FEDERAL COURT OF AUSTRALIA

NALZ v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 320

CITIZENSHIP AND MIGRATION — refugees — where persecution claimed as a result of imputed political opinion arising from appellant selling electrical goods to Sri Lankan nationals — where nature of persecution claimed was illegitimate maltreatment by authorities — whether asylum-seekers required or expected to modify behaviour or take reasonable steps to avoid persecutory harm — whether there is a distinction between actual and imputed membership of a protected class of citizens under Refugee Convention.

Appellant S 395 of 2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 followed and considered
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 cited
Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 cited
Minister for Immigration and Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559 followed
SFKB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 142 cited
Rhandhawa v Minister for Immigration & Local Government and Ethnic Affairs (1994) 52 FCR 437 cited

NALZ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N1523 of 2003

MADGWICK, EMMETT & DOWNES JJ
2 DECEMBER 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N1523 of 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NALZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**MADGWICK, EMMETT & DOWNES JJ**
DATE OF ORDER:	**2 DECEMBER 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. Insofar as leave is required to file the second amended notice of appeal, leave is refused.

2. The appeal be dismissed.

3. The appellant pay the respondent's costs of the appeal.

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

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JUDGES:	**MADGWICK, EMMETT & DOWNES JJ**
DATE:	**2 DECEMBER 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

MADGWICK J:

1 This is an appeal from a judgment of a single Judge of this Court (see *NALZ v MIMIA* [2003] FCA 1049) confirming a decision of the Refugee Review Tribunal ('the Tribunal'), dated 20 March 2003, whereby the Tribunal refused the appellant's application for a protection (class XA) visa.

Nature of the Case

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.

3 The background to these proceedings and aspects of the appellant's claims and evidence are set out in the judgment of Emmett J. It is unnecessary to refer to the facts in detail here. 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. In these circumstances, the appellant is entitled to have his application for review reheard according to law.

16 The appellant should have leave to appeal and the appeal should be upheld. The determinations of the Tribunal and of this Court at first instance should be set aside. An order in the nature of mandamus should be made to require the Tribunal to hear and determine the appellant's case according to law.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 2 December 2004

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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N1523 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **NALZ**
APPELLANT

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

JUDGES: **MADGWICK, EMMETT & DOWNES JJ**
DATE: **2 DECEMBER 2004**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

EMMETT J:

17 The appellant, who is a citizen of India, arrived in Australia on 14 September 2000. On 26 October 2000, he lodged an application for a protection (Class XA) visa under the *Migration Act 1958* (Cth) ('the Act'). On 4 April 2001 a delegate of the respondent, the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister'), refused to grant a protection visa. On 24 April 2001 the appellant applied to the Refugee Review Tribunal ('the Tribunal') for a review of the delegate's decision. On 28 February 2003, the Tribunal affirmed the decision not to grant a protection visa.

PROCEEDINGS IN THE FEDERAL COURT

18 On 25 March 2003, the appellant filed an application to the Federal Court of Australia seeking constitutional writ relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) in respect of the decision of the Tribunal. The matter came before Gyles J for directions on 17 April 2003. At that time, the question of possible transfer to the Federal Magistrates Court was raised and a provisional timetable was worked out on the basis that, if the matter were transferred to the Federal Magistrates Court, the matter would be listed for hearing on 19 November 2003. However, as Gyles J was able to hear the case prior to that date and,

since the appellant objected to transfer, his Honour listed the matter for hearing before himself on 1 August 2003.

19 On 26 June 2003, Gyles J heard an application by the appellant to vacate the hearing date of 1 August 2003 and fix the matter for hearing on the date originally proposed of 19 November 2003. The reason given for the application was that the appellant wished to organise funds to retain a lawyer to argue his application. Gyles J refused the application and confirmed the fixture for 1 August 2003.

20 At the hearing on 1 August 2003 the appellant appeared in person but did not present any substantive argument in support of his application. Gyles J indicated that he did not wish to hear from the Minister in relation to any of the grounds specified in the appellant's application to the Court other than an assertion that the Tribunal had not taken into consideration the appellant's adviser's written submissions, medical reports and other country reports. His Honour then adjourned the matter to 19 September 2003 in order to afford the appellant the opportunity of adducing evidence in support of that assertion.

