FEDERAL COURT OF AUSTRALIA

Gersten v Minister for Immigration & Multicultural Affairs [2000] FCA 855

MIGRATION – refugees – US attorney claimed refugee status based on alleged well-founded fear of persecution on grounds of political opinion – claim rejected by Refugee Review Tribunal and application for judicial review dismissed by primary judge – whether primary Judge erred in making findings of fact and misconceived process of judicial review – whether Tribunal applied wrong causation test – whether Tribunal failed to make material finding of fact – whether wrong test of persecution applied – decision at first instance affirmed.

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

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 170 ALR 553 considered

R v Immigration Appeal Tribunal; ex parte Shah [1999] 2 AC 629 discussed

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 referred to

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 referred to

Jahazi v Minister for Immigration and Ethnic Affairs (1995) 61 FCR 293 referred to

Kanagasabai v Minister for Immigration and Multicultural Affairs [1999] FCA 205

referred to

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 discussed

Minister for Immigration and Ethnic Affairs v Guo (1997) 144 ALR 567 referred to

Prahastono v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 260

referred to

Sun v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71 referred to

JOSEPH GERSTEN v

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 9 of 2000

HILL, MATHEWS AND LINDGREN JJ

5 JULY 2000

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 9 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	JOSEPH GERSTEN APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	HILL, MATHEWS AND LINDGREN JJ
DATE OF ORDER:	5 JULY 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 9 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	JOSEPH GERSTEN APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	HILL, MATHEWS AND LINDGREN JJ
DATE:	5 JULY 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT:

1 The appellant, Mr Gersten appeals from the judgment of a Judge of this Court (Katz J) dismissing his application to the Court for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") which affirmed the decision of a delegate of the respondent Minister for Immigration and Multicultural Affairs ("the Minister") refusing to grant to him a protection visa.

The background facts

2 Mr Gersten is a citizen of the United States of America. He is qualified to practise law in that country and was, until his suspension by the Supreme Court of Florida for one year on 5 March 1998, admitted to practice at the Florida Bar.

3 Mr Gersten arrived in Australia in September 1993. He applied in October of the same year for a protection visa, claiming that he was a refugee, as that expression is defined in the Convention relating to the Status of Refugeesdone 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. That convention as amended by the protocol, in these reasons, is referred to as "the Convention". It is a criterion for a protection visa that the applicant be a non-citizen to whom Australia has protection obligations under the Convention. Australia has protection obligations towards a person who satisfies the definition in the Convention of *"refugee"*. That definition provides that a person will be a refugee if that person:

"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."

4 Mr Gersten's application was rejected. Mr Gersten then applied to the Refugee Review Tribunal ("the Tribunal") for review. He was unsuccessful before the Tribunal.

The decision of the Refugee Review Tribunal – Mr Gersten's claims and the background facts

5 The Tribunal noted that Mr Gersten's claim to be considered as a refugee was that he would suffer persecution for reason of his political opinions or political opinions imputed to him should he return to the USA. The political opinions of which he spoke arose from his opposition to what he saw as corruption of the *"old guard"*, his political enemies who included the Miami Herald and especially the former State Attorney for Dade County and now Attorney General of the United States, Janet Reno.

6 Mr Gersten was formerly a politician in Florida. He had held public office for approximately twenty years, serving in the Florida House of Representatives and in the State Senate and by 1992 was a member of the Board of Commissioners for Dade County, a large county with a population in excess of two million people and a budget of more than $US3 billion. The position of a member of the Board of Commissioners for Dade County was, the Tribunal found, an important political post in Florida.

7 Mr Gersten claimed to be a reformist. He opposed, he said, development approvals and some practices championed by the Miami Herald, the dominant media organisation in Miami and an organisation exercising great influence on elections and the fate of political appointments.

8 In April 1992 Mr Gersten announced his candidacy for Mayor of Dade County. A few days later his car was stolen from, he said, his home. He reported the car stolen. There were, he said, sensitive documents in the car concerning corrupt dealings he was investigating. Some time later the car was located by the police in the possession of two people, both of whom were convicted felons, one a convicted prostitute. They claimed Mr Gersten had solicited the prostitute to engage in sexual acts with her and had purchased and used crack cocaine while at a *"crack house".* The police claimed that the car had been stolen from Mr Gersten while he was at the crack house. The story was leaked to and reported by the Miami Herald.

