FEDERAL COURT OF AUSTRALIA

SCAT v Minister for Immigration& Multicultural & Indigenous Affairs

[2003] FCAFC 80

MIGRATION – judicial review – protection visa – whether Refugee Review Tribunal failed to have regard to an integer of the appellant's claim – whether such failure amounts to jurisdictional error – whether psychological harm may be "serious harm" within meaning of s 91R *Migration Act 1958* (Cth)

Migration Act 1958 (Cth), s 91R, 474

Judiciary Act 1903 (Cth), s 39B

Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244, followed

Plaintiff S157 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 195 ALR 24, considered

Re Minister for Immigration & Multicultural & Indigenous Affairs Ex Parte Applicants S134/2002 (2003) 195 ALR 1, considered

SCAT V MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

S194 OF 2002

MADGWICK, GYLES & CONTI JJ

30 APRIL 2003

SYDNEY (HEARD IN ADELAIDE)

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	S194 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE

FEDERAL COURT OF AUSTRALIA

BETWEEN:	SCAT APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	MADGWICK, GYLES AND CONTI JJ
DATE OF ORDER:	30 APRIL 2003
WHERE MADE:	**SYDNEY (HEARD IN ADELAIDE)**

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside and that the matter be remitted to the Tribunal, differently constituted, to be dealt with according to law.

2. The respondent pay the appellant's costs of the proceedings in this Court, at first instance and on appeal.

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

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BETWEEN:	SCAT APPELLANT
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JUDGE:	MADGWICK, GYLES AND CONTI JJ
DATE:	30 APRIL 2003
PLACE:	SYDNEY (HEARD IN ADELAIDE)

REASONS FOR JUDGMENT

MADGWICK & CONTI JJ:

Introduction

1 This is an appeal from a judgment of a judge of the Court dismissing an application for judicial review brought under s 39B of the *Judiciary Act 1903* (Cth) in relation to a decision of the Refugee Review Tribunal ("the Tribunal") dated 26 February 2002 *(SCAT v Minister for Immigration & Multicultural Affairs [2002] FCA 962).*

2 The RRT had affirmed a decision of a delegate of the respondent not to grant protection visas in relation to a family comprising a husband and wife and their two children. As the learned primary judge noted, there was some apparent confusion as to whether the applications of the wife and two children fell to be assessed merely derivatively, as members of the husband's family

unit, upon the merits of his claims to be a refugee. It appears that the wife had in fact made a separate visa application and claimed that she herself had suffered persecution. However, as his Honour put it, her claim "echoes in part" the allegations made by her husband.3 In any case, their claims were considered together and it is apparent that the information provided both by wife and husband was taken into account by the Tribunal in reaching overall conclusions expressed in a single set of reasons for decision. The application to the court was made only by the husband although it was clear that it was intended that the application should avail all family members.

Issues on the appeal

4 The principal issues debated before us were:

- whether the Tribunal could properly be said to have failed to have regard to a claim that there was a real chance that the appellant and/or other members of his family would suffer psychological harm serious enough to convert admitted religious discrimination into persecution for the purposes of the Refugee Convention's definition of a "refugee"; and
- whether that would amount to jurisdictional error such that, conformably with the reasoning of the High Court in *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003) 195 ALR 24, s 474 of the Act would not prevent the court from granting relief.

Background: a Mandean family flees Iran

5 The appellant and his family are Iranian citizens who belong to a religious sect known as Sabean Mandeans (both of these words are subject to varying spellings in the sources referred to by the Tribunal Member and/or in the submission made to him on behalf of the appellants by a refugee advocacy service). The appellant and his family arrived in this country on 20 August 2001 on a smuggler's boat from Indonesia which took them to Ashmore Reef.

6 Mandeans, as it will be convenient to call them, number perhaps 25,000 in all, in Iraq and Iran. About 20,000 of these live in Iraq. In Iran, the small numbers of Mandeans apparently live in a couple of regional towns. They emphasize ritual baptism, indulging in it more frequently than most religions, and regard John the Baptist as their principal prophet. The information before the Tribunal Member was conflicting as to their attitude to Jesus Christ but they are regarded, at least in some quarters as a Christian sect, though in others as the religious heirs, as it were, of the ancient Jewish Essenes.

7 Likewise, the information before the Tribunal as to their status and the degree of discrimination which they suffer in Iran was somewhat cloudy. The Tribunal Member concluded that they were an "unofficial religious minority". In Iran all religious minorities including Christians and of course Jews, suffer varying degrees of persecution, *vis a vis* the Shi'ite Muslim majority. The State, since the religiously inspired revolution, does not, for example, permit non-Muslims to engage in government employment or attend university and there are restrictions on the extent to which they can fully practise their

religion, for example, by teaching it. If injured or killed, they or their dependants apparently receive less compensation than would the Muslim majority, and they may suffer in assessments of their credibility as witnesses before Iranian courts. It is not clear whether the latter is a State-sanctioned norm or an instance of societal discrimination left unchecked by the State.

