RECENT DEVELOPMENTS IN REFUGEE LAW

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How does the Refugee Review Tribunal Work?

The Refugee Review Tribunal (RRT) is an administrative tribunal established under the *Migration Act 1958* ("the Act") to conduct external, independent merits review of the Minister's decisions to refuse to grant, or to cancel, a protection visa. The Tribunal's jurisdiction is defined under ss.411, 412 and 414 of the Act. The Tribunal commenced operations on 1 July 1993.

Section 36 of the Act states that a criterion for a protection visa is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees ("the Refugees Convention"), as amended by the 1967 Protocol. Section 65 of the Act in effect requires the RRT to determine whether or not, at the time it makes its decision, it is satisfied that an applicant is a person to whom Australia has protection obligations under the Refugees Convention.[1]

Australia's obligations under the Refugees Convention arise as a consequence of the Executive's ratification (in 1954 and 1973 respectively) of the Convention and the Protocol. Under s.36 of the Act, the Convention definition of 'refugee' is a part of the assessment of a claim for a protection visa.[2] Under Australian law any claims an applicant for a protection visa may be said to have derive solely from the Act.

However, the obligations of Australia under the Convention are very limited. Article 33(1) of the Refugees Convention, which has been described as the "engine room" of the Convention,[3] sets out Australia's principal obligation under the Convention. It states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The principal obligation of Australia is not to expel or return a refugee to the country in which he or she faces persecution. Neither the Convention nor the Act confers upon a fugitive a direct right to asylum in Australia.[4] Article 1A(2), which includes the definition of a "refugee", sets out five grounds of Convention persecution: race, religion, nationality, political opinion, and membership of a particular social group.

Under the Act, the RRT operates as an inquisitorial tribunal. It is required under s.420 to provide a mechanism of review that is fair, just, economical, informal and quick. It is not bound by "technicalities, legal forms or rules of evidence", and must act "according to substantial justice and the merits of the case". This requires the Tribunal to address the

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1 Other requirements are set out in clauses 785 (applicants who are not immigration cleared) and 866 (applicants who are immigration cleared) of Schedule 2 to the Migration Regulations 1994.

2 But it is not the whole test, see n. 11 below.

3 *MIMA v Al-Sallal* (1999) 167 ALR 175, Heerey, Carr, Tamberlin JJ.

4 *SZ v MIMA* [2000] FCA 836 at [14] per Branson J with whom Beaumont and Lehane JJ agreed.

central issues raised in a case,[5] and to "plainly and unambiguously raise with the applicant the critical issues on which his or her application might depend".[6] In *MIEA v Singh* Lee J stated:

> The obligation to provide substantial justice in the circumstances requires a broad consideration of the various elements of the case of an applicant to the tribunal for review. For example, the extent of the harm feared by the applicant, the personal experience of persecution by the applicant, events suffered by the applicant's family, and the general history of persecution in the country of nationality of the applicant would be relevant.[7]

The High Court has ruled that s.420 is intended to be facultative, not restrictive.[8] Consequently, it does not provide a ground of review of decisions made by the Tribunal. It allows the RRT to operate under the flexible procedures appropriate to an inquisitorial tribunal. For example, the RRT can take into account hearsay evidence, which in a court would be inadmissible under the rules of evidence.

In reviewing a decision to refuse to grant a protection visa, the Tribunal must determine whether or not it is "satisfied" that Australia owes protection obligations to an applicant before it. As with other inquisitorial administrative Tribunals, there is in the technical sense no evidentiary onus on applicants appearing before the RRT.[9] The Full Court of the Federal Court in *SZ v MIMA*[10] has recently re-affirmed that neither the Minister nor the Tribunal upon review is (nor could be) exercising judicial power.

In the decision in *A, B&C*, the Full Federal Court stated,

> The fact finding and evaluation to be undertaken by decision-makers in relation to applications for protection visas and by the Refugee Review Tribunal on review of their decisions is administrative in character. In consequence, it is not appropriate for those decision-makers to draw too closely upon the rules of evidence applied in civil proceedings. … It is equally inappropriate for the Tribunal to apply curial devices such as presumptions of law or fact. [Such presumptions have] no part to play in administrative proceedings which are inquisitorial in their nature.[11]

The RRT has a duty to investigate and collect information. Historical and 'background' information on countries from which asylum seekers have departed is essential material for the RRT member's consideration in any given case. The RRT must inform itself as to the conditions of the applicant's country of origin, both throughout the period in which persecution is claimed to have occurred and the point of departure from the country, and the conditions that exist at the time of the Tribunal's determination.

Hearings before the RRT are private. Sections 429, 439 and 440 of the Act ensure this privacy, prohibiting the disclosure and restricting the publication of, confidential information. While decisions of particular interest may be published under s.431, s.431(2) restricts the disclosure of information that would identify the applicant.

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5 *Sun Zhan Qui v MIEA* (1997) 81 FCR 71.

6 *Meadows v MIMA,* Full Court, unreported, 23 December 1998, per Merkel J.

7 (1997) 74 FCR 553, at 566.

8 *MIMA v Eshetu,* (1999) 162 ALR 577, in particular Gleeson CJ & McHugh J.

9 See *McDonald v Director-General of Social Security* (1984) 1 FCR 354, and *Nagalingam v MIEA*, unreported, 22 September 1992, Olney J.

10 [2000] FCA 836.

11 *A, B & C v MIMA,* [1999] FCA 116 (23 February 1999), French, Merkel & Finkelstein JJ. See also the High Court's observations in *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282-3, and in *MIEA v Guo* (1997) 191 CLR 559 at 573-4.

Section 427(6) provides that persons appearing before the Tribunal to give evidence (including applicants) are not entitled to be represented before the Tribunal or to examine or cross- examine others. However, applicants are invariably allowed to have an adviser present, and are given the opportunity to provide legal or other submissions at the hearing or following the hearing.

The power of the RRT is set out under s.415 of the Act: the RRT can affirm the Minister's decision; or vary the decision; or in certain circumstances remit the decision back to the Department for reconsideration; or set aside the decision and substitute a new decision: s.415(2).

What will Happen when the Administrative Review Tribunal Comes into Being?

Subject to the legislative process, it is expected that on 1 February 2001 the Refugee Review Tribunal will cease to exist. Its functions will be taken over by the Immigration Review Division (IRD) of the Administrative Review Tribunal (ART). The IRD will also take over the functions of the present Migration Review Tribunal (MRT).[12] This will not have any effect on the substantive law to be applied in dealing with applications for protection visas. Obviously, the 1951 Convention will remain unaltered. This change may have some effect on the procedures to be followed in dealing with the claims. This will depend on the content of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000.

Recent Amendments to the *Migration Act 1958*

The *Migration Legislation Amendment Act 1998*

This Act introduced, from 1 June 1999, a new procedural code relating to the operations of the RRT. This code is set out under ss.420A, 422, 424 - 426A, 430A,B, C & D, and 441, and additional Regulations.

Following the allocation of a case to a member, a decision is generally taken within 14 days as to whether a favourable decision on the papers can be made, and if not, whether an applicant can be invited to a hearing immediately, or whether further information is to be requested from an applicant or given to an applicant for comment. The general rule remains that, if a favourable decision is not made on the papers, an applicant must be invited to appear before the RRT.

The new provisions allow the RRT to request further information from an applicant. Such a request must be made in writing, comply with the notification requirements of the legislation and regulations, set out the time by which a response is to be made, and set out the consequences of failing to make available the information. Failure to provide the information requested can result in a decision being made without further invitation to provide information and without the offer of a hearing.

The RRT observes procedurally fair practices in its decision-making processes. Under s.425, the Tribunal must invite the applicant to appear before it to give evidence and present arguments. Under s.424A, adverse material which is specifically about the applicant or another person, and which was not given to the Tribunal by the applicant, must be given to an applicant for comment within a prescribed period. Where the information is not specific about the applicant, applying common law notions of procedural fairness, applicants must be given an opportunity to consider and comment upon any adverse information that is relevant, credible and material (and therefore able to be taken into account by the Tribunal).

12 See Administrative Review Tribunal Bill 2000 introduced in the House on 28 June 2000.

Under s.420A of the Act, the Principal Member has the power to issue directions in relation to the efficient conduct of reviews. Such directions have been issued. They set out timelines for the processing of a review by members, and cover issues such as the provision of translated country and other material by applicants, the timeframes for the receipt of written submissions following a hearing, making adverse information available to applicants/advisers where such procedures are not already required under s.424A, and the proper conduct of a hearing. These directions indicate that once a member signs and dates a decision the matter is 'finalised'. The Principal Member's Directions are accessible on the Tribunal's website.

Under the new provisions, where a decision is not given orally, it must be handed down (except in the case of applicants in detention). The date of the handing down is the date of the decision for the purposes of the 28-day period within which Federal Court appeals must be lodged. About 23% of applicants attend the handing-down of the decision.