21 On 18 September 2003, the Court received what was described as an outline of the appellant's submissions, which acknowledged receipt of a transcript of the tapes of the hearing by the Tribunal. Apart from a brief reference, the submissions did not address the issue that occasioned the adjournment. Rather, they sought to raise a further ground of attack, namely, failure to accord procedural fairness for not making the appellant aware of, and providing access to, material that was adverse to his interests. However, no application was made by the appellant to amend the grounds of his application. Gyles J recorded that, if such an application had been made, he would have rejected it.

22 His Honour concluded that the appellant had not established that the Tribunal failed to take into account material that had been presented to it by or on behalf of the appellant immediately prior to the hearing and shortly after the hearing. His Honour considered that it was clear enough that material provided to the Tribunal on the morning prior to the hearing was present to the mind of the member of the Tribunal at the hearing. His Honour also considered that it was clear that the submission that was subsequently provided on behalf of the appellant was provided as a result of an express arrangement between the member of the Tribunal and the appellant's adviser at the hearing. His Honour considered that the material

and submissions in question did not mark any essential change to the basis upon which the appellant put his case for a protection visa. Hs Honour concluded that the fact that the Tribunal did not refer to particular pieces of corroborative material in its reasons did not establish any error on its part. Accordingly, on 19 September 2003, his Honour ordered that the application be dismissed with costs.

23 On 9 October 2003, the appellant filed a notice of appeal, the only grounds of which were:

'The judgment of the learned Gyles J is erroneous and has no effect in law.'

However, on 30 December 2003, an amended notice of appeal was filed setting out nine separate grounds.

24 The appeal was listed for hearing before a Full Court comprising Finn, Emmett and Selway JJ on 17 February 2004. On that day, the Court ordered that the appeal be stood over to a date to be fixed and referred the appellant to the Registrar pursuant to Order 80 of the Federal Court Rules. Order 80 provides for the provision of *pro bono* assistance. That course was taken because it appeared to the Court, on reading the materials that had been filed, that there may be an arguable ground of appeal relating to a matter that was not raised before Gyles J but which was suggested by the reasons of the High Court in *Applicant S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 203 ALR 112 at [50] and [82] ('*S395/2002*'). That decision was given after the decision of Gyles J. In making the orders on 17 February 2004, the Full Court expressed no view on the likelihood of the appellant being granted leave to amend his notice of appeal to raise a new ground or on whether the Tribunal had actually fallen into error.

25 Pursuant to directions given by Moore J on 5 May 2004, the appellant filed another amended notice of appeal on 18 June 2004. The only ground of appeal contained in that amended notice of appeal was that suggested by the Full Court on 17 February 2004.

THE TRIBUNAL'S DECISION

26 The Tribunal was satisfied that the appellant is an Indian national and that he is a Tamil and a Muslim. The Tribunal was also satisfied that the appellant is unwilling to return to India as he fears he may be harmed because of suspected connections to the Liberation

Tigers of Tamil Eelam ('LTTE') or because he is a Muslim. The Tribunal had some doubts about the appellant's claims but, giving him the benefit of the doubt, the Tribunal was satisfied that the appellant had been arrested and detained on three occasions as he claimed.

27 In a written statement furnished by the appellant in conjunction with his original application for a protection visa, he claimed that he had been arrested and detained on three occasions. He claimed that he was first arrested and detained following the assassination of Rajiv Ghandi. He was under suspicion because of his relationship with Sri Lankan students in India. He was detained for about ten days, during which he was assaulted. He said, however, that it became apparent to the police that he was innocent and so he was released.

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.

30 The appellant refused to accept the accusations and was detained for three weeks, until his father arranged for his release with the help of a politician. The appellant said that the politician ordered him to leave India, failing which he would be found as an accomplice of the LTTE. He claimed that politicians in Tamil Nadu who were against him would brand him as an LTTE member.

31 The appellant said that the CID officers told the Madras politician and his father that, though they were satisfied that he was only acting in the capacity of a normal salesman, they were unable to stay action against him while some people who belonged to the opposing political groups were giving evidence against him with regard to his involvement in the LTTE. The appellant claimed that he had no other choice but to go into hiding until an agent made arrangements for him to flee the country for good.