Proceedings before the Tribunal

8 We did not have a transcript of proceedings by the Tribunal before us, though we had the apparently material documents to which the Tribunal Member might have had regard. Introducing the appellant's and his wife's claims, the Tribunal Member said, "The appellants stated belief that they will be persecuted [for belonging to the Mandean faith] is based on their own experiences of harassment, discrimination, threats and mistreatment in Iran".

9 The appellant himself raised a number of claims. The Tribunal Member recounted them, presumably in the order in which they emerged at the hearing before him. In turn, they were:

- that if the appellant returned to Iran he would be punished for having left illegally - the Tribunal Member did not believe that he left illegally;

- that the appellant had been dismissed from his employment as a food technologist at a meat processing works a couple of months before leaving for Australia. (He had qualified for this work before the deposition of the Shah). The employer discovered that he was a Mandean and not a Muslim and, as the Tribunal Member put it:

> "was disgusted that he had allowed a non-Muslim to handle and prepare food for Muslims. The employer threatened to kill the Applicant. He told the Applicant that he would [teach] him a lesson that he would never forget."

The appellant claimed he was thereby at risk of being killed or otherwise harmed by the erstwhile employer or other Muslims. The Tribunal Member, though believing the story of the dismissal and the reason for it, was not satisfied that there was a real chance that the appellant would come to any serious harm on account of that episode;

- in relation to the claim that it was difficult for Mandeans to find employment, the Tribunal Member accepted that this was so, but considered that there would be no real difficulty in the appellant making a living;

- the appellant also made a general assertion, it seems, which the Tribunal Member described in the following way:

> "The Applicant also fears that he and his family will face societal discrimination and harassment. There is a lack of respect for Sabeans. There is little tolerance for non-Muslim beliefs, and no protection for Sabeans under Iranian law."

10 The appellant's wife referred to her husband's fear of harm from his former employer but gave some detail of other matters. As the Tribunal Member put it:

"The Applicant wife states that as Sabeans in Iran they face constant discrimination and intolerance. The children are forced to learn the Koran at school. They are all insulted and called dirty Sabeans.

Thirteen or fourteen years ago she had a clash with a Muslim neighbour. He had made insulting remarks to her as she left her home. She replied by calling him a monkey and asking him if he had a sister and would he use such words to her.

Another day this neighbour ran into the Applicant wife while riding his motorbike. She was injured.

The Applicant wife does not like the dress regulations in Iran. Even in the detention centre other Iranian children will not play with her children because the Applicant wife does not cover her hair."

11 Immediately after recounting those matters, the Tribunal Member continued:

"There was evidence from Father Monaghan, a Catholic priest at Woomera, that in his opinion Sabeans were mistreated by Muslims in the detention centre.

I note the following independent evidence."

He then considered a deal of information from the kinds of sources that are often referred to as "country information" in these cases. It becomes important to refer to some of it which the Tribunal Member seems to have accepted or at least recorded

without the expression of any reservation about its reliability. The Tribunal Member said:

“I also note an article entitled ‘Information on the Mandaeans in Iran in regards to human rights’, apparently published in ASUTA: The Journal for the Study and Research into the Mandean Culture, Religion and Language. It is not clear when or by whom this article was written. These excerpts are taken from N00\32026.

The ASUTA article states, inter alia, that:

> With the Mandeans becoming surround[ed] by Moslem neighbours as well as working and buying in Moslem business[es], the Mandaeans have recently taken to blending into the surrounding culture. This has been achieved … by employing a variety of cosmetic techniques [s]uch as naming children with Moslem associated names rather than traditional Mandaic names, learning the basic Moslem customs, religious customs, and rituals so that one may pass in time of harassment, and finally wearing lay clothes similar to the average Moslem. These techniques do not defile or pollute the religion since they are not covered by Mandaic codes…
>
> … Mandaeism is not an officially recognized religion in Iran. In 1996, Dr Jorunn Jacobsen Buckley, a Bowdoin College professor, in her article ‘With the Mandaeans in Iran’ wrote:
>
>> …The Qu’ran exempts [Mandaeans] as “people of the book” from forced conversion to Islam. After the revolution in 1980, however, the government stopped supporting this protection. Since then the Mandaeans have worked to regain it. About a year ago the Iranian president [sic] Khamenei issued a fatwa, an opinion, about the Mandaeans, stating that they seemed to be monotheists with a holy scripture and a prophet and should therefore be recognized as a protected religion…
>
> Whereas the Mandaeans are acknowledged as the Sabians of the Koran they still are not recognized according to the Constitution of Iran…
>
> Mandaeans have no recognition, although they do have some protection due to the fatwa and [their] position as the Sabians of the Book…

