FEDERAL COURT OF AUSTRALIA

IMMIGRATION - Refugee Status - whether discrimination in employment necessarily persecution - whether Tribunal erred in not considering effect of discrimination on the applicant - meaning of “persecution” considered.

Migration Act 1958 (Cth)

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280, applied

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

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, considered

Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs (1994) 35 ALD 557; (1994) 35 ALD 225 (Full Court), considered

Chen v Minister for Immigration and Ethnic Affairs (1995) 58 FCR 97, considered

Thalary v The Minister for Immigration and Ethnic Affairs (Mansfield J, 4 April 1997, unreported), considered

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, considered

IBNU PRAHASTONO v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 491 of 1996

HILL J

SYDNEY

8 JULY 1997

IN THE FEDERAL COURT OF AUSTRALIA)

	)	
NEW SOUTH WALES DISTRICT REGISTRY	)	NG 491 of 1996
	)	
GENERAL DIVISION	)	

BETWEEN:	IBNU PRAHASTONO Applicant	
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent	

JUDGE(s):	HILL J
PLACE:	SYDNEY
DATED:	8 JULY 1997

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs of the application.

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	**)**	**NG 491 of 1996**
	)	
GENERAL DIVISION	**)**	

ON APPEAL FROM THE REFUGEE REVIEW TRIBUNAL

BETWEEN:	**IBNU PRAHASTONO** **Applicant**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS** **Respondent**

JUDGE(s):	**HILL J**
PLACE:	**SYDNEY**
DATED:	**8 JULY 1997**

REASONS FOR JUDGMENT

The applicant, Mr Ibnu Prahastono, applies to the Court for judicial review of a decision of the respondent, the Minister for Immigration and Multicultural Affairs (*"the Minister"*), refusing a protection visa. He says that the Tribunal erred in law in reaching its decision.

In his application to the Court, the applicant initially identified what were said to be two errors of law. The first was an alleged incorrect interpretation of the meaning of the word *"persecution",* adopted by the Tribunal; the second, the incorrect application of the law relating to the definition of *"refugee"* to the facts of the case as found by the Tribunal, by failing to recognise the suffering of the applicant as persecution. If what is meant by this ground is that it was not open to the Tribunal on the facts as found to come to its conclusion, there is a question of law involved. If, however, it was reasonably open for the Tribunal to find, as it did, then the question whether the facts as found entitled the Tribunal to conclude as it did involves a question of law which in the present proceedings is non-justiciable: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288 (Proposition 5).

The applicant also sought to rely upon there having been no evidence to justify the Tribunal's finding that the applicant and his family, given their individual circumstances, would be able to re-acquire Indonesian nationality on return to Indonesia.

Before me, however, counsel reformulated the questions of law said to arise. As no substantial change is brought about by the reformulation, I gave leave to amend the application. No question of prejudice arose.

Before identifying and discussing the so-called errors of law, it is convenient to narrate the facts as found by the Tribunal.

The applicant was a citizen of Indonesia. He arrived in Australia with his wife and three children on 31 November 1989, travelling on a valid Indonesian passport. He made application for refugee status for himself and four children (a child had been born in the meantime in Australia) on 7 December 1993. As a consequence of legislative changes, his application is now treated as being an application for a protection visa. It is a criterion for the grant of such a visa that the Minister is satisfied that the applicant is a person to whom

Australia has protection obligations under the *"Refugees Convention",* an expression defined in the Act to mean the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the 1967 Refugees Protocol Relating to the Status of Refugees. Thus the issue before the Tribunal, standing in the shoes of the Minister, was whether it was satisfied that the applicant was a person to whom Australia had protection obligations under the Treaty as amended by the Protocol.

The applicant's father had been a lieutenant colonel in the army at the time of the coup in Indonesia in 1965. Certain sections of the army had indirectly been involved in helping the communists seize power. The ring leaders were executed and the applicant's father was detained for one year, but then released. He was required for the next five years to report monthly to the intelligence bureau. He was not permitted to travel. The father died in 1978, by which time the father was, the applicant said, *"a very broken and frustrated man"*.

According to the applicant (whose evidence the Tribunal accepted) the applicant's family was under constant monitoring by governmental agencies. He was able to complete his education but when he sought employment the question of his father's involvement in the coup was always raised. He was unable to work in the public service. He said:

"My life was basically hell, even though we moved the problem never went away."

