HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No S395/2002

APPELLANT S395/2002 APPELLANT

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS RESPONDENT

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MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS RESPONDENT

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs
Appellant S396/2002 v Minister for Immigration and Multicultural Affairs
[2003] HCA 71
9 December 2003
S395/2002 and S396/2002

ORDER

In each matter:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court dated 20 February 2002 and, in place thereof, order that:*

   (a) the appeal be allowed with costs; and

(b) the orders of Lindgren J dated 26 July 2001 be set aside and, in place thereof, order that:

(i) the application be granted with costs;

(ii) the decision of the Refugee Review Tribunal dated 5 February 2001 be set aside; and

(iii) the matter be remitted to the Tribunal for re-determination.

On appeal from the Federal Court of Australia

Representation:

B Levet with P de Dassel for the appellants (instructed by Bharati Solicitors)

S J Gageler SC with S B Lloyd for the respondent (instructed by Australian Government Solicitor)

Intervener:

J W K Burnside QC with S E Pritchard appearing as amicus curiae on behalf of Amnesty International Australia (instructed by Allens Arthur Robinson)

CATCHWORDS

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs
Appellant S396/2002 v Minister for Immigration and Multicultural Affairs

Immigration – Refugees – Particular social group identified as homosexual men in Bangladesh – Whether well-founded fear of persecution – Whether error of law by Refugee Review Tribunal in finding that no real chance of persecution because appellants conducted themselves discreetly and would continue to do so – Whether finding had effect of requiring appellants to act discreetly to avoid persecution – Whether need to act discreetly to avoid serious harm constituted persecution.

Migration Act 1958 (Cth), s 476(1)(e).

1 GLEESON CJ. The system of judicial review of administrative action, as it operates in relation to visa applications by people seeking acceptance as refugees, often means that, by the time a case reaches this Court, it is at the fifth level of decision-making. It may be, as in this case, that there have been adverse decisions at the first and second levels (the Minister's delegate and the Refugee Review Tribunal ("the Tribunal")) and that the Tribunal's decision has been upheld at the third (Federal Court of Australia) and fourth (Full Court of the Federal Court) levels. It may not be surprising that, at the fifth level, an appellant will look for a new way of putting a case that has already failed on four occasions. The case put to this Court may bear little relationship to what was previously advanced, considered, and rejected. There is a risk that criticism of the reasoning of a decision-maker at an earlier stage might overlook the forensic context in which such reasoning was expressed; a context that may have changed almost beyond recognition. Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous process. Even so, this Court has insisted that, on judicial review, a decision of the Tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process[1].

2 The reasons for judgment of other members of the Court set out the general background to the present appeals, and it is unnecessary to repeat them. In considering whether the decision of the Tribunal involved error, it is necessary to be clear about the case which the appellants sought to make to the Tribunal, and the reasons why that case was rejected.

3 The appellants based their claim that they had a well-founded fear of persecution if they returned to Bangladesh upon a series of assertions as to what had happened to them in the past. Their claim failed because those assertions were comprehensively disbelieved.

4 The appellants told the Tribunal that they were homosexuals who had been living in Bangladesh in a domestic relationship, and that they had been ostracised by their families. The Tribunal accepted that much, but very little else, of what they had to say. The appellants claimed they had been sentenced to death by a religious council. They said they feared that, if they returned to Bangladesh, they would be killed or suffer other serious harm. That was the essence of their case before the Tribunal. That was the form of persecution in question. The appellants supported that case by evidence of threats and violence which they said they had experienced over many years.

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1 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 77 ALJR 437 at 443 [31]; 195 ALR 1 at 8.

5 In its reasons, the Tribunal, before recording the history of threats and violence given by the appellants, and for the purpose of evaluating the evidence of the appellants, set out, by way of background information, what it described as "the situation of homosexual men in Bangladesh". That information concluded with a summary to the effect that homosexuality is not accepted or condoned by society in Bangladesh, that it is not possible to live openly as a homosexual, but that people prefer to ignore the issue rather than confront it, and that "Bangladeshi men can have homosexual affairs or relationships, provided they are discreet". That information was to be used to evaluate the reliability of the account of threats and violence given by the appellants. The Tribunal then turned to that account.

6 The first appellant said that his problems began in 1994 when, while he was living at home with his parents, some Islamic fundamentalists entered his bedroom and found him having sex with a male servant. He was told to leave home. Soon afterwards, he met the second appellant, and went to live with him. He said that local people abused, insulted, bashed and tortured him. When he and the second appellant moved to another locality, they were attacked and beaten, and their possessions were destroyed. They then came to Australia. They made a return visit to Bangladesh, but the first appellant's employer humiliated him and forced him to leave his job. Local fundamentalists issued a fatwa, which decreed that he should be stoned to death. He returned to Australia.

7 For reasons that were explained in detail, the Tribunal found that information internally inconsistent and unconvincing. Those reasons are not in issue in these appeals, and it is unnecessary to go into them. The Tribunal also found the evidence difficult to reconcile with the background information referred to earlier. It is to be emphasised that the first appellant's claim of fear of future persecution was based upon an account of violence, torture, and condemnation to death, and a prediction of death or serious injury, not upon any supposed concern about being obliged, against his will, to behave discreetly.

8 The second appellant's account of what had happened to him was at least as graphic, but, in the judgment of the Tribunal, even more difficult to accept. He said he left his family in 1980, when they suspected he would never marry. In 1980 or 1981, he raped several young men at his workplace. This resulted in the loss of his job (only). Before he met the first appellant, he had a relationship with another man. They were attacked on a number of occasions by Islamic fundamentalists. He was sentenced by the fundamentalists to 300 lashes of a whip with a stone on the end. He said the lashing left him scarred. The Tribunal asked to inspect the scars, and could find none. After the two appellants began to live together, they were mobbed on the street and beaten. The second appellant also was condemned to death by stoning. Again, for reasons set out in considerable detail, the Tribunal found the second appellant's evidence unworthy of credit. Again, it is presently immaterial to go into the detail of the Tribunal's reasons for rejecting the second appellant's account of what had happened to him.

9 At the conclusion of the outline of the case made by the appellants, the evaluation of their evidence, and the explanation of the reasons for disbelieving that evidence, the Tribunal made the following statement, which is the foundation of the present appeal:

> "[The first appellant] and [the second appellant] did not experience serious harm or discrimination prior to their departure from Bangladesh and I do not believe that there is a real chance that they will be persecuted because of their sexuality if they return. As discussed above, while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now."

10 When that passage is considered in the context of the claim advanced by the appellants, their evidence, the Tribunal's evaluation of the evidence, and the reasons given for rejecting that evidence, it is clear that the Tribunal was neither counselling nor requiring discretion on the part of the appellants. The statement that they had conducted themselves in a discreet manner in the past was made in the course of giving reasons for disbelieving their account of what had occurred to them in Bangladesh. It was part of a finding that they had not been attacked, beaten, tortured, or condemned to death, as they alleged. It was a finding of a fact relevant, and damaging, to their claim that they had reason, based on past events, to fear that they would be killed or seriously injured if they were to return to Bangladesh. The observation that they would behave in the future as they had in the past was no more than an expression of the conclusion that they had not been persecuted (in the manner they described) in the past, and there was no reason to believe that (as they claimed) they would be killed or seriously injured in the future.

11 In this Court, the appellants fasten onto the Tribunal's reference to discreet behaviour as indicating that the Tribunal fell into the error of concluding, or assuming, that persecution does not exist if a person, by concealing opinions or behaviour likely to attract retribution and serious harm, can avoid such retribution. In truth, a fair reading of the reasons of the Tribunal shows that it made no such assumption, and reached no such conclusion. Indeed, any such assumption or conclusion would have had nothing to do with the claim advanced by the appellants. The appellants' argument, in my view, depends upon a misreading of the Tribunal's reasons. In particular, it depends upon taking the reference to discreet behaviour entirely out of context.