> As far back as written record[s] show, the Mandaeans have existed as simple tradesmen: such as [smiths], goldsmiths, boat builders and carpenters. Noticeably there are no vendors of grocery or animal products. Since a Moslem sees touching the food of a non-Moslem as a sin, it would be economical disaster to venture into such a business…
>
> Even today a Moslem will not allow a non-Moslem to touch store merchandise. Instead a Mandaean must ask for a certain item and then the Moslem will hand it to the Mandaean…Khomeini was a model for strict observance in regards to touching non-Moslems. He holds that to touch a non-Moslem requires major ritual washing…
>
> …
>
> Even when a Mandaean seeks to educate him or herself further [than] the high school level, they must adhere to Islamic rules [and pass [an] examination in Islamic theology]…
>
> Only recognized religious minorities are allowed to have private schools in Iran…
>
> Only recognized religions have permission to hold religious instruction as long as they do not discuss or sermonize the religion in Persian… The Mandaeans, since they are not a recognized religious minority, are not allowed by law to provide any religious instruction. Yet they have been able to continue weddings, baptisms and funerals by the local Islamic community because of their protection as the 'people of the book' and the fact that all the ceremonies are spoken in Mandaic only. Also we must factor in that these rituals have been performed in this region for the last 2000 years and the local Moslems are used to seeing them. These rituals are not threatening to Islam nor are they any sermons of discussions being performed… The fact that the Mandaeans do not allow any converts to their religion may be one element in helping them to survive…

…

In relation to religious minorities in Iran generally, the US State Department's Annual Report on Religious Freedom (2000) comments:

The U.N. Special Representative for Human Rights in Iran noted in his September 1998 report frequent assertions that religious minorities are, by law and practice, barred from being elected to a representative body (except to the seats in the Majles reserved for minorities, as provided for in the Constitution) and from holding senior government or military positions. Members of religious minorities are allowed to vote, but they may not run for president. All religious minorities suffer varying degrees of officially sanctioned discrimination, particularly in the areas of employment, education, and housing.

…

Religious minorities suffer discrimination in the legal system, receiving lower awards in injury and death lawsuits, and incurring heavier punishments, than Muslims. Muslim men are free to marry non-Muslim women but marriages between Muslim women and non-Muslim men are not recognized.

The US State Department's Report does not indicate that Sabean Mandeans face persecution in Iran, either by the state, or by vigilante groups."

12 There was, however, other material before the Tribunal Member. In his initial interview with an officer of the respondent, so far as is presently relevant, the appellant said that Iranian Muslims "consider us to be dirty people"; he said that "there are a lot of barriers to [Mandean] people in Iran. In answer to the question "Do you have any reasons for not wishing to return to your country of nationality?, he said "I don't want to because of all these issues my minority group face. I won't be able to get employment."

13 In a statement accompanying his formal application for a protection visa, the appellant said, among other things:

"According to Sharia Law I was not supposed to touch any food items and I had committed a huge offence against Islam. I committed two offences of not disclosing that I was not a Muslim and that I had contaminated food by being a Sabian."

I became very fearful because throughout my professional working life I had to hide my identity and avoid socialising. We were under constant stress."

The appellant's wife said, in a statement accompanying her application:

"I have a commitment to my children to ensure that they are brought up in a safe environment, free from the fear of being arrested for practising our religious and cultural beliefs.

My children were singled out for treatment because [their] names were not Arabic and as a consequence their fate was already determined."

14 In a submission to the Tribunal which followed the appellant's and his wife's apparently unrepresented appearance before the Tribunal, the Refugee Advice and Casework Service (Australia) Inc ("RACS") which, by then, was acting for the appellant and his wife, said:

"**Psychological harm**

Of course, to be granted a protection visa, our clients must satisfy the Tribunal that the discrimination and harassment they suffer in Iran amounts to persecution. Section 91R(2) of the Migration Act 1958 proscribes instances of serious harm for the purposes of the Act. However, s91R is not

exhaustive, and we submit that psychological harm amounts to serious harm for the purposes of the Migration Act.

We refer the Tribunal to the attached fax from Father Jim Monaghan, of the Woomera-Roxby Downs Catholic Parish, dated 26 January 2002 (Attachment B). This letter points out that the discrimination suffered by Mandaean children, at the hands of Muslims at the detention centre in Woomera, causes psychological harm. This supports [the wife's] claim that her children suffer in the detention camp, as they did in Iran.

Further, Sister Anne Higgins, Chaplain at Woomera IRPC, and Russell Wilson, Psychologist, in a letter provided to our office on 15 January 2002, agree that the persecution suffered by our clients in Iran and Woomera, combined with the general sense of helplessness felt by Mandaeans in Iran, combine to create a sense of fear and eventual destruction of emotional wellbeing (see Attachment C). Such an emotional state is clearly, in our submission, serious harm.

Cumulative persecution

Further, the UNHCR states in the Handbook on Procedures and Criteria for Determining Refugee Status that:

> '…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.
>
> 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. … his right to practise his religion, or his access to normally available educational facilities.
>
> 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.’