9 Mr Gersten's attorney was told in a meeting with the State Attorney's Office that the felons' story was believed and that it was desired to question Mr Gersten. It was said that if he denied the account of the witnesses he would be charged with perjury. Mr Gersten was subject to a deal of adverse publicity in the Miami Herald about the incident. He claimed that Ms Reno as the State Attorney acted in bad faith in using the theft as an opportunity to investigate him and damage him politically. Two investigations were mounted from within the State Attorney's Office, supposedly operating independently of each other (the purported independence via a *"Chinese wall"* was, Mr Gersten said, a sham). Each investigator reported to Ms Reno. One was the investigation into the theft of the car, and the other the investigation of Mr Gersten's activities. The car thieves were given, Mr Gersten alleged, lenient treatment to procure their assistance in harming Mr Gersten in the investigation into his affairs.

10 Samples of Mr Gersten's hair were taken to see if he had been using drugs. The result was ultimately negative, i.e., the tests provided no support for the suggestion that he had been involved in taking illegal drugs. Nevertheless the investigation continued amidst continuing unfavourable media coverage. The aim was, according to Mr Gersten, to place him in a *"perjury trap"*. By this expression Mr Gersten meant that he was to be required to answer questions on oath as to his whereabouts when the car was stolen. If he answered that he was at home he would be charged with perjury. If he said that he was using crack in the company of the prostitutes, he would be politically, professionally and socially ruined and charged with a number of offences.

11 The investigator who conducted the investigation into the car theft had the powers of a grand jury. He subpoenaed Mr Gersten to attend before him on the day of the election. Mr Gersten agreed to answer questions to the effect that he was the owner of the car and that those apprehended had not his permission to use it, but otherwise refused to answer other questions as irrelevant to the car theft and designed to trap him. The investigator commenced proceedings in the Eleventh Judicial Circuit to enforce the subpoena. Mr Gersten challenged the good faith of the investigation. The hearing, before Judge Dean, continued over some days. Ultimately the Court ruled that Mr Gersten must answer certain specific questions or be guilty of contempt. These questions were, the Tribunal held, about Mr Gersten's background or related to his whereabouts at various times on the day the car was stolen. Mr Gersten refused to answer the questions he was required to answer and was gaoled for civil contempt. He was held in gaol for three weeks. He claims that he was singled out for special treatment there, was placed with dangerous criminals, was twice assaulted and was denied adequate medical care.

12 After three weeks Mr Gersten was released on bail while an appeal against the ruling of the Eleventh Circuit Court was heard. The appeal was unsuccessful. An injunction was sought in the United States District Court in proceedings where at least the substantive relief sought was to have that Court set aside the State Court order. The relief sought was refused.

13 In the meantime Mr Gersten had left the jurisdiction. Were he in Florida he would be returned to gaol on the contempt charge. If he were in any other part of the United States, he would be returned to Florida to serve the gaol sentence. In other words there was nowhere in the United States to which he could relocate. The power of Ms Reno and his enemies (the prosecutor/investigator into his affairs has, in the meantime, been appointed a federal official and has conducted further investigations) extends throughout the United States. Mr Gersten claims that if he answered the questions honestly he would be charged with perjury and not receive a fair trial. To be placed in the perjury trap was itself, he said, persecution, as was the need to defend himself on the potential perjury case regardless of the outcome.

14 Further, Mr Gersten claimed that his political enemies had initiated proceedings to have him struck off as a lawyer. In those proceedings Mr

Gersten complained that he was denied a fair hearing. He claimed that the proceedings were attended by irregularities suggesting bad faith. There was, he said, overall a pattern of behaviour by his political enemies designed to cause him harm for reason of his political opinions. He claimed that he would be prevented from carrying on any business activities; that prospective business partners would be discouraged from dealing with him; that there were bad faith investigations of commercial dealings in which he was involved in Florida and elsewhere and that he had been subjected to ridicule and adverse publicity through the Miami Herald and its affiliates.