The applicant had trained in Australia to be a pilot and held an Australian Commercial Pilot's Licence. However, in Indonesia he was refused a pilot's license on the quoted ground that he was partially colour blind. The applicant knew of others who had been granted a license, notwithstanding similar colour blindness. When he sought employment in Indonesia he needed a clearance certificate. He was unable to get such a certificate because of his father's involvement in the coup. It may, however, be noted that the Tribunal expressed the view that the requirement for a clearance certificate, a form G30S clearance, was generally no longer needed in Indonesia. The Tribunal appears to have accepted, however, that the applicant would be denied work with the government should he seek it. Notwithstanding, the applicant had been employed at various times, including in the private sector in a car-wash as a leading hand and worked with a relative. He was excluded from university at the end of his first year (or perhaps second year, the reasons are not clear on this) when he was not allowed to sit for a religious examination because he did not have a clearance certificate.

About once a month *"people"* put faeces on the applicant's house and threw stones on the roof. The applicant complained to the police but the problem persisted. The applicant and his family were subjected to harassment. When they passed a shop some people would say *"Oh PKI, pass"*.

Other matters upon which the applicant relied as showing alone, or cumulatively, persecution were:

(1) In 1967 the applicant was refused entry to a mosque because of his father's PKI link. So the applicant practised his religion at home. The Tribunal was unable to say on the evidence before it whether this was a continuing problem.

(2) His first marriage was dissolved after two years in 1977 because of the pressure of the social stigma of the applicant's father having been suspected of being a PKI supporter in 1965.

(3) People had abused his first wife. They would whistle and say *"PKI, PKI* ", touch her as she passed and say *"You are stupid"*.

(4) The applicant's second wife was met with questions such as why she had married the applicant. People said of their child that she was a PKI.

(5) Although the applicant and his second wife had moved to a new area (Malans), faeces were regularly put on their house walls and stones thrown at the house.

(6) The applicant had had problems obtaining a passport

The Tribunal formed the view that the applicant was not a refugee within the meaning of the Convention and Protocol. It did so because it was of the view that while the applicant faced discrimination he did not, nor did his family face persecution. The Tribunal's process of reasoning is exposed in the following passage taken from the reasons:

> "Everyone has a fundamental right to 'life, liberty and security of person' (International Bill of Human Rights Article 3), a right to a basic education (International Bill of Human Rights Article 26), the right to practise their religion (International Bill of Human Rights Article 18), the right to earn a livelihood

(International Bill of Human Rights Article 23), and the right not to be subjected to arbitrary interference with his privacy, family, home, correspondence, attacks on his honour and reputation (International Bill of Human Rights Article 12). Breach of a fundamental right may amount to persecution: Hathaway, op cit, at pages 104-5 and **Chen Ru Mei v Minister for Immigration and Ethnic Affairs and Refugee Review Tribunal**, op cit. However, persecution must either emanate from the authorities, or be conduct which the authorities will not or cannot prevent and must be of a level of seriousness which warrants a finding that the conduct amounts, individually and/or cumulatively, to persecution under the Convention. However, in this case, the Tribunal finds that the harassment he and his family experienced in Indonesian society does not amount to breach of these rights. In this case, the Tribunal accepts that the Applicant experienced ostracism in society, including at the mosque in 1968, and some discrimination in his tertiary studies and employment. However, though he has encountered unfair conduct, as in the apparent discriminatory refusal of his commercial pilot's licence in Indonesia, the Tribunal finds that even considered cumulatively, the discrimination is not of such a level of seriousness as to amount to persecution within the Convention. The Applicant's fundamental rights to a basic education and to earn a livelihood have not been breached. The Applicant has completed high school and two years of university studies, and he has maintained employment, albeit he is not able to work for the government in Indonesia. The Applicant (and/or his wife and children) has not been detained, questioned, monitored or harassed by the authorities in Indonesia and the Tribunal finds that the harassment he and his family experienced in Indonesian society is not of such a level of seriousness, individually and/or cumulatively, as to amount to persecution within the Convention. The Tribunal finds that there is no evidence before the Tribunal to suggest that the discrimination which the Applicant may suffer on return might be of greater severity that [sic] what he has suffered in the past. Accordingly, having considered the material before the Tribunal, the Tribunal finds that if the Applicant returns to Indonesia, there is not a real chance that he will face persecution on the basis of imputed political opinion, or any other Convention ground."

