation and classification occurs only where that process of assessment is inapt to the application….

41 The process of categorisation and classification is not what renders the decision in excess of jurisdiction. It is the use of that process to direct the focus of the Tribunal's assessment to something other than the issue of protection obligations owed to the applicant. The task of the Tribunal is mandated by the *Migration Act*. If the method adopted by the Tribunal prevents the carrying out of that task, the Tribunal's decision will be attended by error. As Gummow and Hayne JJ said in *Appellant S395/2002*[18]:

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

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

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

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

45 It is difficult, even linguistically, to distinguish between evangelism and proselytising. *The Macquarie Dictionary* defines "proselyte" as "one who has come over or changed from one opinion, religious belief, sect, or the like to another; a convert" and "proselytise" is the verb "to make a proselyte of; convert"[19]. To "evangelise" is, according to the same source, "to preach the gospel to" or "to convert to Christianity". "Evangelist", "evangelism" and other related words derive from the word "evangel" that refers to the teachings of and about Jesus Christ, primarily contained in the four gospels of the New Testament in the Christian Bible. So, any activity related to "evangel" is the preaching, sharing, telling or proclaiming of the Christian faith. In the context of a Muslim community, controlled by an Islamic regime and Muslim authorities, it is difficult to imagine how the Tribunal concluded that the appellant could operate as any kind of evangelist without this being perceived as an intention to "influence a Muslim to convert faith". But it is enough that the Tribunal had no basis in the "country information" or any other evidence before it for its assumption that a category of Christians who engaged in "quiet sharing of one's faith as an evangelist" either existed or was recognised by the authorities in Iran.
46 The second part of the error by the Tribunal was in its application of the categorisation to the appellant, that is, the classification of the appellant by reference to the categories presumed. There are two problems with this aspect of the decision. The Tribunal came to unsubstantiated conclusions about the appellant's Christian beliefs and, by classifying the appellant according to its erroneous categories, failed to ask itself important questions about the appellant's chance of facing persecution in Iran.
47 A number of the conclusions of the Tribunal were unsupported by evidence. The Tribunal referred to and relied on the identification of the denomination of Christianity to which the appellant belongs. The Tribunal said that it was not "a denomination that exhorts its adherents to proselytize". The Tribunal referred at this point to a letter from the appellant's spiritual adviser to the effect that the tenets of the Uniting Church were similar to those of the church in West Timor in which the appellant had been baptized. Insofar as Reverend Watts said anything in that letter about the content of the tenets of the faith that the appellant had embraced, he said:

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

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

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

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

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

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

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

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

Conclusion

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

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

[5] (2003) 216 CLR 473.
[6] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 490 [43], 492 [50], 493 [51].
[7] *Appellant S395/2002* (2003) 216 CLR 473 at 501-502 [83].
[8] *Appellant S395/2002* (2003) 216 CLR 473 at 494-495 [55]-[58].
[9] *Appellant S395/2002* (2003) 216 CLR 473 at 499-500 [76]-[77].
[10] *Appellant S395/2002* (2003) 216 CLR 473 at 503 [90].
[11] *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678; 205 ALR 487.
[12] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.
[13] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854; 206 ALR 242.
[14] *Appellant S395/2002* (2003) 216 CLR 473 at 499 [76].
[15] *Appellant S395/2002* (2003) 216 CLR 473 at 499-500 [77].
….
[18] *Appellant S395/2002* (2003) 216 CLR 473 at 500 [78].
[19] *The Macquarie Dictionary*, 3rd ed (1997).
[20] *NABD v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court of Australia, 26 March 2002) per Emmett J at [27].
[21] Commonwealth Department of Foreign Affairs and Trade, *Country Profile for Use in Refugee Determination: Islamic Republic of Iran* (1996).

Kirby J. said(dissenting)

55 In Appellant *S395*/2002 v Minister for Immigration and Multicultural Affairs[22], this Court drew attention to the error of dividing applicants claiming protection as refugees[23] into a priori categories: those who, if returned to their country of nationality, might avoid persecution by acting "discreetly" and those who might not.
56 The decision in that case concerned a claim for protection on the basis of a well-founded fear of being persecuted for reasons of membership of a particular social group (homosexuals from Bangladesh). The present is a case involving a claim of well-founded fear of persecution for reasons of religion (a Muslim convert to Christianity from Iran).
57 The decision in Appellant *S395* was given after the Full Court of the Federal Court of Australia determined the present case[24]. The central question in this appeal is whether the impermissibility of the taxonomy revealed in Appellant *S395* requires the reversal of the decisions below and a reconsideration by the Refugee Review Tribunal ("the Tribunal"), freed from the postulate of the exercise of "discretion" - in this case identified as "the quiet sharing of one's faith as an evangelist [as distinct from] the aggressive outreach through proselytizing"[25].

58 Consistency with the approach adopted in Appellant *S395* requires the same outcome. The Tribunal made an error of jurisdiction. That error should have been corrected by the Federal Court. This Court should require the reconsideration of the appellant's case, absent the arbitrary classification adopted. There is no postulate in the Refugees' Convention ("the Convention")[26] that, in the exercise of the fundamental freedoms mentioned (including in respect of religion), applicants for protection must act "quietly", "maintain a low profile", avoid proselytising their views or otherwise act "discreetly" in matters so fundamental[27].
59 The Tribunal misdirected itself by imposing this classification on the facts and by failing to consider whether, in Iran, the obligation to act in such a fashion would be the result of the denial of fundamental freedoms, thereby occasioning the "well-founded fear of being persecuted" referred to in the Convention and incorporated in the *Migration Act 1958* (Cth) ("the Act"). There are further errors which I explain below

....

83 Genuineness of conversion: Yet was the appellant a "genuine" convert to Christianity? Or was his conversion opportunistic, effected so as to secure a favourable outcome to his application for a protection visa in Australia[56]?
84 Upon this subject, the second Tribunal's reasons were somewhat ambivalent and, with respect, rather ill-structured. On the one hand, the Tribunal noted that "the [appellant] is among 100 detainees in the same [detention] centre who have embraced Christianity in just eight months"[57]. Moreover, it gave weight to a report that described the economic downturn in Iran as the source of "growing numbers of illegal Iranian immigrants"[58]. Yet each of these statements, which suggest a doubt on the Tribunal's part concerning the genuineness of the appellant's conversion from Islam to Christianity, appears after the Tribunal records its finding that his application was to be considered on the basis that his conversion was genuine[59].
85 Thus, even in respect of the events that preceded the appellant's departure from Iran, the second Tribunal stated that it "accepts that the applicant befriended a Christian in Iran and that he occasionally discussed the Christian faith with him"[60]. It also accepted that, in Indonesia, he "might have been intimidated by some generalized violence against Christians ... and by some personal harassment"[61]. Whilst finding that some of his claims were not genuine (such as the letter attributed to the appellant's brother) and expressing "serious reservations about his motivations", it stated quite clearly that it "accepts ... that [the appellant] might have genuinely embraced Christianity over time"[62]; that he had been baptised in Indonesia; that he had undertaken Bible study courses by correspondence; and that he had attended religious gatherings in Indonesia and whilst in detention in Australia[63].
86 These conclusions led the Tribunal to accept that the appellant "has engaged in other religious activities as outlined by him at the hearing before this Tribunal" and that these included distribution of religious pamphlets, speaking to others privately about his faith and encouraging interested persons to attend church services[64]. Whilst raising again the question whether the appellant had converted "for convenience", the second Tribunal held back from making such a finding. On the contrary, it proceeded to assume that the appellant "has now done so", that is, embraced Christianity[65]. Upon that assumption - which cannot be questioned in this Court - the Tribunal then proceeded to consider the appellant's position, were he to return to Iran.
87 It follows that this is not a case where the Tribunal dismissed the appellant's assertion of religious conversion to Christianity. On the contrary, the acceptance that an interest existed before he left Iran; that he was baptised in Indonesia; and that he had been engaged in Christian activities whilst in detention all indicate that the case was to be approached on the footing of a "genuine" religious conversion. This footing was reinforced by a letter

provided to the Tribunal by Reverend Watts, the Uniting Church Minister serving the detention centre where the appellant was held. That letter is reproduced in the reasons of Emmett J[66]. There is no apparent reason to doubt the truthfulness of its contents:

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

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

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

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

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

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

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

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

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

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

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

96 Tenets of the Christian religion: In the Federal Court and in this Court, the appellant also complained of the reliance by the Tribunal on assumptions it had made concerning the tenets of the Christian Church with which he had become involved in Indonesia and whilst in detention in Australia. On this, the Tribunal expressed its own view, presumably on the basis of its knowledge of, or perceptions about, the Uniting Church in Australia. The Tribunal accepted specific evidence that the appellant "discussed Christianity with other detainees"[75], distributed pamphlets and encouraged others to attend church[76].
97 In the reasons of the second Tribunal, it was said[77]:

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

98 The appellant submitted that this finding, made without specific evidence, involved a procedural unfairness to him. In so far as there was evidence at all on this issue, it was contained in the statement by Reverend Watts that telling other people, specifically Muslim people, about Christian beliefs was "living out the call of Christ to share the good news with others" and "an essential part of being a Christian".
99 It might be true that, in Australia, the Uniting Church does not ordinarily proselytise "aggressively". However, a person who has converted to Christianity, as the appellant was accepted to have done, living in a country overwhelmingly constituted of adherents to a different religion, might feel a greater desire to tell others about his new beliefs. So it certainly was historically in Australia, as in England, in the case of the Protestant denominations which, in 1977, combined in the Uniting Church in Australia.