An administrative circular has been issued by the Principal Member, which states that once a member signs and dates a decision, the member is *functus officio.* This means that the member has no further functions to perform in relation to the decision.[13]

The *Border Protection Legislation Amendment Act 1999*

The *Border Protection Legislation Amendment Act 1999*, which commenced on 16 December 1999, introduced amendments to the Act designed to prevent "forum shopping". The Supplementary Explanatory Memorandum to the Bill refers to "forum shopping" as the practice of using refugee processes as a means of bypassing general immigration requirements to obtain residence in Australia, and notes that "this practice of seeking protection elsewhere … represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations."

This Act codified in the Act the principles developed by the Federal Court in relation to "effective protection". The expression "effective protection" means "protection which will effectively ensure that there is not a breach of Article 33 if the person happens to be a refugee."[14]

Under international law, and under Australia's domestic law at least since the 1992 amendments to the Act,[15] an assessment under the Refugees Convention properly begins with a consideration of whether, under Art 33(1), the country in which asylum is sought owes protection obligations to the applicant for refugee status. As indicated, Australia does not necessarily have protection obligations to a person merely by virtue of that person having satisfied the Convention definition of "refugee". Australia does not owe an obligation of protection to a person, although a refugee from his or her country of origin, who enjoys 'effective protection' in another country.

Under the general law the following principles in relation to 'effective protection' had been established:

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13 See *Semunigus v MIMA* [2000] FCA 240 at [78] per Higgins J, and also at [20] per Spender J. But see, *contra*, *Akand v MIMA* [2000] FCA 626, where Madgwick J took the view that the Tribunal is not *functus* until the decision is actually handed down.

14 *MIMA v Thiyagarajah* (1998) 80 FCR 543, per von Doussa J.

15 These amendments changed the decision under the Act from whether a person met the definition of "refugee", which was up until the amendments a part of the Act, to an assessment of whether Australia owed protection obligations to a person; part of such an assessment involves applying the Convention definition.

- Where an applicant has a right of residence and re-entry to a third country, that country may be considered as providing effective protection to the applicant. Where an applicant has effective protection in a third country, Australia does not have protection obligations under Article 33 of the Convention, in relation to that person.[16] However, the Tribunal must consider whether the third country protection is practically accessible to the applicant in the light of his or her particular circumstances.[17]
- That third country must be a "safe" country in the sense that the applicant does not have a well founded fear of being persecuted there or being refouled to his or her own country. That country does not have to be a signatory to the Convention in order to be "safe", if it meets the above criterion.[18]
- The right of residence contemplated for the purposes of effective protection is not confined to the recognition of refugee status in the third country.[19]
- The right of residence does not have to be permanent; it may only be temporary.[20]
- Where a person has resided in a third country and travelled to Australia on travel documents provided by that third country, it is for that person to demonstrate that they have no right of re-entry to the third country.[21]
- Unwillingness alone to seek the protection of the third country is not enough.[22]
- A country does not have to provide a guarantee of protection from all harms in order for it to be considered a safe third country.[23]
- It is an error of law for the RRT to fail to consider the possible application of Article 33 of the Convention.[24]

Section 36 of the Act has been amended by the 1999 Act. The provision applies to applications made on or after 16 December 1999. The new s.36 (3) codifies the general law position that, by virtue of Article 33(1) of the Refugees Convention, Australia does not owe protection obligations to a person who has a right to enter and reside in, whether permanently or temporarily any country apart from Australia, and however that right arose or is expressed. Such a country includes countries of which the non-citizen is a national, but it may also arise on other grounds. An interesting question is whether the applicant should have visited the country in question. Or does it suffice that the applicant has a right to enter a country he or she has never been to, as might be the case of an ethnic Jew facing persecution but who has the right to enter Israel. Or he or she could be an ethnic Russian from a CIS State. The non-citizen is expected to take all possible steps to avail him/herself of the right. The general law requirement that it is for the non-citizen to demonstrate that he or she has no right of re-entry is not specifically referred to, but presumably remains operative.

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16 *Thiyagarajah,* op. cit, von Doussa, Moore & Sackville JJ.

17 *MIMA v Sameh* [2000] FCA 578, O'Connor, Tamberlin and Mansfield JJ.

18 *MIMA v Al-Sallal*, (1999) 167 ALR 175, Heerey, Carr and Tamberlin JJ. Reaffirmed in *MIMA v Sameh* [2000] FCA 578, O'Connor, Tamberlin and Mansfield JJ.

19 *Rajendran v MIMA,* unreported, full Federal Court, von Doussa, O'Loughlin & Finn JJ, 4 September 1998.

20 *MIMA v Gnanapiragasam & Ors* (1998) 88 FCR 1, Weinberg J.

21 *Tharmalingam v MIMA* [1999] FCA 1180, Ryan, Tamberlin & Madgwick JJ. Leave to appeal to High Court refused.

22 *MIMA v Prathapan* (1998) 156 ALR 672, Burchett, Whitlam & Lindgren JJ.

23 Id.

24 *Thiyagarajah, Gnanapiragasam.*

The new s.36 (4) and (5) excepts from such third countries any country in respect of which the non-citizen has a well-founded fear of being persecuted on Convention grounds or of being refouled to another country where he or she fears such persecution.

The new s.36 (6) introduces a change to the general law. It provides for the purposes of s.36(3) that "the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country." This section was intended to render inoperative the ruling of the Full Federal Court in *Jong*,[25] where it was held that the reference to "nationality" under the second paragraph of Article 1A of the Convention (which deals with persons with more than one nationality) is to be interpreted as a reference to "effective nationality". At the same time, that Court re-affirmed the well-established rule that the "formal" nationality of a person depends on the law of the country whose nationality is claimed.[26] It is not clear whether the provision as drafted actually goes beyond restating that principle.

In *Jong* the Court stated,

> … the inquiry does not necessarily end, in the case of a person with dual nationality, once it is concluded that the person has a second nationality and has no fear of persecution for a convention reason in the country of the second nationality. In such a case there remains the question whether the nationality is "effective", which in turn may lead to an inquiry as to the "availability" of protection.

The Court referred to the UNHCR Handbook at para 107, and quoted Professor Hathaway's comment that "the major caveat to the principle of deferring to protection by a State of citizenship is the need to ensure effective, rather than merely formal, nationality."[27] The Court went on to state,

> What is involved here is the proper construction of Article 1A(2) of the Refugees Convention. To interpret "nationality" for the purposes of Art 1A(2) as something of a "merely formal" character (to use the language of Professor Hathaway), instead of something effective from the viewpoint of a putative refugee, would be liable to frustrate rather than advance the humanitarian objects of the Refugees Convention. Nor would such a construction advance, in any practical way, another object of the Refugees Convention, namely the precedence of national protection over international protection. That precedence has no obvious relevance where national protection is not effective.

The Court concluded by stating that,

> … to construe "nationality" … as referring to nationality that is effective as a source of protection and which is not merely formal is, in our view, to interpret Art 1A(2) in the manner required by the Vienna Convention as explained in the High Court in *Applicant A*, that is to say, in accordance with the ordinary meaning of the text but considering also the context and the object and purpose of the Refugees Convention.

The new s.36(6) requires a decision-maker to have regard only to the laws of the country in question when deciding whether a person is a national of that country for the purposes of subs. (3). This may only repeat a well-established rule, or it may be interpreted more broadly as overriding the "effective nationality" concept. If the latter is the case, the decision in *Jong* that

> (e)ffective nationality for this purpose is of course something that must be assessed in the light of all the circumstances of a particular case. The inquiry will thus extend to a range of practical questions, parallel to those posed by the expression "unable" in the first paragraph of Art 1A(2)

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25 *Jong Kim Koe v MIMA* (1997) 143 ALR 695, 705, Black CJ, Foster and Lehane JJ.

26 See the Hague Convention on Certain Questions Relating to Conflicts in Nationality Laws 1930, Art. 2.

27 *Jong*, note 25.

may no longer be the law. Section 36(6), if broadly interpreted, may also render the decision of Finkelstein in *Lay*[28] inoperative, premised as it is on an inquiry as to whether the applicant had an "effective nationality". However, even if the provision has the broader effect, the question remains, as pointed out by Hathaway in the passage cited earlier, whether a person can avail himself or herself effectively of the protection of the country of nationality. This would not be the case if that person were unable to enter the country of which he or she was a national.

However, for the dual national the amending legislation has put a further obstacle in his or her way which makes the assertion of a lack of protection dependent on the permission of the Minister. The 1999 Act further amends the Act so that in certain circumstances, a person who has more than one nationality, or who has effective protection in a third country, may not make a valid application for a protection visa, unless the Minister gives written permission to do so. In a world where empires have dissolved, countries have been partitioned and which has seen massive movements of population, dual nationality is very common. However, many persons, including many Australians, may not be aware that they possess more than one nationality. In other cases, as in the case of the East Timorese, the question of dual nationality may be disputed.

