IMMIGRATION - refugee status - protection visas - well-founded fear of persecution - facts on which fear based - whether to be determined at date of application for refugee status or date of determination of application - whether relevant date of determination is the date of the delegate's decision or the date upon which the Tribunal on review makes its determination - whether Tribunal's decision involved error of law - whether incorrect interpretation of applicable law - whether incorrect application of the law to the facts as found - Minister's delegate found that applicant was refugee upon departure from Germany in mid-1994 - whether, before denying applicant refugee status, Tribunal was required by law to find that there had been a substantial change in Germany since that time - whether there was evidence or other material from which Tribunal could reasonably be satisfied that there had been sufficient and relevant change.

Migration Act 1958 (Cth) ss.476(1)(e), 476(1)(g), 476(4)(a) and (b)

Minister for Immigration and Ethnic Affairs v. Mohinder Singh (Full Court of the Federal Court of Australia, not yet reported, Judgment No. 17 of 1997, 24 January 1997)

Mocan v. Refugee Review Tribunal (1996) 42 ALD 241

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

Minister for Immigration and Ethnic Affairs v. Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration, Local Government and Ethnic Affairs v. Che Guang Xiang (Full Court of the Federal Court of Australia, 12 August 1994, unreported, Judgment No. 534 of 1994)

Wu Shan Liang v. Minister for Immigration and Ethnic Affairs (1995) 130 ALR 367

WALTER CHANDRAKEERTHI HAPUARACHCHIGE v. THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

No. WAG 75 of 1996

CARR J

PERTH

18 MARCH 1997

IN THE FEDERAL COURT)

OF AUSTRALIA)

WESTERN AUSTRALIA)

DISTRICT REGISTRY) **No. WAG 75 of 1996**

GENERAL DIVISION)

B E T W E E N : **WALTER CHANDRAKEERTHI HAPUARACHCHIGE**

Applicant

and

THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Respondent

CORAM: CARR J.

PLACE: PERTH

DATE: 18 MARCH 1997

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The application for review be dismissed.

2. The applicant pay the respondent's costs.

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

IN THE FEDERAL COURT)

OF AUSTRALIA)

WESTERN AUSTRALIA)

DISTRICT REGISTRY) **No. WAG 75 of 1996**

GENERAL DIVISION)

B E T W E E N : **WALTER CHANDRAKEERTHI HAPUARACHCHIGE**

Applicant

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THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Respondent

CORAM: CARR J.

PLACE: PERTH

DATE: 18 MARCH 1997

REASONS FOR JUDGMENT

Introduction

This is an application for review of a decision of the Refugee Review Tribunal ("the Tribunal"), made on 14 May 1996, that the applicant was not a person to whom Australia has protection obligations under the Convention Relating to the Status of Refugees 1951 ("the Convention"). As a consequence of that decision the Tribunal affirmed a decision by a delegate of the respondent, made on 5 September 1994, to refuse the grant of a protection visa for the same reason.

Factual Background

The Tribunal found the applicant to be credible and said that it had no reason to doubt the facts as stated by him. The following is a summary of those facts, taken mainly from the Tribunal's reasons for decision.The applicant, now aged 42, was born in Sri Lanka. After attending the Colombo Hindu College from 1967 to 1972, the applicant travelled to Germany in 1973 where he studied at the German School in Freiburg and also at Freiburg University. He entered and stayed in Germany on a student visa. In 1976 the applicant married a German citizen. The applicant's wife was born in Poland, entered what was then known as West Germany in 1974 and was granted citizenship of that country two or three weeks after her arrival. The applicant acquired German citizenship on 19 March 1990. From 1982 to 1990 the applicant was employed as a cleaning contractor. In 1990 the applicant set up a similar business, which he conducted until he left Germany. The business appears to have been successful. The applicant's evidence before the Tribunal was that until shortly before he left Germany, on 15 May 1994, he owned a house, a block of land (on which he intended to build a restaurant) and three cars, all of which were unencumbered. The applicant employed between 20 and 30 people in his business. The applicant and his wife have five children, all daughters, born in Germany between 1976 and 1987. The eldest daughter is not a party to the present application, having recently married and obtained permanent resident status in Australia.

The applicant and his family lived in a village on the outskirts of Freiburg. The applicant was "always" told by other Germans that he was a negro and that he should go back to Africa. The

applicant tried to be friendly, but his neighbours responded by saying that he was not from Germany. The applicant's children especially had constant problems. The applicant and all of the children have a dark complexion and this caused severe problems due, so the applicant claimed, to the level of racism in Germany. Those problems escalated in the three years prior to the family's departure from

Germany. The applicant's children suffered abuse and ill-treatment at school. The children were affected socially as well as emotionally by these racial problems. Some of their teachers called them "niggers" or "gypsies" in front of the other children. Parents of the other children discouraged them from socialising with the applicant's children. They were not asked to birthday parties and other children would not attend their birthday parties. The situation reached a point whereby the applicant's children did not want to go to school as a result of these experiences.