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

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

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

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

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

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

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

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

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

And:

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

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

107 The issue for this Court is whether the approach so described constitutes jurisdictional

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

The Convention and the ground of religion

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

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

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

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

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

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

114 "Religion", in that context, connotes not simply a private belief, or lack of belief, kept secret to the person concerned. Necessarily, it involves manifestations, and the practice of such a belief, including where relevant in community with others[93]. So much follows

from nothing more than the use in the Convention of the word "religion".
115 This conclusion is reinforced by the developments of international law respecting freedom of religion as a basic human right[94]. Thus, Art 18 of the UDHR provides that:

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

116 Article 18 of the ICCPR is in similar terms, making it clear that the right there expressed is subject "only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"[95].
117 In a General Comment on Art 18 of the ICCPR[96], the United Nations Human Rights Committee adopts a wide interpretation of the right of the individual to manifest his or her religion. Such manifestation extends to worship; ritual and ceremonial acts; customs; the wearing of distinctive clothing; use of particular languages; choice of leaders; establishment of schools; and "the freedom to prepare and distribute religious texts or publications". In the General Comment, the display of symbols, the conduct of public worship and other observances are included in the concept of "religion". The situation of religious minorities in Iran, as described in the uncontested country descriptions before the second Tribunal, fall far short of this elaboration of the activities inherent in freedom of religion as understood in international human rights law.
118 The general statements in the UDHR and ICCPR have been further elaborated, relevantly, by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proclaimed by the General Assembly of the United Nations in 1981[97]. This Declaration states that the "freedom of thought, conscience and religion" includes the manifestation of a religion or belief in "worship, observance, practice and teaching"[98]. It includes, relevantly, freedom to "worship or assemble"; to "write, issue and disseminate relevant publications"; to "teach a religion or belief in places suitable for these purposes"; and to "establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels"[99].
119 There are similar elaborations of the freedoms inherent in manifesting one's religion or beliefs in regional human rights instruments[100]. The law, social practices and attitudes to the manifestation of minority religious beliefs in Iran, as described in the uncontested record, seriously conflict with these virtually universal statements of what is involved when international instruments, such as the Convention, refer to the protection of individual rights with respect to "religion".
120 The connection between the reference in the Convention to "religion" and this body of international law is acknowledged in the *Handbook on Procedures and Criteria for Determining Refugee Status*, issued by the United Nations High Commissioner for Refugees[101]. According to that Handbook, a prohibition on religious worship in private or in public and "serious measures of discrimination" imposed on religious grounds enliven the operation of the Convention. It is now well established that the Convention "protects not only religious beliefs, but also religious manifestations"[102]. What is at stake is not simply the defence of private thoughts and opinions. Of their nature, such internal processes can usually be maintained whatever the oppressive efforts of State power. International instruments, such as the Convention, are concerned with protecting the individual's public activities in interaction with others. This includes being open about one's religion and discussing it freely with others whilst at the same time respecting the rights of

others to adhere to a different religion or no religion at all.
121 The foregoing approach to the Convention is further confirmed by decisions of the European Court of Human Rights in elaboration of Art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[103]. In *Kokkinakis v Greece*[104], that Court affirmed that religious freedom includes the freedom:

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

122 Similarly, in *Metropolitan Church of Bessarabia v Moldova*[105], the same Court insisted on the right of those of a particular belief to be allowed to "associate freely, without arbitrary interference by the State". This, it was held, was "indispensable to pluralism ... and is therefore at the very heart of the protection". Mere "tolerance", in the sense of ignoring a minority religious belief whilst confirming legal and State protection for others, was said to be no substitute for "recognition", since only recognition is capable of conferring enforceable rights on those concerned[106].
123 The idea that individuals have *rights* to religious freedom, and to change or abandon an earlier religion or religion in general, is thus one that lies at the heart of the word "religion" appearing in the Convention. It does not give religious adherents a *carte blanche* in the manifestation of their beliefs and the practice of their religion. The assertion of their rights must be respectful of the rights of others. However, the picture of religious intolerance, and the limitations (legal and otherwise) imposed on Christian believers in Iran, especially Muslim converts to Christianity, falls far short of the notion of religious freedom expressed in international law[107], to which the Convention is intended to contribute.
124 Postulate of "quiet exercise of faith": Against this understanding of the purpose and content of the reference to "religion" in the Convention, it remains to consider the approach of judicial and other authorities to the suggestion that a "fear" of persecution for reasons of religion will not be "well-founded" if it can be avoided in the country of nationality by the exercise of "discretion" on the part of the putative refugee.
125 Generally speaking, scholars and courts that have considered the identified grounds in the Convention have rejected the notion that such is the content of the freedoms referred to there[108]. Their rejection is explained by reference to the fact that, were it otherwise, the Convention would itself become an instrument to diminish, instead of to protect and enhance, the nominated freedoms. Courts, tribunals and other decision-makers in countries of refuge would become, effectively, enforcers for those who diminish the identified freedoms instead of the protectors of those who claim that their freedoms are at risk[109].
126 In *Fosu v Canada (Minister for Employment and Immigration)*[110] an applicant for refugee status complained of being arrested by authorities in Ghana under a law that prohibited public manifestations of the beliefs of Jehovah's Witnesses. Responding to the decision of the refugee tribunal in Canada that the applicant could pray to God and study the Bible in Ghana, Denault J stated that this was an "unduly limited" conception of the practice of "religion" protected by the Convention[111]:

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

implementation of serious discriminatory policies against persons on account of the practice of their religion."

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

128 In Australia, individual judges of the Federal Court have adopted an approach similar to the Canadian courts. Thus in *Woudneh v Inder*[115], Gray J, in the context of the exercise of religion concluded that the "mere fact of the necessity to conceal would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds". There are similar decisions of other judges[116]. In respect of freedom from political persecution of a political dissenter, also envisaged in the Convention, Madgwick J, in *Win v Minister for Immigration and Multicultural Affairs*[117], expressed the point succinctly in words that I would endorse:

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

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

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

130 The United States courts have emphasised the importance for religious freedom of the entitlement to practise the religion openly[119]. In *Bucur v Immigration and Naturalization Service*[120], the Court of Appeals (7th Circuit) observed that an essential feature of religious "persecution" is the attempt it involves to preclude those who espouse a particular religion from practising it openly. Doing so challenges the power of those who wish to preserve their own dominance, or the dominance of their ideas, which will only give way to the diversity inherent in freedom when those ideas are publicly perceived to be subject to differing ideas, beliefs and conduct[121].

131 According to this view, to reinforce in any way the oppressive denial of public religious practices (or any other feature of freedom essential to human rights) is to participate in the violation of the purposes that the Convention is intended to uphold[122].

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

132 In the South African Constitutional Court[125], Sachs J has explained with great clarity how a well-established means to prevent the attainment of fundamental human rights is to pressure the oppressed to be invisible, so that they continue to be regarded as shameful, powerless, exceptional and dangerous to the majority. No Australian tribunal or court has the authority or power *directly* to inflict such a wrong on a national of another country. Nor should it do so *indirectly* by imposing such a test for the determination of whether a claimed "fear of persecution" is unfounded, because it could be avoided by subscribing to the oppression that diminishes one of the individual's core freedoms. I agree with Mahoney JA of the Canadian Federal Court of Appeals that[126]:

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

Conclusion: jurisdictional error is shown

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

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

135 Secondly, the Tribunal did not consider the possibility that the situation in Iran might change for the worse for converts. Self-evidently, Iran and its region are volatile, not static. As they have demonstrated, religious forces are capable of asserting themselves. At least arguably, the Shari'a law presents risks to apostates in Iran that cannot be treated as trivial unless a firm conclusion is reached that the "conversion" was opportunistic and would be safely shed upon return, and that in Iran, such a "conversion" would not become known at all and so result in no well-founded fear of persecution. No such conclusion was made in the appellant's case. In reviewing a claim based on apostasy, the Court of Appeals (7th Circuit) has stated that the formalities of conversion and even the sincerity of beliefs is not what is ultimately critical, but rather "what would count as conversion in the eyes of an Iranian religious judge"[128]. In the appellant's case, the Tribunal held back from making the necessary findings. It gave the appellant the benefit of the doubt as to his conversion: a course supported by the evidence. It did not address the resulting issue of the fear of the appellant in Australia having regard to the possible reactions of officials in Iran.