THE FIRST SUGGESTED ERROR OF LAW

The gravamen of the first submission was that the Tribunal had adopted the wrong legal test as to what constituted persecution. It was said that the Tribunal had found that discrimination in relation to education and employment did not amount to persecution unless:

(i) it involved a breach of a fundamental right to a basic education and to earn a livelihood, or

(ii) it allowed only a job that was extremely dangerous or grossly out of keeping with one's qualifications, or

(iii) employment was extremely difficult to find

It was said that in setting the test for persecution too high, the Tribunal had misread or misapplied the decisions of this Court in *Li Shi Ping* v *Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557 (the decision of the Full Court on appeal is reported at (1994) 35 ALD 225) and *Chen* v *Minister for Immigration and Ethnic Affairs* (1995) 58 FCR 97 and of the High Court in *Chan* v *Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

The reference in the submissions to these, and other authorities said to be inconsistent with the reasons in the present case may, at first sight, appear to add support for a case based upon reviewable error. In entertaining these submissions I must, however, keep steadily in mind two related propositions made abundantly clear from the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. First, this Court is confined to judicial review. It must not turn judicial review into merits review. The Court has no jurisdiction to set aside a decision so as to avoid *"administrative injustice or error"*. Second, and it follows from the first, the Court should not engage in a minute dissection of the reasons of the decision-maker, parsing and analysing them until there is teased out some suggested legal error. So, as was said in *Pozzolanic*, in a passage cited with approval by Brennan, Toohey, McHugh and Gummow JJ in *Wu* (at 272), the Court should not be:

"... concerned with looseness in the language ... nor with unhappy phrasing ... The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error."

At the heart of the submission, and indeed at the heart of the difficulty which faced the Tribunal in the present case, is the need to draw a line between *"persecution"*, as that word is used in the Convention, and something which is mere discrimination. I say *"mere discrimination"* because persecution and discrimination are not mutually exclusive. Some forms of discriminationwill amount to persecution in the Convention sense.

A useful starting point for any discussion on the concept of persecution is the judgment of McHugh J in *Chan* at 429-31 His Honour said:

"The term 'persecuted' is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes 'being persecuted'. The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual... Nor is it a necessary element of 'persecution' that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purpose of the Convention.... Moreover, to constitute 'persecution' the harm threatened need not be that of loss of life or liberty.. Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution... Thus the U.N.H.C.R. Handbook asserts that serious violations of human rights for one of the reasons enumerated in the definition of refugees would constitute persecution: par.151. In **Oyarzo v Minister of Employment and Immigration** [1982] 2 FC 779 at p783 the Federal Court of Appeal of Canada held that on the facts of that case loss of employment because of political activities constituted persecution for the purpose of the definition of 'Convention refugee' in the **Immigration Act** 1976 (Can), s2(1). The Court rejected the proposition that persecution required deprivation of liberty [1982] 2 FC at p782. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social. Political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason..."

So, it may be accepted that while, perhaps *a fortiori*, deprivation of liberty will amount to persecution, something short of that will suffice. Denial of access to employment or education might be persecution. Nothing in the above passage requires the conclusion that deprivation of employment, or for that matter education, will necessarily be persecution, even if done for a Convention reason. It will be necessary to look at all of the facts. We can, at this point, put to one side education for it is not suggested that the applicant wishes to engage in any further educational activities.

The judgment of Mason CJ in the same case refers to the notion of significant harm, detriment or disadvantage where persecution is to be found. His Honour said (at 388):

"The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether **any** deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason."

In *Li Shi Ping* at first instance before Drummond J ((1994) 35 ALD 557), it was argued that the applicant would face *"employment difficulties"* if returned to China. His Honour said (at 585), in a passage cited by the Tribunal:

"Such a detriment is I think well capable of constituting 'persecution' within the meaning of that term in the Convention definition of 'refugee': see **Chan**, supra, per McHugh J at CLR 430-1."

