FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural & Indigenous Affairs v VWBA [2005] FCAFC 175

MIGRATION – protection visa – finding that private practice of Falun Gong unlikely to attract attention of authorities – whether Tribunal obliged to ask why it was unlikely to attract attention – whether Tribunal determined that question

Appellant S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 216 CLR 473 distinguished
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 cited

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v VWBA and VWBB and REFUGEE REVIEW TRIBUNAL

VID 168 OF 2005

SUNDBERG, MARSHALL and NORTH JJ
26 AUGUST 2005
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 168 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**VWBA** **FIRST RESPONDENT**
	VWBB **SECOND RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **THIRD RESPONDENT**

JUDGES:	**SUNDBERG, MARSHALL and NORTH JJ**
DATE OF ORDER:	**26 AUGUST 2005**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The Refugee Review Tribunal be added as a respondent.
2. The appeals be allowed.
3. The orders of the primary judge be set aside.
4. The first and second respondents pay the appellant's costs of the appeals and of the proceedings before the primary judge.

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

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JUDGES	**SUNDBERG, MARSHALL and NORTH JJ**
DATE:	**26 AUGUST 2005**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

SUNDBERG and NORTH JJ

BACKGROUND

1 Each of the first and second respondents (the respondents) is a citizen of the People's Republic of China. VWBA is female and VWBB is male. They are not related, but are apparently well acquainted. They arrived in Australia on the same date, 28 March 2002, as part of a delegation. On 8 April 2002 each lodged an application for a protection visa. The visas were refused by a delegate of the respondent (the Minister). Their applications for review of that decision were refused by the Refugee Review Tribunal. Their applications for relief pursuant to s 39B of the *Judiciary Act* 1903 (Cth) were successful. In each case the primary judge declared that the Tribunal's decision was void and of no effect. The Minister appeals from those declarations. The appeals were heard together.

2 An account of the respondents' claims and the Tribunal's reasons can be found in the judgment appealed from. There is no suggestion that that account is in any respect inaccurate, and we will adopt and not repeat it.

BEFORE THE PRIMARY JUDGE

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. Thus a DFAT report of 5 November 1999 contains these passages:

"We assess that ordinary adherents of Falungong who practise privately are unlikely to come to the attention of the authorities.

…

In recent months, signs have been placed in several public parks in Beijing (and presumably other locations) forbidding the practice of Falungong exercises. Public security officers have been posted in prominent public areas to try to identify anyone who appears to be practising Falungong. In such cases, individuals are questioned and some individuals have been taken away for further questioning. This action appears to be aimed primarily at preventing public displays of defiance against the government's campaign against Falungong. Private practice on an individual level would be unlikely to attract such attention.

…

The authorities might seek to question high profile advocates of Falungong on their return, or even take action to prevent their return, but are unlikely to take much interest in ordinary adherents."

9 A July 2001 DFAT report, after first referring to "those who have played a leadership or organisational role", said:

> *"We assess that ordinary adherents of Falungong who practise privately are unlikely to be the subject of particular attention by the authorities."*

10 A DFAT report of 20 May 2002 records:

> *"Laws banning Falungong are aimed at preventing the formation of public assembly of groups and the use of public means (books, videos, leaflets, mass media etc) to promote Falungong. 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 as a 'core' or 'diehard' member."*

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.

ORDINARY ADHERENT?

22 The respondents' principal submissions were directed to sustaining the primary judge's criticisms of the Tribunal's reasons on the ground that they fell foul of *S395*, even though the Tribunal did not have the benefit of that case. What we have said sufficiently deals with those submissions. There was however one additional submission. It was said that the Tribunal wrongly treated the respondents as mere private practitioners, whereas they were in fact somewhere between such practitioners and those having a leadership role. It was pointed out that the Tribunal had referred to matters that showed that they were not at the lowest level of those who had done nothing other than practise in private. Nevertheless it treated them as "ordinary adherents" and failed to ask whether the consequence of their somewhat elevated status, though falling short of leadership positions, might lead to persecution.