The second eldest daughter (referred to by the Tribunal as "X") was abducted on three occasions by a racist gang in November and December 1993. The first occasion was on a Friday afternoon when X had just finished school and was en route to Freiburg. She was in a narrow street and was approached by five to six "skinheads". They forced her to go with them to a fourth floor flat. Neither X nor her family drinks alcohol. The gang forced her to consume large quantities of beer until she became drunk. They kept X prisoner for a period of three days during which they played anti-foreign/pro-Nazi music and gave her no food. They also made remarks about the colour of her skin and, after they became drunk, they cut off her hair, which was long at that time. The gang forced X to keep drinking so that she was drunk all the time. She was told to persuade her parents to leave Germany and take all the family. She was then put out on the pavement in a drunken state where she was found by her parents.

The second abduction happened about two weeks later. It was the same gang and the same thing occurred, save that X was kept "only" for one day. She managed to escape in a very intoxicated condition. Her parents found her wandering along a freeway. X told the Tribunal that she did not know what she was doing but at that time she just wanted to end her life.

The third abduction occurred in December 1993. X was kept for a few days and forced repeatedly to drink alcohol. She was eventually rescued by her parents who found her in a run-

down cellar bar. X could not tell the Tribunal how she got there and it was some days before she could think normally. The applicant's evidence was that this was the last straw. He and his wife made preparations for the family to leave Germany. Each time X was abducted, the family had received death threats over the telephone and were warned that if they did not leave Germany the family would be killed one by one. On 31 December 1993 the family home was attacked by gun fire which shattered bedroom windows. On the same day the applicant's car was tampered with - all the wheels were loosened. The applicant reported each incident to the police headquarters in Freiburg and gave them a photograph of X, asking them to find her. He also told the police about the telephone threats. The police made no apparent effort to find X and appeared unhelpful and disinterested on each occasion. The police told the applicant to go home and that they would contact him. Even though X was missing for periods up to three days, the police did not once contact the applicant about progress of the searches or visit their home. The applicant telephoned the police every three or four hours and was treated with indifference.

After the third abduction the principal of X's school showed sympathy and drove her

to school for a week. After that X stopped going to school. The applicant could not drive her to school because of his business commitments. The applicant's wife cannot drive and was unable to escort X on public transport because she had to take the two youngest children to another school at the same time. The applicant sold his business and other assets at a considerable loss, so as to be able to leave Germany quickly. The applicant decided to come to Australia because he had a cousin in this country and the children wanted to come to Australia. The applicant's evidence was that Freiburg is a particularly racist area. There are not many other non-German people living in the area apart from some Turkish families. In response to questions from the Tribunal regarding the option of moving to another part of Germany, the applicant stated that there was nowhere else in Germany where they would be safe from racial harassment.

The Tibunal's Findings

The Tribunal, in summary, found as follows:

. In the mid 1980s, approximately 4.5 million foreign citizens were living in the Federal Republic of Germany.

. After the reunification of the Federal and Democratic Republics of Germany in 1990 there were approximately six million foreign citizens in Germany with the main foreign groups comprising Turks, Yugoslavs, Italians and Greeks.

. Since German reunification, Germany neo-Nazis have perpetrated a series of widely reported attacks on foreigners, including refugees and asylum-seekers.

. A wave of attacks in late 1991 left a number of foreigners dead and many injured. The total number of attacks increased significantly in that year to approximately 3,000.

. Attacks by neo-Nazis continued in 1992, with foreigners and hostels for asylum-seekers remaining major targets for that violence.

. Freiburg has had a high proportion of ethnic tension between foreigners and Germans over the past few years. As with other German cities such as Hoyersweda, Berlin, Rostock and Magdeberg, right wing violence was manifested in the form of arson attacks on asylum-seeker hostels and street bashings. While most international news reports concentrated on violent attacks involving property, one news report mentioned that violence in the form of street bashing was common in Freiburg during 1991.

. The series of attacks on foreigners created outrage in Germany, with large processions and demonstrations against neo-Nazi violence.

