FEDERAL COURT OF AUSTRALIA

VWBA v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 71

CORRIGENDUM

VWBA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
V 1106 of 2003

VWBB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
V 1107 of 2003

GRAY J
11 FEBRUARY 2005 (CORRIGENDUM 5 SEPTEMBER 2005)
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1106 of 2003**

BETWEEN:	**VWBA** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**GRAY J**
DATE OF ORDER:	**11 FEBRUARY 2005**
WHERE MADE:	**MELBOURNE**

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1107 of 2003**

BETWEEN:	**VWBB** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**GRAY J**
DATE OF ORDER:	**11 FEBRUARY 2005**
WHERE MADE:	**MELBOURNE**

CORRIGENDUM

1. On page 8 paragraph 20 line 3 delete “practise” and insert “practice”.

2. On page 10 paragraph 25 line 5 delete “practise” and insert “practice”.

3. On page 15 paragraph 38 line 5 delete “practise” and insert “practice”.

4. On page 15 paragraph 39 line 1 delete “practise” and insert “practice”.

I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 5 September 2005

FEDERAL COURT OF AUSTRALIA

VWBA v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 71

MIGRATION – visa – protection visa – procedural fairness – Falun Gong practitioners from China – same tribunal member heard both applications – tribunal indicated it would provide opportunity to comment on adverse information it heard in each other applicant's case – no such opportunity provided – whether tribunal took into account such information – whether tribunal gave adequate opportunity to respond to 'country information'

MIGRATION – visa – protection visa – finding that private practice of Falun Gong unlikely to attract attention of authorities – whether tribunal asked wrong question – whether obliged to make finding on what would happen if practice of Falun Gong became known – whether tribunal obliged to make finding on whether fear a substantial motivation for keeping Falun Gong practice secret

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) ss 36, 5(1), 91X, 424A, 91R, 474(2), 474(1)
Federal Court of Australia Act 1976 (Cth) s 21

Convention relating to the Status of Refugees done at Geneva on 28 July 1951
Protocol relating to the Status of Refugees done at New York on 31 January 1967

Appellant S395/2002 v Minister for Immigration & Multicultural Affairs [2003] HCA 71 (2003) 203 ALR 112 followed
VFAC v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 367 followed
SZACV v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 469 followed

VWBA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
V 1106 of 2003

VWBB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
V 1107 of 2003

GRAY J
11 FEBRUARY 2005
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1106 of 2003**

BETWEEN:	**VWBA** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**GRAY J**
DATE OF ORDER:	**11 FEBRUARY 2005**
WHERE MADE:	**MELBOURNE**

THE COURT DECLARES THAT:

The decision of the Refugee Review Tribunal, dated 21 October 2003, affirming the decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse to grant to the applicant a protection visa, is void and of no effect.

THE COURT ORDERS THAT:

1. Liberty to apply be reserved.

2. The respondent pay the applicant's costs of the proceeding.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1107 of 2003**

BETWEEN:	**VWBB** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**GRAY J**
DATE OF ORDER:	**11 FEBRUARY 2005**
WHERE MADE:	**MELBOURNE**

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GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1106 of 2003**

BETWEEN: **VWBA**
APPLICANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
RESPONDENT

V 1107 of 2003

BETWEEN: **VWBB**
APPLICANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
RESPONDENT

JUDGE: **GRAY J**

DATE: **11 FEBRUARY 2005**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

The nature and history of the proceedings

1 In these two proceedings, each applicant seeks relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) ('the Judiciary Act') in respect of a decision of the Refugee Review Tribunal. In each case, the Tribunal affirmed a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister'), refusing to grant to each applicant a protection visa.

2 By s 36 of the *Migration Act 1958* (Cth) ('the Migration Act'), there is a class of visas to be known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied that Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms

'Refugees Convention' and 'Refugees Protocol' are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to call these two instruments, taken together, the 'Convention'. For present purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to a person who:

> *'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'*.