32 In connection with his application to the Tribunal for review of the delegate's decision, the appellant furnished a statutory declaration dated 14 June 2002. In the statutory declaration, the appellant said that in December 1997 he got a job as a salesman in an electronics shop where he worked until August 1999. He was in charge of selling electrical goods and was asked to manage branches in and around Madras. He said that he knew some Indian businessmen who purchased generators from him and resold them for a higher price to Sri Lankan traders to be taken to Jaffna and Vanni in Sri Lanka. When his employers came to know about that, they ordered him to sell generators direct to those traders instead of to the Indian middlemen.

33 In August 1999, the coastguard arrested the appellant on suspicion of a connection with the LTTE. He was accused of providing generators to the LTTE and the coastguards confiscated the goods. The appellant claimed that he was taken to a police station and assaulted until he told them the truth about his involvement as just described. He said he was kept in detention for nearly a week until his manager came forward to release him. In the statutory declaration, the appellant also repeated verbatim the claims that he had made concerning the supply of 20 generators to a Sri Lankan Tamil customer in Bangalore.

34 The appellant also claimed that he feared that he had acquired a profile as a suspected LTTE sympathiser and was at risk of further detention, interrogation and even torture. He said that, if problems emerged concerning the LTTE and its activities in India, the police arrest all persons whose names are known as suspected LTTE supporters or sympathisers and those persons face severe harassment and serious harm in detention with possible torture and even disappearance and death.

35 In its reasons, the Tribunal recorded that the appellant claimed that he had become aware of local politicians who were corrupt and who were smuggling goods to the LTTE.

The appellant claimed that the politicians suspected that the appellant might reveal their connections to the LTTE. The Tribunal also recorded the appellant's claim that he is a member of many Tamil organisations that campaigned against what he termed the genocide of the Tamil people. He claimed that he has never been a supporter of the LTTE but people had thought that he was. He claimed that other local politicians, not the ones who were smuggling goods to the LTTE, believed that the appellant supported the LTTE.

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 In its findings, the Tribunal noted that the appellant claimed to fear the risk of further arrest, detention and mistreatment. The Tribunal noted that the appellant had been arrested in the circumstances described above but that he had been released on each occasion. The Tribunal observed that the appellant was able to leave India on his own passport, which would indicate that he is not of ongoing serious interest to the authorities. 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. The Tribunal found the appellant's evidence about being at risk of harm because he knows information about politicians, which would be damaging to them or because politicians suspected him of being an LTTE supporter was vague and inconsistent. The Tribunal was not satisfied that the appellant had any such knowledge or that he is at risk of persecution if he does.

39 The Tribunal, therefore, was not satisfied that the appellant is at risk of persecution should he return to India. The Tribunal was not satisfied that any fear of persecution that the appellant may have is well-founded. Accordingly, the Tribunal was not satisfied that the appellant is a person to whom Australia has protection obligations under the Refugees

Convention and, consequently the appellant did not satisfy the criterion set out in s 36(2) of the Act for the grant of a protection visa.

THE APPEAL

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*.

CONCLUSION

52 While the Minister does not suggest that there would be any prejudice by permitting the appellant to raise the new ground, there would be no utility in doing so, because there is no substance in it. Accordingly, in so far as leave is required to file the second amended notice of appeal, leave should be refused. The appeal should be dismissed 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 Emmett.

Associate:

Dated: 2 December 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1523 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NALZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**MADGWICK, EMMETT AND DOWNES JJ**
DATE:	**2 DECEMBER 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

DOWNES J:

53 The appellant is an Indian national. He is a Tamil and a Muslim. He claims a protection visa. His application was rejected by the Department of Immigration and Multicultural and Indigenous Affairs as well as by the Refugee Review Tribunal. Gyles J dismissed an application for review of the decision of the Tribunal.

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.

60 It seems to me that the appellant has not made out a claim for refugee status and no reviewable error is shown on the part of the Refugee Review Tribunal. I would accordingly refuse to grant leave to raise this new ground because it must fail.

61 The appeal must be dismissed with costs.

I certify that the proceeding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Downes.

Associate:

Dated: 2 December 2004

Counsel for the Applicant:	Mr B Zipser
Counsel for the Respondent:	Mr T Reilly
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	17 August 2004
Date of Judgment:	2 December 2004