. In November 1992, after a fire bomb attack on a Turkish house in Molln, an "enormous" citizens' march was organised to protest against attacks on foreigners. In some places citizens' groups mobilised to protect the hostels of asylum-seekers. The German mainstream press roundly condemned the attacks on foreigners, was very critical of the Federal Government for its response to the violence and accused it of pursuing prosecutions against neo-Nazis less vigorously than against leftist terrorists.

. Human rights groups also criticised the German Government, citing evidence of police unwillingness or inability to respond to calls related to racially-motivated attacks, police ill-treatment of asylum-seekers and police failure to prevent ongoing incidents of small-scale right-wing violence and illegal neo-Nazi public gatherings.

. By mid to late 1993, however, the German Government had declared, at the highest levels, its determination to curb the neo-Nazi violence. Federal and State ministers responsible for internal securities have taken steps to strengthen their co-operation in combating racial violence.

. Neo-Nazi extremists and their supporters are now registered in the central police register and the government has announced plans to create special police and judicial units to combat racist activities.

. A number of actions has been taken by the German Government to improve the security situation of foreigners and specifically asylum-seekers. The US Department of State Country Reports on Human

Rights Practices ("US State Department Reports") for 1993 disclosed more robust action by the German Government against violence targeted towards foreigners and asylum-seekers with judges levying heavier sentences on right wing offenders, a number of police offenders being charged with mistreatment of foreigners. The police force as a whole has not faced accusations of inaction in the face of anti-foreigner violence, as had arisen in the past.

. The US State Department Reports for the following year confirmed that, while violence and harassment directed at foreigners continued to occur, right-wing extremist violence had continued to decline since its peak in 1992. The Tribunal cited a passage from that report which read as follows:

> "To a large degree, these attacks were perpetrated by alienated youths, many of them `skinheads' and a small core of neo-Nazis. All the major parties and all the leading representatives of the Federal Republic denounced the violence, and there was widespread acknowledgment that police willingness and ability to deal with such violence has notably improved."

. The German government has also recommended tougher anti-crime legislation and law enforcement measures aimed at the societal roots of extremist violence and other crime.

. As part of a nationwide crackdown on right-wing extremists, in February 1995 the German authorities took further steps to isolate Germany's neo-Nazi community, including the banning of two neo-Nazi movements, the seizing of their assets and the raiding of dozens of their bases.

. The 1995 US State Department Reports indicate that xenophobic violence in Germany is declining. For example, it declined by 14% in the first half of 1995 compared to the same period in 1994, continuing a downward trend since 1992. Right-wing violence against foreigners declined by 27% since 1992.*

[* It was common ground at the hearing that this was in fact a 27% decline in violence against local ethnic minorities during the first 5 months of 1995].

The Tribunal accepted that the applicant's family had been socially ostracised in the local community and that damage was done to family property, including gunfire to windows. The Tribunal further accepted that X was subjected to particular abuse and harassment from neo-Nazis during 1993 when she was abducted and cruelly treated in the manner described above. The Tribunal accepted that the applicant regrettably encountered discrimination and harassment at the hands of hooligans and neo-Nazi groups and that the police may have been unresponsive to his reports.

The Tribunal concluded that the applicant and his family had a well-founded fear of persecution at the time when they left Germany. It will be recalled that this was on 15 May 1994. The Tribunal then turned to consider whether there was a real chance that the applicant and his family will be persecuted for a Convention reason should they now return to Germany.

The Tribunal noted that the discrimination and harassment encountered by the applicant and his family mainly occurred during the period 1990-1994 when right-wing and extremist violence was at its peak and when there was evidence of police unwillingness or inability to respond to calls related to racially-motivated attacks. The Tribunal expressed its conclusions in the following terms:

> "In view of the recent steps taken by the German authorities to combat racially-motivated violence and given the German political structures and mature judicial system, the Tribunal finds that the chance that the applicant will not be accorded protection against persecution on return to Germany is remote.
>
> The Tribunal notes that the applicant and his family may not wish to return to the area where they were previously living particularly in view of X's experience. Whilst relocation to another part of Germany would require some upheaval, it would surely be a less drastic option than relocating to another country. If the applicant and his family do not wish to return to Freiburg, they can safely return to another part of Germany."

While the eradication of extremist bigotry is unlikely to occur in Germany, the Government has effectively regained control of the activities of neo-Nazis and other violent, racist groups and, apart from some isolated incidents, has greatly reduced the number of violent attacks on foreigners or those perceived to be foreigners. The Tribunal notes that the discrimination and harassment encountered by the applicant and his family occurred during the period when right-wing and extremist violence was at its peak and when there was evidence of police unwillingness or inability to respond to calls related to racially-motivated attacks. While there are still incidents of racially-motivated attacks, they are decreasing and, in view of the number of foreigners in Germany, are isolated. Given the more recent

steps taken by the German authorities to combat racially-motivated violence, the Tribunal finds that the applicant and his family will be accorded protection against persecution on return to Germany

> The Tribunal affirms the delegate's decision that the applicant and his family are not entitled to a protection visa."

