

# FEDERAL COURT OF AUSTRALIA

SBAS v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCA 528

**MIGRATION** - refugees - application for protection visa - appeal from decision of Refugee Review Tribunal - fear of persecution - applicant family of Sabaeen Mandaean religion - whether applicant family persecuted - whether decision of Tribunal amounts to jurisdictional error.

*Migration Act 1958 (Cth) s 474*

*Judiciary Act 1903 (Cth) s 39B*

*R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598*

*NAAV v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 228*

*SBAU v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1076*

*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 [2003] HCA 1; (2003) 195 ALR 1*

*Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 195 ALR 24*

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

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

*Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293*

*Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1*

*Sepet v Secretary of State for the Home Department [2003] 1 WLR 856 (HL)*

*R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840*

*Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802*

**SBAS v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND  
INDIGENOUS AFFAIRS**

**S239 OF 2001**

**COOPER J**

**BRISBANE (HEARD IN ADELAIDE)**

**30 MAY 2003**

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY

S239 OF 2001

BETWEEN: SBAS  
APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AND INDIGENOUS AFFAIRS  
RESPONDENT

JUDGE: COOPER J

DATE OF ORDER: 30 MAY 2003

WHERE MADE: BRISBANE

THE COURT DECLARES THAT: The decision of the Refugee Review Tribunal given on 11 December 2001 is null and void.

**THE COURT ORDERS THAT:**

1. The Refugee Review Tribunal, differently constituted, proceed to hear and determine the applicants' application for review of a decision of the delegate of the Minister for Immigration and Multicultural and Indigenous Affairs, made on 24 August 2001, to refuse to grant to the applicants (being the applicant and each of the members of his family) a protection visa according to law and these reasons.
2. The respondent pay the applicants' costs of and incidental to the application, including reserved costs, if any, to be taxed if not agreed.

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

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PLACE: BRISBANE

### REASONS FOR JUDGMENT

# background

1 The applicant, his wife and two children ('the applicants') arrived in Australia on 4 May 2001. They were taken into detention as unlawful non-citizens for the purposes of the *Migration Act 1958* (Cth) ('the Act').

2 On 31 July 2001, an application in Form B for a protection (Class XA) visa was lodged. The application included the husband, wife and children as the persons in respect of whom the application was made. Additionally, a separate application in Form C to claim to be a refugee was lodged for the husband, and separate applications in Form D, as a member of a family unit who does not have his or her own claim to be a refugee, was lodged on behalf of the wife and each of the children.

3 In order to claim such a visa for the applicants, the respondent was required to be satisfied that they were persons to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol (as defined in s 5 of the Act): s 36(2). That required that the respondent was satisfied that the applicants were 'refugees' within the meaning of the Art 1A(2) of the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951 as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 ('the Convention').

4 Article 1A(2) of the Convention provides that a person will be a refugee if that person is one who:

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

5 The application of the Convention definition of 'refugee' is to be read with s 91R of the Act, which provides:

'91R Persecution

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

- (a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
  - (b) the persecution involves serious harm to the person; and
  - (c) the persecution involves systematic and discriminatory conduct.
- (2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of **serious harm** for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (3) For the purposes of the application of this Act and the regulations to a particular person:
- (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

- (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.'

(Original emphasis)

6 On 24 August 2001, the delegate of the respondent refused to grant to each of the applicants a protection (Class XA) visa. On 4 September 2001, the applicants applied for review of the decision of the delegate by the Refugee Review Tribunal ('the RRT'). On 11 December 2001, the RRT affirmed the decision of the delegate not to grant protection visas to the applicants. On 24 December 2001, the applicants, who were then unrepresented, filed an application in this Court for order for review of the decision of the RRT. Although it is only headed in the name of the male applicant, it is clear from the terms of the application that it is made on his own behalf, and on behalf of his wife and children.

## the claim to refugee status

7 The applicants are citizens of Iran. They are not of the Islamic faith. They are members of the Mandaean religion (also called the Sabaeen, Sabian, Sobian, Sabeen or Sobbi religion). The male applicant is aged 44 years, his wife 30 years, and their daughters 11 and 4 years.