Subdivision AK of Division 3 of Part 2 has been added to the Act. The provisions of Subdivision AK including s.91P, and in conjunction with amendments to s.46 of the Act, have the effect of preventing non-citizens who have more than one nationality, or who are deemed, by virtue of the Minister's written declaration,[29] to have effective protection in a third country where they have stayed for more than 7 days and to which they have a right of re-entry, from lodging valid applications for a visa whilst they remain in the migration zone (defined in s.5 to include the States and Territories of Australia, land that is part of a State or Territory at mean low water, and sea within the limits of a State or Territory and a port). Non-citizens who are in the migration zone, but who are not immigration-cleared, cannot make a valid application for a visa whilst they are in the migration zone, or once they have left the migration zone. There is a ministerial discretion, which is exercisable in the public interest, to determine that s.91P does not apply to a non-citizen.

Section 46 of the Act sets out the requirements for a valid application for a visa. Section 46(1)(d) of the Act was recently amended to preclude non-citizens with access to protection from third countries from making a valid application for a protection visa or for any visa if they are not immigration cleared.

How does the new Subdivision AK affect the RRT?

Section 414 of the Act gives the RRT jurisdiction to review "RRT-reviewable decisions". Section 411 defines the term "RRT-reviewable decision" to include a decision to refuse to grant a protection visa. Section 412(2) provides that "[a]n application for review may only be made by a non-citizen who is the subject of the primary decision."

Section 65 of the Act provides that if, after considering a valid application for a visa, the Minister is satisfied of a number of criteria, he or she is to grant the visa; or, if the Minister is not so satisfied, he or she is to refuse to grant the visa. This section has the effect of allowing a decision to be made by the Minister or his delegate only where a valid application for a visa has been lodged. Moreover, under s.47(3), the Minister is not permitted to consider an application that is not valid. It follows that an application for a visa, which is not valid, will not usually be the subject of a decision to refuse a visa. If there is no such decision, then

28 *Lay Kon Tji* v *MIMA* (1998) 158 ALR 681, FC, Finkelstein J.

29 No such declaration has as yet been made.

there is no RRT-reviewable decision. In such a case the RRT has no jurisdiction. The RRT does not have the authority to review a decision that an application is not a valid application.

If there is no decision by the RRT, there cannot be jurisdiction on the part of the Federal Court to review that decision under s.475(1).[30] However the High Court in its original jurisdiction may review a decision of an officer of the Commonwealth.[31] The only recourse open to a non-citizen may be to seek from the High Court a writ of mandamus to have a decision-maker make a decision, or certiorari to have a decision that an application is invalid quashed.

If the RRT makes a decision on the merits in a case where the Department has determined that no valid application was lodged, then the Minister may appeal this decision to the Federal Court relying upon s.476(1)(b) of the Act – that is, that the person who purported to make the decision did not have jurisdiction to make the decision.

If the RRT receives an application for review of a decision to refuse to grant a protection visa, and the RRT determines that an applicant is a person to whom Subdivision AK applies, and the application for a visa was made on or after 16 December 1999 (the date of commencement of the amendments introduced by the 1999 Act), then by virtue of the amended s.46, its conclusion must be that the applicant did not lodge a valid application for a protection visa. In these circumstances the non-citizen cannot be granted a protection visa.

In this scenario, the RRT has jurisdiction by virtue of the existence of an RRT-reviewable decision. The fact that the primary decision is wrong does not deprive the RRT of its jurisdiction under ss.411, 412 and 414 of the Act.

In these circumstances, the Federal Court has jurisdiction to hear an appeal from a decision of the RRT that an applicant did not lodge a valid application for a visa.

Stateless persons

At the other end of the spectrum from the dual national stands the stateless person. The Convention in Article A (2) specifically provides for that situation in stating:

> …or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

For a short period the idea gained acceptance that it was sufficient that a stateless person was unable to return to the former habitual residence for whatever reason, whether based on the Convention or not. This view has now been rejected. The Full Court of the Federal Court held in *MIMA v Savvin*[32] that the inability of a stateless person to return to his or her country of origin does not by itself attract refugee status.

Other invalid applications for a protection visa

Leaving aside the issues just discussed concerning Subdivision AK, a number of recent decisions of the Federal Court have dealt with the issue of what constitutes a valid application for a protection visa. The issue of whether or not an application is valid is to be considered in the light of the statutory scheme provided under the Act.

Section 47 provides that the Minister is to consider a valid application for a visa, and s.45(2) states that the regulations may prescribe the way to make an application for a visa. Section

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30 But query whether in that case the exclusion of the Court's jurisdiction under s 485 applies. It could conceivably have jurisdiction under the *Administrative Decisions (Judicial review) Act 1977*.

31 Section 75(v) Constitution.

32 [2000] FCA 478 per Spender, Drummond and Katz JJ.

46 states that a visa is valid "if, and only if" it is made in accordance with s.45(2). The regulations provide that the Minister may in writing approve forms for making an application for a visa (clause 1.18); that an applicant must complete an approved form in accordance with any directions on it (clause 2.97(3)); and that the applicant must make specific claims under the Refugees Convention (clause 866.211(a)). Section 65 of the Act states that the Minister is to either refuse an application for a visa or grant the application "after considering a valid application for a visa".

Section 54 of the Act provides that the Minister must have regard to all the information in the application. Section 55 provides:

> 55. Further information may be given
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> (1) Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister may have regard to that information in making the decision.
> (2) Subsection (1) does not mean that the Minister is required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information.

Section 25C of the *Acts Interpretation Act 1901* is also relevant:

> 25C. Compliance with forms
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> Where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient.

It is not unusual for an application to be completed incorrectly. The crucial questions asked in Items 36 to 40 are sometimes not responded to at all. At other times an applicant may simply say: "statement attached" or "statement follows". Sometimes a separate statement is attached to the application. At other times the statement is filed shortly thereafter and reaches the primary decision-maker later. In some cases no statement is filed until an application is made for review by the RRT.

In *MIMA v A*,[33] the majority of the Full Court took the view that an application which does not state the grounds upon which a protection visa is sought is not a valid application. As Merkel J stated:

> There is much to be said for the view that the intent of the legislative scheme is that information necessary to enable the Minister or his delegate to decide the substantive issues raised by a visa application must be provided as directed in an approved form. However, I do not accept that the same intent exists in respect of all of the information sought in an incomplete application irrespective of the significance or relevance to the outcome of the application or the uncompleted parts of it. I respectfully agree with the observation of RD Nicholson J in *Wu* that a literal approach to compliance "would possibly occasion great injustice". I would add that such an approach would be a triumph of form over substance which I do not regard the legislature as intending in an area fundamental to the human and family rights of those falling within the purview of the Act, many of whom could be expected to experience some difficulty in duly completing approved forms.

Specifically this means that the questions asked in items 36 to 40 inclusive of Part C must be answered. It cannot suffice to state "Statement follows" when nothing is attached. Although the advantage of an invalid application may be that a fresh application can be lodged without requiring the permission of the Minister under s.48A, the disadvantage is that, until this is done or unless the non-citizen has another kind of substantive or bridging visa not linked to a protection visa application, the applicant has no protection from removal. Any fresh

33 (1999) 91 FCR 435.

application must, of course, also comply with the law as it now stands, including Subdivision AK. Work rights, which were available under an earlier regime, may not be available on a later application.

Following *MIMA v A*, the view was initially taken that if no substantive material had been placed before the primary decision maker there was nothing for the Tribunal to review. The submission of material after the primary decision could not "cure" the defect, since the Tribunal was a review body and could not be placed in the position of a primary decision maker.[34] It was even suggested that an application, which was not self-contained but referred to accompanying material was invalid.[35]

However, following the Full Court decision of *Yilmaz v MIMA*,[36] pragmatism has prevailed. The Full Court endorsed the view expressed in *MIMA v A* that an incomplete application was invalid. The primary decision-maker therefore could not consider it. However, if the primary decision-maker did mistakenly consider it, according to the majority of the Court (Spender and Gyles JJ) his or her decision was nevertheless an RRT-reviewable decision. The majority also held that the original invalidity of the application could be remedied by the subsequent supply of substantive claims. Marshall J dissented on the simple ground that since the initial application was invalid, there was nothing that could be reviewed by the Tribunal. The subsequent supply of information changed nothing; it could not change the Tribunal from a reviewing body into a primary decision-maker. It follows from the majority view that, a fortiori, the supply of information to the Minister before the primary decision is made means that there is a valid primary decision.[37] The application becomes valid as soon as the statement is provided.