136 Thirdly, there is the appellant's complaint of imputing to an adherent to the Uniting Church, tenets of his religion that appear contrary to the evidence of its Minister about the

Christian duty to share the message of Jesus with those presently outside his religion.
137 I will set these three errors to one side. I can adopt this course because the outcome in this case, in my view, is clearly governed by the error of the second Tribunal in its approach to the suggestion that the appellant's fear of persecution was not "well-founded" because he could, and would, avoid that outcome by following "the quiet sharing of [his faith]", if returned to Iran and by refraining from what authorities there might regard as "the aggressive outreach through proselytizing".
138 The error of postulating self-censorship: The fundamental error of the second Tribunal in this case is similar to that identified by this Court in *Appellant S395*. It lay in the second Tribunal's conclusion that "a distinction can be drawn" between "the quiet sharing of one's faith" and aggressive proselytising and in its stated belief that, if returned to Iran, the appellant would adhere to the former classification and avoid the latter, not because of fear of persecution by the Iranian authorities but because that was the kind of Christianity he had accepted.
139 The inter-connectedness of the taxonomy applied by the second Tribunal and its prediction of how the appellant *would* conduct himself if returned to Iran are critical. Without the *a priori* classification ("quiet sharing of one's faith" against "aggressive outreach through proselytizing"[129]), the second Tribunal would not have asked, and decided, the second question of what the appellant *would* do if returned to Iran. Thus, the classification of "discreet" conduct was accepted, although this is erroneous as this Court later demonstrated in *Appellant S395*. The classification has no foundation in the Convention. It is destructive of the achievement of the Convention's purpose to uphold a fundamental human right. It diverts attention from the real question posed by the Act, and the Convention, namely whether there is a fear of persecution in the applicant for a Convention reason and whether that fear is "well-founded" in all of the circumstances.
140 Yet can it be said (as the majority in this Court holds) that the identified classification is ultimately immaterial, so that the real issue depends on the factual finding made by the Tribunal as to how this particular appellant would "choose to" conduct his religion if he were returned to Iran, as a Christian convert[130]? The joint reasons conclude that it is possible to divorce the uncontested oppressive features of the Iranian State in the matter of religion from the prediction of how the appellant himself would feel about possible persecution in Iran and how he would behave, as an apostate, if returned to that country. With all respect, this approach involves a feat of unrealistic mental gymnastics.
141 The notion that the appellant, upon return to Iran, would act discreetly, keep a "low profile", avoid "aggressive outreach" and "quietly share his faith" might be uncontestable in this Court. However, the idea that he would do so because of his personal "choice"; the tenets of the Uniting Church in Australia; or the pattern of his conduct whilst in the artificial circumstances of immigration detention in this country is fanciful. With the law of apostasy hanging over him, and the chance of murder or disappearance in prospect now, or in unstable conditions in the future, the risk of his freely practising his religion as he chooses would be minuscule. But that was not the question that the Tribunal was required to address. That question, which it failed to consider in the correct way, was whether the appellant's propounded fear was "well-founded", given the uncontested evidence that the Tribunal received of the situation of conversion in Iran.
142 The Tribunal is not entirely at fault in the approach which it took and the conclusion that it reached. The supposed *a priori* classification that it endorsed was adopted without the benefit of this Court's decision in *Appellant S395*. Moreover, it was encouraged by some of the language of the DFAT country profile (although not, it should be said, repeated in the United States material or in that of the High Commissioner for Refugees).
143 Following the decision in *Appellant S395*, it is necessary to rid this area of decisional

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

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

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

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[22] (2003) 216 CLR 473.

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

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

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

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

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

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

[57] Decision of the second Tribunal at 13.
[58] Decision of the second Tribunal at 14.
[59] Decision of the second Tribunal at 12.
[60] Decision of the second Tribunal at 7.
[61] Decision of the second Tribunal at 9.
[62] Decision of the second Tribunal at 10.
[63] Decision of the second Tribunal at 10.
[64] Decision of the second Tribunal at 11.
[65] Decision of the second Tribunal at 12.
[66] [2002] FCA 384 at [13].
[67] Decision of the second Tribunal at 15.
[68] Kirby, "The High Court and the death penalty: Looking back, looking forward, looking around", (2003) 77 *Australian Law Journal* 811 at 817-819.
[69] Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23.
[70] Done at New York on 15 December 1989, [1991] *Australian Treaty Series* No 19 ("Second Optional Protocol").
[71] *Extradition Act 1988* (Cth), s 22(3)(c).
[72] cf *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC).
[73] [2003] FCAFC 44 at [21].
[74] *WAHI* [2003] FCA 908 at [38].
[75] Decision of the second Tribunal at 13.
[76] Decision of the second Tribunal at 11.
[77] Decision of the second Tribunal at 15-16.
[78] Decision of the second Tribunal at 13.
[79] Reasons of Gleeson CJ at [9]; joint reasons at [155].
[80] Decision of the second Tribunal at 13.
[81] Decision of the second Tribunal at 13.
[82] Decision of the second Tribunal at 13.
[83] Decision of the second Tribunal at 15.
[84] Convention, Preamble, par 1.
[85] Convention, Preamble, par 2.
[86] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231-232, 296-297.
[87] *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 639 per Lord Steyn.
[88] Parish, "Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection", (2000) 22 *Cardozo Law Review* 223 at 258.
[89] Steinbock, "Interpreting the Refugee Definition", (1998) 45 *UCLA Law Review* 733 at 736. See also Hall, "Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law", (1998) 73 *Washington Law Review* 105; Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129 at 131-132.
[90] Harvey, "The Right to Seek Asylum in the European Union", (2004) 1 *European Human Rights Law Review* 17 at 20, citing Hathaway, *The Law of Refugee Status*, (1991) at 104-105.
[91] Harvey, "The Right to Seek Asylum in the European Union", (2004) 1 *European Human Rights Law Review* 17 at 21.
[92] Musalo, "Claims for Protection Based on Religion or Belief", (2004) 16 *International Journal of Refugee Law* 165 at 169.
[93] *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at

550 [5].
[94] Anker, *Law of Asylum in the United States*, 3rd ed (1999) at 403-404.
[95] ICCPR, Art 18.3.
[96] United Nations, Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, (1993) at [4].
[97] United Nations, General Assembly Resolution 36/55 (25 November 1981).
[98] Art 1.1.
[99] Art 6(a), (d), (e), (i).
[100] See European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art 9.2; American Declaration of the Rights and Duties of Man (1948), Art III; American Convention on Human Rights (1969), Art 12; Arab Charter on Human Rights (1994), Art 27; African Charter on Human and Peoples' Rights (1981), Art 8; Lester and Pannick, *Human Rights Law and Practice*, 2nd ed (2004) at 324-334 [4.9.3]-[4.9.14]; *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 at 824 [31].
[101] (1992) at [71]-[72]; Vevstad, *Refugee Protection - A European Challenge*, (1998) at 73-74.
[102] Johnson, "Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?", (1996) *Brigham Young University Law Review* 757 at 764.
[103] See Lester and Pannick, *Human Rights Law and Practice*, 2nd ed (2004) at 323-334 [4.9.1]-[4.9.14].
[104] (1993) 17 EHRR 397 at 418.
[105] (2002) 35 EHRR 13 at [118].
[106] (2002) 35 EHRR 13 at [129].
[107] See also *Murphy v Ireland* [2003] ECHR 352 (10 July 2003) at [65].
[108] See Hathaway, "The Michigan Guidelines on Nexus to a Convention Ground", (2002) 23 *Michigan Journal of International Law* 211 at 213.
[109] Dauvergne and Millbank, "*Before the High Court: Applicants S396/2002 and S395/2002*, a gay refugee couple from Bangladesh", (2003) 25 *Sydney Law Review* 97 at 110; Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia", (2002) 26 *Melbourne University Law Review* 144 at 176-177; Kendall, "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?", (2003) 15 *International Journal of Refugee Law* 715.
[110] (1994) 90 FTR 182.
[111] (1994) 90 FTR 182 at [5].
[112] *Husseini v Minister of Citizenship and Immigration* [2002] FCT 177; *Sadeghi-Pari v Canada* [2004] FCT 282 at [29].
[113] (2000) 182 FTR 47.
[114] See also von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law*, (2002) at 31.
[115] Unreported, Federal Court of Australia, 16 September 1988 at 19.
[116] eg *Minister for Immigration and Multicultural Affairs v Zheng* [2000] FCA 50 at [41] per Hill J, [57] per Carr J.
[117] [2001] FCA 132 at [18]. See also *Omar v Minister for Immigration and Multicultural Affairs* (2000) 104 FCR 187 at 200 [42].
[118] 980 F 2d 1129 at 1133 (7th Cir, 1992).
[119] *Najafi v Immigration and Naturalization Service* 104 F 3d 943 at 949 (7th Cir, 1997).
[120] 109 F 3d 399 at 405 (7th Cir, 1997).
[121] See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 738, 748.
[122] See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 740.

[123] See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 739.
[124] Decision of the second Tribunal at 15.
[125] *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* (1999) (1) SALR 6 (CC) at [110], [126]. See Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 736-737.
[126] *Sabaratnam, Thavakaran v Minister for Employment and Immigration*, Federal Court of Appeals (Canada) No A-536-90, 2 October 1992, at 2 per Mahoney JA, cited in Kendall, (2003) 15 *International Journal of Refugee Law* 715 at 739-740.
[127] See *SGKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 44 (special leave to appeal refused 14 August 2003: [2003] HCATrans 313); *WAHI* [2003] FCA 908 at [37]; *VFAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 367 at [36]; Anker, *Law of Asylum in the United States*, 3rd ed (1999) at 403-404.
[128] *Bastanipour* 980 F 2d 1129 at 1132 (7th Cir, 1992).
[129] Decision of the second Tribunal at 15.
[130] Reasons of Gleeson CJ at [10]; joint reasons at [166].
[131] *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577-578 [191]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 101-102 [146], 114 [186].