3 Each applicant is a citizen of the People's Republic of China. The applicant designated as VWBA is female and the applicant designated as VWBB is male. It will be necessary to designate the applicants by these codes in the course of these reasons for judgment, because s 91X of the Migration Act prohibits the Court from publishing the name of a person who has applied for a protection visa in a proceeding of this type. The applicants are not related, but are apparently well acquainted with each other. They arrived in Australia on the same date, 28 March 2002, as part of a delegation. On 8 April 2002, each applicant lodged a separate application for a protection visa. On 7 June 2002, the Minister's delegate refused to grant protection visas. On 4 July 2002, each applicant applied to the Tribunal for review of that decision. The Tribunal conducted a hearing on 22 September 2003, at which applicant VWBA gave evidence, and a separate hearing on 24 September 2003, at which applicant VWBB gave evidence. The Tribunal was constituted by the same member in both cases. The Tribunal gave a separate decision in respect of each applicant. Each decision was dated 21 October 2003 and handed down on 7 November 2003. In each case, as I have said, the Tribunal affirmed the decision not to grant a protection visa.

4 Although the Tribunal is not a party to either proceeding, at the heart of the relief sought by each applicant is the quashing of the relevant Tribunal decision by means of a writ of certiorari, or an order in the nature of certiorari. Although neither applicant seeks a writ of mandamus to compel the Tribunal to hear and determine her or his application according to law, the grant of such a writ would be an ordinary consequence of the grant of certiorari to

quash the decision. Without any decision of the Tribunal on the application of each applicant to review the relevant decision of the Minister's delegate, the applicants would be left with those decisions, refusing to grant them protection visas.

The applicants' claims

5 The applicants claim to be liable to persecution in China as practitioners of Falun Gong, which the Chinese Government has labelled an 'evil cult' and has attempted to eliminate. Applicant VWBA claimed to have begun practising Falun Gong in 1996, but later corrected this to 1999. She said that Falun Gong masters largely cured her serious back problem. She claimed to have become a volunteer in a promotional team, collecting and distributing Falun Gong learning materials, recruiting new members and handing out leaflets. She said that, of the six members of her team, four had been arrested by the Public Security Bureau and one of those was undergoing forced labour.

6 Applicant VWBA claimed that, in early December 1999 and again in June 2000 (later corrected to June 2001), she was summoned to a police station for interrogation. Despite being threatened, abused, and beaten until she was unable to continue her normal work, she claimed that she revealed nothing. She was allowed to go home but was put under secret surveillance and lost personal freedom and basic human rights. In March 2002, as she was preparing to leave for Australia, applicant VWBA claimed that she received a third summons to the police station. She was unable to leave for Australia because of the summons, and had to give up a visa. She obtained another. She said that if her second visa application had been rejected, she would have been thrown into reform through forced labour, and would be living in inhumane conditions. She claimed to have suffered mental and physical harm from the first two interrogations and found it impossible to continue her work as the head midwife at a hospital, or to lead a normal life. She said that recollection of the torture she suffered brought on trembling, cold sweat and fear.

7 Applicant VWBA told the Tribunal that she has continued to practise Falun Gong in Australia.

8 Applicant VWBB claimed that he started participating in the Falun Gong movement in 1998, to cure disease and to strengthen his health. He became motivated to practise Falun Gong and to study its theories. In June 1998, he was appointed to head the team of which applicant VWBA was a member. He was also summoned to the police station in December 1999 and again in June 2001. Despite interrogation, and beatings that left him scarred, he did not reveal anything. He was put under secret surveillance. To avoid further torture, he seldom went home to his wife and child and lost half of his personal freedom. In March 2002, as he was preparing to leave for Australia, he received a third summons to the police station. This caused him to have to give up the first visa he applied for. He made a second application and was granted a visa. If his second visa application had been rejected, he said he would have been thrown into reform through forced labour after the third interrogation, and would be living in inhumane conditions. Although he had been general manager of a trading company, because he had joined Falun Gong he said that it had become impossible for him to work or lead a normal life. He had been unable to fulfil his filial duty as a son, or his obligations as husband and father. He also claimed that he trembled and suffered cold sweat and fear if he recalled the torture he had suffered. Applicant VWBB also claimed that he had continued to practise Falun Gong in Australia by joining a group practising at a park, taking part in an art exhibition and other gatherings, and visiting a permanent Falun Gong protest at the office of the Chinese Consul General in Melbourne.