It is still uncertain whether an application can only be valid if all requirements of the form are fully complied with. For example, must all questions in the form be answered, or is substantial compliance sufficient? Thus, an applicant may answer only one question but supply sufficient material therein from which a claim can be deduced. In *MIMA v A* Merkel J was of the view that the application of s.25C of the *Acts Interpretation Act 1901* to the Act has not been excluded, and that it operates to render valid those applications for visas which substantially comply with the requirements of the Act and the regulations. "Substantial compliance", in his Honour's view, involves at least the completion of that part of the form relating to the specific claims for refugee status. In *Samuels v MIMA*,[38] Wilcox took the view that s.25C did not apply and that consequently strict compliance was required. But this appears to be a minority view.[39]

In apparent contrast to the above decisions stands the decision of Finkelstein J in *Potier v MIMA*.[40] That case concerned an applicant who was held in detention. The applicant had only filled in and lodged the one page application form, which was at the last page of Part A of the "Application Pack". None of the information requested in items 36 to 40 of Part C had been supplied. Nonetheless, the learned judge (who had been a member of the Full Court Bench in *MIMA v A*) held that the application was valid because the relevant instructions given appeared to suggest that the completion of that page was all that was required of

34 *Li Wen Han v MIMA* [2000] FCA 421 (Heerey J).

35 *Li Wen Han v MIMA.*

36 [2000] FCA 906.

37 *Nader v MIMA* [2000] FCA 908; see also: *Najarian v MIMA* [2000] FCA 933 and *Wimalaratne v MIMA* [2000] FCA 964.

38 [2000] FCA 854.

39 The contrary view was taken by Heerey J in *Li Wen Han v MIMA* at [33], by Lindgren J in *Kundu v MIMA* [2000] FCA 560 at [7] and by Merkel J in *Najarian v MIMA* at [43].

40 [2000] FCA 252.

persons held in detention. Although both cases turned on the instructions given in the relevant form, the effect of that decision does not fit in readily with the emphasis given in the decisions referred to earlier, to providing the information necessary to enable the Minister to decide the substantive issues. No doubt, further consideration needs to be given to this issue.

Other procedural issues

The decision of the Full Court in *MIMA v Harinder Pal Singh*[41] has come as rather a shock to both the Department and the RRT. In that case the Full Court held reg. 5.03 of the Migration Regulations to be invalid. This regulation defines the time of receipt of a document that is sent by the Minister or a Tribunal. It is a "deeming" provision whereby a document is deemed to have been received 7 days after its date. The provision did not apply unless the document was in fact sent within 7 days after its date. The Full Court held this to be void for unreasonableness. It was particularly concerned about its application to person in detention, although arguably that situation is covered by reg. 5.02 rather than 5.03.

As from 1 July 2000 reg. 5.03 has been amended to meet the concerns expressed by the Full Court. However, the question may arise whether notifications of decisions made by the Department prior to 1 July 2000 in reliance upon the now invalidated (ab initio) reg. 5.03 are also invalidated in that they wrongly advised applicants to seek review within 35 days of the date of the letter of notification. A possible consequence could be that review could be sought of a primary decision at any time. The alternative view, as the Full Court suggested itself, is that the Department may be able to rely on s.29 of the *Acts Interpretation Act 1901* and s.160 of the *Evidence Act 1995* which together have the effect that notices sent "in the ordinary course of post" are deemed to have been received by the addressee 4 days after they are sent, unless the presumption is rebutted. The question, however, remains whether the now incorrect statement that the applicant has 35 days from the date of the letter to seek review complies with the statutory obligation under s.66(2)(d)(ii) of the Act to state "the time in which the application for review may be made". Presumably that must be the correct time. On the other hand, in almost all cases the time given to the applicant will have overstated the period. If the presumption of receipt is four days from posting (and assuming posting is on the same date as the date of the letter) the relevant period should be 32 days!

The Interpretation of the Convention: Some Issues

It is the function of the courts rather than the RRT to interpret the Convention. In Australia, the relevant courts are the High Court and the Federal Court. Since the Convention is an international instrument, it would be desirable for its interpretation to be uniform. However, apart from the International Court of Justice, which is not accessible to individuals, there is no body with international authority to interpret the Convention on a worldwide basis. Although Australian courts have on occasions referred to foreign decisions, most notably those made in the United Kingdom and Canada, essentially our case law is "home grown" and in some respects differs markedly from interpretations given in other member States.

Even within Australia, there is the risk of differing interpretations. As was said in *Jama* at first instance:

> The courts do not speak with one voice in these matters, despite the interpretation of a single international treaty being at the heart of such litigation. The subject matter and the wording of the Convention are apt to divide judicial opinion. It is a matter of self-criticism, as much as general observation, that individual courts and even individual judges cannot always ensure consistency.

41 [2000] FCA 377.

> These are emotionally charged matters. Consciously or unconsciously, judges are tugged at by emotions and perceptions that may not be easily reconciled.[42]

The "real chance" test

It is now well established that whether or not an applicant is a refugee under the Convention definition is to be determined on the facts as they exist at the time the determination is made.[43] However, the RRT also needs to consider and make findings on past events (the so-called "historical fear"), as indicated in the decision of the High Court in *Guo*.[44]

An assessment of whether a person is a "refugee" under the Refugees Convention requires in effect a decision to be made about the risk of the applicant being persecuted upon returning to the country of origin. In *Chan* the "real chance" test was put forward as the appropriate standard by which this risk was to be assessed. Mason CJ stated in relation to the "real chance" test that it

> … clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring. … If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty percent chance of persecution occurring.[45]

Whilst the RRT properly makes findings of fact on the standard of the preponderance of evidence or the balance of probability,[46] the "real chance" test itself is not an assessment on the balance of probability. In *Guo*, the High Court stated that:

> *Chan* is an important decision of this court because it establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50%.[47]

The "real chance" test does not involve a decision-maker speculating on the risk of future persecution in the sense of conjecturing or surmising as to that risk: "Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is "well-founded" when there is a real substantial basis for it. … A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation."[48]

In elaborating upon the application of the "real chance" test, the majority of the High Court stated in *Guo*, that:

> The extent to which past events are a guide to the future depends upon the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur will border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can safely be disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant

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42 *Jama v MIMA* [1999] FCA 977, para 2 per Madgwick J.

43 *Chan v MIEA* (1989) 169 CLR 379; *MIEA v Singh* (1997) 72 FCR 288.

44 *MIEA v Guo & Anor* (1997) 191 CLR 559. The High court held that "It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events".

45 *Chan*, 389.

46 *Wu Shan Liang* (1996) 185 CLR 259 at 281.

47 *Guo*, p 576.

48 Ibid, p 577.

> field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.[49]

This passage was cited with approval in the recent High Court case of *Abebe*.[50]

The proper approach for the RRT to take is to weigh the material before it and make findings before it engages in a consideration of whether a person has a well-founded fear of persecution under the Convention.[51]

The majority in *Guo* also stated that:

> [i]f … a tribunal finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining whether there is a well-founded fear of future persecution.[52]

This passage reflects the so-called "What if I am wrong?" test. That question need not be asked in every case. If the RRT has no doubt about the correctness of its findings the question is inappropriate. It is only appropriate in cases where the RRT is uncertain as to whether an alleged event took place or finds that, although it is unlikely to have occurred, it may be possible that it did.[53]

Is there a requirement of bona fides?

The situation has arisen from time to time where an applicant who might otherwise have no claim to a protection visa arising out of his or her experiences abroad, creates a *sur place* claim by engaging in an activity in Australia calculated to win him or her the enmity of the authorities in his or her homeland. Often those activities may be engaged in out of sincerely held political conviction. At other times, the suspicion may arise that the act is engaged in for the sole purpose of creating a claim. In *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*,[54] Gummow J (with whose statement on this point Jenkinson and Keely JJ agreed) said:

> …it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution, to which the Convention refers, in such cases will not be "well-founded".

This principle has sometimes been explained as based on the proposition that a refugee acting in bad faith cannot qualify as a refugee under the Convention, even if his or her act has resulted in a situation which gives rise to a well-founded fear of persecution. These remarks were obiter. More recently the issue was reconsidered by the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Mohammed.*[55] In that case French J stated:

> There will be cases in which a deliberate act, expressive of a particular political opinion will give rise to a risk of persecution that supports a well-founded fear for the purposes of the Convention. Good faith will not necessarily have any part to play in such a case. Acts of refugees expressing

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49 Ibid, p 578-9.

50 *Abebe v The Commonwealth* (1999) 162 ALR 1, Gleeson CJ & McHugh J at [81].

51 *Guo*, p 579.

52 Ibid, p 580.

53 *MIMA v Rajalingam* [1999] FCA 719, at [24-5].

54 (1991) 31 FCR 100. See also, *Heshmati v MILGEA* (1991) 31 FCR 123.

55 [2000] FCA 576, Spender, French and Carr JJ.