Hayne and Heydon JJ. said:

150 The determinative issue in the appeal to this Court is whether the Tribunal addressed the fundamental question that arose in its review of the decision to refuse the appellant a protection visa. That question was: did the appellant have a well-founded fear of persecution on the ground of religion? The appellant contended that the Tribunal did not address that question. He submitted that the Tribunal had sought to categorise the way in which he expressed his belief, with insufficient regard to his individual circumstances, and had asked whether he could avoid persecution while practising his religion in a manner consistent with his core beliefs. He submitted that the Tribunal had thus committed a jurisdictional error similar to the error identified in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[134], decided by this Court after the primary judge and the Full Court decided the present matter.
151 The Tribunal did not ask itself a wrong question[135]. It considered whether the appellant had a well-founded fear of persecution if he returned to Iran. It did not ask (as had been the case in *Appellant S395/2002*) whether it was possible for the appellant to live in Iran in such a way as to avoid adverse consequences. To explain why that is so, it is necessary to say something more about the claims which the appellant made and about the Tribunal's decision.

The appellant's claims and the Tribunal's decision
152 The central claim made by the appellant was that, as a convert to Christianity, he would be regarded as an apostate in Iran and, for that reason, would face persecution in that country. He sought to amplify that claim by reference to certain events which he said had occurred before he left Iran, but the Tribunal did not accept that those events had happened, or that he had been "pursued by the authorities [in Iran] for any reason given by him or for any other Convention reason". Rather, the Tribunal accepted that the appellant had been baptised while he was in Indonesia, that he had thereafter undertaken a Bible study course by correspondence, and that he had attended religious gatherings, both in Indonesia and while in immigration detention in Australia. In addition, despite what the Tribunal

described as "some serious reservations about the genuineness" of the appellant, it accepted that the appellant had engaged in other religious activities while in detention in Australia including distributing pamphlets, speaking to others privately about his faith, and encouraging interested persons to attend church services held in the detention centre.

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

….

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

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

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

….

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

….

160 When reviewing a refusal to grant a protection visa, the question for the Tribunal must always be whether the particular applicant has a well-founded fear of persecution (as persecution is now to be understood[143]) for a Convention reason. If the applicant fears persecution for a Convention reason, examining whether that fear is well founded requires the Tribunal to decide whether there is a real chance that the applicant would suffer persecution for a Convention reason. As pointed out[144] in *Chan v Minister for*

Immigration and Ethnic Affairs, reference to a real chance of persecution must not be substituted for, or be permitted to obscure the content of, the test prescribed in the Convention - whether an applicant holds a well-founded fear of persecution. It is sometimes convenient nonetheless to use the expression "real chance" as a shorthand reference to the nature of the factual inquiry being made.

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

162 In *Appellant S395/2002*, the Tribunal was held to have erred by dividing the genus of homosexual males in Bangladesh into two groups - discreet and non-discreet homosexual males. That led, in that case, to the Tribunal assigning the appellants to the former group, without it considering how the appellants wished or intended to behave if returned to Bangladesh. Moreover, the classification which was adopted was one which appeared[147] to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. More fundamentally, however, the reasoning adopted by the Tribunal in that case revealed that it had not made the essentially individual and fact-specific inquiry which is necessary: does the applicant for a protection visa have a well-founded fear of persecution for a Convention reason?

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

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

165 In assessing whether there was a real chance of the appellant being persecuted for a Convention reason, it was essential for the Tribunal to consider the material it had available about conditions in Iran. The information distinguished between those "who go about their devotions quietly" and those who "actively seek attention, or who are engaged in conspicuous proselytization". Applying such a distinction may well be difficult. The two classes are distinct but it may not always be possible to describe an individual's behaviour

as falling wholly within one class rather than the other. It follows that there may be cases in which it would be difficult for a decision-maker to choose between the two as an accurate and complete factual description of past or future patterns of behaviour. But the proceedings in the courts below, and on appeal to this Court, were not directed to the sufficiency or accuracy of the Tribunal's fact finding. Rather, the proceedings were necessarily directed to identifying whether there was jurisdictional error. In that respect, attention must be focused upon the findings which the Tribunal made and the reasoning it adopted.

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

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

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

169 No jurisdictional error was demonstrated….

[134] (2003) 216 CLR 473.

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

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

….

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

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

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

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

…..

[143] s 91R.

[144] (1989) 169 CLR 379 at 389 per Mason CJ, 398 per Dawson J, 407 per Toohey J, 429 per McHugh J. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191

CLR 559 at 571-575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
[145] *Guo* (1997) 191 CLR 559 at 575.
[146] (2003) 216 CLR 473 at 499 [75] per Gummow and Hayne JJ.
[147] (2003) 216 CLR 473 at 501-502 [83] per Gummow and Hayne JJ.

Note the treatment of risk of persecution on the grounds of religion by the Full Court (Lee, Cooper and RD Nicholson JJ.) in W441/01A v MIMA [2002] FCA 453 where the Tribunal decision involved a failure to deal with a wider question of risk of persecution than the one which it had formulated i.e public worship by a convert vis-à-vis proselytising. The Court said:

10 The appellant in his application for a protection visa claimed that he had a well-founded fear of persecution for reasons of religion if he returned to Iran. He claimed that he was an Armenian Catholic, as had his parents been when they migrated to Iran from Russia. It was his evidence that in 1979, post the revolution in Iran, his family, including himself, were pressured to convert to Islam, which they did. Thus, at the age of twelve, he became a Shi'ite Muslim. He gave further evidence that upon his attaining his majority at eighteen, he took steps in Iran directed towards reverting to Christianity and to his practising as an Armenian Catholic.
11 The RRT was not satisfied that while he was in Iran the appellant actually converted from Islam to Christianity. That is, it was not satisfied that he became an apostate prior to his leaving Iran. However, the RRT was satisfied that since arriving in Australia, the
…
16 The question before the RRT was not limited to whether or not the appellant would be at risk of persecution for proselytising amongst Muslims if he returned to Iran. Such a formulation fails to address the wider question of whether the appellant who, as he says before this Court, is known as a Shi'ite Muslim in Iran could, if he returned to Iran, without persecution publicly practice his new faith as an Armenian Catholic by attending services in the ordinary way at the Armenian Catholic Church as part of his religious observance.
17 The RRT in its reasons does not specifically address the wider question. When it finds that the appellant would "maintain a low profile", it does so in the context of refraining from engaging in proselytisation. It then uses the following part of the DFAT report :

> "... Those who convert without making it publicly known and who keep a low profile, are not subjected to harassment. ...""

to ground the finding that he could practice his religion, although being apostate, without harassment because he would adopt a low profile. The DFAT report however uses the notion of keeping a low profile to mean something less than public practice of the new faith and something different from proselytising. Indeed, the DFAT report of 11 January 1996 specifically asserts that those who convert and publicly practice their new faith can be subject to harassment. Counsel for the respondent conceded that the reference described could amount to persecution for the purpose of the Convention. The later report of March 1996 also maintains the distinction between "proselytising" at one extreme and the other extreme of maintaining "a very low profile" by persons "who worship privately and maintain a low profile". The report does not deal with the consequences of public worship

by converts, as for example, by the attendance at religious services at the Armenian Catholic Church without the worshipper being involved in any conduct which was regarded as proselytising.
18 In all the circumstances, we are satisfied that the RRT, in assessing the risk to the appellant of persecution on account of his Christian beliefs, impermissibly limited its assessment of the risk of persecution to the likelihood of the appellant being persecuted for proselytising as an apostate if he returned to Iran. There was material in the DFAT report of 11 January 1996, which the RRT accepted and relied upon, dealing with public practice of a new faith which, if it applied to the circumstances of the appellant, may have given support to his claim to a well-founded fear of persecution for reasons of religion. The RRT did not assess the risk of persecution to the appellant by reference to that material…

An appeal from the judgment in [2002] FCA 982 was allowed by the Full Court (Spender Dowsett and Selway JJ.) in SGKB v MIMIA [2003] FCAFC 44 76 ALD 381 on the basis that his fear of persecution by reason of discovery or exposure of the Appellant's religious conversion as distinct from his disclosure of that conversion were not considered by the Tribunal, which had the effect that it had not applied the correct test of well-founded fear. The Court said:

3 The appellant initially claimed that he held such a fear because of his political opinions and because of activities engaged in by him in support of such opinions whilst in Iran. At a relatively late stage in proceedings, he disclosed that he had been converted to Christianity whilst in Australia and claimed that he had a well-founded fear of persecution because of his conversion. He appeals only against that aspect of the judgment below which dealt with his claimed fear of religious persecution. However the Tribunal's view of his earlier claim to fear political persecution may have influenced its decision concerning his fear of religious persecution. It is therefore appropriate to say something about his former claim. 8 Some time after the Tribunal hearing, he was converted to Christianity. He was baptized at the Roman Catholic Church in Woomera on 29 March 2001. He now claims to fear persecution for religious reasons, should he return to Iran. There was substantial evidence concerning the treatment of Christians in Iran, …FEAR OF RELIGIOUS PERSECUTION
13 The Tribunal accepted that the appellant had been converted to Christianity and that he feared persecution for such conversion, should he return to Iran. However it concluded that he would not be at risk of persecution and that his fear was not well-founded. The basis for this conclusion appears to have been the view that only a convert who discloses his or her conversion is likely to encounter difficulty, and that the appellant was unlikely to do so.
14 The evidence concerning religious persecution is summarized below. The summary is based on the Tribunal's reasons and those of Mansfield J. His Honour appears to have had access to the country information which was before the Tribunal. The evidence showed that:
® There is some persecution of dissident clerics (presumably Islamic) and of some religious activities.
® Christians are subject to harassment.
® Some "ethnic" Christians are treated better than Iranian Christians.