It is submitted that our clients satisfy these tests for cumulative persecution. It is clear from the various sources of country information that Mandaeans suffer discrimination in all aspects of life. Indeed, the US State Department reports that, ‘All religious minorities suffer varying degrees of officially sanctioned discrimination, particularly in the areas of employment, education, and housing.

Religion

Further, the Mandaeans’ right to practise their religion freely is severely curtailed:

> ‘They are restricted in practising their religion because the Mandi they have built has been closed down by the authorities. Local Muslim community interferes with their religious practices by pouring parrafin into water. Pressures on the Sabian community to convert to Islam have recently increased. Sabian Mandeans are seen by local Muslim community as “dirty” and living in hell. Muslims have been brainwashed by local Muslim religious teachers to fulfil their religious duty and save every non-Muslim from hell.’ ”

15 The Tribunal Member’s reference to Father Monaghan’s letter (see [11] above) scarcely conveyed its full import and relevance. The letter, though lengthy, bears quoting in full:

“Dear Tribunal Members,

I am writing to offer you some information which may be of assistance to your deliberations in the case of Sabean-Mandaian applicants from Woomera IRPC.

It is important to establish that incidents of serious persecution of Mandaian people and other minorities has occurred at various times in the Compounds of the Woomera Detention Centre, at the hands of small groups of hostile Muslim people. In making this statement, I should point out that I do not wish to impugn the good name of the vast majority of Muslim people resident in the Centre, who are not involved with persecution of minorities.

For example, during July and August of 2001, it was almost impossible for Mandaian people to access showers in the ablutions blocks of the Main Compound, due to the aggressive actions of such a group of hostile Muslims. These people would warn the Mandaians to stay away, saying that the particular blocks were ‘their blocks’, and that they would not tolerate ‘dirty people’ like Mandaians using them.

The threats were backed up with action, in that when the Mandaians defied the warnings, the persecutors simply turned off the water supply from outside the blocks.

The Mandaian people were not alone in this miserable situation, as there were some Christians and other minority groups affected as well.

The complaints of these minority groups to the local management were not taken seriously for some time. Our letters to DIMA management were followed up with a written representation from the Australian Catholic Bishops’ Conference to the Minister, and some action was eventually taken. No doubt your officers would be able to access this correspondence from DIMA’s files.

Some months later, persecution of Mandaians again broke out, this time in the November Compound. The torment of choice this time involved defecating in the doorways of the bedrooms inhabited by Mandaians in the dormitory buildings of this Compound. In a more serious incident, an elderly, blind Mandaian man was assaulted during a night time visit to the toilet block, and defecated upon by his attackers. In each situation these attacks were accompanied by a consistent verbal harassment in the context of the queues for meals, encounters at ablution blocks and the like.

Mandaian children are constantly subjected to verbal harassment by both adults and peers. Sometimes it happens that Mandaian children and Muslim children develop a friendship. On these occasions, it is not uncommon for the Muslim child to be instructed by his or her parents to inform the Mandaian child that the Mandaian is not to touch the Muslim, nor to share food, or to be in any sort of contact, as this would render the Muslim child ‘unclean’. This has a serious psychological impact on the Mandaian child, amounting substantially to persecution.

With this sort of experience in what one would expect to be a secure situation in an Australian detention facility, it comes as no sort of surprise to me and my colleagues that Mandaian people face many and varied situations of local and personal persecution in their home countries, especially in Iran.

I have seen the ‘Country Information’ provided by DFAT and other organizations, but I find it hard to accept this information, in light of the attitude of those persecuting bigots who plague the lives of the Mandaians in the Woomera Detention Centre. I see this information as largely reflecting an official version, the formal stance of the gradually liberalising national government culture of Iran. At regional and local level, this sort of tolerance and respect for law seems to be non-existent. While there may be occasional instances of helpful police, the Mandaians seem to be consistently denied the protection of the law at the local level. The influence of local religious bigots in positions of power in the courts and local government is commonly destructive. Of course, the local level, rather than the national level, is what counts

where the physical safety of one's family, the safety of one's marriage, and the chances of earning a livelihood in one's chosen profession are concerned.

I hope you are able to take into account the realities of the experiences of Mandaian people in the Detention Centre at Woomera, as I believe it gives some indirect evidence as to their plight in their countries of origin."