The Statutory Framework

The prescribed criteria for the grant of a protection visa are set out in Part 866 of Schedule 2 of the Migration Regulations ("the Regulations"): see s.31(3) of the Act and r.2.03 of the Regulations. One of those criteria is that at the time of decision the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention: cl.866.221 of Schedule 2 of the Regulations. "Refugees Convention" is defined by cl.866.111 of Schedule 2 of the Regulations to mean the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Protocol"). The Convention as amended defines a refugee as any 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; ..."

The Grounds of the Application to this Court

The sole ground of review upon which the applicant originally relied in his application was that provided by s.476(1)(e) of the *Migration Act* 1958 (Cth). That sub-paragraph contains the following ground:

> "(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."

In his application, the applicant listed no less than 22 alleged errors of law said to involve an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found.

At the hearing, the applicant was given leave to amend his application by the addition of a further ground, namely, that there was no evidence or other material to justify the making of the decision - see s.476(1)(g). This ground was particularised as follows:

> "Pursuant to s.476(4)(a), the RRT having found that the Applicant and his family were refugees when they left Germany in mid-1994, the RRT (sic) was required by law to find that there had been a substantial change in the plight of people in the position of the Applicant and his family since that time, before it could decide that the Applicant and his family were no longer refugees in May 1996, and it did not find this matter established and there was no evidence or other material from which it could reasonably be satisfied that this matter was established.
>
> Alternatively, pursuant to s.476(4)(a) [sic - it was common ground that this was intended to be a reference to s.476(4)(b)], in the event that the RRT based its decision on the alleged fact that there had been a substantial change in the plight of people in the position of the Applicant and his family since mid-1994, that fact did not exist."

The application was conducted on the basis that the applicant's complaints fell into four main categories. They were:

1. That the Tribunal erred in deciding the relevant date at which its assessment was to be made;

2. That the Tribunal did not apply the requisite "real chance of persecution" test;

3. Whether there was evidence or other material to justify making the decision; and

4. That the Tribunal gave no consideration to racial discrimination in Germany in the spheres of employment and education. I proceed now to deal with those three matters.

1. Relevant Date

The applicant complained that the Tribunal decided that the relevant date for assessing whether he was a refugee was the date upon which it reached its decision, rather than the date of the determination by the Minister's delegate. It is common ground that the Tribunal treated the

former date as the relevant date. In *Minister for Immigration and Ethnic Affairs v. Mohinder Singh* (Full Court of the Federal Court of Australia, not yet reported, No. 17 of 1997, 24 January 1997) a Full Court of this Court comprising Black CJ, Lee, von Doussa, Sundberg and Mansfield JJ unanimously held that the relevant date is the date of the Tribunal's determination, although (see p.11) the Tribunal should not look exclusively at the facts existing at that date. It is quite clear that the Tribunal in this matter did not look exclusively at the facts existing at the date upon which it reached its decision.

Mr A.O.Karstaedt, counsel for the applicant, conceded that the relevant date is the date of the determination of refugee status. He said that in *Singh* it was not necessary for the Full Court to decide whether the date of the determination was when the delegate made his decision or when the Tribunal made its determination. There was no contention, so it was put, by the applicant in *Singh* on that point, the matter was not argued and the answer would have been the same in any event. Mr Karstaedt submitted that if an applicant satisfied the requirements of entitlement to refugee status at the earlier date and thus should have succeeded before the primary decision-maker, then he should not be denied refugee status some years later because circumstances had changed. This, so it was put, would neither be fair or in accordance with the humanitarian aims which form the basis of the Act and regulations.

It is true that in *Singh* the question was whether circumstances had to be assessed as at the date of application for refugee status or as at the date of the determination of the application. *Singh's* case (decided by a bench of five judges) is clear authority that the relevant date is the date of the determination of the application. The whole tenor of the Full Court's decision in that matter was that the date of the determination of the application was the date upon which the Tribunal affirmed the delegate's decision.