8 The well founded fear of persecution claimed by the male applicant and his wife for themselves and their daughters was by reason of their religion, and further by reason of imputed political opinion of the husband.

9 The claim of religious persecution before the RRT dealt with general persecution of all Mandaeans in Iran, and specific events of persecution suffered by the male applicant, his wife and each of the daughters. The claim of feared persecution for imputed political opinion arose out of an incident which the male applicant and his wife claimed occurred at their home on 18 February 2001.

10 The Mandaean faith is not a Christian faith. Its adherents are followers of John the Baptist and its practices involve ongoing baptisms in fast flowing clean river waters.

11 The claims of general persecution of Mandaeans were that:

- (a) the Mandaean religion was not recognised under the Iranian Constitution as a minority religion, the consequence of which was that Mandaeans had no rights in respect of their religious beliefs;

- (b) under the official religion of Iran, Islam (Ja'fari Shi'ism), which is the religion of ninety-nine per cent of the nationals of that country, Mandaeans are treated as infidels and defiled persons who are unclean and Kafirs (being an offensive characterisation of a non-Muslim or infidel);
- (c) the Mandi (place of worship) was confiscated by the State, forcing Mandaean religious ceremonies into public areas where they are exposed to harassment by Muslim persons, which included driving vehicles into or around groups of Mandaeans at riverside locations to disperse them, or to dirty them with soil or dust thrown up by the vehicle tyres;
- (d) the cemeteries of Mandaeans were bulldozed and the bones and bodies buried there burned and used for concrete;
- (e) the children of Mandaeans were not allowed to be taught about their religion in schools and were obliged to undertake religious education classes in the Muslim religion;
- (f) non-Muslim children were denied access to university education unless they were one of the non-Muslim religious minorities - Zoroastrians, Jews and Christians - recognised by the Iranian Constitution, and then only to members of those minorities who passed an examination in Muslim theology;
- (g) Mandaeans were denied employment in the government service because Mandaeans were non-Muslim and had severe problems in obtaining or maintaining employment in general employment because Mandaeans were regarded as unclean and not allowed to touch a wide range of foods and goods;
- (h) pressure was put on young children at school, and young men and women, to become Muslim or to marry Muslims;
- (i) medical services were withheld from, or provided at a minimal level to Mandaeans in hospitals because Mandaeans are regarded as unclean. The male applicant alleged that the withholding of such services for that reason lead to the death of the his brother;
- (j) Mandaeans are not allowed to touch food or produce in shops because they are regarded as unclean, and required to purchase any produce touched because it is thereafter unmerchantable;
- (k) Mandaeans are discriminated against by the judiciary and legal system, not being believed as witnesses when opposed to Muslim persons, and not being protected by the police when Mandaeans are the victims of crimes perpetrated by Muslims;
- (l) Mandaean women and girls are the victims of home invasion and rape carried out by Muslim males posing as employees of the electricity or water authorities, and/or robbed of their jewellery at gunpoint, the offenders being

able to bribe police to take no action in respect of the crimes should they be identified and reported to the police;

- (m) Mandaean women are at risk of rape in hospitals which deters them from attending hospitals, despite having serious illnesses;
- (n) the authorities have failed to protect Mandaean men working in their jewellery shops, which has seen twenty-five Mandaens killed and their shops looted in the last five years; and
- (o) Mandaean suffer general abuse and vilification by their Muslim neighbours; they are spat at, and have stones thrown at them during baptism ceremonies being performed in the river, or thrown into their homes.