® Whilst the penalty for apostasy from Islam may be death, it is only rarely imposed. Such a sentence was last passed in early 1992 . The offender was granted a reprieve but subsequently murdered.
® Those converts from Islam "... who go about their devotions quietly are generally not disturbed ...".
® Harassment by the local mosque is more likely than harassment by the authorities.
® Converts, "... in almost all cases ..." do not experience problems unless they declare their new religious affiliation upon return to Iran.
® Converts to Christianity are generally tolerated so long as they maintain very low profiles.
® Converts working in government and revolutionary organizations face harassment and even dismissal if it becomes known that they have converted.
15 Mansfield J considered that the Tribunal had accepted "... that, if the applicant's conversion ... might become known to the authorities in Iran, he would have a well-founded fear of persecution if he returned there." Although such a finding is not express, it is probably implicit in the Tribunal's reasons. However it also found that the appellant would not draw his conversion to the authorities' attention, and that he would therefore not suffer harm. Thus, his fears were not well-founded.
16 In some ways the evidence concerning religious persecution posed more questions than it answered. The evidence indicated that a returnee to Iran who declared his or her conversion to the authorities might incur adverse consequences. This may imply that the consequences for a convert will be different, depending upon whether he or she declares the conversion to authorities upon return or the authorities find out about it by other means and at a later time. However the fact that "low profile" converts are unlikely to "... run into difficulties ..." with the authorities or with the local mosque, suggests that it is not so much the formal declaration as the extent to which such conversion is publicized which will determine the likelihood of harassment.
17 The focus upon the death penalty and the relative infrequency with which it has been imposed tends to mask the possibility of lesser forms of harassment which might amount to persecution. His Honour's finding at [51] that "... converts ... working in Government and revolutionary organisations face harassment and even dismissal if it becomes known that they have converted" demonstrates this possibility. It cannot be suggested that because the appellant focussed upon the death penalty in his letter to the Tribunal, he was not also fearful of lesser levels of harassment, motivated by his conversion. It is also of importance that the evidence disclosed the risk of harassment by the "local mosque" as well as by government authorities. Finally, whilst it may be possible for a person to practise his or her religion quietly and to refrain from informing the authorities of his or her conversion, that does not mean that the authorities will not find out about it.
18 The Tribunal was required to determine whether or not the appellant's subjective fear of persecution was well-founded. This question was to be considered in light of the decision of the High Court in Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 571-2, where six members of the Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) said:

> "An applicant for refugee status must also establish that his or her fear of persecution for a Convention reason is a 'well-founded' fear. This element adds an objective requirement to the requirement that an applicant must in fact hold such a fear. In Chan [(1989) 169 CLR 379 at 389], Mason CJ said:

'If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring.'

In the same case, McHugh J said ... that a real chance of persecution excluded a far-fetched possibility of persecution but that as little as a 10 per cent chance of persecution may constitute a well-founded fear of persecution.

Chan is an important decision of this Court because it establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent. But to use the real chance test as a substitute for the Convention term 'well-founded fear' is to invite error.

No doubt in most, perhaps all, cases ... 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. ... 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. ... 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 per cent 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."

19 In the present case the Tribunal disposed of the appellant's fear of religious persecution as follows:

"In respect of the Applicant's claim to fear persecution for having converted to Christianity, the Tribunal acknowledges that he has been baptised and has become a faithful member of the Christian group in the Seirra Compound. Having had the opportunity to make an assessment of the Applicant and his likely conduct on return to Iran, the Tribunal does not consider that the Applicant will bring his conversion to the attention of the Iranian authorities on return or subsequently. The Tribunal has closely examined the country information available, which indicates little prospect of problems with the authorities unless a returnee declares on return his new affiliation. The Tribunal has concluded that the Applicant would not suffer harm because of his conversion, if returned to Iran. The Tribunal finds that the Applicant has no basis to fear return to Iran on this ground."

20 This passage causes some concern. Firstly, the Tribunal appears to have focussed upon the question of whether the appellant might "... bring his conversion to the attention of the Iranian authorities on return or subsequently" rather than upon the possibility that the authorities might discover such conversion. It may be that this was merely a shorthand way of saying that he would practise his religion in a way which would be unlikely to bring him to the attention of the authorities. However the subsequent observation that there was "... little prospect of problems with the authorities unless a returnee declares on return his new

affiliation" suggests otherwise. Further, the evidence referred to by Mansfield J concerning government employees demonstrates that the risk of harassment may arise if the authorities find out about a conversion. The Tribunal appears to have considered only the consequences of a declaration of conversion by the appellant and not the consequences to him, should the authorities become aware of his conversion in some other way. The possibility of action by the local mosque was also not addressed.

21 Secondly, the Tribunal appears not to have considered the seriousness of the consequences to the appellant of his conversion becoming known to the authorities. The Tribunal accepted that the penalty for apostasy might be death. The evidence demonstrated other quite serious consequences, including loss of government employment. It ought to have considered whether or not the mere possibility of a death sentence, regardless of how remote that possibility might be, could itself constitute persecution. In our view, to live under the shadow of such a threat might well do so. Further, the Tribunal ought to have considered whether or not the risk of losing the opportunity of government employment was itself sufficient to constitute persecution. We say nothing about the possibility of mere harassment which appears to be an incident of practising the Christian faith rather than of conversion from Islam. His Honour considered that the appellant had not relied upon discriminatory conduct against Christians, as opposed to converts from Islam, as a justification for his fear.

22 Thirdly, the last two sentences of the paragraph quoted above suggest strongly that the Tribunal considered, not whether the appellant had a well-founded fear of persecution, but whether or not it was likely that he would suffer persecution. The two questions, although distinct, are closely related. Perhaps the Tribunal meant that its view as to the improbability of persecution led it to infer that the appellant's fear was not well-founded. However the Tribunal's apparent failure to consider the seriousness of the possible consequences of exposure suggests strongly that the Tribunal did not consider whether the appellant's fear was well-founded.

23 …. the evidence disclosed at least a theoretical possibility of the death penalty and the more than theoretical chance of discrimination in government employment. The Tribunal could not determine whether the appellant's fear was well-founded without considering those matters, balancing their gravity against the relative improbability of their occurrence. These matters and the absence of any explanation as to how the Tribunal proceeded from its finding that the appellant would not suffer harm to the conclusion that his fear was not well-founded lead us to conclude that the Tribunal failed to evaluate the objective basis of his fear. The failure to deal with the distinction between the disclosure by the appellant of his conversion and discovery of it by other means also suggests that the Tribunal has not fully appreciated the difficulties posed by the evidence. DECISION OF MANSFIELD J

24 This is an appeal from the decision of Mansfield J and not an appeal from the decision of the Tribunal. His Honour commenced his consideration of the religious aspect of the matter by observing that the Tribunal had apparently "... accepted that, if the applicant's conversion to Christianity might become known to the authorities in Iran, he would have a well-founded fear of persecution if he returned there." His Honour then referred to some of the evidence, concluding with this sentence:

> "(The Tribunal) noted that converts are generally tolerated so long as they maintain a very low profile, but converts working in Government and revolutionary organisations face harassment and even dismissal if it becomes known that they have converted."