After referring to the Convention definition of refugee, the Full Court (at pp.6-7) observed:

"Although cast in different language, doubtless reflecting the different situations of a person who has a nationality and one who does not, the expressions "unwilling to avail himself of the protection of that country" and "unwilling to return to it" both look to whether the applicant answers the description of a person who has a well-founded

> fear of persecution if he is returned to the country of his nationality or former habitual residence. The well-founded fear is thus tied to the time at which the question of return arises.
>
> The fact that in many cases there will be an interval between a person's departure from the country of nationality or former habitual residence and arrival in Australia and application for a protection visa, and a further interval, perhaps a lengthy one, between the application and the Minister's determination, does not alter the fact that the definition of "refugee", and thus s.36(2), require the applicant to show a well-founded fear of being persecuted if returned to the country of nationality or former habitual residence. The fear is not a fear in the abstract, but a fear owing to which the applicant is unwilling to return, and thus it must exist at the time the question of return arises, namely at the time the decision is made whether the applicant is a refugee."

The delegate's decision in this matter was what is termed "an RRT-reviewable decision". It is common ground that the applicant in this matter made a valid application to the Tribunal for review. That meant that under s.414 of the Act, the Tribunal was obliged to review the delegate's decision. Section 415 of the Act confers power on the Tribunal to exercise all the powers and discretions that are conferred by the Act on the person who made the decision. The Tribunal was expressly empowered [see s.415(2)] to affirm, vary, remit or set aside the decision and substitute a new decision. Section 415(3) provides that if the Tribunal varies the decision or sets it aside and substitutes a new decision then the decision as varied or substituted is taken (except for the purposes of appeals from decisions of the Tribunal) to be a decision of the Minister. In my view, the same applies where the Tribunal affirms the decision. The decision of the delegate, so affirmed by the Tribunal, is the decision of the Minister. Once a valid application has been made to review an RRT-reviewable decision, it cannot be said, in my opinion, that the application has been determined until the Tribunal makes its decision. The applicant says that this works an unfairness to him in this matter because as at the date of the delegate's decision he satisfied both

the subjective and objective tests of refugee status. He says that the Minister's delegate erred, following which changed circumstances in Germany worked against him so that he is no longer a refugee. That submission has a superficial appeal. The appeal disappears when it is appreciated that throughout the process the applicant has been extended protection. He is to be denied further protection because circumstances have changed in Germany while the decision-making process was taking place. In any event, the whole submission depends upon the assumption that the Tribunal implicitly found that the delegate was wrong and that the applicant had refugee status in September 1994. For reasons which I develop below, I consider that that assertion has not been established as fact. If the applicant's submission concerning the relevant time were accepted, there would be far greater room for unfairness. For example, an applicant whose claim to refugee status was rejected by the primary decision-maker but who was able to establish that conditions in his country of nationality had relevantly deteriorated by the time the Tribunal came to hear the matter would, on the applicant's argument, be denied refugee status and sent back to that country. I reject this ground of review for two reasons. First, I consider that the matter has been decided by the Full Court in *Singh*. Secondly, if it was not so decided, then as a matter of proper construction, the determination of the application took place when the Tribunal made its decision to affirm the primary decision and that date is the relevant date. Such a conclusion is consistent with the reasoning of Merkel J in *Mocan v. Refugee Review Tribunal* (1996) 42 ALD 241 in particular at pp.243 and 248, with which I respectfully agree.

2. <u>Whether the Tribunal applied the "real chance" test</u>

The reference to "a real chance" of persecution is a reference to the test explained by the High Court of Australia in *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and applied in numerous subsequent cases.

The applicant frames his complaint (that the Tribunal did not apply the "real chance" test) in various ways including:

- that in the absence of "some fundamental change occurring in Germany between 1994 and 1996" it was unrealistic to suggest that the applicant and his family were no longer refugees, as this would entail a rejection of the proposition that there was even a chance or possibility, albeit an unlikely one, that they might be subjected to persecution should they return to Germany;

- that the Tribunal stated the applicant's case as being that if he returns to Germany he and his family will suffer persecution. This was said to misconstrue the applicant's case which was merely that if they were returned to Germany there was a real chance that they would suffer persecution;

- McHugh J in *Chan* held that a chance as low as 10% may constitute a real chance; that even a slight, unlikely or remote possibility can satisfy the test provided that it is not too remote or fanciful. In the light of what the applicant and his family endured in Germany less than two years previously, the chance or possibility of persecution if they were forced to return to Germany could not be regarded as far-fetched or fanciful;

- the material referred to by the Tribunal in its reasons showed at the very most that there has been some decline in racist violence, but certainly not any fundamental change which negated the possibility of a real chance of continued persecution;

- the Tribunal had failed to consider the possibility of a resurgence in the former levels of such violence and that the position could be a fluid one;

- the Tribunal failed to engage in the process of speculation said to be required by the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 CLR 259 at p.293 and to return, in the end, to the questions "what if I am wrong?" and "what might happen to the applicant and his family if they were forced to return to Germany?".