12 The male applicant and his wife made specific claims of individual incidents of persecution to which they claimed they and their daughters had been subject. Those events were:

- (a) regular abuse and vilification by their Muslim neighbours, and being spat at while walking in the street, including the wife being run down from behind by a Muslim on a motorcycle, who called the wife '*Soki, dirty Soki*' and spat upon them, when she and her husband were walking along the roadway;
- (b) in the two years prior to leaving Iran, after neighbours learned that the family was Mandaean, garbage was emptied at the front door of their home and rats were thrown into the house;
- (c) during that two year period, they received written threats and telephone calls threatening to kidnap the applicants' children and burn down their home because they were Mandaean and their presence made the area dirty; having stones thrown into their home with threatening messages attached;
- (d) the wife being refused medical services by nursing staff at a hospital when her second daughter was born because she was a Mandaean, and in the view of the Muslim hospital staff, dirty and defiled;
- (e) their daughters were told during Islamic religious instruction that they would go to hell and hell's fire because they were Mandaean and not Muslim, and that those who are not Muslims do not like God, in an attempt to convert the children to Islam, such statements causing fear and emotional distress to the daughters, sufficient to cause them to return home in tears;
- (f) their daughters were harassed a great deal at school because they are not Muslim, with teaching staff showing their dissatisfaction in class with the number of Mandaean students by insulting them and discouraging them, and on one occasion reducing the elder daughter to tears for having touched the Koran;



- (g) the wife being told in food shops that as a Mandaean she is unwashed and unclean; and not being allowed to touch goods in the store;
- (h) a robbery of their home by two Muslim men on 4 February 2001, one of whom was recognised as a neighbour, and the refusal of the police to charge the offender when the police became aware of the identity of the offender, and that the complainant was Mandaean;
- (i) a threat by the offender to take action against the male applicant for having lodged a complaint with the police, and demanding retribution by payment of money or the male applicant giving his wife to the offender;
- (j) the planting of anti-government and anti-Islamic materials in the applicants' home and procuring the police on or about 18 February 2001 to attend and search the applicants' home causing him to flee lest he be arrested and dealt with as an opponent of the government and of the Islamic faith; and
- (k) the physical assault of the wife by the police and threats made to end her life should she not reveal the whereabouts of the male applicant, such conduct occurring in the presence of the applicants' daughters who were and remain emotionally affected by the incident.

13 The two incidents which the applicant and his wife claimed precipitated the flight of the family from Iran, were the burglary of their home on 4 February 2001, and the attempt on 18 February 2001 to frame the male applicant and procure his arrest as a political and religious opponent of the government and of the Islamic faith as practised in Iran.

14 The male applicant, in his original statement and in the subsequent statements he has made in support of the protection visa applications, has given a consistent version of what he and his wife claim occurred on 4 February 2001 and later on 18 February 2001.

15 The male applicant claims that at around 3.00 am on the morning of 4 February 2001, he was awoken by his wife who said she could hear someone walking on the roof of their two storey house. Upon investigating he saw that the door which opened onto the roof was open. He saw two persons, one of whom he recognised, who worked as a Pasdars and lived nearby. He saw that some of the goods which were ordinarily kept near the door were missing. When he yelled '*thief thief*', the men ran away. Later in the morning the male applicant lodged a complaint with the police, naming the neighbour as one of the burglars. When the neighbour was brought to the police station he was taken to see the Chief of Police, and the male applicant saw him take out a few cards and show them to the Police Chief. The police then asked the male applicant if he was sure about identifying the man and about his being responsible, because he was a well regarded Muslim, he always said his prayers at work, and was a good person. The male applicant was told not to blame the man for something he had not done because he was a very good person. In the interview he had with the RRT the male applicant said that the Police Chief told the male applicant that the man was trusted by the

government, and that the male applicant would need to withdraw the complaint. The male applicant claims he left the police station because he could get nowhere with his complaint.

16 The male applicant says that he had previously had trouble from the neighbour, who would spit at the male applicant as he passed in the street, and would call him a 'dirty neighbour'.

17 Outside the police station, the male applicant was confronted by the neighbour and two others who were seated in a Sepah car. The neighbour confronted him and said that the allegation was untrue and he wanted compensation, either by the male applicant paying money or giving over his wife. He also stated in the earlier interview that the neighbour also had threatened to kill him.

18 The male applicant claimed that at around midnight on 18 February 2001, he heard the doorbell ringing, and because of the hour he was scared to open the door. He states that he climbed to the top of the house and looked down to the front door where he saw two police officers. The male applicant said that when he opened the door to the roof, he saw a lot of leaflets and other documents '*... anti-government fliers and pictures of Khomenie and Khoumenaire*'. The pictures were half burned and torn.