12 It was never part of the claim advanced by the appellants to the Tribunal that the persecution they had experienced in the past, and apprehended in future,

took the form of repression of behaviour about which they desired to be more open, and that they escaped harm only by concealing their relationship. If such a claim had been made, it would have raised factual and legal questions beyond the scope of the case put to the Tribunal. For example, the Tribunal had before it background information noting that the Penal Code of Bangladesh makes homosexual intercourse a criminal offence (s 377). A Bangladeshi lawyer was quoted as saying that he was not aware of any prosecutions of homosexuals in Bangladesh. This does not necessarily mean that the law is a dead letter[2]. If the case had been about enforced and unwilling conformity to external pressure to be discreet, the fact that there is a law against the behaviour in question would need to be taken into account. The Penal Code also makes adultery, and enticement, illegal (ss 497, 498). Presumably this affects the openness of some heterosexual behaviour. Standards of openness, and discretion, in sexual matters vary with time and place, and are influenced by a variety of legal and cultural factors.

13 There was no argument in this Court about whether the existence and potential enforcement of s 377 of the Penal Code might itself constitute persecution. If a view is to be expressed on that matter, it should await a case in which the point is raised and argued.

14 All this is far removed from any contention that was raised for decision by the Tribunal. The appellants did not claim that the law of Bangladesh itself involves persecution of homosexuals. They did not claim that they wanted to behave less discreetly about their sexual relationship, and that their inability to do so involved persecution. Their claim was that they had been subjected to extreme violence, and sentenced to death, and, for that reason, they feared that if they returned to Bangladesh they would be killed or seriously injured. That claim was rejected, and the Tribunal's reference to their discreet behaviour was no more than a factual element in the evaluation of their claim.

15 The decisions of Lindgren J in the Federal Court and of the Full Court of the Federal Court were correct. The appeals should be dismissed with costs.

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2 cf *Nur Mohammad @ Bog Master v The State* 1989 BLD 314.

16 McHUGH AND KIRBY JJ. The 1951 Convention relating to the Status of Refugees[3] declares[4] that for the purpose of the Convention a refugee is a person who:

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

17 The Refugee Review Tribunal ("the Tribunal") found that homosexual men in Bangladesh constituted a "particular social group" for the purpose of the Convention. But in that country, it is not possible to live openly as a homosexual. If a homosexual male – and perhaps a homosexual female – does so, that person runs the risk of suffering serious harm including the possibility of being bashed or blackmailed by police officers or "hustlers". The Tribunal found[5] that, while living in Bangladesh, the appellants had conducted themselves discreetly with the result that they had escaped serious harm in the past. The Tribunal held that, if they were returned to Bangladesh and continued to conduct themselves discreetly in the future, they would not suffer serious harm by reason of their homosexuality.

18 The questions in these appeals are whether the Tribunal erred in law:

- by impliedly dividing homosexual men into two particular social groups – discreet and non-discreet homosexual men;
- by failing to consider whether the need to act discreetly to avoid the threat of serious harm constituted persecution; and
- by failing to consider whether the appellants might suffer serious harm if members of the Bangladesh community discovered that they were homosexuals.

19 In our opinion, the Tribunal erred in law in each of these respects.

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3 As amended by the 1967 Protocol relating to the Status of Refugees.

4 Article 1A(2).

5 RRT Reference N99/28381; RRT Reference N99/28382.

Statement of the case

20 In February 1999, the appellants arrived in Australia from Bangladesh. Within two weeks of their arrival, they applied for protection visas, claiming that they were refugees because they feared persecution in Bangladesh by reason of their homosexuality. Under s 36(2) of the *Migration Act* 1958 (Cth), a non-citizen qualified for the grant of a protection visa if, among other matters, that person was a person to whom Australia owed protection obligations under the Convention. In April 1999, a delegate of the Minister for Immigration and Multicultural Affairs refused the appellants' applications. The Tribunal rejected their applications for a review of the delegate's decisions.

21 The Tribunal found that the appellants were homosexuals and that in Bangladesh homosexual men are a particular social group for the purpose of the Convention. It also found that, while living in Bangladesh, the appellants had suffered no serious harm by reason of their homosexuality. The Tribunal said they had "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now." Accordingly, the Tribunal held that the appellants had no well-founded fear that they would be persecuted if they returned to Bangladesh and that therefore they were not refugees within the meaning of the Convention entitled to a protection visa under the *Migration Act*.

22 The Federal Court (Lindgren J) dismissed[6] an application made by the appellants under s 476(1) of the *Migration Act* for a review of the decision of the Tribunal. Lindgren J held that, given the finding that the appellants had lived together discreetly, they "are able to return to Bangladesh and to resume living there in a homosexual relationship as they did previously without a well-founded fear of being persecuted for reason of their homosexuality". His Honour also noted that the appellants "did not complain that they had to modify their behaviour so as not to attract attention".

23 The Full Court of the Federal Court (Black CJ, Tamberlin and Allsop JJ) dismissed[7] an appeal against the order of Lindgren J. The Full Court held that, with one exception, the questions raised by the appellants were not matters that could be the subject of an application for review under s 476(1) of the *Migration Act*. The Full Court refused to allow the appellants to raise the remaining question – "whether modifying behaviour in order not to attract attention and so to prevent persecution would itself constitute persecution such as to found a claim under the Convention." The Full Court said:

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6 [2001] FCA 968.

7 [2002] FCA 129.

> "They did not put this case forward to the Tribunal and it would be wrong to allow it to be raised now in an appeal from an application for judicial review."

24 Subsequently, this Court granted the appellants special leave to appeal against the order of the Full Court. The appellants now appeal against that order on a single ground. They contend that the Tribunal erred in rejecting their applications because its decisions "involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the Tribunal".

The material findings of the Tribunal

25 The Tribunal found that the appellants were homosexual males who had lived together at various places in Bangladesh from 1994 to 1996. They came to Australia for several months in 1998. They came back to Australia in February 1999 and applied for protection visas in March 1999 on the ground that they had a well-founded fear of persecution in Bangladesh by reason of their homosexuality. The Tribunal accepted that "homosexual men in Bangladesh constitute a particular social group under the Convention." The Tribunal found:

> "[H]omosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police. However, Bangladeshi men can have homosexual affairs or relationships, provided they are discreet. Bangladeshis generally prefer to deny the existence of homosexuality in their society and, if possible, will ignore rather than confront it. It is also clear that the mere fact that two young men held hands or hugged in the street would not cause them to be seen as homosexuals, and that being caught engaging in sexual activity on one occasion would be most unlikely to cause a young single man to be labelled a homosexual."

26 However, the Tribunal rejected various claims by the appellants that they had suffered persecution or any serious harm as the result of their homosexuality. The Tribunal "found much of the evidence given by both men regarding the problems which they faced during their time together to be lacking in credibility."

27 The Tribunal rejected the appellants' claim that:

- they were attacked in the street in July 1998 and forced to leave their home and live in Dhaka "because they were having problems because of their sexuality";
- they had come "to Australia in 1998 because it had been discovered that they were a homosexual couple and they had been attacked and threatened";
- they had lost their jobs during 1998-1999 because they were homosexual; and
- a religious court had issued a fatwa (or an authoritative ruling) sentencing them to death by stoning.

28 The Tribunal also rejected claims by one of the appellants that, because of his homosexuality:

- he had not been able to get work between 1980 and 1991;
- he was sentenced in 1985 to 300 lashes with a whip and whipped until he was unconscious;
- he and his then partner were tried and sentenced by a religious court in 1985;
- he and his then partner were attacked in their home in 1990; and
- he and the other appellant had been seen having sex in their home because they forgot to shut the door.

29 However, the Tribunal accepted that the appellants:

- were shunned by their families because of their homosexuality; and
- may have been the subject of gossip and taunts from neighbours who suspected they were homosexuals.