The Tribunal, in its reasons, specifically referred to the decision in *Chan* and cited two passages from the reasons for judgment in that case. One was from the judgment of Mason CJ at p.388 and the other was from the judgment of McHugh J at pp.430-431. Furthermore the Tribunal referred to a decision of a Full Court of this Court in *Minister for Immigration, Local Government and Ethnic Affairs v. Che Guang Xiang* (12 August 1994, unreported Judgment No. 534 of 1994) at pp.15-17. Those passages which the Tribunal cited made it clear that a well-founded fear of persecution may be grounded upon the possibility of such an occurrence even though such persecution is unlikely to occur. It is apparent that the Tribunal was well aware of the test to be applied. The applicant's complaint boils down to assertions that the Tribunal attached undue weight to the changes which it found had recently occurred in Germany in relation to the matter of persecution for reasons of race. The assertion must, of necessity, include a complaint that although the Tribunal referred to the test to be applied, it in fact applied some different test. I do not think that the passages referred to in the Tribunal's reasons suggest that this happened. The Tribunal expressly found (in the passage set out above) that the chance that the applicant will not be accorded protection against persecution on return to Germany is remote. As a Full Court of this Court said in *Wu Shan Liang v. Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 367 at p.378:

> "The delegate was thus aware of the test she had to apply. Her reasons are entitled to a beneficial construction. We should not take the view that she did not apply the correct test unless this appears clearly from what she has written."

On appeal in that case, *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 136 ALR 481 at p.491 the High Cout emphasised:

> "... the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."

I do not consider that the applicant has made good his complaint that the Tribunal failed to apply the "real chance of persecution" test.

Mr Karstaedt next contended that within the objective test of a "real chance" there was also a subjective element, which he said the Tribunal ignored. Mr Karstaedt submitted

> "... that events which a person endures [when he originally left a country] can give rise to a well-founded fear, even though those circumstances no longer exist ..."

Applying that principle to the present matter, he argued that even though circumstances have changed in Germany, the Tribunal should have taken into account the horrific events, which the applicant and his family went through at an earlier time, when it decided whether their fears were now baseless. Mr Karstaedt based this submission on the observations of Mason CJ in *Chan* at pp.386-387; McHugh J at p.429 and Gaudron J at p.414-415. In my view, those observations do not provide a sound foundation for Mr Karstaedt's submission. In particular the passage (at p.387): "But that does not deny the relevance of the facts as they existed at the time of departure to the determination of the question whether an applicant has a "fear of persecution" and whether that fear is "well-founded"."

does not, in my opinion, require the Tribunal to revisit the applicant's state of mind when assessing whether there is an objective well-founded fear of persecution. Having found that there was a subjective fear of persecution the Tribunal, in my opinion, did not err in the manner alleged. It took into account the facts existing at the time of the applicant's departure when it

concluded not only did they have a subjective fear of persecution but that objectively that fear was well-founded. It accepted that the subjective fear continued, but its task was to assess whether, at the time when it made its decision, that fear continued to be objectively well-founded.

Similarly at p.415 in *Chan*, Gaudron J acknowledged that a continuing subjective fear ought not to be accepted as well-founded if it were possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality. I see nothing in the passages cited from the reasons for judgment of McHugh J at p.429 to support the proposition advanced by Mr Karstaedt.

As part of this submission, Mr Karstaedt contended that the Tribunal accepted as fact the applicant's written submission to it, dated 3 May 1996 concerning reports of ill-treatment of foreigners when arrested or in police custody. I should say, in passing, that I do not read the Tribunal's reasons as supporting that submission. I think that the submission made by Mr P.R.Macliver, counsel for the respondent, on this matter was correct. Mr Macliver submitted that the Tribunal's acceptance of the applicant's evidence should be read as being confined to the applicant's statements concerning actual events experienced by the applicant and his family and the events "surrounding" their departure from Germany. Furthermore at p.17 of its reasons the Tribunal rejected the Amnesty International Reports (on which the applicant relied in its submission dated 3 May 1996) as not being relevant to the circumstances of the applicant and his family. The Tribunal said this:

> "Whilst the Amnesty International Reports referred to by the applicant focus on allegations of ill-treatment of foreigners during arrest and detention the applicant and his family do not claim to have ever been arrested or detained by the authorities."