The Tribunal's findings of fact

15 The Tribunal made the following findings of fact:

1. Mr Gersten was gaoled for refusing to answer the questions he had been ordered to answer. That refusal was his choice. It was not an inevitable result of the allegedly bad faith investigation. It was not unreasonable for him to have been required to answer the questions he was ordered to answer. The Tribunal was not satisfied that Judge Dean would permit the investigator to engage in a fishing expedition of unlimited scope. (It is to be noted that the Judge's order gave Mr Gersten liberty to have the inappropriateness of particular questions determined by her and that she had, in the course of the hearing, ruled that Mr Gersten did not have to answer specific questions).
2. The argument that the investigation was instigated in bad faith and infringed Mr Gersten's constitutional rights had been rejected both in the Florida Supreme Court and the Federal District Court.
3. Mr Gersten was not gaoled for reasons of his political opinion. Any harm he suffered in gaol did not occur for reason of his political opinion. He could at any time have secured his release by answering the questions he had been ordered to answer.
4. The fact that he could be returned to gaol on the contempt charge should he be within the jurisdiction of the American courts was, likewise, not a matter which arose by reason of his political opinion.
5. The so-called *"perjury trap"* was not, of itself, serious harm. All Mr Gersten had to do was answer the questions truthfully and, if charged with perjury, defend the charge. The cost of so doing was not such serious harm as to constitute persecution.
6. There was no reasonable apprehension that judges in the United States (despite differences in the appointment process) would not dispense justice. Mr Gersten would receive a fair trial. In particular the Tribunal was not satisfied that any of the judges before whom Mr Gersten had appeared had acted in bad faith, displayed bias or denied him a fair hearing.

7. The Tribunal was not satisfied that Mr Gersten faced any substantial risk of not having any charge against him of perjury resolved by a reasonably fair and impartial judge or a jury unaffected by the publicity he had received.

8. In consequence there was no real chance that Mr Gersten would be unfairly convicted for reasons of his political opinion of any charge of perjury or any other charge brought against him. Nor was there a real chance that he would be unfairly disbarred or prevented from earning a living.

9. Even if there was a pattern of behaviour calculated to harm Mr Gersten, it was a pattern in which the harm stopped short of persecution.

10. The Tribunal was not satisfied that Mr Gersten had suffered persecution in the past, although he had been put to inconvenience and expense and his reputation had been damaged. He had not for many years been active in politics in Florida and was not subject to persecution while he was active and would not be at be a greater risk in the future than he had been in the past.

16 It was for these reasons that the Tribunal concluded that it was not satisfied that any fear Mr Gersten had of persecution for a Convention reason was well-founded. It accordingly rejected his claim that he was a refugee. Mr Gersten then applied to this Court for judicial review of the Tribunal's decision.

The grounds of review

17 The grounds upon which Mr Gersten applied to this Court for judicial review (the same grounds were argued before us) were, as summarised in written submissions, as follows (in these submissions references to the RRT are references to the Tribunal):

"(i) The RRT erred in applying the law to the facts as found, by concluding that the Appellant's actions in refusing to answer certain questions posed by the State Attorney's office, which were assumed by the RRT, to be part of a bad faith investigation conducted for reasons of his political opinion, meant that any subsequent imprisonment was not 'for reasons of' his political opinion; the causation test was incorrectly applied by the RRT ... ;

(ii) Contrary to s 430 of the Act, the RRT failed to make findings on material questions of fact by its failure to make findings concerning the Appellant's claim that his political opponent were [sic] conducting a vendetta against him and instead merely assuming that 'may have been the case'; the RRT… manifested actual bias against the Appellant;

(iii) The RRT failed to address and determine the Appellant's claim that he was the subject of selective and discriminatory treatment while in prison for reasons of his political opinion and

(iv) The RRT erred in interpreting the applicable law, or erred in applying the law to the facts as found, by applying a test of persecution that required there to be 'significant or serious'."

The decision appealed from

18 It appears that there were filed in the Court with the application for review some thousands of pages of material that had been before the Tribunal, a great deal of which the learned primary Judge said came from Mr Gersten. Much of the material consisted, apparently, of transcripts and judgments from the legal proceedings in which Mr Gersten had been involved between 1992 and 1996. It may be inferred that the learned primary Judge was invited to look at this material in connection with the submissions made to him. Indeed, many of the submissions made to us referred not to the factual findings of the Tribunal, but to the underlying evidence before it. Whether or not his Honour was invited to consider the whole of the material which was before the Tribunal is of no consequence to the appeal. It is true that his Honour's judgment summarises the substance of the material before the Tribunal and notes that it was in places incomplete and that some of the material contained conflicting assertions. However, we do not, contrary to the submissions made on the appeal, read his Honour as having made findings of fact, as Mr Gersten before us complains.