He then noted that the appellant might have a well-founded fear of persecution by reason of his Christianity, as opposed to his conversion. The evidence certainly demonstrated

discrimination against Christians, particularly non-ethnic Christians, but as we have said, his Honour took the view that the appellant had not suggested that his fear was of such discrimination. That rather narrow approach to the problem may well be correct.
25 However Mansfield J then noted that the Tribunal had found that the appellant would not bring his conversion to the attention of the Iranian authorities and that he would not suffer harm on account of his conversion. His Honour recognized that this finding was not "... in the precise terms of the Convention ..." but concluded that this approach did not demonstrate error. It is at this point that we disagree with his Honour. For reasons which we have previously given, we consider that the Tribunal failed to appreciate the distinction between the likelihood of the appellant suffering persecution and the objective justification of the appellant's fear. In particular, we consider that the Tribunal failed to take into account the potential seriousness of the consequences to the appellant of exposure of his conversion or to consider his fear in that context. In so doing the Tribunal erred in law, applying the wrong test….(bold added)
…

In ***Minister for Immigration & Multicultural & Indigenous Affairs v VWBA*** **[2005] FCAFC 175** the Full Court (Sundberg Marshall (diss) and North JJ.) allowed the Ministers appeal from VWBA v Immigration & Multicultural & Indigenous Affairs [2005] FCA 71 (**2005) 86 ALD 78** (GrayJ.) . The principles for which ***Appellant S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs*** **[2003] HCA 71 (2003) 216 CLR 473 (*S395***) stands were set out by the majority – (1) Tribunal will err if it assesses a claim on the basis that an applicant is expected to take reasonable steps to avoid persecution if returned to his or her country of origin.- its task is to assess what the applicant will do, not what he or she should do. – (2) if the Tribunal finds that a person will act in a way that will reduce a risk of persecution that would otherwise have been well-founded, the Tribunal must consider why the person will act in that way - if it fails to do so, it commits a jurisdictional error - (3) it will err if, having found that a person will act in a way that will reduce a risk of persecution, it does not go on to consider whether the person nevertheless has a well-founded fear of persecution because, despite the conduct that reduces the risk, there is still a real risk that the person will be persecuted.

In the present case tribunal's made findings that on basis of past activity it was far more likely she would again practise Falung Gong (FG) privately and not draw attention to herself – would not be likely to engage in open public distribution of FG - public practice is not an inherent or significant component of FG - applicant could if she wished practise privately in PRC, without real risk of persecution, and without

significant restriction on her right to follow her beliefs. It was noted by the majority that in S395 RRT had said appellants had "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now" All members of the Court in S395 accepted that this was not the imposition of a requirement of discretion; the position was the same in the present cases. I was .point (2) above which was offended in S395. It was held in the present case that the RRT did ask the question posed by the second proposition – it said that the restriction involved in her decision to practise in private in order to reduce the risk of persecution, did not itself amount to persecution . The third proposition above was applied when it said based on the country information, the first applicant could, if she wished, practise privately in the PRC without real risk of persecution. It was held that Tribunal had **not** "failed to determine whether the requirement to act discreetly to avoid the infliction of harm could constitute persecution" .

Further, there was no basis to be found in S395 for the requirement enunciated by primary judge that the Tribunal determine why *the authorities* would not adversely react to a person who practised FG in private. The Tribunal did not, by failing to ask that question, ask itself the wrong question or fail to ask itself the right question. Further on a fair reading of the Tribunal's reasons derived from country information it found that the respondents would not have a well-founded fear even if their private practice was detected, because the authorities were not concerned with ordinary adherents who practised in private. The. primary judge erred in holding that the Tribunal had failed to consider whether there was a chance of adverse consequences to the respondents if their practice of FG were detected – the ultimate conclusion that ordinary adherents who practise privately are unlikely to be the subject of particular attention, assumes detection; the RRT did not fail to deal with what his Honour described as a fundamental issue . There was no jurisdictional error.

Sundberg and North JJ. said:

3 The ground upon which the respondents were successful before the primary judge related to the Tribunal's conclusion that they would be likely to practise Falun Gong privately in China, and that this would not be likely to render them liable to persecution by the authorities. The respondents claimed that the Tribunal had failed to determine whether the

requirement to act discreetly to avoid the infliction of harm could constitute persecution. This was claimed to be obnoxious to the High Court's decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (*S395*). The Tribunal made its determinations before *S395* was decided.

4 After quoting passages from the judgments in *S395* the primary judge said:

"38. In each of the present cases, the Tribunal found that engagement in public practice or demonstration of Falun Gong in China would attract adverse reaction from the authorities. It found that each applicant would practise Falun Gong privately and not draw attention to herself or himself. It gave much weight to the proposition that the beliefs associated with Falun Gong did not require its practise in public, or with others.

39. The Tribunal did not make a specific finding as to whether the private practise of Falun Gong would lead to avoidance of an adverse reaction from the authorities because it was unlikely to come to the notice of the authorities, or because the authorities were not concerned about private practice. Its finding that 'lower level Falun Gong practitioners or followers, are likely to attract ***relatively little*** *adverse attention' [emphasis added] suggests the former. So does its specific finding that 'a decision not to practice [sic] Falun Gong in public may be related to subjective fear of the likely consequences of such practice'. These findings suggest that, if for some reason private practice of Falun Gong were to become publicly known, it might lead to adverse consequences.*

40. In my view, the Tribunal could not determine either of these cases properly without pursuing that question. It was required to ask whether each applicant had a well-founded fear of being persecuted for reasons of political opinion (on the basis that Chinese authorities treat Falun Gong practitioners as dissenters), religion (if Falun Gong can be regarded as a religion), or membership of a particular social group (Falun Gong practitioners), if her or his Falun Gong activities came to the attention of the authorities. The Tribunal was required to ask whether the fear was well-founded in the sense that it was a substantial motivation for each applicant to keep her or his Falun Gong practice secret. If it answered these questions favourably to the applicants, the Tribunal was then required to consider whether there was a chance of adverse consequences to either applicant if her or his practice of Falun Gong were detected, and if those adverse consequences might be sufficiently serious to amount to persecution ...."

His Honour concluded that by reason of the Tribunal's failure to deal with "these fundamental issues" it had asked itself the wrong question, or failed to ask itself the right question, and that this amounted to jurisdictional error.

GROUNDS OF APPEAL

5 The Minister's grounds of appeal are as follows:

"1. In circumstances where the Refugee Review Tribunal had found as a fact that the Respondents:

1.1 would practice Falun Gong only in private; and

1.2 would not have a well-founded fear of persecution if they practised Falun Gong in private;

his Honour erred in finding that the Tribunal made a jurisdictional error in failing to ask itself whether the reason that the Respondents would not be persecuted was because it was unlikely that they would come to the notice of the authorities, or because the authorities were not concerned about private practice.

2. His Honour erred in finding that the Refugee Review Tribunal did not consider the reason that the Respondents would not have a well founded fear of persecution if they practised Falun Gong in private. On a fair reading of the Tribunal's decision, it found that

the Respondents would not have a well-founded fear of persecution even if their private practice of Falun Gong was detected by the authorities, because the authorities were not concerned with ordinary adherents who practised in private."

S395

6 Extended extracts from the majority judgments in *S395* are found in the judgment appealed from. It is unnecessary to repeat them. Rather we will set out our understanding of the propositions for which that case is authority. They are

(a) The Tribunal will err if it assesses a claim on the basis that an applicant is expected to take reasonable steps to avoid persecution if returned to his or her country of origin. The Tribunal's task is to assess what the applicant will do, not what he or she *should* do. See *S395* at [40] and [50] per McHugh and Kirby JJ and at [80] and [82] per Gummow and Hayne JJ.

(b) If the Tribunal finds that a person will act in a way that will reduce a risk of persecution that would otherwise have been well-founded, the Tribunal must consider *why* the person will act in that way. If it fails to do so, it commits a jurisdictional error. See *S395* at [43] and [53] per McHugh and Kirby JJ and at [88] per Gummow and Hayne JJ.

(c) The Tribunal will err if, having found that a person will act in a way that will reduce a risk of persecution, it does not go on to consider whether the person nevertheless has a well-founded fear of persecution because, despite the conduct that reduces the risk, there is still a real risk that the person will be persecuted. See *S395* at [56] per McHugh and Kirby JJ and at [85]-[86] per Gummow and Hayne JJ.

THE TRIBUNAL'S REASONS

7 It is necessary now to set out those parts of the Tribunal's reasons that were seen by the primary judge as disclosing jurisdictional error. The Tribunal gave separate reasons in each case. The following extracts are from its reasons in relation to the first respondent. Those in relation to the second respondent are substantially the same.

"This leaves the issue of what may happen to the applicant if she returned to PRC and wished to practice Falun Gong. Country information above suggests if she was to engage in public practice or demonstration of Falun Gong in PRC, it would be seen as defiance of the law and would be likely to draw adverse reaction from PRC authorities. The Tribunal is however satisfied the chance of the applicant undertaking such activity is remote. In reaching this conclusion, the Tribunal notes she had not, when living in the PRC previously engaged in public practice of Falun Gong after the movement was banned, but had practised in private. The Tribunal accordingly finds it is far more likely she would again practise Falun Gong privately, and not draw attention to herself. Similarly the Tribunal is satisfied that she would not be likely to engage in open public distribution or promotion of Falun Gong if she was to return to PRC.

Whilst a decision not to practise Falun Gong in public may be related to subjective fear of the likely consequences of such practice, the Tribunal notes the teachings of the founder of the Falun Gong movement (Li Hongzhi) state Falun Gong does not need to be practised in public, or with others, but can be practised privately.

The Tribunal is satisfied that whilst open or public practice and promotion of Falun Gong would draw the attention of PRC authorities, public practice is not an inherent or significant component of Falun Gong, and the applicant does not need to practise publicly in order to pursue her beliefs. Based on the country information set out above, which suggests ordinary adherents who practise privately are unlikely to be the subject of particular attention, the Tribunal is also satisfied the applicant could - if she wished - practise privately in PRC, without real risk of persecution, and without significant

restriction on her right to follow her beliefs and that such restriction does not amount to persecution for the purposes of the Convention.