19 The male applicant stated:

'7. ... I realised that this was a plot to set me up to accuse me of political crime. I ran away over the roof-tops but before I left I told my wife not to open the door. ...

...

9. The next morning my wife gathered a few things for the children and went to her mother's house. She was there for about 2 days until her uncle called and told her where I was. My wife was at her mother's for 3 days and I was at her Uncle's until the 30th March until we had prepared ourselves to leave. I knew that any charges brought against me would be serious, this was a political and religious crime that I was set-up with doing. I knew that I had to get out of Iran with my family or face death.'

20 The male applicant claimed he purchased false passports from a people smuggler who arranged for the departure of the family by air from Tehran.

21 The RRT member questioned the male applicant as to how the documents came to be left in the house and why he left his wife and children alone and fled:

'MR KISSANE: Now, [SBAS], why don't you want to return to Iran?

[SBAS]: The, ah, document that I have, ah, provided, um, will show that the plot that they have prepared for me is a sufficient event for a Muslim to be executed, let alone somebody like us that belongs to a minority group.

MR KISSANE: All right. Um, well, when did this plot, how did this plot come about?

[SBAS]: On 29th of that month, which is the 11th month of the Iranian calendar, 1339. I can't tell you date, it was quite recent, year is 2001, and the ah, is 18th of February.

MR KISSANE: All right. And what happened on that day?

[SBAS]: There was a knock on our front door. I went to have a look and I saw the officers of the Government. We normally overlook to see who is ah, knocking at the door because we were, ah, feeling a bit threatened, then when I look at, ah, the doorway I realised that there were some ah, counter-revolutionary or anti-government leaflets, ah, in, in our home and I was wondering who has, what they are doing there. And the officers were pressing for us to open the door.

MR KISSANE: Where were the anti-Government leaflets?

[SBAS]: They were in the, they were on the, in the hallway and also were scattered in the room.

MR KISSANE: In the hallway of your house?

[SBAS]: Upstairs of our home.

MR KISSANE: And how did they get there?

[SBAS]: I don't know, I haven't seen anybody putting that but our house was robbed, and ah, the same day as the robber came in and robbed our house they must have done the same.

MR KISSANE: Um, is it, is it possible to get into the ah, um, upstairs of your house without coming in through the front door?

[SBAS]: The, the rooftop of our home is connected to the top of the other ah, rooms, ah, other houses, neighbouring houses.

MR KISSANE: And do you have a door in the from the rooftop?

[SBAS]: We have the rooms upstairs, and the rooms upstairs are connected to a hall.

MR KISSANE: Right, and how do you get from upstairs to the roof?

[SBAS]: When I went upstairs and opened the window to see um, who is knocking on the door I noticed them.

MR KISSANE: Where, where were they ... From upstairs in the rooms, how do you get to the roof of your house?

[SBAS]: Yes there is a stairs that takes to the rooftop.

MR KISSANE: And is there a door there that's kept locked or something?

[SBAS]: No, it doesn't.

MR KISSANE: What, it's not, it's not locked?

[SBAS]: Yes.

MR KISSANE: And were the, were the pamphlets, they were, they were in the hallway which is connected to the, that the rooms run off, is that were the pamphlets were?

[SBAS]: Yes.

MR KISSANE: And what were the pamphlets about?

[SBAS]: There were some torn pictures of Komenhi and Homenhi, and there were quite a number of leaflets of um, ah, anti-Government leaflets, but the number of leaflets were much more than the torn photographs.

MR KISSANE: And um, did you, and you say they were anti-Government leaflets?

[SBAS]: I didn't have time to read through all of them but I just read the, ah, the titles.

MR KISSANE: So what did you do?

[SBAS]: And, um at, at the time when I saw that the security officers were at the door I also, I had some leaflets there I thought it was not merely those ah, leaflets and there were some other things. I thought that there was a plot. At the time I couldn't think of anything that I could do but flee or escape the home.