30 The Tribunal found that the shunning and any gossip or taunts did not constitute "serious harm amounting to persecution". The Tribunal said that the appellants:

> "did not experience serious harm or discrimination prior to their departure from Bangladesh and I do not believe that there is a real chance that they will be persecuted because of their sexuality if they return. As discussed above, while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over 4 years without experiencing any more

than minor problems with anyone outside their own families. *They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now*." (emphasis added)

Persecution

31 In a case like the present, defining the particular social group and the type of harm feared is fundamental in determining whether a member of that group has a well-founded fear of persecution. Only by defining the group and its characteristics or attributes, actual or imputed, can a tribunal of fact determine whether the harm feared is well-founded and is causally related to the particular social group[8]. So in determining whether there is a real chance that a discreet or non-discreet homosexual man in Bangladesh will suffer persecution, consideration must be given to:

- the characteristics and attributes of the particular social group;
- the nature, severity and likely repetitiveness of the harm feared;
- the extent to which, if at all, the individual will encounter the harm feared;
- the existence of a causal relationship between the harm feared and one or more of the characteristics or attributes, real or imputed, of the social group; and
- the extent to which the individual can be expected to tolerate the harm without leaving or refusing to return to the country of nationality[9].

The claims of the appellants

32 In the statements that they filed in support of their claims for protection visas, each appellant said:

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8 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092-1093 [26]-[27], 1099 [69]-[72]; 197 ALR 389 at 394-395, 403-404.

9 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 18-19 [55].

> "We realized Bangladesh is not a safe place for us at all. Our ideology and perceptions were wrong in the eyes of the 99% people in Bangladesh. We were captives in our homeland. There are no rights for us in the state Constitution.
>
> ... I have a real fear of persecution. If I return to Bangladesh I will be killed. My life is not safe. I will be killed not only by the fundamentalists but also by the general masses."

33 Each appellant supported these claims with assertions of harm and discrimination that he had suffered while living in Bangladesh. With the exception of matters that the Tribunal regarded as minor, it rejected these claims. Although rejecting the appellants' claims of past acts of persecution, the Tribunal nevertheless considered what might happen to them if they returned to Bangladesh. It concluded that there was no "real chance that they will be persecuted because of their sexuality if they return." Central to that conclusion was the assumption or implicit finding of the Tribunal that homosexual men in Bangladesh will not be subjected to persecution if they act discreetly.

The need to act discreetly

34 Much of the appellants' argument in this Court was directed to the claim that the Tribunal had required them "to be 'discreet' about their membership of a group." In answer, the Minister submitted that the Tribunal had imposed no such requirement. He contended that it merely found that the appellants would live discreetly in the future, as they had done in the past, because "there is no reason to suppose that they would not continue to do so if they returned home now." It was for that reason, so the Minister contended, that the Tribunal found the appellants had no well-founded fear of persecution. In our view, these contentions of the Minister are correct.

35 The reasons of the Tribunal show, however, that it did not consider whether the choice of the appellants to live discreetly was a voluntary choice uninfluenced by the fear of harm if they did not live discreetly. It did not consider whether persons for whom the government of Bangladesh is responsible condone or inculcate a fear of harm in those living openly as homosexuals, although it seems implicit in the Tribunal's findings that they do. Nor did the Tribunal's reasons discuss whether the infliction of harm can constitute persecution where an applicant must act discreetly to avoid that harm. Nor did they discuss whether, if the appellants wished to display, or inadvertently disclosed, their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution. If the Tribunal could not have properly exercised its jurisdiction without considering these matters, it has fallen into jurisdictional error and the Federal Court should have set aside the Tribunal's decisions.

36 Either expressly or by necessary inference, the Minister argued that the appellants cannot raise in this Court any of the matters referred to in the previous paragraph. Moreover as we earlier indicated, the Full Court of the Federal Court, having noted that the appellants had not claimed before the Tribunal that they had suffered harm by reason of having to live discreetly, held that they could not raise that issue in the Full Court. The Minister supported the correctness of this finding by reference to what Gummow and Hayne JJ had said in *Abebe v Commonwealth*[10] in a passage with which Gaudron and Kirby JJ agreed[11]:

> "It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out."

37 The Minister also relied on a passage in the judgment of Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*[12]. In that case, their Honours said[13] that the Tribunal had "to consider the application and the criteria which that application had to meet, not the criteria for an application, never made, which might have been put on another basis."

38 Reliance on these cases might be persuasive if the Tribunal had rejected the appellants' claims for a protection visa simply because the appellants' evidence lacked credibility. But the Tribunal went further than rejecting the appellants' claims on credibility grounds. It examined the general issue of homosexuality and persecution in Bangladesh by using "country information" from the Department of Foreign Affairs and Trade, by making enquiries of various people and organisations and by taking into account various publications concerned with the subjects of homosexuality and persecution. It was this information, and not the evidence or arguments of the appellants, that led the Tribunal to conclude that "it is not possible to live openly as a homosexual in Bangladesh." It was this information that also led the Tribunal to conclude that "[t]o attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police." And it seems

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10 (1999) 197 CLR 510 at 576 [187].

11 (1999) 197 CLR 510 at 546 [90] and 584 [212] respectively.

12 (2003) 77 ALJR 437; 195 ALR 1.

13 (2003) 77 ALJR 437 at 443 [31]; 195 ALR 1 at 8.

likely that it was this information that led the Tribunal to conclude that the appellants would not be persecuted if they acted discreetly in the future.

39 On a number of occasions this Court has said that proceedings before the Tribunal are inquisitorial in nature. The arguments and evidence of applicants or the Minister cannot narrow the Tribunal's jurisdiction to investigate the generality of a claim for a protection visa. Whatever the arguments or evidence of an applicant, the Tribunal is entitled, but not bound, to look at the issue generally. If the Tribunal elects to exercise its jurisdiction more widely than the applicant or the Minister has asked, however, it must do so in accordance with law. Given that the appellants claimed that Bangladesh was "not a safe place for [them] at all" and that they had "a real fear of persecution", the Tribunal was entitled to go beyond examining whether the appellants faced persecution because of their personal history. Notwithstanding that it rejected the particular claims of the appellants, it was entitled to investigate the matter more fully and determine whether the appellants' more general fear of persecution was well-founded. Rejection of an applicant's specific claims of persecution and the failure to identify other forms of harm provide a reason for holding that the applicant has no fear of persecution. But that is all. In the present case, for example, although the appellants did not raise any issue of modifying their behaviour because they feared persecution, it seems highly likely that they acted discreetly in the past because they feared they would suffer harm unless they did. If it is an error of law to reject a Convention claim because the applicant can avoid harm by acting discreetly, the Tribunal not only erred in law but has failed to consider the real question that it had to decide – whether the appellants had a well-founded fear of persecution.

Living openly as a homosexual

40 The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the

group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.

41 History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention. As Simon Brown LJ stated in *Secretary of State for the Home Department v Ahmed*[14]:

> "It is one thing to say ... that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would *not* refrain from such activities – if, in other words, it is established that he would in fact act unreasonably – he is not entitled to refugee status." (original emphasis)

42 Simon Brown LJ went on to say:

> "[I]n all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable."

43 The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying

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14 Unreported, United Kingdom Court of Appeal, 5 November 1999 at 8.

this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.

44 Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person's associations or particular mode of life. This is the underlying assumption of the rule of law. Subject to the law of the society in which they live, homosexuals as well as heterosexuals are free to associate with such persons as they wish and to live as they please.

45 If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality[15]? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters. If the first of these questions is answered: Yes, and the second: No, the claim of refugee status must be upheld even if the applicant has conducted him or herself in a way that is likely to attract prosecution.

46 In some countries, there may be little or no chance of a law against homosexual conduct being enforced. In Bangladesh, for example, s 377 of the Penal Code makes it an offence to have "carnal intercourse against the order of nature with any man, woman or animal". The offence carries various penalties, one of which is "imprisonment for life". However, a person who had practised law for 20 years told the Tribunal that prosecutions under the section were "extremely rare". That person had never known or heard of a person being prosecuted under the section during that time in practice. No doubt for that reason, the appellants did not suggest that the existence of s 377, and its potential application to them, constituted persecution for a Convention reason.

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15 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258.