> political opinions outside the country of nationality may be done for a variety of reasons. They may be intended to be supportive of those who remain at risk within their country of origin. They may be designed to bring international pressure to bear upon that country. They may be designed to draw the attention of the country to whom they are applying for refugee status, and of its community, to the situation in the country of nationality. There may be a case in which a person genuinely holds an opinion which would attract persecution if known to the country of origin and who deliberately draws that opinion to the attention of authorities in that country to crystallise or demonstrate the basis for the fear which is asserted. All of these reasons may be consistent with the existence of a well-founded fear of persecution, albeit it is enhanced or even brought into existence by the conduct in the country of residence. Given the freedoms guaranteed under the Universal Declaration of Human Rights and other international conventions, it could not have been consistent with the purpose of the Refugee Convention to require that persons claiming to be refugees be deprived of their fundamental human rights and freedoms in the country from whom they are seeking protection.
>
> The imposition of a good faith qualification for refugees *sur place* as a gloss upon the Convention is not warranted by its language and is capable of eroding, in its practical application, the protection that the Convention provides. That is because of its very vagueness. Moreover the problem which that gloss seeks to address is more apparent than real. There can be few, if any, cases in which political statements made from the country whose protection is sought for the sole purpose of generating the circumstances attracting Convention protection will be found to reflect any political opinion genuinely held by the person making them. And even if that obstacle is sidestepped by invoking imputed opinion, a demonstration of a well-founded fear or the necessary causal connection between apprehended persecution and Convention attribute in such a case would also be difficult. But each case turns upon its own facts. The Convention must be given effect according to its language. Even those who, notwithstanding their want of good faith, could show that the conditions for protection are satisfied are entitled to that protection. Want of good faith is a factual issue with evidentiary significance in the ultimate issue to be determined which is whether the applicant satisfies the conditions of Article 1A. It is not a rule of law to be laid over the words of the Convention.

Spender J supported the reasoning of French J. Carr J dissented. Both Spender J and French J are at pains to point out that a "manufactured" *sur place* claim will not necessarily succeed. The question remains whether a person without any previous political or other profile who makes such a statement holds a genuine and well-founded fear of persecution or whether the authorities who become aware of such statement or act are likely to inflict sanctions upon a person whose actions they may not take seriously.

Civil War

Generally speaking, under the Refugees Convention when assessing whether a person has a well-founded fear of persecution on a Convention ground, a person fleeing civil war and the general deprivations which follow a civil war, will not have established a Convention ground for persecution.[56] But this does not exclude persons who become involved in a civil war situation from qualifying as victims of Convention persecution. There is a difference between the person caught in crossfire, as it were, and a person or group against whom the violence is specifically directed.

This distinction has been of particular relevance in relation to two countries, Somalia and Sri Lanka. The decisional law can be seen to have developed in response to the particular conditions in these countries, which distinguish them from other countries. In Somalia those conditions are the existence of clan warfare. In Sri Lanka the conditions are mistreatment of young Tamils in detention.

56 See UNHCR Handbook para. 164.

A useful starting point from which to examine the development of the law in relation to claimants from these two countries is the decision of the House of Lords in *Adan.*[57] In that case, which centred upon civil war in Somalia but which is relevant to both countries, it was held that a differential impact needed to be established to show that the applicant would experience persecution for reasons over and above the ordinary risks incurred in a country ravaged by civil war or acts of terrorism. This requirement was not accepted in Australia.

Clan Warfare and Civil Unrest

In *Adan* the majority of the House of Lords decided that in the context of a civil war, where there are warring clans an asylum seeker must show that he or she is being targeted for Convention reasons other than his or her membership of one of the warring clans: "He must be able to show … a differential impact. In other words he must be able to show a fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."[58]

This decision was not followed by the Full Federal Court in the decision of *Abdi.*[59] There it was held that

> … the statements made in *Adan* travel beyond the requirements of the Convention by imposing additional or differential requirements where the civil war in question is based on racial or clan grounds and not grounds such as a struggle for power or dominance, the acquisition of territory, the appropriation of property or the acquisition of access to strategic resources or facilities. In the latter examples where the civil war is not directed to racial persecution, it is necessary, of course, to establish the existence of selective harassment on a Convention ground, whereas in the former example such a ground is already present because the civil war is properly characterised as race based.[60]

Therefore a decision-maker must examine the reasons underlying the war to see whether or not it is based upon a Convention ground. It is, with great respect, difficult to understand the distinction drawn. A struggle for power usually involves the elimination of an opposing political group, which in many countries is ethnically based. Thus, in modern terms a struggle for resources will almost inevitably involve "ethnic cleansing". The era of wars for the greater personal glory of warrior kings has long ceased.

The Minister was granted leave to appeal this decision to the High Court. However, the appeal lapsed after Mr Abdi returned home to Somalia.

In the recent decision of *Jama*,[61] a majority of the Full Federal Court decided that the RRT had failed to consider, in applying the real chance test, whether the applicant could be safely repatriated to Somalia. The issue centered upon the conditions in northwest Somalia where the applicant's clan is based. The majority held that the RRT failed to consider whether, in the context of clan based warfare over control of the territory of north-west Somalia, the fighting might be indirectly advanced by acts aimed at destroying the morale of the applicant's clan, such as acts directed at "non-combatants". This it was said resulted in the RRT failing to consider whether the clan-based conflict gave rise to a real chance that members of the sub-clan including the applicant would be singled out for persecutory treatment because of their clan membership. No doubt German non-combatants in 1944 might have claimed that they were "persecuted" by the allies!

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57 *Adan v Secretary of State for the Home Department* [1998] 2 WLR 702.

58 Ibid, at 710-713 per Lord Lloyd.

59 *MIMA v Abdullah Sheikh Mohamed Abdi* (1999) 87 FCR 280, O'Connor, Tamberlin & Mansfield JJ.

60 Ibid, 42.

61 *MIMA v Jama* [1999] FCA 1680, unreported, Branson, Sackville and Kiefel JJ, 3 December 1999.

The Court, applying the reasoning of the Full Court in *Abdi*[62] and adopting the trial judge's references to the decision of *Abdalla,*[63] upheld the decision at first instance that whilst the clan-based war in north-west Somalia was centred upon attempts to control the territory, (a "traditional" war) the Tribunal should also have inquired whether there may also have been a persecutory element in the war. I understand that *Jama* is also the subject of a special leave application.

The disturbed conditions in Somalia do not prevent the return of claimants who are found not to be refugees within the meaning of the Convention. In *Yonis Hussein Abdi*[64] (decided on 10 March 2000, and not to be confused with the decision of March 1999 of the same name) the Full Court affirmed the reasoning of the trial judge that

> [a]s the issue of relocation, in so far as it affects the applicant's status as a refugee as opposed to the question of relocation in fact does not arise after the applicant has left [his] country of origin, and is concerned with whether he could have, reasonably, relocated prior to departure, the subsequent question of whether the applicant can, at this time because of other circumstances, be returned to North East Somalia, is not in this case, a material question of fact. That conclusion follows from the finding that there was no well-founded fear of persecution.

The Full Court commented on this statement in the following terms:

> … once the Tribunal made the central and material finding that the appellant did not have a well-founded fear of persecution if he returned to north-east Somalia, then other questions of relocation became academic and so were not material within the meaning of s 430. That is plainly correct.[65]

The inability to return must be due to a well-founded fear of persecution for a Convention reason. *A fortiori*, unwillingness to return, not based on a well-founded fear of persecution, cannot convert a person who is not a refugee into a person entitled to protection under the Convention. As the Full Court said in *Yonis Hussein Abdi*:

> It follows, in our view, from what was said in *Randhawa*, and from a proper understanding of the terms of the Convention definition, that unwillingness to return (not based on well-founded fear of persecution for a Convention reason) cannot of itself (nor can consequences that follow entirely from that unwillingness) convert into a refugee an applicant who would not otherwise be entitled to international protection. That is simply an application of the well established principle that third countries are obliged to give international protection only in circumstances where national protection is not available.[66]

General Maltreatment

The conditions in Sri Lanka which were central to the development of the law were:

- The fact that when people of any racial or ethnic background are detained they face a high risk of being mistreated once in detention; and
- A large proportion of the population (Tamils) is routinely and legitimately detained for questioning from time to time in response to the acts of terrorism committed by a small percentage of that population.

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62 26 March 1999.

63 *Abdalla v MIMA (*1998) 51 ALD 11, Burchett, Tamberlin & Emmett JJ.

64 *Yonis Hussein Abdi v MIMA* [2000] FCA 242.

65 Ibid, [7], per Whitlam, Lehane and Gyles JJ.

66 [2000] FCA 242 at [13].

The decision of the Full Federal Court in *Paramananthan*[67] examined the relationship between the above two factors, and concluded that, where a proportion of the population is legitimately rounded up and detained on the basis of the race or ethnicity - a Convention ground - of the people, and where it is a known fact that people are routinely mistreated in detention in Sri Lanka, then it is not enough to conclude that the mistreatment experienced by those detained on the basis of their ethnicity or race is merely indiscriminate. A causal nexus exists to render such mistreatment persecution on a Convention ground.