23 This was not an error that was put to the primary judge, and it is not mentioned in his reasons. What the respondents seek to do is to support his Honour's decision on a ground other than that on which it was based. The respondents did not file a notice of contention. The Court drew attention to this, but counsel did not seek leave to file a notice. Accordingly the respondents are not at liberty to raise this issue. Had there been a notice, we would have rejected the contention. The Tribunal was plainly aware of the matters that were said by the respondents to make them more than mere private practitioners, because it recorded them. It said that the first respondent *may* have been involved in very minor local Falun Gong promotion activities, but it did not accept that she had a leadership role or was a high level

organiser or promoter of Falun Gong. It accepted that she may have been somewhat more active than one who merely practised privately, in that she was a minor participant in localised activity; but she was not a leader or high profile person. The Tribunal then concluded that she was "perceived [by the authorities] to be simply an ordinary Falun Gong adherent". Later it repeated its finding that she was not a leader or high profile person in the eyes of the authorities, but "was perceived as nothing more than an ordinary Falun Gong practitioner".

24 The Tribunal's approach to the second respondent was the same. It said that although he may have been involved in relatively low level Falun Gong distribution and promotion activities, he did not have a core or leadership role, and was not a high level organiser or promoter. Whilst he "may have perhaps been" more active than a mere private practitioner, he was but a minor participant in a local area. The Tribunal went on to say that he was "of little or no real concern to authorities" and was not a person in whom they had any adverse interest. Thereafter it referred to him as an ordinary adherent.

25 Having in the case of the first respondent outlined the facts that "may" have meant that he was more than mere private practitioner, the Tribunal concluded, for the reasons it gave, that whether or not that was so, she was perceived by the authorities as nothing more than an ordinary practitioner. In those circumstances there was no occasion or need to ask whether she would be of greater risk of persecution than an ordinary practitioner.

26 In the case of the second respondent, the Tribunal recorded the matters that "may perhaps" have meant he was more than a mere private practitioner. It made no finding to that effect. Thereafter, for the reasons it gave, it treated him as a person in whom the authorities had no adverse interest. As with the first respondent, there was in those circumstances neither occasion nor need to ask whether he would have been at more risk of persecution than an ordinary adherent.

JOINDER OF TRIBUNAL

27 In his written submissions counsel for the Minister sought the joinder of the Tribunal as a proper and necessary party: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162. In oral submissions counsel said that since the only order made by the primary judge was a declaration, rather than an order quashing the

Tribunal's decision, it did not appear to be necessary for the Tribunal to be a party. The declaration was that the Tribunal's decision was null and void. In terms of whether the Tribunal should be a party, we think there is little if any difference between a declaration of invalidity and an order quashing the decision. We will order that the Tribunal be joined as a respondent.

CONCLUSION

28 The appeals must be allowed with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Sundberg and North.

Associate:

Dated: 26 August 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 168 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE COURT

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**VWBA** **FIRST RESPONDENT**
	VWBB **SECOND RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **THIRD RESPONDENT**

JUDGES:	**SUNDBERG, MARSHALL AND NORTH JJ**
DATE:	**26 AUGUST 2005**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

MARSHALL J

29 This is an appeal by the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") from a judgment of Gray J published on 11 February 2005. In that judgment, his Honour held that the Refugee Review Tribunal ("the RRT") committed jurisdictional errors in dismissing two applications before it. Those applications were for review of decisions of a delegate of the Minister to refuse to grant protection visas to the first and second respondents (hereafter referred to as VWBA and VWBB respectively).

30 The appeal raises for consideration whether the RRT, in the case of VWBA and VWBB, erred by failing to consider why they would practise Falun Gong in private, and whether that was a voluntary choice uninfluenced by the fear of harm if they did not do so. The appeal specifically raises for consideration the application of the views of the majority of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

Factual background

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. I would dismiss the appeal, with costs.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 26 August 2005

Counsel for the Appellants:	S Donaghue
Solicitor for the Appellants:	Australian Government Solicitor
Counsel for the First and Second Respondents:	RRS Tracey QC and SM Frederico
Solicitors for the First and Second Respondents:	Wayne Wong & Associates
Date of Hearing:	12 August 2005
Date of Judgment:	26 August 2005