47 Even where a law such as s 377 is not enforced, however, there may be a real chance that a homosexual person will suffer serious harm – bashings or blackmail, for example – that the government of the country will not or cannot adequately suppress. That appears to be the position in Bangladesh. If the harm is inflicted for a Convention reason and is serious enough to constitute persecution, the homosexual person is entitled to protection under the Convention. It is immaterial that the conduct of the applicant for refugee status disclosed his or her identity as a homosexual and attracted the attention of the persecutors.

48 The Federal Court has recognised that taking steps to hide political opinions and activities is no answer to a claim for refugee status where the applicant claims he or she will be persecuted for those opinions or activities[16]. But in a series of cases concerned with homosexual applicants, the Federal Court and the Tribunal have assumed, decided or accepted that the capacity of an applicant to avoid persecutory harm is relevant to whether the applicant faces a real chance of persecution[17]. Thus, in *WABR v Minister for Immigration and Multicultural Affairs*[18], the Full Court of the Federal Court said:

> "[I]t was open to the Tribunal to conclude, on the material that was before it, that there was no active program for the prosecution of homosexuals in Iran, so long as they were discreet and conducted their affairs privately. It was also open to the Tribunal to conclude that it was reasonable to expect that the appellant would accept the constraints that were a consequence of the exercise of that discretion."

49 Whether or not *WABR* was rightly decided on its facts, this statement of the Full Court should have played no part in the Court's reasoning process. In *WABR*, the appellant, an Iranian, alleged that he was a homosexual and claimed that he feared persecution because homosexual conduct was illegal in Iran and that penalties ranged from death to flogging to imprisonment. Thus, the issues

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16 *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132.

17 RRT Reference V96/05496; RRT Reference N97/14489; RRT Reference N98/21362; RRT Reference N98/24718; RRT Reference N98/23955; *Khalili Vahed v Minister for Immigration and Multicultural Affairs* [2001] FCA 1404 – on appeal *SAAF v Minister for Immigration and Multicultural Affairs* [2002] FCA 343; *Nezhadian v Minister for Immigration and Multicultural Affairs* [2001] FCA 1415; *WABR v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 196.

18 (2002) 121 FCR 196 at 205 [27].

were whether there was a real chance of the appellant being prosecuted for homosexuality and, if so, whether the prosecution and any potential penalty were so inappropriately adapted to achieving a legitimate object of Iranian society as to amount to persecution[19]. The reasonableness of the appellant's conduct was not relevant to either issue. In determining whether the appellant faced a real chance of prosecution, the Tribunal was entitled to consider not only the prosecuting policies of the Iranian authorities, but also the likelihood that inadvertently or deliberately the appellant might attract their attention. But the reasonableness of his conduct did not bear on the issue.

50 In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.

The Tribunal misdirected itself on the issue of discretion

51 Central to the Tribunal's decision was the finding that the appellants had not suffered harm in the past because they had acted discreetly. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, the Tribunal failed to determine whether the appellants had acted discreetly only because it was not possible to live openly as a homosexual in Bangladesh. Because of that failure, the Tribunal, unsurprisingly, failed to give proper attention to what might happen to the appellants if they lived openly in the same way as heterosexual people in Bangladesh live.

52 The Tribunal did find, however, that to attempt to live openly as a homosexual in Bangladesh "would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police." That finding appears to be based on an acceptance of the evidence of Mr Khan, the Executive Director of the Naz Foundation. In its reasons, the Tribunal recorded Mr Khan as saying:

> "[T]he consequences of being identified as homosexual vary enormously, from acceptance and tolerance, to harassment, physical abuse or expulsion from the community. Most of the harassment of males who have sex with males takes the form of extortion by local police and hustlers who threaten to expose them to their families if they do not cooperate."

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19 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258.

53 The Tribunal's findings on the attitude of Bangladesh society and the statements of the appellants indicate that they were discreet about their relationship only because they feared that otherwise they would be subjected to the kinds of discrimination of which Mr Khan spoke. If the Tribunal had found that this fear had caused them to be discreet in the past, it would have been necessary for the Tribunal then to consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the Tribunal was bound to consider if it found that the appellants' "discreet" behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the Tribunal disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh.

54 It follows that the Tribunal has constructively failed to exercise its jurisdiction and its decision must be set aside. The Federal Court therefore erred in rejecting the appellants' claim for judicial review of the Tribunal's decision under s 476(1)(e) of the *Migration Act*.

Particular social group and persecution

55 In our opinion, the Tribunal also fell into jurisdictional error by failing to consider the issue of persecution in relation to the correct "particular social group"[20]. As we have indicated, the Tribunal found that homosexual men in Bangladesh constituted a "particular social group" for the purpose of the Convention. As a matter of law, this finding was open to the Tribunal[21]. Indeed, if the Tribunal had held otherwise, its decision would arguably have been perverse. However, by declaring that there is no reason to suppose that the appellants would not continue to act discreetly in the future, the Tribunal has

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20 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092-1093 [26]-[27], 1099 [69]-[72]; 197 ALR 389 at 394-395, 403-404.

21 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 265, 293-294, 303-304; *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324 at 330; *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 652.

effectively broken the genus of "homosexual males in Bangladesh" into two groups – discreet and non-discreet homosexual males in Bangladesh. This inevitably invited error. It leads to the Federal Court and the Tribunal examining a claim for refugee status in the way that Ryan J did in *Applicant LSLS v Minister for Immigration and Multicultural Affairs*[22] when his Honour said:

> "I have therefore confined my examination of this issue to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in Sri Lanka, disclosing his sexual orientation to the extent *reasonably* necessary to identify and attract sexual partners and maintain any relationship established as a result." (emphasis added)

56 Similarly, in this case, consciously or unconsciously, the Tribunal directed its mind principally to the consequences of the sexual behaviour of the non-discreet members of the particular social group. Certainly, it made only passing reference to other forms of harm to members of the social group generally. And it failed to consider whether the appellants might suffer harm if for one reason or another police, hustlers, employers or other persons became aware of their homosexual identity. The perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise.

57 If the Tribunal had placed the appellants in the non-discreet group, it appears that it would have found that they were likely to be persecuted by reason of their membership of that group. Conversely, by placing the appellants in the discreet group, the Tribunal automatically assumed that they would not suffer persecution. But to attempt to resolve the case by this kind of classification was erroneous[23]. It diverted the Tribunal from examining and answering the factual questions that were central to the persecution issues.

58 Even if the Tribunal had classified the appellants as non-discreet homosexual men, it did not necessarily follow that they would suffer persecution. Conversely, it did not follow that discreet homosexual men would not suffer persecution. Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. Similarly, whether a particular individual has been persecuted in the past usually assists in determining whether that person is likely to be persecuted in the future[24]. But

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22 [2000] FCA 211 at [24].

23 cf *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 663.

24 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. Moreover, helpful as the history of the social group may be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is always whether *this individual applicant* has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group".

59 It follows that whether or not a Bangladeshi male homosexual applying for a protection visa has a well-founded fear of persecution cannot be determined by assigning him to the discreet or non-discreet group of homosexual males and determining the probability of a member of that group suffering persecution. An applicant claiming refugee status is asserting an individual right and is entitled to have his or her claim considered as an individual, not as the undifferentiated member of a group.

60 By declaring that there was no reason to suppose that the appellants would not continue to act discreetly in the future, the Tribunal effectively broke the genus of "homosexual males in Bangladesh" into two groups – discreet and non-discreet homosexual men in Bangladesh. By doing so, the Tribunal fell into jurisdictional error that renders its decision of no force or effect.

Order

61 The appeal should be allowed. The order of the Full Court of the Federal Court in each case should be set aside. In place thereof, this Court should order that the appeal to the Full Court be allowed and the orders of Lindgren J be set aside. In place thereof, it should be ordered that the application be granted, the decision of the Tribunal be set aside and the matter remitted to the Tribunal to re-determine its review of the decision of the Minister's delegate. The Minister should pay the costs of the appeal to this Court, the proceedings before Lindgren J and the appeal to the Full Court of the Federal Court.