16 Of even greater relevance to the claim of likely psychological harm, especially to the appellant's children, was the letter signed by both Sister Anne Higgins, Catholic Chaplain at the Woomera Detention Centre and a qualified psychologist, Mr Russell Wilson. They said:

"In considering the degree of harm and therefore the question of discrimination versus persecution occasioned by ill treatment, it seems to us that the mental effects of severe ill treatment are indeed often more serious. The constancy of verbal abuse linked to the deprivation of normal human social activities – physical touch in greetings, exclusion from clubs, insults from peers and authority figures in education, denigration of one's religion – often lead to severe depression. In addition, especially in the case of women there is the fear of sexual exploitation and even the possibility of being forced into marriage with a Muslim and so compelled to convert to the Muslim religion. Furthermore, the powerlessness of the Mandean people to expect justice from the law leads to a helplessness, a feeling of lack of power over one's life choices, and a deep-seated insecurity concerning the predictability and control of one's life. To be not supported by the law in one's own country is surely to be persecuted in one's own country. The combination, especially when one has a lifetime of such experiences, starting from an early age, is so damaging to one's personal identity that there is often a grave risk of suicide. This risk is not just confined to adults, and is so not just the product of an accumulation of experience, but to children as well whose very being is unable to satisfactorily mature and hence personal coping skills are incapable of being developed and validated by the person, resulting in ongoing feelings of desperation and of being in crisis. Australian law recognises not only physical abuse, but also emotional and psychological abuse as forms of aggression and abuse of power resulting in a victim's emotional destruction.

We hope that the above will assist you in considering the case of … Mandean people."

17 There was also before the Tribunal an article published in the "Australian" newspaper on 3 December 2001, which contained the following apparently illuminating material:

"A Shi'ite Muslim leader incited the harassment of members of a non-Muslim religious minority inside the Port Hedland detention camp, according to official complaints received by the federal Government.

The claim was one of several made in a graphic written account by Mandaean detainees of religious based harassment at the hands of some Shi'ite Muslim asylum-seekers.

The 38 Mandaeans from Iran and Iraq follow a pre-Christian monotheistic faith and count John the Baptist among their prophets.

According to an account written in Arabic by Mandaean detainees, dated November 13 and obtained by The Australian, the sheik had incited violence against them and they were being subject to religious vilification by his followers. One Mandaean wrote that the sheik was preaching (to) his followers and instigating them by saying (we) have no faith nor a prophet. We are infidels and Islam permits our killing, and so forth.

Another Mandaean detainee wrote: "Religious instigations and harassment began since our arrival in this confined camp… they said we are infidels with no religion and prophet… that killing an infidel and looting his wealth is permitted in Islam". A spokesman for Immigration Minister Philip Ruddock confirmed yesterday that **the Department of Immigration and Multicultural Affairs (DIMA) had received complaints of harassment and did not doubt their truth**".

…

Mandaean Association of Australia secretary Raghib Zaidan said most Mandaeans from Iran claimed refugee status on the basis of religious persecution.

Many of the Mandaeans from Iraq claim refugee status based on membership of a social or political group". (emphasis added)

The approach at first instance

18 The matter was put slightly differently to his Honour, but the substance of his Honour's reasoning was urged upon us by counsel for the respondent. His Honour said at [21]:

"**Section 91R of the Act**

It is contended that the Tribunal erred in failing to consider whether psychological harm could amount to 'serious harm' within the meaning of s 91R of the Act. Implicit in this submission is the premise that the claims of the applicant, either on his own behalf or on behalf of family members, included a claim that a family member had suffered psychological harm. I do not think it could be doubted that serious psychological harm, particularly harm involving mental illness, could constitute 'serious harm' within the meaning of s 91R. The difficulty which confronts the applicant in this case is that a claim of psychological harm does not appear to have been pressed before the Tribunal by the husband or the wife. There is no mention of such a claim in their personal statements, nor is there mention of such a claim in the reasons for decision of the Tribunal.

In written submissions made by a migration agent to the Tribunal on behalf of the husband and the wife, a submission was made that psychological harm amounts to serious harm for the purposes of the Migration Act, and two documents in support of that proposition were submitted. The first was a letter from Father Jim Monaghan of the Woomera-Roxby Downs Catholic Parish which points out that discrimination suffered by Sabean Mandean children at the hands of Muslims at the Detention Centre in Woomera, causes psychological harm. The migration agent's letter says: 'This supports [the wife's] claim that her children suffer in the detention camp, as they did in Iran.' The other document is a letter jointly signed by Sister Anne Higgins, Chaplain at the Woomera IRPC, and Mr Russell Wilson, psychologist. That letter says that constant verbal abuse linked to the deprivation of normal human activities often leads to severe depression, and refers to feelings of powerlessness and helplessness said to be experienced by Sabean Mandean people. The authors say:

> The combination, especially when one has a lifetime of such experiences, starting from an early age, is so damaging to one's personal identity that there is often a grave risk of suicide.

Both the letter from Father Monaghan and the joint letter from Sister Higgins and Mr Wilson are in general terms about Sabean Mandean people, and are not specific to the present applicants. The probative value of the documents, if any, would lie in the coincidence between factors identified by the authors of the documents as possible causes of psychological harm, and the complaints made by the husband and the wife. The link between the two appears to be entirely missing in the present case. Counsel for the husband emphasises that the letter from the migration agents at one point says that the document from Father Monaghan supports the wife's claim that her children suffer in detention camp as they did in Iran. However, the nature of that suffering is not spelt out in the letter, nor does the letter (or any other information) assert psychological illness or psychological harm over and above the general complaints of discrimination in Iran in schools and the community generally suffered by Sabean Mandeans which the Tribunal has addressed in its reasons for decision.