MR KISSANE: And how did you do that?

[SBAS]: As I said ah, earlier, the, the rooftops were connected to one another, although some of them are higher or lower. With difficulty I managed to escape through the roof.

MR KISSANE: What about your ... was your wife and children home?

[SBAS]: Yes, ah, my children were asleep ah, and my wife was awake. (Inaudible words).

MR KISSANE: Why would you run away over the roofs and, and leave your wife and children at home if there were, um, if there were um, security officers banging on the front door?

[SBAS]: Because ah, I couldn't ah - I escaped with difficulties jumping and climbing up and down - ah, and the plot was against me, they wanted me, not my family.

MR KISSANE: All right. Well, if somebody did have a plot against you why would they go to the trouble of leaving um, these pamphlets and torn pictures in the, in the house? Wouldn't they just arrive and arrest you and make a false allegation against you?

[SBAS]: Ah, this is quite an established tradition. Those minority groups who are um, wanted or targeted by the officials, sometimes they ah, use ah, illicit drugs, in, ah, putting in the homes, and sometimes use the um, ah, anti-Government ah, literature.

A [sic] Yeah, but if they're going to um, falsely accuse you of having illicit drugs or having anti-Government material, why do they need to bother to break into your house and leave the items there in the first place?

[SBAS]: What they want to do is to demonstrate that ah, what they are doing is for a reason. And this particularly so is in front, is, ah, in front of the people. They want to say, what we do, if we kill somebody, that it's for a reason.

MR KISSANE: Right. So, well, did they arrest your wife and take her to the police station?

[SBAS]: Um, they entered ... My wife can elaborate on that.

MR KISSANE: All right. Would you um, expect that if they came to your house and found anti-Government material and um, some torn picture of Komenhi and Homenhi, and your wife was at home, wouldn't they detain her if that was the case?

[SBAS]: I don't know what was ah, the reason, but ah, despite the fact that my wife was beaten severely and also they have ah, beat with those papers to her face, but ah, they didn't take her away. Whether they wanted to use my wife in order to catch me up, or what, I don't know.'

22 The RRT member also questioned the male applicant as to the circumstances of the family's departure from Iran:

'MR KISSANE: Did you all leave on your own passports?

[SBAS]: With a single passport.

MR KISSANE: What - you, all - yourself and your wife and your two children were all on the one passport?

[SBAS]: Yes.

MR KISSANE: And that was in your own names?

[SBAS]: Yes.

MR KISSANE: And you didn't have any problems leaving?

[SBAS]: We paid a bribe of 9 million tuhmans or 90 million reals. The middle-man said that, 6 million tuhmans, or 60 million reals are for the arrangement of your travel, and 3 million tuhmans, or 30 million reals for bribing people all around to ensure that you, you get out, because I told him that I'm blacklisted, ah, and he said that, ah, we will take care of that.

MR KISSANE: But usually when you go and you leave through the airport and you go through immigration the, um, my understanding of Tehran, that's like most airports in the world and people that check your passports and check you out for departure are sitting at a desk and you're just randomly sent up to one of the desks that are there.

[SBAS]: We were ah, accompanied with ah, yeah, a lady organised that for us, and ah, she accompanied us until we left the airport. Even our luggages were not checked, ah, while some other people's luggages are checked.

MR KISSANE: Well, I mean I haven't been to Tehran airport, but the information I've read about Tehran airport indicates that that's not the way it happens, that you just go through, you just get sent to, through a number of random checks and it's not possible to pay bribes to leave in that fashion.

[SBAS]: It's not the case, in Iran you can do virtually anything with money. Money is the solution to a lot of problems, unfortunately. Ah, I'm a minority Mandoi group, a member of the Mandoi group, and when we want to do something we, we are told that this is not possible. We paid the, ah, large sums of money as bribe, and this impossible becomes possible.

MR KISSANE: Well, why would your name be on a blacklist at Tehran airport, when ...?

[SBAS]: Can I say something that I remembered?

MR KISSANE: Mm-hmm.