On appeal ((1994) 35 ALD 225)(and the Tribunal was criticised for not having noted that there had been an appeal, albeit that for relevant purposes the appeal did no more than affirm the judgment at first instance) the above passage was referred to with approval by Carr J, with whom the other members of the Court, Sheppard and Gummow JJ, agreed. His Honour continued at 231:

"The only evidence before Mr Barnsley relating to the consequences of being denied employment ... was to the effect that once sacked from a work unit for political activities a person would be very likely confined to obtaining employment in the private sector. The evidence was that employment in the private sector in China accounted for less than 1% of all urban workers. Employment would therefore be extremely difficult to find."

The decision of Drummond J in *Li Shi Ping* was referred to on a number of occasions by the Tribunal in the course of its reasons in the present case. On the first occasion, there is a reference to a right to work at a job that was not extremely dangerous or grossly out of keeping with the applicant's qualifications. The reference to *Li Shi Ping* would not seem particularly apposite. However, I would not suggest that any error of law had been committed in saying, as I take the Tribunal to be saying, that persecution may arise not only in the case where no employment at all is available to an applicant, but also where employment is available but is dangerous or demeaning. The second reference to *Li Shi Ping* is unexceptionable and need not be repeated. The third reference is in the following passage:

"As to the proposition that a denial of work for a Convention reason also could amount to persecution within the Convention, the Tribunal notes that The International Bill of Human Rights Article 23(1), states that the right to work is a fundamental right, and that to some extent, breach of the right to work for a Convention reason has been acknowledged in Australia as amounting in some circumstances to 'persecution' within the Convention. The Tribunal notes that the right to work is not absolute; still, if employment is 'extremely

difficult' to find because of a Convention reason this may amount to denial of the right to work (see **Li Shi Ping** at 585)."

Again, it is hard to see why what is there said misapplies authority.

The next case said to have been misapplied was *Chen v Minister for Immigration and Ethnic Affairs*. The error is said to have been the citation of a passage at 102 (letter F) while neglecting what was said at 102-4.

In the first of these passages the Full Court, comprising Northrop, Spender and Lee JJ, said (at 102), speaking of *"persecution"*:

"Whether it may have a broader meaning to include, where such actions are undertaken for a Convention reason, measures in disregard of human dignity, the imposition of serious economic disadvantage, denial of access to employment or education, denial of rights enjoyed by compatriots and, perhaps, denial of freedoms fundamental to the existence of a democratic society, is undecided..."

In the later passage, their Honours, after referring to *Chan*, said (at 104):

"Having regard to the guidance provided by the judgments in **Chan**, it should be concluded that the denial of access to employment, if that denial is arbitrary and indefinite and part of a process of harassment by authorities for the purpose of suppressing political dissent, may involve detriment or disadvantage of such a magnitude as to constitute harm amounting to persecution for a Convention reason..."

It is difficult to see how the failure to quote the passage cited detracts from the initial passage cited, which should be taken to be concerned with discrimination in employment of a less severe nature.

Reference was made on behalf of the applicant to the decision of Tamberlin J in *Ji Kil Soon v Minister for Immigration and Ethnic Affairs* (1994) 37 ALD 609. In that case the applicant had experienced discrimination in employment in Korea, which the Tribunal had found not to

constitute persecution. The Tribunal's decision was upheld in a judgment which pointed out that there can be levels of discrimination or harassment and that in the circumstances the Tribunal's decision was open to it.

What the cases cited do stand for is the proposition that discrimination in employment may amount to persecution in a particular case. However, at the heart of the applicant's submission there lies a different proposition, namely, that denial of employment **must** constitute persecution. That is not a proposition for which any of the cases so far cited is authority. Reference was made in the course of argument to *Thalary v The Minister for Immigration and Ethnic Affairs* (Mansfield J, 4 April 1997, unreported) where it was said that this proposition was established. The applicant in that case came from Andhra Pradesh. She claimed that she was unable to get a job there because she was a Christian and because of her political beliefs. There was no clear finding of fact in the Tribunal and this alone constituted a ground for having the matter remitted to the Tribunal. His Honour, after citing from *Chan*, continued:

"In the Office of the United Nations High Commissioner for Refugees **Handbook on Procedures and Criteria for Determining Refugee Status** (1992) at 15, reference is made to discrimination of a substantially prejudicial nature for the person concerned eg 'serious restrictions on his right to earn his livelihood ...'. Chapter 4 of Professor Hathaway's book **The Law of Refugee Status**, Butterworths 1991, discusses the nature of persecution at some length esp at 116-124. Included in the **'basic and inalienable rights'** are those in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (United Nations' General Assembly, Resolution 2200 A (XXI), 16 December 1966) protecting the right to work, including just and favourable conditions of employment remuneration, and rest.