There being no claim that the discrimination suffered by the husband and his family had caused 'psychological harm' or that one of them was suffering depression or suicidal feelings, I do not think that the Tribunal erred in not addressing the question whether psychological harm could amount to 'serious harm' within the meaning of s 91R of the Act."

Consideration

19 What is involved is essentially a finding of fact as to whether a claim was being put forward that the appellant and/or any member of his family might suffer psychological harm. As the primary judge dealt with the matter carefully, it would be wrong to approach his

Honour’s reasons in this matter without giving them real respect and weight. However, his Honour decided the matter solely on the written materials, which are also before us.

20 The material extracted above in our opinion shows that a claim of *potential* psychological harm was explicitly made by the Refugee Advice and Casework Service (Australia) Inc (“RACS”). The reference, in the applicant’s advisor’s submission, to “eventual destruction of emotional wellbeing” seems to make that clear.

21 Further, and despite the unfeigned respect for his Honour’s views that we have indicated is appropriate in relation to this matter, the appellant was entitled to have certain inferences drawn in his favour, as to the implications of what he and his wife were saying. If people are, from an early age, considered by the great majority of the people in the society in which they live to be “dirty”, are positively treated as if they are dirty, and if there is otherwise widespread and far reaching discrimination against them, it requires no degree in psychology to accept that this may well be very harmful to mental well-being. In any case, the letter signed by Mr Wilson (as well as Sister Anne Higgins) amounts to a professional opinion on the subject. Both that letter and the observations of Father Monaghan have a force that needs no supplementation.

22 We do not find it persuasive on the issue of whether there was a claim made to the Tribunal concerning psychological harm that there was not a complaint, in terms, directly made to the Tribunal by either the appellant or his wife that either of them or any of their children was sustaining psychological harm. While the appellant and his wife had had some degree of tertiary education in the days of the more liberal regime of the Shah, two observations may be made. The first is that it is by no means uncommon for people to be unaware that they or those close to them are psychologically damaged or distressed. That is so even in our society where amateur psychologising is popular. The second is that it is simply not known to what extent there is any popular interest in, or knowledge or discussion of, actual or supposed psychological concepts either in Iran generally or among Mandean people there. In any case, in all kinds of litigation it is a commonplace that people representing themselves without expert advice tend not to put their best foot forward. It is not surprising that, when the obviously capable people associated with RACS came to represent the appellant, a potentially cogent matter was raised for the first time.

23 In our view the matter was clearly and sufficiently raised. In particular, it was put forward that the appellant and his family were likely to suffer considerable discrimination, including in highly personally offensive terms and that the cumulative effect of this was likely to entail severe psychological harm. A link was made between the general observations of Mr Wilson and Sister Higgins and of Father Monaghan and the claims of and on behalf of the appellants. Insofar as psychological harm to the appellant’s family members, rather than directly to himself, might have been in issue, that could plainly be taken into account as an element of harm to the appellant himself. To harm a

child may also be to harm its custodial parents. In our view, the matters referred to by the learned primary judge properly go more to the possible *weight* that might be accorded to the claim of potentially serious psychological harm than to whether such a claim was truly or adequately made.

24 In our opinion the material was, as the RACS submission adumbrated, vital to the appellant's case as ultimately presented to the Tribunal. The Tribunal's summation of Father Monaghan's letter was plainly inadequate. The omission by the Tribunal of any reference to Mr Wilkin's and Sister Higgin's letter is striking, as is the failure to consider the potential effects on children of being treated in effect as untouchables. While these instances are not legally significant in themselves, in the circumstances they are pointers to the conclusion, which we feel obliged to draw, that the Tribunal Member must have simply overlooked this aspect of the claim.

25 The Tribunal Member had a legal duty, implicit in the notion of his obligation to "review" the decision of the respondent's delegate, to consider this matter. The claim as put relevantly involved the assertion that:

(a) there was serious discrimination against the appellant and his family as Mandeans; and

(b) the discrimination, because of its potential to cause serious psychological harm, amounted to serious harm within the Convention definition of a refugee and within s 91R of the Act.

These were not merely peripheral matters. They were central to a proper assessment of the appellant's case.

26 The Tribunal Member, it is trite, was obliged to come to what he considered the correct or preferable decision on all the material before him. It is implicit in that task that the Tribunal should carefully attend to such material. What is involved here is not simply the Tribunal's silence as to some of the evidence going to an issue; an issue was itself not addressed. In the view to which we have come, there was, to that extent, a failure to carry out the review function.