19 That his Honour did not intend the summary he made to be other than a summary of the material before the Tribunal is in our view clear. Having commented that the material before the Tribunal revealed that it was open to the Tribunal to come to the conclusions it did, his Honour said:

"…I now turn to the Tribunal's statement of findings and reasons in the matter in order to deal both with the way in which the tribunal did approach those claims and with Mr Gersten's complaints about that approach."

20 In our view his Honour did not, contrary to the constraints attendant upon judicial review, make findings of fact upon which he then relied in reaching the conclusion that the application should be rejected. But even if, contrary to our view, his Honour did embark upon a merits review and made findings of fact, the appeal should nevertheless not be allowed. To explain our reasons for so saying, it is necessary now to consider each of the grounds of review which Mr Gersten sought to make out before his Honour and before us and the reasons why those grounds demonstrate no reviewable error.

Did the Tribunal err in applying the "causation test"?

21 The first ground of review purported to be founded upon s 476(1)(e) of the *Migration Act 1958* (Cth)("the Act"). That paragraph makes it a ground of review that the Tribunal made an error of law, being an incorrect interpretation the Act or an incorrect application of the law to the facts as found. The error of law is said to be the application of an incorrect test of causation.

22 The submission spends much time discussing the question of causation, but little explaining how the Tribunal erred in applying an incorrect test. However it seems that the real complaint is that the Tribunal erred because it applied a *"but for"* test of causation, asking itself why Judge Dean

came to have to adjudicate on whether Mr Gersten should be required to answer questions put to him rather than asking why the State was *"pursuing"* Mr Gersten to give evidence on oath and then initiating contempt charges arising therefrom. It is said that when this latter question is asked, the answer is that the State *"was engineering a perjury trap, which had the primary aim of having the Appellant dismissed from his elected office immediately the charge was laid".* Presumably this answer would then permit the conclusion to be reached that Mr Gersten was persecuted by reason of his political opinions. In support of the submission reference is made to the High Court decision in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553, and particularly the Reasons for Judgment of Kirby J, who delivered a separate, although concurring, judgment (the other judgment was a joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ) and certain dicta of Lord Hoffman in *R v Immigration Appeal Tribunal; ex parte Shah* [1999] 2 AC 629 at 653-4, cited by Kirby J in *Chen* with approval.

23 There is, as the joint judgment in *Chen* and the judgment of Burchett J in this Court in *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568 make clear, some danger in considering each of the elements to be found in the definition of *"refugee"* in the Convention as separate and distinct from the other elements. The definition contains a *"common thread"* which links the elements together, those elements being persecution *"for reasons of"* at least one of the several grounds specified in the definition among which is to be found, as relevant to the present case, political opinion. Further, no doubt, the words *"for reasons of"* introduce an idea of causation. But care must, in considering the question of causation, be taken not to be distracted from what is actually expressed in the Convention definition, namely, as relevant to the present case, whether the person claiming to be a refugee has a well-founded fear of persecution for reason of political opinion.

24 *Chen* concerned an application by a child to be considered as a refugee by reason of his feared persecution as a member of a social group. The claim was that the child, born outside the parameters of the one child policy in China and born of an unauthorised marriage (referred to as a *"black child"* in China) would be denied access to food, education and health care beyond a very basic level and would probably face social discrimination, prejudice and ostracism. The claim was rejected by the Tribunal because, although it found that the child faced a real chance of persecution *"because of, in a strict causative sense his membership of a particular social group",* this persecution was not *"for reasons of his membership of that group".* Emphasis was placed in the Tribunal upon the fact that the consequences to the child would not result from any malignity, enmity or other adverse intention towards him on the part of the Chinese authorities. French J at first instance set aside the Tribunal's decision, but his Honour's decision was reversed by majority on appeal. The High Court allowed an appeal against the Full Court decision.

25 A number of important propositions emerge from the joint judgment. These are, relevant to the present discussion:

- The question whether persecution is undertaken for a Convention reason can not be entirely isolated from the question whether the conduct is persecution.

- If persons of a particular race, religion or, as in the present case, political opinion are treated differently, that may justify the conclusion that they are treated differently by reason of their race, religion (or political opinion).