62 GUMMOW AND HAYNE JJ. The appellants arrived in Australia from Bangladesh in 1999. They applied for protection visas claiming that they feared persecution in Bangladesh because they were homosexual. The delegate of the respondent Minister refused their applications. In February 2001, the Refugee Review Tribunal ("the Tribunal") affirmed the delegate's decisions. In July of that year, a single judge of the Federal Court of Australia (Lindgren J) dismissed their applications for review of the Tribunal's decisions[25]. On 20 February 2002, the Full Court of the Federal Court (Black CJ, Tamberlin and Allsop JJ) dismissed the appellants' appeals from the orders of Lindgren J[26].

63 By special leave they now appeal to this Court. The sole ground of appeal advanced by each appellant was that the Federal Court should have held that the ground of review specified in s 476(1)(e) of the *Migration Act* 1958 (Cth) ("the Act"), as it stood at the relevant time, was made out. That is, each appellant alleged that the Tribunal's decision "involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found" by the Tribunal.

64 The essential issue in this Court was whether the Tribunal had properly applied the Convention[27] definition of "refugee". At the times relevant to this matter, the Act provided (by s 36(2)) that a criterion for a protection visa was that the applicant was a non-citizen in Australia to whom Australia had protection obligations under the Convention. Australia had protection obligations under the Convention to those who, within Art 1 of the Convention, were refugees. It was not disputed that the amendments made to the Act by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth), which changed the Act's provisions dealing with refugees in a number of ways, had no application in the determination of the appeals[28].

65 The question for the Tribunal was, therefore, were the appellants, being outside their country of nationality, persons who "owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group" were

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25 [2001] FCA 968.

26 [2002] FCA 129.

27 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

28 The Minister contended that on remitter to the Tribunal those provisions will apply – *Migration Legislation Amendment Act (No 6)* 2001 (Cth), Sched 1, Item 7(c).

unable, or owing to such fear, were unwilling, to avail themselves of the protection of their country of nationality. It is important to note that the Tribunal found, and it has not since been disputed, that each appellant was a member of a particular social group identified as homosexual men in Bangladesh. The fundamental question which then arises is: did the Tribunal address the correct question in relation to well-founded fear of persecution?

66 The term "persecution" is not defined in the Convention, and in the decisions of this Court there has been no precise tracing of the metes and bounds of its meaning in the Convention definition of "refugee" applied in the Act. It is not of great assistance and is apt to mislead to approach the matter by saying, as did an English court, that "persecution" is a "strong word"[29]. However, it is clear from the decision of this Court in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*[30] that a systematic course of conduct is not required. Further, in the joint judgment of six members of this Court in *Minister for Immigration and Ethnic Affairs v Guo*[31], an approving reference was made to the proposition stated by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs*[32] that measures in disregard of human dignity may, in appropriate cases, constitute persecution. In the present appeals, there was no challenge to those propositions.

The Tribunal

67 The Tribunal concluded that there was not a real chance that the appellants would be persecuted because of their sexuality if they were to return to Bangladesh. It did not accept a number of particular contentions which the appellants made. In particular, it did not accept that a judgment by a local religious council (a fatwa) had been issued condemning the appellants to death. Nonetheless, the Tribunal accepted that "homosexuality is not accepted or condoned by society in Bangladesh and [that] it is not possible to live openly as a homosexual in Bangladesh". The consequences of attempting to do so were said to be "to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police".

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29 *R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi* [1989] Imm AR 595 at 599 per Kennedy J.

30 (2000) 204 CLR 1 at 4 [1], 7 [16], 20 [60], 30 [95], 44 [133], 67 [192], 72 [203], 79 [223].

31 (1997) 191 CLR 559 at 570.

32 (1989) 169 CLR 379 at 430.

68 The material before the Tribunal included reference to s 377 of the Penal Code of Bangladesh. That section provided that:

> "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

This information was obtained from The International Lesbian and Gay Association and provided by The Naz Foundation in response to inquiries by the Tribunal. The author of the document sent to the Tribunal said that instances of prosecution under the section were "extremely rare" and that, in 20 years of law practice, "I have not known or heard of a case where a person has been prosecuted for or convicted of homosexuality" under s 377. Presumably, it was for this reason that neither the appellants in their submissions to the Tribunal, nor the Tribunal in its reasons, mentioned the possible enforcement of s 377 as an adverse consequence feared by the appellants.

69 Central to the Tribunal's reasoning rejecting the appellants' claims were three propositions: (i) that although homosexuality is not acceptable in Bangladesh, Bangladeshis "generally prefer to ignore the issue rather than confront it"; (ii) the appellants had lived together in Bangladesh for over four years "without experiencing any more than minor problems with anyone outside their own families"; and (iii) the appellants "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now".

70 The appellants submitted both in the courts below, and in this Court, that the Tribunal's error lay in the third of these three propositions. They contended that the Tribunal had, in effect, required that they act discreetly in order to avoid what otherwise would be persecution. The respondent Minister contended that the Tribunal had made no such *requirement*. The Minister submitted that the Tribunal had made a finding about what the appellants *would* do on their return and that, based on that finding, it had concluded that there was not a real chance of persecution.

71 On its face, the immediate dispute between the parties was about how the Tribunal's reasons should be understood. To resolve it, however, it is necessary to recall some fundamental principles.

Applicable principles

72 It is well established that the Convention definition of "refugee" has subjective and objective elements. Does the applicant fear persecution for a

Convention reason (the subjective element)? Is that fear well founded (the objective element)? The fear will be well founded if there is a real chance that the applicant would face persecution for a Convention reason if the applicant returned to the country of nationality[33].

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

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

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

76 Because reasoning of the kinds just described is often employed, it is perhaps inevitable that those, like the Tribunal, who must deal with large numbers of decisions about who is a refugee, will attempt to classify cases. There are dangers in creating and applying a scheme for classifying claims to protection. Those dangers are greatest if the classes are few and rigidly defined. But whatever scheme is devised, classification carries the risk that the individual and distinctive features of a claim are put aside in favour of other, more general features which define the chosen class.

77 Further, there is a serious risk of inverting the proper order of inquiry by arguing from an a priori classification given to the applicant, or the applicant's claim, to a conclusion about what may happen to the applicant if he or she

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33 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-573.

returns to the country of nationality, without giving proper attention to the accuracy or applicability of the class chosen. That is, there is a real risk of assuming (wrongly) that a particular applicant will be treated in the same way as others of that race, religion, social class or political view are treated in that country. It would, for example, be wrong to argue from a premise like "homosexuality is generally ignored in Bangladesh" to a conclusion that "this applicant (a homosexual) will not be persecuted on account of his sexuality", without paying close attention to the effect of the qualification of the premise provided by the word "generally". Thus it would be necessary in the example given to consider whether, on return to Bangladesh, the applicant would stand apart from other homosexuals in that country for any reason.

"Discretion" and "being discreet"

78 The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made[34].

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

80 If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the

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34 *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840 at 841 [2] per Lord Bingham of Cornhill, 843 [7] per Lord Steyn, 854 [42] per Lord Rodger of Earlsferry; [2003] 2 All ER 1097 at 1099, 1101, 1112.

applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

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

82 Saying that an applicant for protection would live "discreetly" in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker "expects" that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. No less importantly, if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.

83 Addressing the question of what an individual is *entitled* to do (as distinct from what the individual *will* do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the Tribunal in other cases, cited by the Federal Court in *Applicant LSLS v Minister for Immigration and Multicultural Affairs*[35], leads to error. It distracts attention from the fundamental question. It leads to confining the examination undertaken (as it was in *LSLS*) merely "to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in [the country of nationality], disclosing his sexual

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35 [2000] FCA 211 at [20]-[21].

orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result"[36]. That narrow inquiry would be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged. On its face it appears to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. Whether or not that is so, considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution.

This case

84 It is against the background of these principles that these appeals must be determined. Much attention was given in argument to the sentence appearing near the end of the reasons of the Tribunal which we have set out above: that the appellants "clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now". Taken in isolation, it is far from clear that the Tribunal is there to be understood as seeking to impose any requirement on the appellants. The better view is that that sentence records the Tribunal's conclusion about what the appellants were likely to do if they did return to Bangladesh.