In my view, the Tribunal erred in concluding that the ability to obtain work in private enterprise reflects the State upholding the 'right to work', where the State either imposes or tolerates a system which precludes certain of its citizens from working in government employment for reasons of religion or political beliefs. Far from treating its citizens equally, the State then is sanctioning discrimination against some of them for Convention reasons. It is difficult to envisage circumstances where such discrimination may, in a practical sense, be insignificant. That is the more so when there is a significant economic disadvantage consequent upon that restriction, although actual economic disadvantage in an immediate personal sense is not per se the critical matter...

As I have said above, I am unclear whether the Tribunal in fact found that to be the case in any event. It would, therefore, but for the further point raised by the Minister, be necessary to refer this matter back to the Tribunal for further consideration."

Ultimately, his Honour referred the matter to the Tribunal to consider the claim for persecution concerning employment.

Despite a submission to the contrary, I do not think that the comments quoted above are part of the *ratio*. Ultimately, because no facts had been found, the matter was remitted to the Tribunal. But, even were I to regard these comments as part of the *ratio*, I would not be bound by them in any technical sense, although judicial comity would then lead to my following what was said unless convinced that it was clearly wrong.

In my view, the true position can be explained as follows. Discrimination in employment may constitute persecution in the relevant sense if for a Convention reason. However, whether it does so depends on all the circumstances. Clearly, in an economy where there was no private enterprise at all, inability to obtain government employment for a convention reason would constitute discrimination because that would constitute an *"*ac*t of oppression"*, to adopt the language of McHugh J in *Chan*. And it would be just as much oppressive and thus involve persecution if, instead of there being no ability to obtain employment, there is ability to obtain employment but limited to jobs which are dangerous or demeaning to the person employed to do them. If, on the other hand, there existed a mixed economy, so that government employment merely competed with private employment and exclusion from government employment would not result or be likely to result in the person seeking work being unable to obtain appropriate work and thus an appropriate living, then it is hard to see that the refusal to permit employment would constitute persecution. That would not be oppressive, at least to any significant extent. Thus, generally, whether restriction on employment amounts to persecution in a Convention sense will depend upon all the circumstances, and particularly upon whether there can be said to be oppression or real harm to the person.

Although Australia may not in all things be a model to be held up for universal admiration, it may be mentioned that permanent employment in the Australian Public Service is still limited to those of Australian nationality. It would not ordinarily have been said that this discrimination constituted persecution of those who do not qualify as Australian nationals, although obviously directed at such persons.

In my view, there is nothing in the texts or cases which support the universal proposition that discrimination in employment **must** be persecution. No case has attempted an all-inclusive definition of "*persecution"* and that certainly is not a task which I wish to undertake in the present case. I am prepared to accept that the UNHCR Handbook is correct in the following passage upon which the applicant relies. But nothing in that Handbook permits me to reach a conclusion other than that the question whether discrimination becomes persecution involves an issue of fact and degree, and that this is an issue for the decision-maker and not for the Court. In my view, it was open for the Tribunal to find there to be no persecution in the present case.

The Handbook relevantly says:

"**(b) Persecution**

51. There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution.

52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

(c) Discrimination

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved."

THE SECOND SUGGESTED ERROR OF LAW

As reformulated in the amended application, the second suggested error of law is said to be that the Tribunal failed to take into account, in determining whether persecution existed, the effect which the cumulative incidents of discrimination relied upon had on the mind of the applicant and, in particular, whether they produced or were likely to produce a feeling of apprehension and insecurity as regards his future existence. This formulation assumes, as was the case here and as will ordinarily be the case, that there is sought to be drawn from incidents in the past an inference that, if the claimant is returned to the country of nationality, those incidents will be repeated.