The Tribunal's reasons

9 In each case, the Tribunal set out in its reasons for decision a substantial quantity of material, described as 'country information', mostly relating to the treatment of Falun Gong practitioners in the People's Republic of China. It expressed a finding summarising this material as follows:

> *'This information suggests lower level Falun Gong practitioners or followers, are likely to attract relatively little adverse attention, and that such attention is more directed to high profile leaders and core elements of the practice.'*

10 The Tribunal also discussed material relating to the impact of activities by Falun Gong practitioners outside of the country on the way in which they would be treated on return. It also referred to material concerning exit procedures from China, particularly as to whether wanted persons would be able to leave the country on passports issued in their own names.

11 The Tribunal then discussed a number of specific issues relating to the respective cases. It accepted that each applicant had a basic understanding of the principles and practices of Falun Gong and had been involved in Falun Gong activity in China and in Australia. It characterised the involvement of applicant VWBB in distribution and promotion activities as 'relatively low-level' and accepted that applicant VWBA may have been involved in 'very minor local' Falun Gong promotion activities. It did not accept that either applicant's role could be described as a core or leadership role, or that either was a high-level organiser or promoter of Falun Gong. It characterised each as a minor participant in local activity.

12 The Tribunal accepted that each applicant may have been questioned by the authorities as part of a broad public campaign against Falun Gong activity. It found that the questioning was directed to ascertaining information about the leaders of the movement, not about targeting either applicant for her or his own personal activities. The fact that each applicant was released after interrogation, and was able to resume employment in a senior position in a state-operated institution or enterprise, was seen by the Tribunal as supporting its conclusion that the authorities were not interested in either applicant. The Tribunal did not accept that applicant VWBA had confessed to distribution or promotion activities, because this would have been sufficient to support charges against her and elicited a far more adverse response from the authorities than she experienced.

13 The Tribunal was also not satisfied that either applicant was beaten or physically abused in the course of interrogation. The fact that each claimed to have resumed Falun Gong activity immediately after the interrogation was inconsistent with the claim of ill-

treatment. The Tribunal was not satisfied that applicant VWBA was placed under surveillance, or that applicant VWBB lived away from his family home because of fear.

14 The Tribunal found that the fact that applicant VWBA was able to obtain a passport lawfully, and in her own name, without difficulty after she said she had been subjected to two interrogations indicated that she was not a person of any adverse interest to authorities at that stage. Similarly, the Tribunal found that the ability of applicant VWBB to obtain the necessary clearance to leave the country, and to depart the country lawfully, meant that he was not a person in whom the authorities had any adverse interest.

15 The Tribunal rejected each applicant's claim that she and he had received a summons to attend a police station in March 2002. The Tribunal doubted the authenticity of the documents tendered, in the light of 'country information' suggesting that false documents are easy to obtain and are prevalent in China. For a number of reasons, the Tribunal was not satisfied that either document was genuine, and placed no weight on the document. It did not accept either applicant's account of the circumstances surrounding the service of the summons. In the case of applicant VWBA, it did not accept that she ignored the contents of the document and proceeded with plans to leave the country seven days after the appointed date. The Tribunal considered this to be highly unlikely, given the assertion that ignoring such reporting requirements was likely to result in arrest. Because applicant VWBA had retired earlier from her senior position as chief mid-wife at a hospital, arranged for her pension to be available to her adult child in China, and applied for and obtained a passport and two visas to travel to Australia with a Falun Gong colleague, the Tribunal found that she had already determined to leave and was not motivated to do so by fear. The Tribunal also found it improbable that failure to attend in answer to the summons would have been ignored and that she would not have been listed on airport departure lists as a person wanted by the police. The Tribunal also considered that it was highly unlikely that applicant VWBA would risk taking the document with her through an official exit point if she had really received a summons to attend for interrogation. The Tribunal was also not satisfied that the authorities would be searching for applicant VWBA in her home location, after she left, when official records would show that she held a passport that she had used to exit the country, and had not returned.