[SBAS]: The reason why we chose that lady was because she had assisted a number of other peoples to leave Iran successfully and if it were not due to that reason we wouldn't have trusted her, um, and now can I put the question to you?

MR KISSANE: Why would your name, why would your name have been on the blacklist?

[SBAS]: With finding so many leaflets in, in our home I have no doubt that I was a hundred per cent blacklisted. It's such a thing, such a, an evidence, definitely one would be blacklisted, because this, the offense is very severe.

MR KISSANE: But the authorities, the security officers that came to your house, they didn't arrest your wife, and then forty days later you were able to leave from Arwaz airport to go to, to go to Tehran, it would be surprising if the set-up that they attempted, you say they attempted to set up on you, would have led to you being blacklisted at Tehran airport, wouldn't it?

[SBAS]: The airport, the Arwaz airport is like a bus terminal or a railway station. It's not that strict, anybody can go on that. Only Tehran was strict.

MR KISSANE: I understand, my query was it seems a long way from somebody trying to um, ah, falsely accuse you of something to your name being on a blacklist at Tehran airport.

[SBAS]: When they target somebody um, to exterminate they arrange for false accusations. But the private purpose is to kill that person, not ... with any means possible.'

23       The wife gave evidence, which corroborated the version of events given by her husband. In respect of the incident on 18 February 2001, she said in her earlier interview:

'... After the incident (burglary) one night around 12 o'clock police officers rang our door my husband looked out from the roof top & noticed anti government fliers and pictures of religious leaders had been scattered on the rooftop. My husband feared that he had been found ... he noticed the fliers so he fled through the rooftops. After resisting opening the door as police were banging and attacking the door, I opened the door. Police came in, they interrogated and slapped me. They forced me to tell them where my husband was. I maintained that I didn't know - When did this happen? Around the 4th of Feb 2001. My children were screaming. This incident has left a lasting & devastating effect on my children and they still exhibit signs of insecurity.'

24       In her oral testimony to the RRT, the wife said:

'[MRS SBAS]: When they were knocking at the door they were shouting that, "We know that you're at home, open the door." The two of them - eventually I opened the door. Two of them came in and one of them hit me, ah, and said, "Where is your husband?" I said, "I don't know." He hit me again. He grabbed my neck and pressed me against a wall and said, "I will suffocate you if you don't tell me where your husband is." The other person went upstairs, brought the leaflets and ah, the bundle of leaflets, he hit my face with that. The children woke up, they were asleep at the time, but they woke up and they were pleading with the officers not to harm their mother. They said, "Leave my mother alone."

MR KISSANE: Yeah, if, if the leaflets carried the sort of penalty that your husband seems to suggest, why wouldn't they detain you and take you away then, there and then?

[MRS SBAS]: Their aim was not to ah, destroy me, they wanted to exterminate my husband.

MR KISSANE: Why would they want to -?

[MRS SBAS]: I don't even know, I thought that probably they thought that if I stay that my husband would come back home. And I could have been used as an entrapment too.

MR KISSANE: Mm-hmm. Your husband was only, was staying with relatives, wouldn't they have found him there if they really wanted to find him?

[MRS SBAS]: I beg your pardon?

MR KISSANE: Your husband was staying with your relatives. Wouldn't they, wouldn't the police officers have found him there if they really wanted him?

[MRS SBAS]: They didn't know the whereabouts of my husband, and I didn't know either.'

## the decision of the rrt

25 The RRT finding in respect of the applicants in respect of their individual applications, was that there was '*no real chance they will face persecution if they now return to Iran*' and that '*the applicants do not have a well-founded fear of persecution for a Convention reason*'. It found:

'... [h]aving considered the evidence as a whole, the Tribunal is not satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicants do not satisfy the criteria set out in s36(2) of the Act for a protection visa.'

26 In respect of the incidents arising on 4 February 2001, the RRT found:

'The Tribunal accepts that the applicants may have been robbed of items from their home on 4 February 2001. The Tribunal also accepts that they may have complained to the police and may have received no satisfaction. This may be because the person accused was a Muslim and influential and the applicants are Sabian Mandaean. It may be the case that the applicant husband was taunted by the person he accused when he was leaving the police station. However the Tribunal does not accept that any of this either taken separately or together is serious harm amounting to persecution. The applicants have also made no other allegations of having been robbed and the Tribunal does not accept that this was other than an isolated event.'