Whilst the Tribunal accepts the applicant may have subjective fears about the prospect of further police questioning if returned to the PRC, it is not satisfied she faces a real chance of jail or torture or mistreatment of sufficient magnitude to constitute 'serious harm'."

THE COUNTRY INFORMATION

8 The "country information" referred to in the first and third paragraphs at [7] is the same material. It bears out what the Tribunal derived from it about those who practise Falun Gong in public places, and those who have a leadership or organisational role as opposed to "ordinary adherents" who practise privately

…

FIRST GROUND OF APPEAL

11 We turn now to whether the Tribunal's approach offended any of the propositions set out at [6]. As to the first, the Tribunal did not require or even expect the respondents to take reasonable steps to avoid persecution. Nor did it purport to determine what they should do upon return. Rather it found, taking the first respondent as the example, that it was likely "she would again practise Falun Gong privately, and not draw attention to herself". It went on to say it was also satisfied that "she would not be likely to engage in open public distribution or promotion of Falun Gong" if she were to return. These findings were based on an earlier finding that the first respondent, when living in the PRC, had not engaged in public practice of Falun Gong after the movement was banned, but had practised in private. In *S395* the Tribunal said the appellants had "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now". All members of the Court accepted that this was not the imposition of a requirement of discretion. The position is the same in the present cases.

12 The second proposition at [6] is the one that was offended in *S395*. The Tribunal had failed to ask why the appellants in that case would live in a way that would reduce the risk of persecution. The majority did not need to consider what kinds of answers to the question would have meant that a person was a refugee. In particular, their Honours did not decide whether, if the Tribunal were to find that a person had modified his or her behaviour under the influence of a well-founded fear of persecution, and as a result of the modification would no longer have that fear, the person would without more be a refugee. In the present cases, the Tribunal did ask the question posed by the second proposition. It first said, in the second paragraph at [7], that a decision not to practise in public "may be related to subjective fear of the likely consequences of such practice", and went on to say that Falun Gong does not need to be practised in public, or with others, but can be practised privately. At this stage, the Tribunal may have been speaking generally, and not specifically of the respondents. However, in the third paragraph it turned to the first respondent herself, and said that the restriction involved in her decision to practise in private in order to reduce the risk of persecution, did not itself amount to persecution.

13 The third proposition was applied by the Tribunal in the second sentence of the third paragraph in [7]. It said that based on the country information, the first applicant could, if she wished, practise privately in the PRC without real risk of persecution.

14 Accordingly the Tribunal did not make any of the errors identified in *S395*.

15 The main issue argued before the primary judge was purportedly based on *S395*. According to his Honour at [25], it was whether the Tribunal had "failed to determine whether the requirement to act discreetly to avoid the infliction of harm could constitute persecution". As indicated at [12], the Tribunal did determine that point, and decided that the "restriction" of practising privately did not amount to persecution. That should have

been the end of the matter. However the primary judge criticised the Tribunal for not making a specific finding as to the reason why the authorities would not react adversely to private practice. Was it because the private practice was unlikely to come to the notice of the authorities, or because the authorities were not concerned about private practice? The source of this requirement is not apparent to us. It does not derive from *S395*. The "why" question there was the second proposition at [6], namely that if a person will act in a way that will reduce a risk of persecution that would otherwise have been unfounded, the Tribunal must ask why *the person* will act in that way. Neither that case nor any other source to which our attention was drawn posits a requirement that the Tribunal determine why *the authorities* would not adversely react to a person who practised Falun Gong in private. The issue for decision under s 36 of the *Migration Act* 1958 is whether the decision-maker is satisfied that an applicant has a well-founded fear of persecution. If no such fear exists, the *reason* for its absence is not relevant to the decision to grant or refuse a visa, though a Tribunal would do no wrong in exposing the reason.

16 Accordingly the primary judge erred in saying that the Tribunal could not determine the cases properly without ascertaining the authorities' reason for not reacting adversely to the appellant's private practice. The Tribunal did not, by failing to ask the question, ask itself the wrong question or fail to ask itself the right question.

SECOND GROUND OF APPEAL

17 The Minister contends that if, contrary to her submission on the first ground, the Tribunal was obliged to determine why the respondents did not have a well-founded fear if they practised in private, it did decide that question.

18 The Tribunal's conclusion that "ordinary adherents who practise privately are unlikely to be subject of particular attention" is said to be based on the country information it had earlier set out. In the July 2001 report, part of which is recorded at [9], the Tribunal said that ordinary adherents who practise privately are "unlikely to be the subject of particular attention by the authorities". That assumes detection by the authorities. This is reinforced by the report's earlier reference to "ordinary followers who come to the attention of the authorities (through their participation in public demonstrations or by being named by others)". The 20 May 2002 report, part of which is set out at [10], says the authorities are less likely to consider an individual private practitioner as a core or diehard member "should such a person come to their attention". Again the report assumes detection. The November 1999 report, parts of which are set out at [8], says that ordinary adherents who practise privately are unlikely to come to the attention of the authorities.

19 At the conclusion of its exposition of the country information, the Tribunal said the information suggested that lower level practitioners are likely to attract relatively little adverse attention. This it repeats at the end of its reasons – the information suggests that ordinary adherents who practise privately are unlikely to be the subject of particular attention. This ultimate conclusion is said to be based on the country information set out earlier in the Tribunal's reasons. The whole of its reasons must be read in order to understand individual sentences. On a fair reading of those reasons, it is apparent that the Tribunal found that the respondents would not have a well-founded fear even if their private practice was detected, because the authorities were not concerned with ordinary adherents who practised in private.

20 The PRC authorities cannot subject private practitioners to any "attention" unless they are aware of them. Accordingly, the Tribunal's ultimate conclusion that ordinary adherents who practise privately are unlikely to be the subject of particular attention, assumes detection. The propriety, indeed obviousness, of such an inference is confirmed by the country information expressly stating – "ordinary adherents who come to the attention of the authorities" and "an individual member who practises alone and in private (should such

a person come to their attention)".
21 The primary judge erred in holding that the Tribunal had failed to consider whether there was a chance of adverse consequences to the respondents if their practice of Falun Gong were detected. It did not fail to deal with what his Honour described as a fundamental issue. It did not fail to ask itself the right question. There was no jurisdictional error.
...

Marshall J. (dissenting) said:

31 VWBA and VWBB are citizens of the People's Republic of China. The appeal was argued on the basis that the facts relevant to each of them were materially indistinguishable. Submissions were focussed on the circumstances of VWBA. This judgment will, accordingly, focus on her circumstances. Counsel were agreed that VWBB would not have any independent basis for any different outcome in his appeal than the outcome of her appeal.
32 VWBA claimed that she had a well founded fear of persecution if returned to China on the basis of her practice of Falun Gong.
33 The RRT found that VWBA was not involved in a leadership role with Falun Gong. It said at p.24 of its reasons:
"At best, whilst she may have been somewhat more active than Falun Gong practitioners who simply practised for their own personal benefit privately, like the other members of the group she says she was part of, she was a minor participant in localised activity, and she was not a leader or high profile person."
34 The RRT accepted that VWBA "may have been questioned and detained by local police" but was "not satisfied that she was in fact under surveillance by authorities".
35 The RRT found that VWBA had practised Falun Gong in Australia, but that such practice did not create any higher profile for her than she had at the time of her arrival in Australia. It found that she did not face a real chance of persecution, if returned to China in the foreseeable future, on account of her Falun Gong activity in Australia.
36 The RRT then considered what would happen to VWBA if she returned to China and wished to practise Falun Gong. It said, at p.27 of its reasons:
"Country information above suggests that if she was to engage in public practice or demonstration of Falun Gong in PRC, it would be seen as defiance of the law and would be likely to draw adverse reaction from PRC authorities."
37 The RRT said, however, that the chance of VWBA engaging in public practice or demonstration of Falun Gong is "remote". It based this conclusion on the fact that VWBA practised Falun Gong in private, after Falun Gong was banned. It then said:
"The Tribunal accordingly finds it is far more likely she would practise Falun Gong privately, and not draw attention to herself."
38 The RRT acknowledged that a decision to practise privately "may be related to subjective fear of the likely consequences of such practice" but noted that Falun Gong, according to its founder, may be practised privately, and public practice was not "an inherent or significant component of Falun Gong". The RRT then said that it was satisfied that VWBA:
"...could – if she wished – practise privately in PRC, without real risk of persecution, and without significant restriction on her right to follow her beliefs and that such restriction does not amount to persecution for the purposes of the Convention."
It then said:
"Whilst the Tribunal accepts the applicant may have subjective fears about the prospect of further police questioning if returned to the PRC, it is not satisfied she faces a real chance

of jail or torture or mistreatment of sufficient magnitude to constitute "serious harm"."
That view was dependent on the RRT's finding that VWBA would not engage in public practice of Falun Gong.

The reasoning of the primary judge on the issue relevant to the appeal

39 Gray J referred to *S395* and in particular to the judgment of McHugh and Kirby JJ at [35], [50] and [53] and the judgment of Gummow and Hayne JJ at [82], [86] and [88].