- Whether differential treatment constitutes persecution will at least usually depend on whether the treatment received is *"appropriate and adapted to achieving some legitimate object of the country* [concerned]*"* (see McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258). This is, however, subject to the reservation that it would only be in exceptional circumstances that a sanction aimed at persons for reasons of race, religion (or political opinion) would not be persecution. Standards of a civil society will be relevant in answering this question. In *Chen,* once it was found that the appellant would be denied access to food, education and health care beyond a very basic level, that *"black children"* were a social group treated differently from other children and that the treatment amounted to persecution, there was little scope for contending that the treatment was other than *"for reasons of"* his being a *"black child".*

- Where enmity or malignity motivates the discriminatory conduct, that fact facilitates the conclusion that the discrimination is for a Convention reason. However absence of enmity or malignity does not mean that the conduct can not amount to persecution for a convention reason. *"It is enough that the reason for the persecution is found in one or more of the five attributes listed in the Convention"* (one of which is political opinion): *Chen* at 33.

- It was no answer, in *Chen,* that the consequences likely to befall the child if returned to China resulted from the parents' financial inability to mitigate the consequences of the adverse treatment.

26 It may be noted that, except so far as causation is reflected in the propositions we have set out, it was not the subject of direct comment in the joint judgment.

27 Kirby J delivered, as we have said, a separate judgment. His Honour drew attention to the humanitarian purpose of the Convention. His Honour, too, pointed to the need to consider the definition as a whole, rather than *"atomising"* the concept it contains. Like the rest of the Court, his Honour rejected the submission that it was necessary, to show persecution, that the conduct in question be motivated by malignity, enmity or adverse intention. That was sufficient to dispose of the appeal. However, his Honour then turned to what his Honour referred to as *"the causation point".*

28 His Honour noted that causation was an issue which bedevilled the law in many aspects and depended upon the context in which it arose. His Honour noted that in the law of torts a *"but for"* test had to be tempered by *"the infusion of policy considerations",* citing *March v E and MH Stramare Pty Ltd*

(1991) 171 CLR 506 at 515-7 as authority for this proposition. However his Honour then said, at 68, in a passage with which, with respect, we agree:

"In the context of the expression 'for reasons of' in the Convention, it is neither practicable nor desirable to attempt to formulate 'rules' or 'principles' which can be substituted for the Convention language."

29 So, his Honour said, it was necessary for the decision maker to *"evaluate the postulated connection between the asserted fear of persecution and the ground suggested to give rise to that fear",* bearing in mind the *"broad policy of the Convention"*.

30 As his Honour thereafter points out, there will be occasions where there may be different reasons which may be assigned to conduct. His Honour referred, then, to the dicta of Lord Hoffman in *Shah,* upon which counsel for Mr Gersten relied. In the passage cited, Lord Hoffman said:

"Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. Those who conform to the discriminatory laws, wear yellow stars out of doors and so forth can go about their ordinary business. But those who contravene the racial laws are persecuted. Are they being persecuted on grounds of race? In my opinion, they plainly are. It is therefore a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership of that class. Or to come nearer to the facts of the present case, suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that the answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business". But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew."

31 The purpose of his Honour's quotation from Lord Hoffman is clear enough from the comments which follow it. The point which his Honour makes is that there may be different reasons for particular acts which constitute persecution. It is not necessary that the Convention reason relied upon be the sole reason for the persecution, as the Tribunal in *Chen* appeared to his Honour to have thought. On the facts of the particular case and when regard

is had to the objects of the Convention and the Australian law which gives effect to it, the persecution which the child suffered was *"for reasons of"* its membership of a social group, being the group described as *"black children".* His Honour's view echoes the comments of French J in *Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 61 FCR 293 to which reference was also made in the submissions made on behalf of Mr Gersten.

32 That there will be cases, and *Chen* is but one example, where the persecution feared is inflicted for multiple reasons (which include a Convention reason) may readily be accepted. Likewise, it may be accepted that in such a case it will be open to the Tribunal to find that the feared persecution is for a Convention reason. But, it is another thing to say that the Tribunal erred in the present case in law in arriving at the conclusion which it did. It is necessary to refer to the facts which the Tribunal found.