27 In respect of the events of 18 February 2001, the RRT found:

'The applicant's account of the events of 18 February 2001 is in the Tribunal's view far fetched for the following reasons. Firstly the Tribunal does not accept that setting the applicant up in the manner he claims occurred is a credible response to his complaint on 4 February 2001. Secondly the Tribunal does not accept that the applicant if he thought he was being set up would run away in the manner claimed leaving his wife and children in the house. Thirdly the Tribunal does not consider that the applicant has adequately explained how such pamphlets would get into his house in the first place. Fourthly the country information above indicates that Sobbis in Ahwaz get along well with the Muslim community. In the Tribunal's view the applicant's description of being set up by members of the revolutionary guard is not consistent with the general information about the treatment of Sabeen Mandaens. When all of these matters are considered the Tribunal concludes the applicant's claims about alleged events on 18 February 2001 are far fetched and does not accept that they occurred.

In addition the applicant has claimed that whilst he escaped he will face harsh treatment if he now returns. However the Tribunal does not accept that this is consistent with what occurred after the alleged events of 18 February 2001. Firstly on his account he remained at his wife's uncle's place for the next forty days. If he was seriously of interest to the Revolutionary Guards or the police the Tribunal considers that they would have been able to locate the applicant if he was staying with relatives. Secondly, as the applicant stated in the hearing, the applicant left Iran using a passport in his own name and containing the names of his wife and two children. The Tribunal notes that he claimed to have paid a bribe. However whatever money he may have paid to the agent the Tribunal does not accept that it is possible for those on the wanted list to pay a bribe to avoid being detained at the airport. Indeed the applicant's willingness to leave via the airport using his own name indicates to the Tribunal that he did not seriously think he was wanted by the authorities. Had he really been wanted by the authorities he could have left Iran by another route rather than from the airport in the main city. Further his suggestion that he was on the black list is in any event far fetched, given the nature of his claims, and an indication that the applicant is willing to exaggerate his situation to further his claims in Australia for refugee status.'

28 In respect of what can be described as the general claim to persecution on account of being Mandaean and adherents to the Mandaean religion, the RRT found:

'In relation to their religion generally the Tribunal accepts that Sabian Madaeans feel discriminated against because their children are obliged to attend Iranian schools and are obliged to study Islam. The Tribunal also accepts that university entry is a problem. However their children are not denied an education and the difficulties in their children attending university whilst clearly discriminatory are not persecutory. Whilst there is evidence of religious premises being confiscated the Tribunal considers that overall the country information indicates that they can practise their religion without interference. In this regard the applicant's own claims do not indicate any ongoing pattern of interference and if this did occur the Tribunal would have expected it to be apparent from the applicants' claims. Given these matters the

Tribunal finds that the applicants can practise their religion without facing a real chance of persecution.'

29 In respect of the claims of personal persecution beyond the general claims and in addition to the occurrences on 4 February 2001 and 18 February 2001, the RRT found:

'The Tribunal has been able to glean the following about the Sabian religion from the country information above. It is likely that the Sabian religion is not an official religion. Nonetheless it has a long history in Iran. The situation of Sabians may have deteriorated in the period shortly after the 1979 revolution but appears to have improved since then. It seems likely that Sabians cannot go to university unless they change their religion but it is apparent that they can go to school, as evidenced by the applicant daughter's situation. The country information also indicates that they are not mistreated by the population in general. As a result the Tribunal does not accept that the applicant has received threatening telephone calls once his religion became known. The Tribunal notes that the applicant purchased a house and that there were other Sabians in the neighbourhood. The police also according to the country information protect Sabians, and the applicant's own experience of going to the police indicates some support for this even if in this case they took no action. It is possible that they have experienced isolate [sic] instances of harassment whilst shopping but the Tribunal does not accept that this amounts to persecution or that they cannot shop elsewhere. It is also possible that they have experienced items thrown through their window but the Tribunal does not accept that they would not receive the assistance of the police if this occurred. The Tribunal also does not accept that such occurrences are regular given the tenor the country information above that Sabians generally get on with the rest of the community but keep to themselves.