16 In the case of applicant VWBB, in the light of his claim that he had gone into hiding to avoid surveillance, the Tribunal did not accept that he would have attended his place of work to collect the summons from his supervisor. If he had come out of hiding to collect the summons, he would not have ignored it. The Tribunal did not accept applicant VWBB's explanation of his taking of the summons when he left the country, which was that he could have claimed to have forgotten to report. Carrying the document would have weakened his excuse for failing to attend. As in the case of applicant VWBA, the Tribunal took the view that applicant VWBB would not have been able to leave the country if he had been wanted by the police at the time of his departure.

17 Also in relation to applicant VWBB, the Tribunal did not accept that he was the subject of surveillance, or that he was demoted from his position as general manager because of Falun Gong activity. If he had made no admissions as to involvement, and there was no evidence against him, as he claimed, there would be nothing to justify demotion. The Tribunal also noted that applicant VWBB claimed to have continued in his senior position for a considerable time after he was first interrogated and after his supervisor was aware of his Falun Gong connection. The Tribunal did not accept that authorities were searching for applicant VWBB in his home, when official records would show that he held a passport, which he had used to exit the country, and had not returned.

18 The Tribunal was therefore not satisfied that either applicant was of adverse interest to the authorities, or was wanted by the authorities, at the time of their departure from China.

19 The Tribunal then turned to examine the activities of each applicant in Australia. It accepted that each had been associated with Falun Gong in Australia, although on their own evidence, this was as practitioners and not as leaders. The Tribunal found that attendance at protests or demonstrations would not create any higher profile with Chinese authorities than existed at the time of arrival in Australia.

20 The Tribunal was not therefore satisfied that either applicant faced a real chance of persecution on return to the People's Republic of China, now or in the foreseeable future, because of her or his belief or practise of Falun Gong in Australia, or for any other activity in which she or he had engaged since leaving China.

21 In its reasons for decision in the case of applicant VWBA, the Tribunal then said:

> *'This leaves the issue of what may happen to the applicant if she returned to PRC and wished to practice [*sic*] 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 practiced [*sic*] in private. The Tribunal accordingly finds it is far more likely she would again practice [*sic*] 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 practice [*sic*] 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 practiced [*sic*] in public, or with others, but can be practiced [*sic*] 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 practice [*sic*] publicly in order to pursue her beliefs. Based on the country information set out above, which suggests ordinary adherents who practice [*sic*] privately are unlikely to be the subject of particular attention, the Tribunal is also satisfied the applicant could – if she wished-practice [*sic*] 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.'*

22 A similar passage appears in the reasons for decision in the case of applicant VWBB.

23 In the case of applicant VWBA, the Tribunal was not satisfied that she faced a real chance of gaol or torture or mistreatment of sufficient magnitude to constitute 'serious harm'. In each case, the Tribunal concluded that there was no real chance of persecution for a Convention-related reason, now or in the reasonably foreseeable future, if either applicant was returned to the People's Republic of China, and there was no well-founded fear of persecution for a Convention-related reason.

The applicants' cases

24 In each case, the original application filed in the Court was replaced by an amended application some four months later. Each applicant also filed in Court at the hearing a document containing further grounds. The material filed on behalf of each applicant was devoted heavily to criticism of numerous findings of fact made by the Tribunal. Nevertheless, from the documents to which I have referred, written contentions filed on behalf of each applicant and the submissions of counsel at the hearing, it is possible to distil a case put on behalf of each applicant, falling into two parts. In the first place, it was suggested that the Tribunal denied each applicant procedural fairness. This was put in three ways. First, it was said that there was a denial of procedural fairness in the same Tribunal member hearing both applicants' cases, presumably thereby acquiring from one case information about the other, prejudicial to the other applicant. Second, it was said that the Tribunal had told each applicant at its hearing of her or his case that it would provide a subsequent opportunity to comment on any adverse information it acquired from the other applicant's case, but the Tribunal in fact provided no such opportunity. Third, it was said that the Tribunal relied on 'country information' to make adverse findings against the applicants, without giving either applicant an opportunity to refute it, or to make submissions about its significance. This was also said to constitute a failure on the Tribunal's part to comply with its obligations to allow the applicants to comment on adverse material, found in s 424A of the Migration Act.