33 First, it is necessary to identify the persecution which is claimed to have existed in the past and which is said to provide the foundation for the well-founded fear of persecution in the event that Mr Gersten is returned to his country of nationality. This was, on Mr Gersten's case, primarily, his being gaoled. For the purposes of this submission the claim that being placed in a perjury trap itself constituted persecution need not be considered for it was the finding that Mr Gersten's gaoling was not persecution for reasons of his political opinion which was the subject of attack in this submission (including the special and adverse treatment he claimed to have received in gaol). Then it is necessary to determine, having regard to the objects which the Convention serves to promote, whether the identified persecution was for reasons of the claimant's political opinion.

34 The Tribunal made no specific finding as to whether the investigation which was launched against Mr Gersten was itself politically motivated. It said no more than that Mr Gersten *"may have been right"* in asserting that the investigation was carried out in bad faith. However the Tribunal concluded, and the conclusion was to say the least open to it, that Mr Gersten's gaol term arose in the circumstances, not because an investigation was launched, but rather because he had refused to answer questions which he had been ordered to answer by Judge Dean. While it is true that Mr Gersten may not have been placed in the position of having an investigation being instigated into his affairs without his opponents being motivated by a political view adverse to his, that was not the reason he was gaoled.

35 It may be noted that Mr Gersten did not suggest that Judge Dean had done anything other than afford him a fair trial or that her Honour was herself biased against him. In these circumstances it was open to the Tribunal to find as a fact that his being gaoled was not persecution for reasons of any political opinion he held. There is nothing in the Tribunal's reasons which suggests that it applied, as was suggested, a *"but for"* test in arriving at its conclusion or that it failed to recognise that persecution may be activated by multiple reasons and failed to take account of one of those reasons.

36 In other words, the reasons of the Tribunal do not suggest that it erred, as counsel for Mr Gersten claimed, in applying some wrong test of causation.

The failure to make findings of fact as to the political vendetta which was being conducted against Mr Gersten

37 Section 476(1)(a) of the Act makes it a ground of review that the Tribunal failed to observe *"procedures"* that the Act required to be observed. Section 430 of the Act requires the Tribunal, in its reasons, to make findings on material facts.

38 For the purposes of the present appeal we are prepared to assume that the obligation imposed upon the Tribunal under s 430 of the Act to give reasons is a requirement that a procedure be observed within s 476(1)(a), so that the failure of the Tribunal in its reasons to make a factual finding on a material fact would entitled the applicant for review to have the Tribunal's decision set aside. This is a matter upon which differently constituted full Courts have differed, cf *Xu v Minister for Immigration and Multicultural Affairs* [1999] FCA 1741 and *Minister for Immigration and Multicultural Affairs v Yusuf* [1999] FCA 1681. It is presently an issue before a full Court of five Judges and the subject of an appeal to the High Court. Unless it truly arises it is inappropriate that we express our views on the question. And we are of the opinion that it does not.

39 The obligation on the Tribunal to make findings of fact arises only where the facts are material. There is room for differences in marginal cases as to what is meant by *"material"*. But on the most favourable view to an applicant, a fact could be material only where the finding if made could affect the outcome of the review in the Tribunal. The complaint here is that the Tribunal failed to make a factual finding as to Mr Gersten's claim that his political opponents were conducting a vendetta against him. However the Tribunal accepted, as we have already indicated, for the purposes of its reasons, that the investigation into his affairs may have been launched by his opponents for reasons of political opinion different to his. In other words it assumed for the purposes of its reasons the very fact which Mr Gersten claims it had impermissibly failed to find. In such circumstances the failure to make a finding can not possibly be a matter which would affect the outcome of the review. This ground must, accordingly, fail.

The failure of the Tribunal to address the claim that Mr Gersten's discriminatory treatment while in

prison constituted persecution for a Convention reason

40 The submission made on behalf of Mr Gersten is that before the Tribunal Mr Gersten argued that even if his imprisonment for refusing to answer questions was of itself not persecution, the differential treatment which Mr Gersten claimed to have been subjected to while in gaol was. It is then submitted that the Tribunal had simply not addressed this claim. What the Tribunal said with respect to this claim was:

"The Tribunal notes that the Appellant was kept in jail for some weeks, in most unpleasant conditions. The Appellant states that he was not classified as he should have been and was kept with dangerous prisoners and denied adequate medical treatment. He was threatened and perhaps assaulted by fellow inmates.

The Tribunal is not satisfied that any harm which the Appellant suffered in prison occurred for reasons of his political opinion. The Tribunal notes the Appellant could have secured his own release at any time by agreeing to answer the questions as ordered by Judge Dean."