The reasons of the Court were delivered in three separate judgments, and although a ratio exists amongst the three, each judge reached his decision in different ways. The decision was approved by a differently constituted Full Court in the subsequent decision of *Nagaratnam,*[68] which summed up the principle as follows:

> When, in accordance with some law or government policy, persons are selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons may or may not amount to persecution for a Convention reason, depending upon the circumstances in which the law or government policy is being implemented. It may be implemented, for instance, in circumstances of war, whether foreign or domestic. If so and the criteria of selection of persons for detention is seen as appropriate and adapted to the successful prosecution of that war, then the act of detention will not be persecution for a Convention reason. However, when those who detain such persons in accordance with such law or government policy are aware that the probable consequence of such detention will be the physical mistreatment of those detained, even though those detained will not be selected for such physical mistreatment by those who administer that physical mistreatment upon a ground which equates to one of the Convention reasons and even though those selecting the detainees are unwilling that such physical mistreatment should occur, then those who detain such persons will be taken to have caused such physical mistreatment. As such persons have been selected for detention upon a ground which equates to one of the Convention reasons, the act of detaining such persons will amount to persecution for a Convention reason.

Membership of a Particular Social Group

Applicant A[69] is the leading case on this Convention ground. It dealt with the issue of whether people in breach of the one-child policy in the Peoples Republic of China constituted a "particular social group" under the Convention. The High Court ruled in *Applicant A* that a particular social group cannot be defined by reference to the persecution which its members experience or fear. Dawson J stated

> However, one important limitation which is, I think, obvious is that the characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.[70]

McHugh J stated:

> Discrimination - even discrimination amounting to persecution - that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be. ... [71]

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67 *Paramananthan v MIMA; MIMA v Sivarasa* (1998) 160 ALR 24, Wilcox J, Lindgren J and Merkel J.

68 *Nagaratnam v MIMA* [1999] FCA 176, Lee, Moore, Katz JJ, para 25 (1999) 89 FCR 569.

69 *Applicant A & Anor v MIMA* (1997) 190 CLR 225.

70 Ibid, 242.

71 Ibid, 257.

Later on he continued:

> The concept of persecution can have no place in defining the term "a particular social group. Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of "fear of persecution", "for reasons of" and "membership of a particular social group" in the definition of "refugee". It would also effectively make the other four grounds of persecution superfluous.[72]

In relation to the word "social" McHugh J stated,

> The use of that term in conjunction with "particular social group" connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.[73]

Gummow J[74] approved the following passage from *Ram:*

> There must be a common unifying element binding the members together before there is a social group … When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group"[75]

In *MIMA v Zamora* the Full Court expressed the view that *Applicant A* is authority for the following proposition:

> To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.[76]

A "Black Child" Under the One-Child Oolicy of the Peoples Republic of China

"Black children" in the PRC are those born in contravention of the one-child policy. In the decision of the High Court in *Chen Shi Hai v MIMA*[77] the five member Court ruled unanimously that such children can be considered to be members of a particular social group who are persecuted for reasons of such membership.

"Black children" can face treatment in the PRC which includes the withdrawal of state funded basic education and medical treatment. The Court ruled that

> denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.[78]

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72 Ibid, 263.

73 Ibid, 264.

74 Ibid, 285.

75 *Ram v MIEA* (1995) 130 ALR 314,

76 *MIMA v Zamora* (1998) 85 FCR 458, 464 per Black CJ, Branson and Finkelstein JJ.

77 [2000] HCA 19, 13 April 2000 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

78 Ibid, para 29.

The Court ruled that enmity and malignity are not necessary elements of 'persecution'. As noted by Kirby J, "persecution is often banal".[79]

The Court dealt with the issue of whether the social group was being defined by reference to the persecutory conduct to which it was subjected by noting that in the present case a significant element of the definition of "black child" was the fact that the appellant had been born out of wedlock. The Court also rejected the reasoning of the majority of the Full Court that the persecution to be suffered by a "black child" is for reasons of the contravention by his parents of a law of general application (the one-child policy) rather than for reasons of the child being a "black child". The Court distinguished *Applicant A,*

> [*Applicant A*] was concerned with persons who feared the imposition of sanctions upon them in the event that they contravened China's "one-child policy". In this case, the question is whether children, who did not contravene that policy but were born in contravention of it, can constitute a group of that kind. To put the matter in that way indicates that the group constituted by children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear. … The circumstances that "black children" receive adverse treatment in China is descriptive of their situation and, as McHugh J pointed out in *Applicant A,* that may facilitate their recognition as a social group for the purposes of the Convention but it does not define them.[80]

This does not mean, however, that every child born in China in contravention of the one-child policy is necessarily a refugee. As Kirby J stated:

> … it by no means follows that every child of PRC nationality born in immigration detention necessarily secures a right to refugee status in this country. Each case must depend on the evidence.[81]

Thus, the impact of being a "black child" may depend on ethnicity (Han or minority status), provincial policy and even whether the child is to live in a city or in the countryside. In some cases the consequences of breach may be averted by the payment of a fee. The irony of the two High Court decisions will be that, whilst the parents in the latter case were not entitled to refugee status by reason of their breach of the policy, their child will be.

Family as a Particular Social Group

In *Chan* and eight years later in *Applicant A* the High Court referred to the possibility of a family being a particular social group under the Convention.

The question is whether it is relevant that the family member faces persecution by reason of a family connection with a person who may not face such persecution himself or herself. In *Aliparo v MIMA*,[82] O'Connor J held that a wife was not a refugee, even assuming that her family constituted a "particular social group", because she was at risk of retaliation by reason of her husband having reported a wrongdoer to the authorities. That was not a Convention reason. On the other hand, in the decision of *Sarrazola*[83] the Full Federal Court ruled that where membership of a family renders a person subject to persecution, then a further Convention ground does not have to be found to attach to that family in order for the person to satisfy the Convention definition. The Court decided the proposition that ""the Convention

79 Ibid, [63].

80 Ibid at [22] – [23].

81 Ibid at [81].

82 [1999] FCA 79.

83 *MIMA v Sarrazola* [1999] FCA 1134, Einfeld, Moore & Branson JJ, 6 October 1999.

was not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition" is entirely unsupported by authority. In *Sarrazola* the applicant faced persecution because criminals sought to extort money from her which her brother owed to them as a result of his own criminal activities. However, the Full Court did not decide whether this particular family constituted a particular social group. This decision has considerable potential to expand the ambit of the Convention. Although the person who is the particular focus of the pressure may not qualify as a refugee (and may even be regarded as unworthy of protection), members of his or her family may qualify.

Prior to *Sarrazola* it was generally assumed that while a family can constitute a social group, it does not follow that all families constitute a social group. Thus in *Aliparo*, O'Connor J. noted that the characteristics which define a group must "pre-exist the persecution" and said "[t]here is no characteristic, on the evidence available to the Tribunal, of this applicant's family which distinguishes them from society at large, other than the fear of persecution or retaliation".[84] Similarly in *Mahuroof v MIMA*, Branson J applied the reasoning in *Applicant A* to hold that the applicant's family was not a particular social group in the circumstances, as there "was nothing before the Tribunal which suggested that the applicant's family is perceived in Sri Lanka as a cognisable group within society".[85]

In the subsequent decision of *C and S*[86] (a case where the factual situation did not differ much from that in *Aliparo*), Wilcox J expressly agreed with the statement made by the trial judge in *Sarrazola*, that "[m]embership of a family is a characteristic which distinguishes members of that family from society at large … family members possess a common unifying element which binds them together as a particular social group." According to Wilcox J,:

> [t]hat which binds together the members of a family is not the suffering of persecution but a relationship of blood and marriage; membership of a family is something that exists independently of any persecution the members may suffer. Moreover, in almost every society, familial links are recognised and families are identifiable.

This could be taken to mean that every family constitutes a "particular social group", a proposition the Full Court in *Sarrazola* was not prepared to accept.[87] On this analysis, the real issue becomes one of causation; does the feared persecution exist by reason of membership of the family?

Homosexuals

In *Applicant A*, McHugh J stated

> [a] group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient if the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. … If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status.

84 [1999] FCA 79 at [21]-[22].

85 Unreported, Branson J, 13 March 1998, at p. 7.

86 *C and S v MIMA* [1999] FCA 1430, Wilcox J, 20 October 1999.

87 Upon remittal the Tribunal again affirmed the primary decision. The case of *Aliparo* is before the Federal Court again.

In that same case, Kirby J stated,

> It is now well established … that it is not necessary for an individual applicant to have been a member of a concerted body or association affirming group identity. In some cases, such as homosexuals in certain countries, such a requirement could be extremely perilous to the members of the group and self-defeating.

There is little doubt that homosexuals can constitute a particular social group. As Burchett J said in *F v MIMA*:

> It is in accordance with settled authority to see as a member of a social group a person who identifies himself by some means with an ascertainable set of associated persons linked by shared homosexual activities. So, too, in the case of a person who is identified as such by others, though perhaps against his will.[88]

In other words the person must be identified in the eyes of others as a homosexual, either correctly or falsely. Being a "closet" homosexual may not suffice. As his Honour put it: "the mere possession of some homosexual feelings might not necessarily be enough".