25 The second element of the applicants' cases was related to the Tribunal's conclusion that each applicant would be likely to practise Falun Gong privately in China, and that this would not be likely to render either applicant liable to persecution by the authorities. A fundamental attack was made on this finding, as being contrary to the intention of the Convention, because it was said to deny the applicants protection in the practise of their religion, or as members of a particular social group. It was said that the Tribunal did not consider which of the relevant Convention reasons (political opinion, religion or membership of a particular social group) might fit the applicants. More importantly, in an argument based on *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* [2003] HCA 71 (2003) 203 ALR 112, it was said that the Tribunal had failed to determine whether the requirement to act discreetly to avoid the infliction of harm could constitute persecution.

Procedural fairness

26 The arguments concerning alleged denial of procedural fairness are unsustainable. Unless it could be shown that actual harm occurred as a result of the same Tribunal member dealing with both cases, the applicants could not succeed on that basis. It would have been necessary for them to make out a case of apprehended bias on the part of the Tribunal member, in consequence of that member learning something prejudicial about one applicant in the case of the other. No attempt was made to refer to any such specific prejudicial information. As to the Tribunal's statements that it would provide each applicant with an opportunity to comment on adverse information it obtained from the other's hearing, again no attempt was made to establish that the Tribunal had in fact acquired any adverse information about either applicant from its hearing of the other applicant's case. The simple answer to both of these arguments is a statement appearing, in a similar form, in the Tribunal's reasons for decision in each case:

> *'Subsequent to the hearing the Tribunal had the opportunity to review the material available to it, and is satisfied there was no adverse material provided in respect to the associated review by [*the other applicant*]. It was therefore unnecessary to contact the applicant again, and her [*his*] application has been dealt with on the basis of the material contained on her [*his*] files, the material she [*he*] provided, and the general country information set out below.'*

27 It is true that the Tribunal relied on a considerable amount of 'country information' to make findings adverse to each of the applicants. What the applicants failed to do was to make a case that each was not given sufficient opportunity to deal with the substance of this information. No attempt was made to identify a specific finding of fact, to relate it to a specific item of 'country information', and to prove as a matter of fact that no opportunity was given to the relevant applicant to deal with that item of information. Still less was any attempt made to establish exactly what either applicant would have done, or would have been able to do, by way of refuting the information, or making submissions about its significance, if such an opportunity had been provided. In short, neither applicant was shown to have lost a chance of achieving a favourable result by the failure of the Tribunal to confront her or him with adverse information on which it relied.

28 Although the transcript of each of the Tribunal's hearings was placed before the Court, by way of supplementary court book, I was not taken to the transcript of either hearing in any detail, for the purpose of making out any denial of procedural fairness. A cursory examination of the transcript of each hearing suggests that the Tribunal did put to each applicant the substance of the information on which it subsequently relied and did give each applicant an opportunity to comment on the issues raised. Each applicant was represented at the Tribunal hearings by an agent. The Tribunal member indicated that he would not make a decision until after looking at all the issues in the other applicant's case. The opportunity therefore existed for the supply of further material, in the light of the issues raised by the Tribunal, if the relevant applicant or the agent had desired to place any before the Tribunal.

29 Even if it were the case that the Tribunal had failed to comply with its obligations pursuant to s 424A of the Migration Act, it would not necessarily follow that either applicant would be entitled to the relief sought. The orders sought are discretionary in nature. If the purpose of s 424A had in fact been fulfilled satisfactorily by the giving of a proper opportunity at the hearing for comment on the issues raised by the material on which the Tribunal relied, there would be every reason to exercise the discretion so as to refuse relief.

The need to act discreetly

30 In *S395*, the High Court dealt with the case of a homosexual couple from Bangladesh, who claimed to have a well-founded fear of persecution, by reason of their membership of the particular social group of homosexuals, if they should return to Bangladesh. The Tribunal had found that it was not possible to live openly as a homosexual in Bangladesh, that to attempt to live openly would mean to face problems, and that Bangladeshi men could have homosexual affairs or relationships, provided they were discreet. It had also found that, if they were to return to Bangladesh, the two men would avoid harm by living discreetly as a couple. By majority, the High Court held that the decision of the Tribunal involved a jurisdictional error and should have been set aside by this Court in the exercise of its powers pursuant to Pt VIII of the Migration Act as it then stood. The majority in the High Court was made up of two joint judgments, of McHugh and Kirby JJ, and Gummow and Hayne JJ respectively.