41 With respect to the submission it is clear that the Tribunal did address the claim. It held, and it is the holding of which counsel for Mr Gersten complains, that what happened to him in prison was not for a Convention reason, that is to say, for a reason related to his political opinions. It is true that the Tribunal dealt with the matter briefly. It is also true that the Tribunal did not use the word *"selective"* or *"discriminatory"* in referring to Mr Gersten's treatment while in gaol. But what is undeniable is that the Tribunal dealt with and decided against the claim that any treatment in gaol of the type of which Mr Gersten complained was by reasons of his political opinion. There is no substance in the ground of review.

The meaning of the word "persecution"

42 The final ground of review advanced before the learned primary Judge was that the Tribunal had erred in law by applying a test of persecution that required there to be *"significant or serious harm"*. The ground relies upon s 476(1)(e) of the Act.

43 As has already been noted, Mr Gersten claimed that as well as imprisonment the persecution he feared included, by way of example, the cost and inconvenience of defending a perjury charge, suffering political embarrassment, interference with his business relationships and disbarment. It is submitted that, in holding that these matters were not persecution but rather harm which fell short of persecution, the Tribunal erred in its interpretation and application of the word *"persecution",* a word which it is submitted was not to be confined, as it is said the Tribunal did, to *"serious harm".* In support of this submission reference is made to the decision of Branson J in *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205.

44 At the commencement of its reasons the Tribunal, in discussing the meaning of the word *"persecution"*, indicated that it meant *"serious or significant harm"*. It is said that it carried through in its reasons, erroneously, the concept of persecution constituting serious or significant harm as illustrated in the following extracts from its reasons dealing with the claimed acts of persecution:

"The Tribunal acknowledges that such a charge would, in itself, be costly and inconvenient to the Appellant. The Tribunal is not satisfied that the cost and inconvenience of defending a perjury charge would cause the Appellant such serious harm as to amount to persecution." …

The Tribunal finds that even if there is a pattern of behaviour calculated to harm the Appellant, it is pattern in which the harm caused stops short of persecution if there is a pattern, it is a pattern of investigation, bad publicity, inconvenience and expense, but not persecution. His fundamental human rights have not been interfered with…

The Tribunal is not satisfied that the Appellant has suffered persecution in the past. He has been put to inconvenience and expense and his good name has been damaged. The Tribunal notes that the Appellant is not prevented from expressing his political opinions. ... He may have suffered detriment or disadvantage compared to his previous political position, for instance he is no longer an elected political [sic], but even allowing for the inconvenience, expense, and publicity, he is not seriously disadvantaged compared to his fellow countrymen." (emphasis added)

45 It may be accepted that the word *"persecution",* in the context of the Convention, carries with it the connotation of harm. As the dictionary meanings discussed by Kirby J in *Chen* at 567-8 show, the word is capable of having a meaning such as *"to pursue with harassing or oppressive treatment"* (the *Macquarie Dictionary)* or *"to subject (a person etc) to hostility or ill-treatment, especially on the grounds of political or religious belief"* (the *Australian Concise Oxford Dictionary*). The High Court decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 contains a discussion of the word (see at 399-400 per Dawson J, at 416 per Gaudron J and at 429-30 per McHugh J) which is a convenient starting point. It is clear that, while the word means infliction of harm, not every kind of harm constitutes persecution. That having been said, harm short of interference with life or liberty may suffice. Many forms of social, political and economic discrimination may constitute persecution, including denial of access to employment and restriction on freedom of worship. Denial of access to education, food or health care constituted persecution in *Chen.* However that harm which is merely trivial or insignificant could not constitute persecution in the Convention sense. What is important is that there is a well-founded fear that if returned to the country of nationality (and we restrict our comments to this, the normal case) the applicant will suffer that harm. Events in the past may, in a particular case, provide a reliable guide to what might be expected to happen in the future, in the event that the applicant were repatriated. See, too, *Applicant A* at 258 per McHugh, *Minister for Immigration and Ethnic*

Affairs v Guo (1997) 144 ALR 567 and *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260 at 264 as examples of cases where the concept of persecution has been discussed.

46 It may be noted, however, that in *Chan,* in a passage quoted with approval in *Guo* at 575, Mason CJ, in language perhaps evocative of what the Tribunal had said, wrote at 388:

" [the] Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns."