What is not yet clear is whether a law or social attitude which punishes public manifestations of homosexuality amounts to persecution. In *MIMA v Gui,*[89] the Minister had conceded that homosexuals in Shanghai constituted a particular social group. However, the Tribunal had found that it was the applicant's behaviour in a public place (kissing another male), which was "unacceptable according to the cultural norms prevailing in China", which had brought him to the notice of the authorities. The Full Court said that that finding, which was open on the evidence, was inconsistent with a finding of persecution for a Convention reason. "What precipitated the police action was not Mr Gui's membership of a social group but his conduct in a public place".[90]

A similar issue arises of whether it is possible to avoid persecution by expressing one's sexuality in a "discreet" manner. In *Applicant LSLS v MIMA*,[91] Ryan J made the following comments:

> An error of law could readily have been imputed to the Tribunal had it acknowledged, on the one hand, that the practice of a homosexual lifestyle as a whole is "protected" by the operation of the Convention, but, on the other, had denied the applicant all means of meeting prospective sexual partners, thereby reasoning that the Convention does not, as a matter of law, "protect" a part of the activity of a particular social group that is necessary and integral to the defining characteristic of that group. That erroneous reasoning would render illusory the protection afforded by the Convention, but I am not persuaded that the approach of the Tribunal has been infected by that error and this ground is not made out.
>
> In truth, this complaint of the applicant is that the line drawn by the Tribunal between what it is, and is not, reasonable to require of the applicant in order to avoid persecution should not, on the material available to the Tribunal, have been drawn where it evidently was. The strong injunctions against merits review of Tribunal decisions which have been expressed in many recent authorities are a reminder that consideration of a complaint of this kind is allowed only to a limited extent. It is within the permissible limits to ask whether there was evidence to justify the Tribunal's determination that the applicant could avoid persecution by being "discreet", consistently with the practice of a homosexual lifestyle of the extent under the consideration of the Tribunal. ….
>
> The further error of law contended for by the applicant is the Tribunal's treatment of the effective criminalisation of homosexuality by the Sri Lankan Criminal Code. The finding of the Tribunal in

88 [1999] FCA 947 at [11].

89 [1999] FCA 1496, Heerey, Carr and Tamberlin JJ.

90 Ibid at [28].

91 [2000] FCA 211.

> this respect was that these laws were not, in practice, enforced "to any significant extent" and that the applicant, therefore, did not have a well-founded fear of persecution on that basis. This is said to be a misapplication of the test laid down by the High Court in *Chan Yee Kim v. Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ("*Chan*").
>
> The Tribunal's use of the phrase "to any significant extent" does not strictly accord with any of the descriptions in *Chan* of the degree of satisfaction required for making such a determination. However, in the context in which the phrase was used, I am unable to say that this criticism is anything more than "pernickety" (per Kirby J, *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1998) 151 ALR 711 at 714, referring to the earlier case of *Wu Shan Liang v. Minister for Immigration and Multicultural Affairs* (1996) 185 CLR 259), and it does not entail an error of law.

Domestic Violence and Discrimination against Women

The law in this area is still developing. Claims based upon these grounds must be characterised by reference to membership of a particular social group under the Convention. Much will depend upon the conditions in the country of origin when considering these grounds.

It must be remembered that the Convention is primarily designed "to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality".[92] This means that "persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is, or appears to be, powerless to prevent that private persecution".[93] Consequently, private harm, such as domestic violence or other violence against women does not qualify as persecution, unless the State permits it, condones it or appears to be powerless to prevent it. Even if State inaction converts it into State harm, the next issue is whether that State harm is inflicted for a Convention reason. This is no problem where the harm is inflicted for a reason such as an attempt to forcibly convert the wife to the husband's religion. [94]It is more problematic if one has to consider whether the harm was inflicted by reason of the victim's membership of a particular social group: the family to which the perpetrator may also belong, or gender which may be either too broad or amorphous.

The Department of Immigration and Multicultural Affairs has published *Guidelines on Gender Issues for Decision-Makers*[95] which state in part:

> 2.5 … due to social and cultural mores [women] may not necessarily have the same remedies for state protection as men, or the same opportunities for flight. …
>
> The issue of gender persecution and problems facing women asylum seekers have received attention from the Executive Committee of the United Nations High Commissioner for Refugees' Programme (EXCOM), UNHCR and some governments. UNHCR adopted Guidelines on the Protection of Refugee Women in 1991. A number of EXCOM conclusions have been adopted recommending the development of appropriate guidelines, culminating in 1995 with EXCOM's recommendation that:
>
> In accordance with the principle that women's rights are human rights, these guidelines should recognise as refugees women whose claim to refugee status is based on well-founded fear of persecution for reasons enumerated in the 1951 Convention and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution.
> …

92 *Applicant A v MIMA* (1997) 190 CLR 225 at 258 per McHugh J.

93 Id.

94 *A, B & C v MIMA* [1999] FCA 116.

95 July 1996.

> 3.5 The types of information which may be relevant in assessing gender related claims are often similar to those relevant to other types of claims. However, research should also focus on the following areas:
>
> - legal, economic and civil status of women in the country of origin;
> - the incidence of violence against women in the country of origin, including both sexual and domestic, and the adequacy of state protection afforded to women;
> - cultural and social mores of the country with respect to such issues as the role and status of women, the family, nature of family relationships, attitude towards same-sex relationships, attitudes to 'foreign' influences, etc;
> - respect for and adherence to fundamental human rights;
> - the differential application of human rights for women;
> - issues directly related to claims raised in the application.
>
> It should be noted that violence against women, particularly sexual or domestic violence, tends to be largely under-reported or ignored in many countries.
>
> Identifying these issues will enable an officer to become aware of the cultural sensitivities and differences in a particular country before considering the applicant's claims.
>
> 3.8 When assessing a woman's claims of well-founded fear of persecution … the evidence must show that what the woman genuinely fears is persecution for a Convention reason as distinguished from random violence or criminal activity perpetrated against her as an individual. The general human rights record of the country of origin, and the experiences of other women in a similar situation, may indicate the existence of systematic persecution for a Convention reason.

Where a woman and her children are subject to domestic violence, and the authorities refuse to intervene on the grounds that it is a domestic matter,[96] the Tribunal should consider whether that family constitutes members of a particular social group. Alternatively, O'Connor J opined in *Lupac*, the possibility of gender-based persecution should also be considered. As regards the latter, in *Ndege* Weinberg J observed in obiter that "[t]he finding that the particular social group was married women in Tanzania, and that its members could be a target for Convention related persecution, is in no way inconsistent with recent authority."[97] He referred with approval to the decision of the House of Lords in *Islam,* where it had been found that "women in Pakistan" were a particular social group.[98]

In *Khawar*[99] the court referred with approval to the test of causation applied by the House of Lords in *Islam.* Lord Steyn said:

> Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic. And that is so whether a 'but for' test, or an effective cause test, is adopted.[100]

Lord Hoffman noted that,

> … the reason for the persecution is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband … Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute

96 As occurred in the case of *Lupac v MIMA* [1998] FCA 696, O'Connor J, 24 November 1998.

97 *MIMA v Ndege* [1999] FCA 783, 11 June 1999, at [60].

98 *Islam v Secretary of State for the Home Department* [1999] 2 WLR 1015.

99 *Khawar* v *MIMA* [1999] FCA 1529, Branson J, 5 November 1999.

100 op cit, 1028.

> persecution within the meaning of the Convention. … An essential element in the persecution, the failure of the authorities to provide protection, is based upon [a Convention ground].[101]

In *Khawar*, Branson J found that this test of causation is consistent with Australian jurisprudence. Thus, the refusal or failure of State law enforcement officers to take steps to protect members of a social group from violence is itself capable of amounting to persecution under the Convention. That is, it is open to the Tribunal, if it found that women, or married women, constituted a particular social group in Pakistan, to find that the applicant had a well-founded fear of persecution by the Pakistani police for reasons of membership of a particular social group.

In *Jayawardene*, Goldberg J suggested that a Sri Lankan woman could experience persecution from her former husband because of their former relationship, and not because she was a member of the group of 'single women without protection'.[102] Goldberg J cited the passage from *Applicant A* where Dawson J stated,

> The words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group.[103]

The latest decision is that of Branson J in *Mendis v MIMA*,[104] where the applicant had complained of sexual harassment ("stalking") falling short of physical assault after her husband had left for Australia. Her Honour remitted the matter because the Tribunal should have considered whether the applicant was pursued as a member of a vulnerable social group "unprotected women in Sri Lanka". If that was so,[105] the Tribunal should have further considered whether the Sri Lankan government was encouraging or was powerless to prevent that harm. To the argument that unwanted attention and propositioning without physical violence was insufficient, her Honour replied:

> The term "harassment" is apt to cover conduct of varying degrees of seriousness. I understand the Tribunal to have intended the term to embrace conduct which is offensive and perhaps threatening but not amounting to physical assault (or, more accurately, battery). I do not consider that offensive and threatening conduct, whether sexual or not, is incapable of amounting to persecution within the meaning of the Convention. Whether it will amount to persecution in any particular case will depend on all of the circumstances of the case. The cultural context in which the conduct is experienced may prove to be a relevant circumstance. Nor do I conclude that for a woman to be "followed by men and approached by others" is necessarily incapable of amounting to persecution within the meaning of the Convention. Depending on the circumstances of the particular case, such conduct might be highly frightening and capable of constituting intimidation and duress.