27 In *S157* the judgment of the majority speaks of the necessity to read s 474 as referring only to decisions which do not involve any "jurisdictional error", because of Ch III of the Constitution: see [76]. It is true that, at some points in the judgment of the majority, as well as in the judgments of the Chief Justice and Callinan J, there are references to matters such as "imperative duties" and "inviolable limitations or restraints" (see e.g. [76]). It was argued for the respondent that these references indicate that, by jurisdictional errors, the majority should be taken to have indicated something narrower than the full range of jurisdictional errors adverted to in *Craig v South Australia* (1995) 184 CLR 163 and cited in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 in the following well known passage at 351:

"It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in Craig v South Australia, if an administrative tribunal (like the Tribunal):

> '…falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

> 28 There may be difficulties in maintaining this argument, both on a proper reading of the various judgments in *S157* and by reason of the summary of the effect of *S157* in *Re Minister for Immigration& Multicultural & Indigenous Affairs Ex Parte Applicants S134/2002* (2003) 195 ALR 1 at 5 in terms suggesting no such restriction at [15]:

"Central to the operation of the new Pt 8 is the definition of "privative clause decision" in s 474(2). Section 474 is construed in Plaintiff S157/2002 v The Commonwealth of Australia, with the result that, **if they were infected by jurisdictional error**, the decisions here of the Tribunal and the Minister were not privative clause decisions." (emphasis added)

> 29 However these matters may be, even on the narrow view of the effect of *S157* proposed by counsel for the appellant, it cannot be other than an important matter, going to the core of the Tribunal's jurisdiction, to overlook crucial material amounting, as Allsop J put it in *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at 259, to an integer of the claim. In that case, Allsop J, with whom Spender J agreed, said that "To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on". His Honour then made clear that this includes a failure to examine all the integers of any claim, saying "*The claim or claims and its or their component integers are considerations **made***

mandatorily relevant *by the Act for consideration in the sense discussed in* Minister for Immigration and Multicultural Affairs v Peko-Wallsend *(1986) 162 CLR 24 … and* Minister for Immigration and Multicultural Affairs v Yusuf *(2001) 206 CLR 323*" (emphasis added). Merkel J agreed with Allsop J in the result and was not at odds with Allsop J's approach. Another Full Court (Black CJ, Wilcox and Moore JJ) agreed with this approach in *W396/01 v Minister for Immigration and Multicultural Affairs* (2002) 68 ALD 69 at 78-81 [31]-[38].

30 The Tribunal's error in our view involved the failure to perform an imperative duty and amounted to a jurisdictional error able to be corrected by this Court despite s 474 of the Act. Section 39B of the *Judiciary Act* gives this court "jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer … of

the Commonwealth". Mandamus would lie to compel a proper exercise of jurisdiction by the Tribunal, and should go.

Disposition

31 It follows that the decision of the Tribunal should be set aside and that the matter should be remitted to the Tribunal, differently constituted, to be dealt with according to law. The respondent should pay the appellant's costs of the proceedings in this Court, at first instance and on appeal.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Justices Madgwick & Conti.

Associate:

Dated: 30 April 2003

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	S194 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE

FEDERAL COURT OF AUSTRALIA

BETWEEN:	SCAT APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	MADGWICK, GYLES AND CONTI JJ
DATE:	30 APRIL 2003
PLACE:	SYDNEY (HEARD IN ADELAIDE)

REASONS FOR JUDGMENT

GYLES J:

32 The appellant’s claim to be a refugee has at all times been based upon his membership of a minority religious group of people in Iran variously called Mandeans, Sabean Mandeans or Sabeans – here called Mandeans – all members of which, it was claimed, suffer from persecution if they are identified as members of that minority religious group. Both the delegate of the Minister and the Refugee Review Tribunal (“the Tribunal”) accepted that the appellant was a member of that minority religious group. Each also accepted that, as an identified member of that minority religious group, the appellant and his wife had and would suffer various forms of discrimination which could be sheeted home actually or constructively to the organs of the state. Neither, however, took the view that that discrimination amounted to persecution within the meaning of s 91R of the *Migration Act* 1958 (Cth) (“the Act”). In particular, it was found that the discrimination would not involve “serious harm” to the appellant (or others in his position, including his wife). In coming to this conclusion, the Tribunal considered evidence directly from the appellant and his wife, material supplied on their behalf and a body of external material known colloquially as “country information”.

33 That conclusion is undoubtedly controversial. Many might disagree and come to a contrary conclusion. Indeed, it appears that differently constituted Tribunals have come to a different conclusion. This might be seen as an unsatisfactory situation from the point of view of public policy. The fundamental question as to whether Mandeans in Iran have a reasonable basis for fearing persecution as defined in the Act has little to do with the individual characteristics of those visa applicants who are accepted as being Mandeans. It might be thought that the answer should not depend upon the vagaries of decision-making by individual Tribunal members. To some extent, that may be the inevitable product of a system designed to scrutinise individual cases by a variety of decision-makers without any internal appeal. There are, no doubt, steps which the Tribunal might take to minimise inconsistent handling of similar or identical cases and steps which the Minister might take pursuant to his discretionary powers to the same end. Neither those questions of process nor the merits of the decision about the position of Mandeans in Iran are matters for this Court.