31 McHugh and Kirby JJ identified the defects in the Tribunal's reasoning at [35] as follows:

> *'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.'*

32 Their Honours examined statements in reasons for decision of the Tribunal, and judgments of this Court, and said at [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.'

33 As to the consequences of the defects in the reasoning of the Tribunal, their Honours said at [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.'

34 On the question of the requirement to live 'discreetly', Gummow and Hayne JJ said at [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. The tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. No*

> *less importantly, 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.'*

35 Their Honours identified the defects in the Tribunal's reasoning at [86] as follows:

> *'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.'*

36 Further, at [88], their Honours said:

> *'The tribunal did not ask* why *the appellants would live "discreetly".'*

37 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. See *VFAC v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 367 at [32]. 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. See *SZACV v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 469, which was also a case in which the Tribunal found that a citizen of the People's Republic of China could return to that country and practise Falun Gong on a private basis. At [20], Gyles J held that the Tribunal had answered the question whether the person could live in that country without attracting adverse consequences, which Gummow and Hayne JJ identified in *S395* as the wrong question.

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 within the meaning of the Convention, as modified by s 91R of the Migration Act.

41 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. Its decisions could not be regarded as decisions 'made...under this Act', within the definition of 'privative clause decision' in s 474(2) of the Migration Act. Because the privative clause in s 474(1) applies only to a privative clause decision as defined, the privative clause does not preclude the Court from granting relief pursuant to s 39B of the Judiciary Act in respect of each of the decisions concerning each applicant.

Conclusion

42 The conclusion that the Tribunal's decision in each of these cases has resulted from jurisdictional error on the part of the Tribunal requires that the Court consider whether to grant relief and, if so, what relief it is appropriate to grant. Such a conclusion would entitle each applicant, subject to the exercise of the Court's discretion not to grant relief, to the grant of certiorari to quash the Tribunal's decision and mandamus to compel the performance of the Tribunal's duty to review the decision of the Minister's delegate according to law, if the Tribunal were a party to this proceeding. The problem is that the only respondent is the Minister. In my view, it is inappropriate to make orders for certiorari and mandamus against a decision-maker who is not a party to the proceeding. In such cases, I prefer to exercise the power, conferred on the Court by s 21 of the *Federal Court of Australia Act 1976* (Cth), to make a declaration of right. A declaration that a decision of the Tribunal is void and of no effect will bind only the parties to the proceeding. Its effect will be, as between each applicant and the Minister, that each applicant's application to the Minister for a protection visa has not been determined finally, because each applicant has not had the benefit of a proper review of an adverse decision of the Minister's delegate. I assume that the Tribunal would take notice of such a declaration, recognise that it has failed to perform its function of reviewing the decision of the Minster's delegate in each case, and proceed to perform that function, without the necessity for further order.

43 A declaration of right is, of course, a discretionary remedy, like the remedies of certiorari and mandamus. In the present cases, there are no factors that would compel me to exercise my discretion adversely to the applicants. Accordingly, in each case, I shall make a declaration of right. It would be appropriate to reserve liberty to apply, in case the Tribunal should fail to deal with the applications for review of the decisions of the delegate of the Minister. In that event, the parties can return to the Court seeking to add the Tribunal as a party and seeking relief directly against the Tribunal.

44 No reason was advanced, and none appears, why the usual rule, that costs follow the event, should not be followed. The Minister will therefore be ordered to pay each applicant's costs of the proceeding.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 11 February 2005

Counsel for the applicants:	S Frederico
Solicitor for the applicants:	Wayne Wong & Associates
Counsel for the respondent:	Dr S Donaghue
Solicitor for the respondent:	Blake Dawson Waldron
Date of Hearing:	31 August 2004
Date of Judgment:	11 February 2005