The decision is currently being appealed. If upheld, it would, like *Sarrazola*, expand the ambit of the Convention quite considerably.

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101 op cit, 1034-1035.

102 *Jayawardene v MIMA* [1999] FCA 1577, Goldberg J at [28]. The comments were *obiter*.

103 op cit p240-241 CLR.

104 [2000] FCA 114.

105 Goldberg J in *Jayawardene* at [29] doubted that a group such as "single women" or "single women without protection in Sri Lanka" was a proper group for the purposes of the Convention. See also *Jama v MIMA* [1999] FCA 977 (Madgwick J).

Grounds for Judicial Review

The grounds for judicial review of decisions of the Tribunal by the Federal Court are set out under s.476 of the Migration Act. These grounds include a failure to apply procedures required under the Act to be applied,[106] restricted grounds relating to a failure of jurisdiction, improper exercise of power, fraud or actual bias, and certain types of error of law. The Act specifically excludes as a basis for judicial review the common law grounds of natural justice, and *Wednesbury* unreasonableness.

The powers of the Federal Court are set out in s.481 of the Act.

In the decision of the High Court in *Wu Shan Liang*[107] it was held that the reasons of the RRT are "… meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

In the recent High Court decision of *Abebe v Commonwealth*[108] the constitutional validity of Part 8 of the Act was confirmed.

A legal controversy of relatively recent origin has emerged as advisers seek new ways of challenging Tribunal decisions in the Federal Court following the decision of the High Court in *Eshetu*. The dispute centres upon whether a failure to comply with s.430 of the Act constitutes a ground of review under s.476(1)(a) of the Act. Section 430 requires the Tribunal to set out its reasons for decision in writing, and, in particular "to set out the findings on any material questions of fact". Related to the dispute is a question as to what constitutes a "material question of fact", and issues pertaining to how detailed a reference needs to be made, if at all, in relation to evidence not supportive of a Tribunal finding of fact.

Two decisions of the Full Court of the Federal Court illustrate the conflicting approaches to the s.476 aspect of the dispute, which prevailed until recently.

In *Yusuf*,[109] the Court found that a breach of s430 does constitute a ground of review under s.476(1)(a). This is because although s.430 refers to acts being performed after a decision has already been made, the expression in s.430, "in connection with" is

> neutral as to time. In the literal sense a decision is made when the decision-maker reaches in his or her own mind a conclusion as to the question, Refugee, yes or no? Practicality however requires that more be done. Is the announcement of the decision to be made orally or in writing? And with reasons? And, if so, what kind of reasons? All these are, in ordinary language, matters "in connection with the making of the decision.[110]

The High Court has granted special leave to appeal in this case. An extension of this view would require the Tribunal not only to give its reasons for its findings on material facts on which its decision is based, but also its reasons for rejecting evidence which was adverse to such findings. The materiality of a fact was ultimately a matter for the court to determine.

This requirement, and, *a fortiori*, its more extended version, imposes a great burden on the members of the Tribunal. Since it is not clear what facts the Federal Court may consider to

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106 And which, following the decision of the High Court in *Eshetu v MIMA* [1999] HCA 14, do not include s 420.

107 op cit, at 272.

108 [1999] HCA 14.

109 *MIMA v Yusuf* [1999] FCA 1681, Heerey, Merkel & Goldberg JJ, 2 December 1999.

110 Ibid, [24].

be "material", the member must in fact consider every fact alleged by the applicant and give reasons for its acceptance or rejection. Indeed, the current s.430 approach by the Federal Court as well as the requirement that decisions be "handed down" at a special session to which the applicant must be invited, has led to an increase of 22% in the time taken to finalise a decision. It also provides an avenue for review on the merits by those judges who are tempted to do so.

In the case of *Xu*,[111] the majority of the differently constituted Full Federal Court decided that a breach of s.430 does not fall within the scope of s.476(1)(a) of the Act. This is because s.430 assumes that decision has already been made, and the requirement to write a statement under s.430 is not "sparked" until the decision has already been made. The Court referred to Gummow J in *Eshetu* where his Honour said "the subject matter for judicial review nevertheless remains the decision itself…section 430 …does not provide the foundation for a merits review of the fact-finding processes of the tribunal."[112]

Whilst reasons may reveal matters which will make a decision reviewable, reasons themselves are not reviewable. "The correct question is … not whether the procedure is in connection with the decision, but rather in connection with the making of the decision."[113]

In relation to the issue of what constitutes a material fact, the Court in *Xu* made *obiter* comments. In administrative law, materiality needs to be understood in the context of the relevant statute:

> Where a statute does not expressly or impliedly constrain the decision maker, the decision-maker is the sole judge of materiality and there can be no judicial review of that question, no matter how wrong or illogical the decision-maker is seen to be by the judge. In those circumstances a fact is material only if the decision-maker considers it so. … If a judge makes an assessment that an absent fact is material otherwise than by holding that the Act requires the fact to be considered, then that plainly involves a merits review which the High Court have emphatically said should not happen.[114]

The Court distinguished between material facts, and those facts of a lesser order of relevance to material facts, and drew attention to a finding of fact and the weight to be given to that finding. Courts are concerned only with the legality of a decision, and not the merits. It is necessary to look to the requirements of the Act to establish which facts must be found to exercise the statutory power. A flaw is only disclosed if the Tribunal fails to make a finding it was legally required to make.

A court should consider whether a tribunal has decided that a fact was material. "Mere consideration of the fact by the Tribunal would not establish a decision that the fact is material."[115] An applicant cannot make a fact a material fact merely by alleging it.

In the decision of the High Court in *Durairajasingham*,[116] McHugh J approved of the approach taken in *Xu* that s.430 is concerned with requirements to be met subsequent to a decision having been made. The language of s.430 indicates that it does not impose a jurisdictional requirement. Thus a breach of s430 will not entail a jurisdictional error. McHugh

111 *Xu v MIMA* [1999] FCA 1741, Whitlam, RD Nicholson & Gyles JJ, 17 December 1999.

112 *Eshetu* at [117], quoted in *Xu* at [21].

113 *Xu* at [26].

114 Id.

115 Ibid, [54].

116 *Re MIMA; ex parte Durairajasingham* [2000] HCA (21 January 2000),

J also approved of the reasoning in *Addo* that, in relation to evidence contrary to the findings of the Tribunal, s.430

> does not impose an obligation to do anything more than to refer to the evidence on which the finding of fact are based. Section 430 does not require a decision-maker to give reasons for rejecting evidence inconsistent with the findings made. Accordingly, there was no failure to comply with s430 (1) of the Act.[117]

The issue has now been considered by a special 5 member bench in *MIMA v Singh*.[118] The Chief Justice and Sundberg, Katz and Hely JJ delivered a joint judgment. In essence the majority maintained the view that s.430(1) prescribes a procedure "in connection with" the making of the decision within the meaning of s.476(1)(a). This means that the Tribunal is not only under an obligation to set out its findings on a question of fact which the court on judicial review holds to be material, but that a failure to do so could lead to the decision being set aside under s.476(1)(a) for lack of compliance.[119] Materiality, as the joint judgment asserted, is ordinarily an objective concept. If the Tribunal fails to make a finding on a fact which the court afterwards determines is a material fact then s.430(1)(c) has not been complied with.[120] However, and this is an important qualification, materiality is not to be determined by the applicant. In other words, the applicant cannot demand that there be a finding on every fact alleged because the applicant considers it to be material. "A fact is material if the decision in the practical circumstances of the particular case turns upon whether that fact exists".[121]

The joint judgment rejected the view taken in *Xu* that s.430(1) only requires the Tribunal to make findings on the ultimate facts, that is to say, whether the applicant has a well-founded fear of persecution. The facts which lead to that ultimate finding are also material. Furthermore, the Tribunal must refer to the materials on which the finding is based. But this "is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with".[122]

To sum up: the Full Court in *Singh* has adopted what is sometimes called the "moderate" view of s.430. It certainly has rejected the "extreme" view, which the trial judge in that case had adopted, of requiring reasons for rejecting evidence that is inconsistent with the findings. But it still maintains the requirement to make findings on material facts with the materiality to be determined by the court. It is true that the court cannot review those findings themselves: the finding does not have to be the correct one. But it still leaves it open to the court to redefine materiality if the court takes a different view of how the factual claims should have been dealt with, or even how they should have been determined. There is still scope for consideration by the High Court.

117 *Addo v MIMA*.
118 [2000] FCA 845 (Black CJ, Kiefel, Sundberg, Katz and Hely JJ.
119 Ibid, [43].
120 Ibid, [47].
121 Ibid, [57].
122 Ibid, [56].