34 The position in the present case is well summarised by the primary judge:

> "16. The Tribunal's finding that the discrimination suffered by the applicants did not amount to persecution is to be understood as a finding that the discrimination did not involve "serious harm" to the applicants. The Tribunal gave reasons for this conclusion which indicate that it engaged upon a qualitative assessment of the degree of seriousness of the discrimination they would face in Iran. …"

The Tribunal discussed the meaning of persecution under the Act, and in particular, with reference to the provisions of s 91R, in a manner which cannot be criticised.

> 35 In my opinion, this is a straightforward case in which the Tribunal directed its mind to the correct statutory question, even though some, perhaps many, would disagree with the factual conclusion it reached. The qualitative assessment was a matter for the Tribunal. The primary judge was right to reject the submission that there was any jurisdictional error involved (*SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 962 particularly at [15]-[16] and [36]).
>
> 36 One of the arguments presented to the primary judge by then counsel for the appellant was that the Tribunal erred in failing to consider whether psychological harm could amount to "serious harm" within the meaning of s 91R of the Act. The primary judge held that there had been no claim that the discrimination suffered by the appellant (or his family) had caused psychological harm and therefore concluded that the Tribunal did not err in not addressing that question. No ground of appeal was directed to that finding, although it was revived in a rather indirect way by counsel for the appellant in written and oral submissions. There are a number of problems with this argument.
>
> 37 The first is that whether or not the claim was made is a pure question of fact which the primary judge considered in an orthodox manner which does not disclose any appealable error. Furthermore, having reviewed the evidence, I agree with the conclusion of the primary judge in this respect. I have read the unauthorised arrival interview of both the appellant and his wife and the later prepared statement of each which was annexed to each visa application. I have also read the decision of the delegate of the Minister which records what was put forward by the appellant and his wife. No claim of psychological injury or trauma is mentioned up to that point. Indeed, whilst various forms of discrimination are mentioned, the emphasis was upon difficulty in obtaining and retaining employment. I then considered the part of the Tribunal decision which summarises what had been put forward by and on behalf of the appellant and his wife at the hearing before the Tribunal. There is no claim of psychological harm or trauma recorded. This is the only evidence before this Court of what occurred at that hearing. No other evidence was tendered before the primary judge as to what occurred. The later submission which was made to the Tribunal on behalf of the appellant, with the enclosed material from external sources, was considered by the primary judge. I agree with his conclusion that the material was in general terms about Mandeans and was not specific to the present appellant or his family. It was in the same category as the other external material identified

and considered by the Tribunal. Assessment of that material was entirely a matter for it. The fact that the Tribunal only made express reference to one of the supporting documents which were provided does not establish any error on the part of the Tribunal. It is not bound to refer to every bit of material presented to it.

38 Some reference was made during argument to the potential psychological effect of discrimination upon the children of the appellant. It was not explained how this claim (even if it had been made) would become relevant to the proceeding before the Court, which relates to a decision of the Tribunal as to the appellant's claim to be a refugee. There was no claim of that kind on behalf of the children, who were family members only. In any event, it is not

appropriate to speculate about the psychological effect of discrimination upon children of members of a group which has existed in Iran side by side with Muslims for many centuries.

39 It can hardly be contended that the Tribunal acted upon the view that psychological harm could not be "serious harm" within the meaning of s 91R when it did not express that view and had no occasion to do so. Even if it had, there would be a real question as to whether any jurisdictional error would have been involved. "Serious harm" as used in the section is an ordinary non-technical phrase. Whether that description applies in particular circumstances is generally a question of fact (*Re Minister for Immigration & Multicultural Affairs; Ex parte Cohen* (2001) 75 ALJR 542 at [35]). Even if there were an error in law, it may well have been an error within jurisdiction (cf per Hill J in *Ratumaiwai v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 311, not disapproved on appeal to the Full Court: *Ratumaiwai v Minister for Immigration& Multicultural &Indigenous Affairs* (2002) 193 ALR 449 per Black CJ at [4], Beaumont J at [188], Wilcox J at [348] and Von Doussa J at [651]). There is also the argument that s 474 of the Act would prevent the grant of relief even if there were a constructive failure to exercise jurisdiction.

40 The appeal should be dismissed with costs.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 30 April 2003

Counsel for the Appellant:	Mr Charman
Solicitor for the Appellant:	Refugee Advocacy Service of South Australia
Counsel for the Respondent:	Ms Maharaj
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	19 February 2003
Date of Judgment:	30 April 2003