85 Of more concern is the Tribunal's statement that "it is not possible to live openly as a homosexual in Bangladesh". It went on to say that: "To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to *more serious forms of harm, for example* the possibility of being bashed by the police." (emphasis added) The Tribunal further found that "Bangladeshi men can have homosexual affairs or relationships, *provided they are discreet*". (emphasis added)

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

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36 [2000] FCA 211 at [24].

87 The primary judge[37] and the Full Court[38] understood the Tribunal as finding that "[i]t is only if a homosexual couple force Bangladeshi society to confront their homosexual identity that they will encounter problems". That may be accepted. Both the primary judge[39] and the Full Court[40] held further, however, that the finding about how the appellants were likely to live on their return to Bangladesh supported the Tribunal's finding that the appellants' fears of persecution were not well founded. That is, the primary judge and the Full Court both read the Tribunal's reasons as finding that the appellants were likely to live in a way that would not cause Bangladeshi society to confront their homosexual identity.

88 This reveals the error made by the Tribunal. The Tribunal did not ask *why* the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is *not* possible to "live *openly* as a homosexual in Bangladesh"; secondly, that "[t]o attempt to [live openly] would mean to face problems"; and, thirdly, that "Bangladeshi men can have homosexual affairs or relationships, *provided they are discreet*". Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly.

89 The Tribunal did not deal with the question presented by s 36(2) of the Act – did Australia owe protection obligations to the appellants? It either did not correctly apply the law to the facts it found, or its decision involved an incorrect interpretation of the applicable law. The ground of review specified in s 476(1)(e) of the Act was made out.

90 Further, as the reasons of McHugh and Kirby JJ demonstrate, the Tribunal can also be seen as falling into error by dividing the genus of homosexual males

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37 [2001] FCA 968 at [17].

38 [2002] FCA 129 at [15].

39 [2001] FCA 968 at [17]-[20].

40 [2002] FCA 129 at [16].

in Bangladesh into two groups – discreet and non-discreet homosexual males in Bangladesh. That false dichotomy also appears to have provided a basis for the reasoning of Kennedy J in *R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi*[41].

91 The Full Court of the Federal Court should in each case have allowed the appellant's appeal with costs, both in that Court and in the court below, set aside the orders of the primary judge and, in their place, made orders setting aside the decision of the Tribunal and remitting the appellant's application for review of the decision of the Minister's delegate to the Tribunal for redetermination. In each case the appeal to this Court should be allowed with costs, the orders of the Full Court set aside and, in their place, there be orders in the terms we have set out.

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41 [1989] Imm AR 595 at 598-599.

92 CALLINAN AND HEYDON JJ. The question in this case was not, as the appellants contended, whether, absent imposed or enforced discretion as to their homosexuality, they would be likely to be persecuted in their country of nationality and residence, but whether their mode of conduct was voluntarily chosen, and had and would not provoke persecution of them.

The facts

93 The appellants, who are homosexuals, are Bangladeshi nationals. They have lived together since 1994. According to one of them, in Bangladesh, "homosexuality is not open and not acceptable like many other countries in the world." His family is of the Muslim faith.

94 The other appellant's history included an account of his loss of a position that he had held in Bangladesh and in respect of which the Refugee Review Tribunal ("the Tribunal"), in affirming the decision of the delegate of the respondent to refuse them Protection Visas, said this[42]:

> "When his 1981 dismissal was discussed, [that appellant] said that he had lost his job because he had raped young men from the office who came to visit him in his room. These people had complained and he lost his job. I asked him to clarify that he had forced these men to have sex with him when they did not want to. He said that this was correct and confirmed that this was the reason that he had lost his job. He said that no other action had been taken against him."

There was evidence before the Tribunal that s 377 of the Penal Code of Bangladesh provides as follows:

> "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The appellants did not suggest that they were likely to be prosecuted under this provision and placed no reliance on it. This was probably because there was evidence before the Tribunal from a knowledgable lawyer that he could not recall a prosecution under the section during the last 20 years.

95 The appellants entered Australia in February 1999. They applied to the respondent for Protection Visas on 4 March 1999. Their applications were

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42 RRT Reference N99/28381; N99/28382, 5 February 2001 at 12.

refused. They applied to the Tribunal for a review of that refusal on 17 May 1999. In order to obtain a Protection Visa the appellants had to satisfy the Tribunal that they were refugees who[43]:

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

96 The Tribunal refused the applications for review. It referred first to some evidence as to the position generally of homosexuals in Bangladesh and concluded[44]:

> "From this evidence it is clear that homosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police. However, Bangladeshi men can have homosexual affairs or relationships, provided they are discreet. Bangladeshis generally prefer to deny the existence of homosexuality in their society and, if possible, will ignore rather than confront it. It is also clear that the mere fact that two young men held hands or hugged in the street would not cause them to be seen as homosexuals, and that being caught engaging in sexual activity on one occasion would be most unlikely to cause a young single man to be labelled a homosexual."

97 The Tribunal was concerned about a number of discrepancies in the evidence of the appellants. It found that much of it was not credible[45]. As to the older of the appellants, it made these findings[46]:

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43 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

44 RRT Reference N99/28381; N99/28382, 5 February 2001 at 6.

45 RRT Reference N99/28381; N99/28382, 5 February 2001 at 16.

46 RRT Reference N99/28381; N99/28382, 5 February 2001 at 17-18.

"I am extremely sceptical of the claim that [one of the appellants] was dismissed from his job in 1980 because he had raped a number of young men from his office. It seems most unlikely that someone who had raped a number of young men would merely have been dismissed from his job and suffered no further consequences. On the other hand, if it is true, then his dismissal was for rape, not because he is a homosexual, and the lack of more serious consequences suggests that Bangladeshis prefer to ignore the issue of homosexuality, even if it involves rape, rather than confront it. And the claim that [this appellant] did not suffer more serious consequences for assaulting some young men in 1980 does not sit well with latter claims that people face being lashed or killed merely because they are homosexual.

I do not believe that [this appellant] was unable to find work between 1980 and 1991 because of his homosexuality. This is at odds with his evidence that he was able to conceal his sexuality from most people in his home area until 1985, after which he moved to another area where people did not know about his sexuality, and where his partner, who was also allegedly exposed as a homosexual in 1985, was able to find work. His ability to find a good job in 1991 with the help of a friend suggests that he could have obtained work earlier if he had wished. If [this appellant] was unable to find work during this time, it was for some other reason, not his sexuality.

I do not believe that [this appellant] was sentenced to 300 lashes with a whip with a small stone attached and whipped until he was unconscious in 1985. At the hearing he claimed that he was scarred by this, but there are no scars on his back. When I pointed this out, he maintained that he had been sentenced to 300 lashes, but said not all of them had been administered because he would have been killed if he had received the full punishment. In light of [his] lack of credibility in relation to other claims put forward in support of his case, and the evidence set out above which suggests that the issue of homosexuality is more likely to be ignored than confronted in Bangladesh, I do not believe that [he] and his then partner were tried and sentenced to any form of punishment by a religious court in 1985. And even if I am wrong and they did face some kind of problem in 1985 because of their sexuality, this was over 15 years ago and [this appellant] has not experienced serious continuing problems because of it. I do not believe it would have any serious impact on his treatment if he returned to Bangladesh now, nor that it indicates that homosexuals in Bangladesh generally face a real chance of being punished by fundamentalists or other religious figures because of their sexuality.

Given [this appellant's] tendency to exaggerate or concoct claims, I am not satisfied that he and his partner were attacked in their home in

> 1990. [His] claim that the attack occurred because one of [his then lover's] relatives saw them in the street after they had fled their home area in 1985 does not sit well with the evidence that [the latter's] family had known about his sexuality since before they moved in together in 1980 and, while they had ostracised him, there is no suggestion that they had attacked him or instigated attacks by other people previously. The claim is also at odds with the evidence set out above that Bangladeshis prefer to ignore the issue of homosexuality if at all possible. Furthermore, even if I accept this claim, it appears that the main target of the attack was [the other man], who was taken away by the attackers. [This appellant] was able to re-establish himself in another area and, as discussed below, I do not believe that he had any problems during that time because of his sexuality."