There can also be no doubt that, in resolving the question whether a person is entitled to refugee status, it will be relevant to consider the motivation of the persecutor and the effect of the conduct complained of on the mind of the person claiming refugee status. This is because the applicant for refugee status must show that the acts claimed to constitute persecution were carried out for a Convention reason and because he or she must show a *"well founded fear*" of persecution, that is to say that the acts of persecution relied upon from the past must engender fear on the part of the persecuted. Although the subjective purpose of the persecutor may be a necessary concomitant to convert discriminatory behaviour into persecution, I do not think that the same can be said of the effect which the discrimination has upon the claimant. The requirement that the persecution have an effect on the person said to have been persecuted stems not, I think, directly from the word *"persecution"*, but from the requirement that the person claiming refugee status have a well-founded fear of persecution before refugee status is made out.. In other words, the mind of the persecuted may be relevant to a finding that that person qualifies for refugee status, although not to the question whether what he has suffered is persecution. However, nothing turns really upon whether the word *"persecution"* carries with it the consequence of fear to the person persecuted or whether this subjective element is derived, as I think it is, from the requirement that there be a well-founded fear of persecution. The context of the Convention and Protocol brings with it the consequence that there will be a need to consider the effect of the behaviour upon the mind of the applicant for refugee status in determining whether there is a well-founded fear of persecution.

But, while it may be accepted that in its context behaviour could not constitute persecution unless that behaviour was both capable of causing and did in fact give rise to fear in the person seeking refugee status, it does not follow logically that every behaviour which engenders fear in an applicant is thereby persecution. In other words, if the conduct complained of is not, without reference to its impact upon the applicant for refugee status, persecution, it will not become so if it produces in that person fear.

Reference was made in the course of argument to *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 where Burchett J said (at 568):

"In my opinion, there is a unity of concept about the whole definition of a refugee contained in the Convention, so far as it relates to membership of a particular social group, which should always be kept firmly in mind. That concept flows through the separate elements of the definition. The well-founded fear of which it speaks is a fear of 'being persecuted'. Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution. Consistently with the use of the word 'persecuted', the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is 'membership of a particular social group' ... The link between the key word 'persecuted' and the phrase descriptive of the position of the refugee, 'membership of a particular social group', is provided by the words 'for reasons of' - the membership of the social group must provide the reason. There is thus a common thread which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group'. That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group."

Likewise in *Amanyar v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 194 Jenkinson J placed emphasis upon the motivation of the persecutor.

These cases support the initial premise of the applicant's argument that the notion of persecution carries with it a motivational element on the part of the State of nationality. There are references in *A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381 which may be taken to support the suggestion that relevant persecution must have an impact on the person claiming refugee status. For example, at 397 McHugh J emphasises the importance of reading the words *"well-founded fear of being persecuted for reasons of ... membership of a particular social group"* as a compound conception, and from which it would follow that

impact on the claimant would be relevant. But, that does not lead to the conclusion that the failure of the Tribunal to address the impact of the behaviour alleged upon the applicant constituted an error of law. As I have already said, fear on the part of the claimant does not turn non-persecution into persecution. The Tribunal concluded, as it was open to conclude, that the events which had happened in the past could not be called persecution. In arriving at this conclusion there was no necessity to consider the mind of the applicant, even if it may well have been necessary to do so if the acts complained of were otherwise properly to be characterised as persecution. The Tribunal did not make any error.

THE THIRD SUGGESTED ERROR OF LAW

The final error alleged was that it was not open to the Tribunal to hold that the discrimination, harassment and ostracism experienced by the applicant amounted to persecution.

As I have already noted, where there is a matter of fact and degree involved, as there almost invariably will be when the question arises whether particular conduct amounts to persecution, the Tribunal will be the final arbiter. It is difficult not to feel sympathy for the applicant. It is difficult to be other than moved by his evidence that his life was *"basically hell"*. But it is of little avail to the applicant that a judge of this Court feels moved. This Court is not empowered to decide the merits of an applicant's claim to refugee status. Its jurisdiction is much narrower. It is empowered only to consider whether the Tribunal, in determining that it was not satisfied that the applicant was a person to whom Australia had Convention responsibilities committed a reviewable error. That the applicant has not shown. In the result the application must be dismissed with costs.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill

Associate:

Dated: 8 July 1997

Counsel for the Applicant:	M B Smith
Solicitor for the Applicant:	Parish Patience
Counsel for the Respondent:	G T Johnson
Solicitor for the Respondent:	Australian Government Solicitor
Dates of Hearing:	27 June 1997