3. <u>Whether there was evidence or other material to justify making the decision</u>

The applicant contends that:

- the Tribunal, having found that he and his family were refugees when they left Germany on 15 May 1994, was required by law to find that there had been a substantial change in the plight of people in their position since that time, before it could decide that they were no longer refugees in May 1996;

- the Tribunal did not find this matter established; and

- there was no evidence or other material from which it could reasonably be satisfied that this matter was established. Alternatively, so it was submitted, in the event that the Tribunal based its decision on the alleged fact that there had been a substantial change in the plight of people in the position of the applicant and his family since 15 May 1994, that fact did not exist.

The starting point for the applicant's submissions was a contention that although the Tribunal purported to affirm the primary decision, it was implicit that the Tribunal in fact disagreed with the delegate's conclusion that as at September 1994 the applicants were not refugees. This argument starts with the following passage from the Tribunal's reasons:

> "The Tribunal concludes that the applicant and his family had a well-founded fear of persecution at the time that they left Germany."

Mr Karstaedt contended that it was "highly artificial" and "impossible to conclude" that if the applicant and his family were refugees in May 1994, they were not refugees on 5 September 1994 (when the delegate made his decision). Accordingly, so the argument ran, although the Tribunal formally affirmed the delegate's decision, it was implicit in its reasons that the applicant and his family had a well-founded fear of persecution as at the date of the delegate's decision. Mr Karstaedt submitted that the Tribunal having reached the "entirely correct conclusion" that the applicant and his family were refugees as at 4 September 1994, it was obliged to conclude that they were still refugees on 14 May 1996 unless there had been some "fundamental substantial change" in Germany between those two dates.

In my view, a fair reading of the Tribunal's reasons is that it did not turn its mind to the question whether there was a real chance of persecution as at 5 September 1994. In the very next sentence, to the sentence set out above, there appears the following passage:

> "The threshold question, however, for the Tribunal to decide is whether there is a real chance that the applicant and his family will be persecuted for a Convention reason should they <u>now</u> return to Germany." (Emphasis added)

In my opinion there is no necessary implication either way in the Tribunal's reasons that it agreed or disagreed with the delegate's assessment *as at 5 September 1994*. For example, in the next paragraph in its reasons the Tribunal refers to the discrimination and harassment encountered by the applicant and his family occurring during the period 1990-1994 when right-wing and extremist violence was at its peak and when there was evidence of police unwillingness or inability to respond to cause related to racially-motivated attacks. It is quite consistent with the Tribunal's reasons (assuming that it had applied its mind to it) for it to have formed the opinion that the discrimination peaked at or about the time the applicant and his family left Germany and thereafter decreased to the extent that the delegate was correct when he made his assessment that there was no real chance that they would be persecuted for a Convention reason should they be returned to Germany in September 1994.

Next Mr Karstaedt turned to the question of whether, assuming refugee status as at 15 May 1994, the Tribunal could only deny refugee status if it found that there had been a substantial change in the relevant circumstances. He relied on the following passage in the reasons for judgment of Dawson J in *Chan v. Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at p.399:

> "Of course, the circumstances in which an applicant for recognition of refugee status fled his country of nationality will ordinarily be the starting point in

> ascertaining his present status and, if at that time he satisfied the test laid down, the absence of any substantial change in circumstances in the meantime will point to a continuation of his original status."

In my view there are two answers to this submission. First, I do not think it is correct to characterise one passage from one of the judgments in *Chan* as imposing an obligation "required by law" [see s.476(4)(a)] to find a substantial change in circumstances. Rather that requirement is one of applying logic in the course of an administrative decision-making process. Dawson J suggested that the absence of any substantial change in circumstances "will point to a continuation" of refugee status. In the very next sentence his Honour said:

> "That must be so in the present case where the delegate in his reasons did not seek to point to any significant change in attitude towards the appellant on the part of the authorities in the People's Republic of China."

This leads to the second basis upon which I reject the submission. As Mr P.R. Macliver, counsel for the respondent, submitted (both orally and in final written submissions) there is no principle of law requiring a substantial or fundamental change. The question still remains whether at the relevant time there is a real chance of persecution. Each case will turn on its own facts. For example, there might be a "borderline" case at the time of departure such that not much of a change might be required to justify a different assessment at a later time. Once again, these two alternative grounds under s.476(4) of the Act amount to assertions that the Tribunal attached undue weight to the various pieces of evidence upon which it relied to find that the relevant circumstances in Germany had changed.