40 At [37] in the primary judge's judgment, his Honour said:

"It is plain since S395 *that the Tribunal falls into error if it purports to require, or to expect, that persons who might otherwise suffer persecution in their home countries will avoid such persecution by taking reasonable steps, or by acting discreetly... It is also clear that a finding that a person will act in a private manner, and thereby avoid persecution, will not necessarily mean that the Tribunal has addressed the question whether a subjective fear of persecution is objectively well founded."*

41 His Honour observed that the RRT did not find specifically why private practice of Falun Gong would not lead to avoidance of an adverse reaction from the authorities. However, the primary judge said that the RRT's findings on that topic suggested that if private practice became publicly known, adverse consequences may follow.

42 At [40] his Honour said [of the RRT]:

"It was required to ask whether each applicant had a well-founded fear of being persecuted...if her or his Falun Gong activities came to the attention of the authorities. The Tribunal was required to ask whether the fear was well-founded in the sense that it was a substantial motivation for each applicant to keep her or his Falun Gong practice secret. If it answered these questions favourably to the applicants, the Tribunal was then required to consider whether there was a chance of adverse consequences to either applicant if her or his practice of Falun Gong were detected, and if those adverse consequences might be sufficiently serious to amount to persecution within the meaning of the Convention, as modified by s 91R of the Migration Act."

43 At [41] his Honour said:

"In the manner in which the Tribunal dealt with the issue of what may happen to each applicant if she or he returned to the People's Republic of China, the Tribunal failed to deal with these fundamental issues. It thereby asked itself the wrong question, or failed to ask itself the right question. In a similar way to the Tribunal in S395*, the Tribunal in the present cases fell into jurisdictional error."*

The Minister's submissions

44 Counsel for the Minister referred to the RRT's finding that VWBA and VWBB would practise Falun Gong privately, if returned to China. It was contended that it is appropriate for the RRT to say what an applicant would do, rather than say what she should do, if returned to her country of origin. It was submitted that that is what the RRT did in VWBA's case and that it was open to it to do so.

45 Counsel for the Minister next submitted that if the RRT finds a person will act in a way that will reduce a risk of persecution, that would otherwise have been well-founded, the RRT must consider why the person will act in that way. Counsel contended that the RRT did consider why VWBA would practise Falun Gong privately, saying that public practice was not important to VWBA. It was submitted that in light of that finding, any restriction on her capacity to engage in public practice was "tolerable". Therefore, so the argument ran, inability to practise Falun Gong in public did not amount to persecution.

46 Counsel for the Minister then submitted that the RRT proceeded to consider whether VWBA nonetheless had a real chance of being persecuted. It answered that question, counsel submitted, but saying that she could practise privately without real risk of persecution.

47 It was contended on behalf of the Minister that the RRT was not required to consider the reason why VWBA would not be persecuted if she practised Falun Gong in private. Counsel submitted that if no well founded fear exists, the reason for its absence is not relevant to the decision to refuse to grant a protection visa.
48 In the alternative, counsel submitted that, if it was necessary for the RRT to consider the reason why VWBA would not be persecuted if she confined herself to private practice, a fair reading of its decision showed that the RRT did consider that question, by reference to country information.

VWBA's submissions

49 Counsel for VWBA and VWBB submitted that Gray J correctly decided the applications before him. They submitted that the key finding of the RRT was that VWBA would practise Falun Gong privately and not draw attention to herself. They further submitted that the RRT considered that the question it had to determine was whether VWBA could live in China without attracting adverse consequences, and not the question posed by the Refugees' Convention.

S395

50 In *S395* the appellants in that matter claimed that they had a well founded fear of persecution, if returned to Bangladesh, by reason of their membership of a particular social group. They were homosexual men. They claimed that in Bangladesh it is not possible to live openly as a homosexual, without running the risk of suffering serious harm at the hands of police or "hustlers". The RRT found that the appellants had conducted themselves discreetly and so had avoided harm in the past. It held that if they returned to Bangladesh, and conducted themselves discreetly in the future, as they had in the past, they would not suffer serious harm by reason of their homosexuality.
51 At [35] McHugh and Kirby JJ said:
"The reasons of the tribunal show...that it did not consider whether the choice of the appellants to live discreetly was a voluntary choice uninfluenced by the fear of harm if they did not live discreetly."
Their Honours also observed that the RRT's reasons did not:
"...discuss whether the infliction of harm can constitute persecution where an applicant must act discreetly to avoid that harm. Nor did they discuss whether, if the appellants wished to display, or inadvertently disclosed, their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution."
At [43], McHugh and Kirby JJ observed that:
"To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly."
At [50] their Honours said:
"In so far as decisions in the tribunal and the Federal Court contain statements that asylum-seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed."
52 At [53] McHugh and Kirby JJ said that if the RRT found that fear of the appellants had caused them to be discreet in the past it would have been necessary for it to consider whether that fear was well founded and would amount to persecution. Their Honours said:
"That would have required the tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the tribunal was bound to consider if it found that the appellants' "discreet" behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the tribunal assumed that it is

reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the tribunal disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh."

53 At [80] Gummow and Hayne JJ said:

"If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences."

54 At [82] their Honours took issue with the RRT using the language of expectation with respect to what an asylum seeker would do on return to the country of origin. Their Honours then said at [83]:

"Addressing the question of what an individual is entitled *to do (as distinct from what the individual* will *do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right."*

Gummow and Hayne JJ said that consideration of what an individual is entitled to do is of little help when deciding whether that person has a well founded fear of persecution.

55 At [88] Gummow and Hayne JJ said:

"The tribunal did not ask why *the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention."*

Applying S395

56 The RRT found that it was far more likely than not that VWBA would practise Falun Gong privately, "and not draw attention to herself". By doing so, it accepted that the choice of VWBA to practise privately was not a voluntary choice uninfluenced by the fear of harm.

57 The RRT, however, did not go to consider whether the infliction of the feared harm, that was to be avoided by private practice, can constitute serious harm in circumstances where VWBA is compelled to practise privately to avoid the feared harm.

58 When the RRT said that VWBA "could – if she wished – practise privately...", it was, in effect, saying that VWBA could take action to avoid persecutory harm. In so doing it failed to consider properly whether there is a real chance of persecution if she is returned to China. Such reasoning involved the RRT in assuming that VWBA's conduct (given she practised previously in China in the past after its banning) would be uninfluenced by the conduct of the Chinese authorities in seeking to clamp down on the public practice of Falun Gong. It is self evident that VWBA has practised Falun Gong in private in China in the past because Falun Gong was banned at that time. The well founded fear of VWBA, in these circumstances, is her fear that unless she acts to avoid harmful conduct (by practising privately) she will suffer harm.

59 In the result, the RRT has purported to determine the issue of "real chance" without determining whether the adoption of private practice was influenced by the threat of harm

in the event that the practice was not private.
60 The RRT's reasoning is tantamount to an expression of opinion that VWBA could live in China without attracting adverse consequences. In so reasoning it failed to consider properly, or at all, whether VWBA's fear of persecution because of her membership of Falun Gong is well founded. The fact that it did use the language of "expectation" does not save the decision from valid criticism. Nowhere in the reasons of the RRT is consideration given to whether VWBA would be subjected to ill treatment by the authorities if she wished to practise Falun Gong, other than privately, and whether, if such ill treatment occurred it would amount to persecution.

NABD of 2002

61 Counsel for the Minister submitted that the more recent judgment of the High Court in Applicant *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29, (2005) 216 ALR 1 was in "conflict" with *S395*. That submission is rejected. *NABD* concerned an asylum seeker from Iran who claimed that he was at risk of persecution due to his Christianity. The RRT found that the asylum seeker in question was not at risk of persecution if he avoided "proselytizing". A majority of the Court considered that a fair reading of the RRT reasons for decision showed that it had asked what would happen if he returned to Iran and not whether he could avoid persecution. The majority judgment which dealt with the relevance of *S395* was that of Hayne and Heydon JJ. At [168] their Honours distinguished *S395*. Their Honours said:

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

There is nothing in any of the other judgments in *NABD* which support counsel's view that it overrides, or is in conflict with, *S395*.
62 In *VWBA's* case the RRT did ask whether she could avoid persecution, specifically by saying that she "could – if she wishes – practise privately". It did not examine whether the private practice of Falun Gong involved any element of choice on her behalf but, on the contrary, acknowledged that her private practice "may be related to the subjective fear of the likely consequences" of practising in public.
63 The alternative submission of the Minister that the RRT, by reference to country information, considered whether VWBA would face a real chance of persecution due to her membership of Falun Gong, is rejected. That submission ignores the fact that the RRT's examination of that issue is founded on its view that any possible persecution must be examined against private practice of Falun Gong, as distinct from practice of Falun Gong, *per se*, including public or open practice.

Conclusion

64 The primary judge was correct in considering that the RRT had not addressed the correct question by failing to deal with the fundamental issues identified in the majority judgments in *S395*. Accordingly he was correct to declare the decision of the RRT to be void and of no effect.

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