98 We need not set out the details of the adverse findings that the Tribunal similarly made against the other appellant. It is sufficient to say that, among other things, their respective versions of relevant events contradicted each other. The Tribunal held that they concealed the true situation. It concluded[47]:

> "After considering all of the evidence, I accept that [the appellants] are homosexuals and that they lived together in Bangladesh from 1994 until their departure from the country in early 1999. I also accept that they were shunned by their families because of their homosexuality. They may also have been the subject of gossip and perhaps even some taunts from neighbours who suspected they were homosexuals. However, I do not believe that this constitutes serious harm amounting to persecution under the definition. [The appellants] did not experience serious harm or discrimination prior to their departure from Bangladesh and I do not believe that there is a real chance that they will be persecuted because of their sexuality if they return. As discussed above, while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now."

The appellants' application to the Federal Court

99 The appellants applied for a review of the Tribunal's decision by the Federal Court under s 476(1) of the *Migration Act* 1958 (Cth) ("the Act"). They

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47 RRT Reference N99/28381; N99/28382, 5 February 2001 at 19-20.

sought to rely on pars (b), (c), (e) and (g) of that sub-section which provided, at the relevant time, as follows:

> "(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:
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> ...
>
> (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
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> (c) that the decision was not authorised by this Act or the regulations;
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> ...
>
> (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
>
> ...
>
> (g) that there was no evidence or other material to justify the making of the decision."

100 Lindgren J, who heard the applications, was not persuaded that the appellants had made out any grounds for review. His Honour said this[48]:

> "The [appellants] did not complain that they had to modify their behaviour so as not to attract attention: cf *Cho v Minister for Immigration & Multicultural Affairs*[49]; *Win v Minister for Immigration & Multicultural Affairs*[50]; *Oo v Minister for Immigration & Multicultural Affairs*[51]. Apparently, therefore, they lived together in the way in which they wished to do. In sum, in living together in the way in which they did, they were

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48 [2001] FCA 968 at [19]-[22].

49 (1998) 55 ALD 487.

50 [2001] FCA 132 at [25]-[26] per Madgwick J.

51 [2001] FCA 348 at [42]-[48] per Lindgren J.

naturally 'discreet' and not 'open', according to the meanings those words had for the RRT. According to this understanding of the passage set out ... above[52], which, I think is correct:

- the [appellants] are able to return to Bangladesh and to resume living there in a homosexual relationship as they did previously without a well-founded fear of being persecuted for reason of their homosexuality; and

- Bangladeshi society's antipathy towards those who 'live openly as' homosexuals is not inconsistent with the RRT's rejection of the [appellants'] allegations of specific instances of persecution.

But what is to be made of the implicit finding referred to ... above[53]? The RRT was dealing with a claim that people in Shantipura taunted and harassed the [appellants] in their home and that [one appellant] complained to the police and told him that he and [the other appellant] were homosexuals. The gravamen of the finding is that if, contrary to another finding of the RRT, the [appellants] had been living openly (non-discreetly) in a homosexual relationship, that is, in a relationship which challenged Bangladeshi society and to which it could not turn a blind eye and which was therefore apt to prompt persecution, [that appellant] would not have told the police that he was being harassed as a homosexual because it is likely that the police would have 'joined in'. But the RRT's finding was that the [appellants] 'conducted themselves in a discreet manner' and so there was no taunting by the local people and nothing about which [that appellant] had cause to complain to the police.

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52 That is, the passage commencing "From this evidence" quoted at [96] above.

53 The "implicit finding" was said by counsel for the appellants before Lindgren J to arise out of the following passage in the Tribunal's reasons:

> "[G]iven the attitude towards homosexuals in Bangladesh, of which [one appellant] was clearly aware, it is not plausible that he would have told the police he was being harassed because he was a homosexual. He might have complained about being harassed, but I do not believe he would have told the police that he was a homosexual."

The passage was said by counsel to demonstrate "an implicit finding that the police shared 'the attitude towards homosexuals in Bangladesh' and would not have protected [the appellant] or would themselves have harmed him if he had revealed his homosexuality, and that [the appellant] knew this to be the case."

> According to my understanding, outlined above, of the passage in question, there is no unreasonableness, illogicality or inconsistency in the RRT's Reasons for Decision, and the occasion does not arise for me to consider whether, if there had been, a ground of relief identified in para (b), (c) or (e) of subs 476(1) is made out; cf *Australian Broadcasting Tribunal v Bond*[54]; *Minister for Immigration & Multicultural Affairs v Epeabaka*[55]; *Minister for Immigration & Multicultural Affairs v Anthonypillai*[56]; *Gamaethige v Minister for Immigration & Multicultural Affairs*[57]; *Minister for Immigration & Multicultural Affairs v Yusuf*[58]. I am, however, of the view that the supposedly inconsistent findings of fact would not have established any of those grounds.
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> There is no substance in the par 476(1)(g) ground. The RRT did not base its decision that the [appellants] did not have a well-founded fear of persecution on account of their homosexuality on the existence of a particular fact which did not exist. The RRT gave reasons for not accepting the [appellants'] allegations of specific instances of persecution."

The appeal to the Full Court of the Federal Court

101 An appeal by the appellants to the Full Court of the Federal Court (Black CJ, Tamberlin and Allsop JJ) was unanimously dismissed[59]. It is unnecessary to set out the Court's reasons because, in substance, it adopted the reasoning of the judge at first instance.

The appeal to this Court

102 Each appellant appeals to this Court on the following grounds:

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54 (1990) 170 CLR 321 at 356-357 per Mason CJ.

55 (1999) 84 FCR 411 at 420-422 [20]-[26] per Black CJ, von Doussa and Carr JJ.

56 (2001) 106 FCR 426.

57 (2001) 109 FCR 424.

58 (2001) 206 CLR 323 at 338-340 [36]-[44] per Gaudron J, 349-352 [76]-[83] per McHugh, Gummow and Hayne JJ, with whom Gleeson CJ agreed.

59 [2002] FCA 129.

"The Court erred in failing to hold that the decision of the Refugee Review Tribunal made 5th February 2001 involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the Tribunal Section 476(1)(c) of *the Migration Act 1958*.

Particulars:

Having determined:

(a) that the Appellant was a homosexual who had lived in a permanent Homosexual relationship since 1994; and

(b) that 'homosexuality is not accepted or condoned by society in Bangladesh. To attempt to do so would mean serious problems ranging from being disowned by one's family and shunned by friends to more serious forms of harms, for example the possibility of being bashed by the police';

the Tribunal erred in holding that the Appellant did not have a well-founded fear of persecution."

103 The appellants' argument may be shortly stated. It is that the Tribunal found that the group to which the appellants belonged was of homosexuals who were disposed, perhaps required – it is not entirely clear whether their argument went so far – to conduct themselves so discreetly as not to attract the attention of the authorities, or other persons who would persecute them with the acquiescence of the authorities. This, it was submitted, was tantamount to the imposition of a requirement of discretion on the part of the appellants. The submission continues that if an applicant is required to be "discreet" about his or her membership of a relevant group, and there is present even the slightest chance that the applicant is able to comply with such a requirement, then effectively that applicant would be disqualified from achieving the status of a refugee in Australia. That test, the appellants claim, would effectively reverse the Convention requirement that a state give protection from persecution: in practical terms it would require an applicant to ensure his or her safety personally by concealing the fact of membership of the social group. The appellants contend that the Federal Court repeated the errors that were made by the Tribunal.

The respondent's argument

104 In dealing with these, and indeed all cases in which applicants seek Protection Visas, the Tribunal and the courts must be careful to avoid generalisations, and to keep in mind that membership of a social group some members of which are persecuted, does not necessarily mean that a particular applicant has been, or will be. Every case depends on its own facts.