47 In *Kanagasabai,* Branson J set aside a decision of the Tribunal which had held that arrests of and extortion practised on an elderly woman from Sri Lanka were not such serious or significant harm as to amount to persecution. After quoting from the judgments of the High Court to which we have made reference, her Honour said:

"… there is in my view a real difference between the concepts of 'serious punishment or penalty' and 'significant detriment or disadvantage' to which Mason CJ referred and 'serious or significant harm' in the sense in which that phrase is used by the Tribunal. Nothing in the reasons for decision of the High Court in Guo's case suggests that the High Court intended in that case to reconsider established authority on the meaning of 'persecution'. It rather intended, as I read the case to make explicit what had in earlier authority been implicit, namely, that the type of harm which can constitute persecution cannot be trivial or insignificant harm but rather must be harm of significance."

48 It is inappropriate to attempt a definition of *"persecution"*, if only because whether a particular act or threat will constitute persecution will depend on the circumstances of each case. This is a point emphasised in the *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) published by the office of the United High Commission for Refugees. It is also a point made by Kirby J in *Chen.* To the extent that the Tribunal did equate persecution with significant harm and applied that as a rigid test, the Tribunal would have erred. However we do not think that it did. In our view the Tribunal did no more than reiterate, as Mason CJ had in *Chan,* the proposition that persecution involves harm that is more than trivial or insignificant. The Tribunal concluded that the conduct complained of by Mr Gersten fell short of persecution in all the circumstances of the case, a conclusion with which we agree.

The submission that the primary Judge was biased

49 When the present appeal was called on for hearing, an application was made for leave to argue that the Tribunal was actually biased and to amend the grounds of appeal to raise as a ground that the learned primary Judge was also actually biased.

50 As to the bias of the Tribunal, we refused leave. This was not a matter which had been raised below and, at least potentially, was a matter upon which evidence may have been able to have been adduced by the Minister before the primary Judge to refute the allegation. More importantly, we were of the view that, in the circumstances, the matter had been raised too late and that the granting of permission to argue bias on the part of the Tribunal could be prejudicial to the Minister. It may be said that there is nothing on the face of the Tribunal's judgment which suggested it was biased. The complaint, so far as we understood it, seems rather to be that the Tribunal reached a conclusion contrary to that which Mr Gersten sought. However, we have not sought to explore the allegation for the reasons we have indicated.

51 We granted leave, however, to permit counsel for Mr Gersten to argue that the learned primary Judge was biased and that for this reason his decision should be set aside. No question of possible prejudice to the Minister arose in our so doing.

52 A submission that a Judge is biased means, as counsel for Mr Gersten conceded, that the Judge has approached the task in hand with a closed mind, rather than impartially and in an unprejudiced way: cf *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 711 at 122-3 per Wilcox J and the cases there cited. Put another way, the question raised is whether in the present case the learned primary Judge had prejudged the issue. A court should not be quick to conclude there is actual bias and should approach the matter with some caution.

53 Given the seriousness of the allegation, one would have expected that the submission would have been accompanied by detailed illustrations, which suggested that the learned primary Judge had approached the case with a closed mind. That no single part of the judgment is pointed to as suggesting bias says much about the submission. There is, in our view, good reason why no example of bias is pointed to and that is because there is nothing at all in the judgment which suggests that his Honour was biased. Were the allegation not so serious, it would be risible.

54 In oral submission a complaint was made that his Honour had made a finding, contrary to the fact that Mr Gersten had a drug problem. Whether this complaint was intended to suggest bias was not clear. There are, however, two answers to the complaint. First, it is clear from a reading of what his Honour said that he made no such finding of fact. His Honour merely narrated material concerning the evidence of a witness who had been called by Mr Gersten in the proceeding before Judge Dean in which the witness had said that Mr Gersten's family *"was concerned with"* Mr Gersten's *"problem"* and a statement made by Mr Gersten's attorney which suggested that Mr Gersten may have had a drug problem. Nowhere did his Honour purport to find that Mr Gersten in fact had a drug problem. Second, his Honour's summary of the material to which he makes reference was an accurate summary.

Conclusion

55 In our view the appeal should be dismissed with costs.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 5 July 2000

Counsel for the Appellant:	S C Churches and J A Coombs
Solicitor for the Appellant:	Alex Lee Solicitor
Counsel for the Respondent:	P Roberts SC and G Kennett
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	31 May 2000
Date of Judgment:	5 July 2000