Mr Karstaedt made some fairly lengthy submissions involving a comparison between the delegate's reasoning and the materials upon which the delegate relied on the one hand, and the

reasoning of the Tribunal and the materials upon which the Tribunal relied, on the other. I think it is fair to say that the delegate relied fairly heavily on the US State Department Report for 1993. Mr Karstaedt's submissions were directed to establishing that there had been no significant change from the situation reflected in

that Report (as relied upon by the delegate) and the US State Reports relied upon by the Tribunal. For example, there was reference in the former document to the German "Basic Law", adopted in 1949. Mr Karstaedt implicitly criticised the Tribunal's reliance (at p.17 of its reasons) on "the German political structures and mature judicial system ...". There was, so it was put, no fundamental change in political structures between the date of the delegate's decision and the date of the Tribunal's decision. I do not regard that criticism as justifiable. In the relevant passage the Tribunal prefaces that statement by reference to recent steps taken by the German authorities to combat racially-motivated violence. Mr Karstaedt invited me to compare the remedial steps outlined in the US State Department Reports for 1993 with its later reports (relied upon by the Tribunal) for 1994 and 1995. This was to demonstrate, so it was submitted, that there was

> "... no qualitative or fundamental change in anything in Germany between 1994 and 1996 ..."

In my view, the answer to this submission is that there was sufficient new material in the US State Department Reports for 1994 and 1995 to justify the Tribunal in reaching its conclusion. I refer, for example, to the evidence summarised at the foot of p.15 of the Tribunal's reasons.

In my view, there was abundant evidence to justify the Tribunal coming to the conclusion which it reached. I refer to my summary above of the Tribunal's findings and in particular its reference to the US State Department Reports. There was other evidence before the Tribunal which was annexed to the affidavit of Peter John Corbould sworn on 5 March 1997. In his final written submissions Mr Karstaedt in

effect criticised the probative value of this evidence. For example, he submitted that the Agence France Presse report published in "The Age" newspaper on 26 February 1995 suggested "... at most some improvements, but not any qualitative or significant change". The answer to this criticism is, in my opinion, that it was for the Tribunal to decide what weight to give to this evidence. In my opinion, these two alternative grounds have not been made out. The whole thrust and basis of the Tribunal's reasoning was that it accepted the evidence that there had been sufficient relevant change in the circumstances in Germany. This is in marked contrast to the situation in *Chan*.

In those circumstances it is not necessary to consider the respondent's submission that, in terms of the application of s.476(4)(b) the relevant fact was the Tribunal's lack of satisfaction that the applicant had a genuine fear of persecution founded upon a real chance of persecution.

4. Whether the Tribunal failed to give any consideration to matters of racial discrimination in the "spheres" of employment and education

Mr Karstaedt took me to certain paragraphs of the applicant's original application for refugee status and certain passages in the transcript of evidence before the Tribunal which indicated racial discrimination against the applicant's children in matters of education and employment respectively. The Tribunal referred to these matters at pages 8 and 11 of its reasons. The applicant submits that the Tribunal accepted that there was such discrimination in employment and education so far as the applicant's children were concerned and that this can and does amount to persecution. The applicant complains that there was nothing in the Tribunal's reasons to suggest any

amelioration of this position.

For the purposes of this argument, it can readily be accepted that racial discrimination in the areas of education and employment may amount to persecution falling within the Convention. This will depend upon the circumstances of each particular case. In this case, it cannot be said, in my opinion, that this discrimination was relied upon as an independent basis for a finding of persecution. A close examination of the transcript of evidence before the Tribunal shows that the reference to a Nazi school teacher giving the children low marks was a reference to the school in Buchheim where the family lived for two years between 1985 and 1987. Then they moved to Ihringen. The Tribunal specifically referred to these pieces of evidence and can be seen to have treated them as being part of the overall picture leading to the applicant's departure with his family from Germany. There is no finding by the Tribunal that the applicant's children had been persecuted (in the relevant sense) in relation to education or employment. In those circumstances the Tribunal was, in my view, entitled to assess the situation as a whole when deciding whether there was a real chance of persecution if the applicant and his family were returned to Germany. The applicant, in making this submission, is, in my view, asking the Court to scrutinise the Tribunal's reasons over-zealously to glean some inadequacy. This is not the proper role of the Court as emphasised by the High Court in the passage cited above from *Wu*. In my view this ground is not made out. No relevant error of law on the part of the Tribunal has been demonstrated.

Conclusions

For the foregoing reasons, the application will be dismissed with costs.

I certify that this and the preceding twenty-five

(25) pages are a true copy of the Reasons for

Judgment of Justice Carr.

A/g Associate:

Date:18 March 1997

Counsel for the Applicant:	Mr A.O. Karstaedt
Solicitors for the Applicant:	Leonard Cohen & Co
Counsel for the Respondent:	Mr P. Macliver
Solicitors for the Respondent:	Australian Government Solicitor
Date of Hearing:	19 February 1997
Date of Judgment:	18 March 1997