105 The facts, the respondent submits, of this case, do not show that these appellants satisfy the criteria for which the Convention makes provision: that each appellant have a subjective fear of being persecuted, and, that any such fear be objectively "well founded". The respondent referred to a statement of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Guo*[60]:

> "[N]o fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that *the applicant* for refugee status is at risk of persecution." (emphasis added)

106 The respondent submits, contrary to the assertion of the appellants, that the Tribunal did not impose a requirement of discretion: that neither in form nor in substance did the Tribunal find that the appellants were bound to, or must, for their own protection, live discreetly in Bangladesh. The appellants had in fact, and would in all likelihood continue to live, as a matter of choice, quietly without flaunting their homosexuality. These were not men who wished to proclaim their homosexuality. Living as they did, they were not oppressed. Discretion, it was put, was purely a matter of choice and not of external imposition. No one required them, as Lindgren J pointed out, ever to modify their behaviour.

The decision

107 The submissions of the respondent should be accepted. It is clear that the appellants did not seek to make a case that they wished to express their homosexuality in other than a discreet, indeed personal, way. There may be good reason, divorced entirely from fear, for this. They may have wished to avoid disapproval of the, or a significant section of the, society in which they lived, perhaps even marked disapproval. There is a great difference however between persecution and disapproval, even strongly expressed disapproval. As Kennedy J in *R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi*[61] points out, persecution is a strong word. In 1951 those who drafted the Convention were not seeking to guarantee all human rights. Rather they were seeking to deal with refugees in the context of the immediate aftermath

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60 (1997) 191 CLR 559 at 572.

61 [1989] Imm AR 595 at 599. On the other hand, it has been accepted in the United States that the harm inflicted on homosexuals in some other countries has been so damaging that it clearly amounts to persecution. See the summary in Anker, *Law of Asylum in the United States*, 3rd ed (1999) at 394-395.

in Europe of the Second World War[62]. More likely, as is the case with many, the appellants here regarded their sexual preference and activities as personal and not public matters, and ones therefore that required no public or overt expression.

108 The appellants were unable to satisfy the Tribunal that there were any expressions or manifestations of their homosexuality which had, or were likely to provoke persecution of them. It was not suggested that they had or wished to engage in "sexual politics" or other politics, to secure greater toleration of homosexuality in the society in which they lived, or indeed that they had any interest in living in other than a relatively private, domestic way. This is by no means unusual. In many societies, both heterosexual and homosexual couples regard their domestic and sexual arrangements and activities as entirely private. So too, in all societies, there are greatly varying views, and indeed laws, about what is or is not acceptable, conventional, or proper sexual conduct or practice, both heterosexual and homosexual. And the same may readily be said about other expressions of identity, not merely sexual. These may well be matters of cultural and national interest in respect of which there may be great divergence of opinion and, in consequence, laws, from nation to nation. For example, in Ireland the *Offences Against the Person Act* 1861, s 58, makes abortion a felony punishable by imprisonment for life and other legislation has restricted access to contraceptive devices[63] and also access to information about abortion[64]. It is not necessarily beyond argument that sexual inclination or practice necessarily defines a social class[65], a matter which was not raised here but seems to have been assumed.

109 Nor, as we have said, did the appellants contend that the presence on the statute books of Bangladesh of s 377 of the Penal Code mean that they were, in consequence, members of a persecuted social group. Until 1997, the year in which the last relevant criminal provision was repealed[66], homosexual intercourse was illegal in at least parts of Australia. Did that repeal mean that

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62 See the original definition of "refugee" in Art 1 of the Convention.

63 See the *Health (Family Planing) Act* 1979 (Ireland).

64 See the *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act* 1995 (Ireland).

65 In *R v Secretary of State for the Home Department; Ex parte Zia Mehmet Binbasi* [1989] Imm AR 595 at 599, Kennedy J neither rejected nor accepted an argument to that effect.

66 See ss 4 and 5 of the *Criminal Code Amendment Act* 1997 (Tas) which amended ss 122 and 123 of the *Criminal Code* (Tas).

homosexuals in other countries in which a similar law may still have applied immediately became potential refugees under the Convention? Many countries (for example Australia[67] and Canada[68]) without qualification make bigamy a criminal offence. Others do not[69]. Does that mean that would-be polygamists in Australia, Muslim or otherwise, might seek refuge in other countries which are subscribers to the Convention where polygamy is not necessarily criminal? The distinction between criminal sanctions and persecution is not yet a settled one[70]. These are not questions which need to be more than noted. Pursuit of them should be left to another case in which the actual issues in suit cause them to arise.

110 On the Tribunal's findings, no fear of such harm as could fairly be characterized as persecution imposed a need for any particular discretion on the part of the appellants: such "discretion" as they exercised, was exercised as a matter of free choice. The outcome of these proceedings might have been different – it is unnecessary in this case to decide whether that is so – if that position were different.

111 This case then turns on its own facts. The appellants' case was not improved by the stories of homosexual rape which one of them, the elder, recounted. On the version which he gave of it, that he escaped criminal sanction entirely, despite the extended knowledge of its occurrence, the appellants could not possibly have maintained that there was persecution of a homosexual social group of which they were members.

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67 See s 94 of the *Marriage Act* 1961 (Cth).

68 See s 293 of the *Criminal Code*, RSC 1985 c C-46.

69 See Art 260 of the *Codigo Penal* 1980 (Colombia) which imposed a penalty of one to four years imprisonment for bigamy and which was repealed by the enactment of a new penal code coming into effect on 24 July 2001. The new *Codigo Penal* does not make bigamy a criminal offence. See also: the *Recognition of Customary Marriages Act* 1998 (South Africa) which recognises the validity and lawfulness of certain polygamous marriages; s 6(1) of the *Muslim Family Laws Ordinance* 1961 (Pakistan) which allows polygamy in Pakistan in some circumstances; and the *Law Reform (Marriage and Divorce) Act* 1976 (Malaysia) which creates a criminal offence of bigamy but exempts Muslims and those married under Muslim law from the application of the Act.

70 See the discussion in Hathaway, *The Law of Refugee Status* (1991) at 169-179. See also *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

112 The great difficulties for the appellants were that the accounts of their experiences in Bangladesh and the attitude of society and officials there to homosexuality, were not only full of inconsistencies but also of improbabilities. That is why the Tribunal found against them. The occasion for an imposition of "discretion" upon their return to Bangladesh simply did not arise. It was an irrelevance to the issue actually decided against them, whether they had a well-founded fear that their homosexual way of life had, or was likely to provoke persecution. To this question, involving as it did both a subjective and an objective element, the Tribunal properly addressed itself. The inquiry which the Tribunal made was not a narrow one. Its careful attention to the facts and personal circumstances of the appellants, complicated as this was by the implausibility and contradictions of much of their evidence, shows this to be so. Furthermore, the Tribunal found that although their way of life may have been the subject of disapproval by much of Bangladeshi society and even the authorities of that country, that disapproval fell well short of persecution.

113 The appellants had every opportunity to state to the Tribunal the grounds on which they claimed refugee status and the background facts – both the facts relating to their personal lives and the facts relating to the political and social environment of Bangladesh. They gave quite detailed accounts of the facts they saw as relevant to their claims. Those accounts may have sufficed to make out an entitlement to refugee status, if the appellants had been believed. In large measure they were not believed. If they had wished to, the appellants could have advanced a claim that their decision to live as they had been living and would live on their return to Bangladesh was influenced by a fear of harm if they did not; or that persons for whom the government of Bangladesh is responsible induce or inculcate a fear of harm in those living openly as homosexuals; or that they are at risk of suffering serious harm constituting persecution if they wished to display, or inadvertently disclosed, their sexuality or relationship to other people. They did not advance any claims of this kind beyond those connected with the factual accounts advanced by them to the Tribunal and rejected in large measure by the Tribunal. The Tribunal accordingly did not err in not dealing with them.

114 The appeals should be dismissed with costs.