...

The applicant wife claimed that after the birth of her second child she was not treated appropriately at the hospital. Whatever complaints she may have about her treatment at hospital the Tribunal finds that such problems do not amount to serious harm amounting to persecution. The Tribunal also notes that the applicant wife has referred to her daughter coming home from school crying. Whilst this is possible the Tribunal considers that the Sabian Mandaean community is of sufficient size to enable such problems to be dealt with by the parents and does not indicate to the Tribunal that the situation at school for young Sabians is so bad as to be considered persecutory.

The Tribunal has also considered the applicants' claims cumulatively. As stated above Sabian Madaeans are subjected to discriminatory treatment. However even with such treatment as that accepted above by the Tribunal, such as, not being able to go to university, their children having to learn about Islam at schools, a treatment difficulty at a hospital, and an occasional harassment shopping the Tribunal does not accept that it amounts to harm serious enough to amount to persecution. Even if the Tribunal accepted that there was an occasion when items were thrown at their windows, the Tribunal does not accept that cumulatively their situation has been so serious that they have suffered persecution in the past. The Tribunal is satisfied that

the same situation will prevail if they return. So whilst it is possible they will continue to suffer discrimination and occasional harassment the Tribunal does not accept that there is a real chance they will face persecution for a Convention reason.

The Tribunal notes the newspaper article about some difficulties Sabians in Port Hedland are having. However the Tribunal does not accept that this indicates that the applicants will face problems if they returned to Iran, particularly given the country information above that Sobbis do not have problems with the general community and get along well with most Iranians.'

30 As can be seen from the reasons of the RRT, the principal basis of its reasoning and rejection of the claims of the applicants was that '*Sobbis in Ahwaz get along well with the Muslim community*', '*...[t]he country information also indicates that they are not mistreated by the population in general*', '*Sabians generally get on with the rest of the community*' and '*the country information ... that Sobbis do not have problems with the general community and get along well with most Iranians.*'

31 The country information to which the RRT referred is Report Number 165/01, entry date of 11 June 2001. It is a report of the Department of Foreign Affairs and Trade. The report is qualified by the following disclaimer:

'The information and/or answers in this Report are derived entirely from the source document(s). No interpretation of the information has been made or comment included by the CIS [Country Information Service]'

The CIS source disclosed on the document is 'DIMA Tehran', Iran, 4 June 2001.

32 The section of the report which the RRT relied upon to make the findings which it did, stated:

'THE SOBBIS IN AHVAZ VERY MUCH KEEP TO THEMSELVES ALTHOUGH THERE IS SOME INTERACTION WITH THE WIDER COMMUNITY. MARRIAGES OUTSIDE THE SOBBI COMMUNITY ARE RARE, AND SOBBIS WHO MARRY MOSLEMS OR EVEN ASSOCIATE WITH THE WIDER COMMUNITY TOO MUCH ARE "DISOWNED". THE SOBBIS DO NOT, HOWEVER, HAVE PROBLEMS WITH MEMBERS OF THE GENERAL COMMUNITY - THEY GET ALONG WELL WITH MOST ORDINARY IRANIANS. THE SOBBIS DO NOT GET INVOLVED IN POLITICS AND ARE A LAW-ABIDING COMMUNITY. THE MAIN CONCERN OF THE SOBBIS IN AHVAZ IS TO PRESERVE THEIR RELIGION AND THEIR SEPARATE IDENTITY, WHICH THEY FEEL ARE UNDER THREAT.'

33 In respect of the situation of Sobbis generally in Iran, the report continued:

'THE SOBBIS FEEL THREATENED MAINLY BECAUSE OF DISCRIMINATION BY THE IRANIAN AUTHORITIES, WHICH RESULTS FROM THE FACT THAT THEIR RELIGION IS NOT OFFICIALLY RECOGNISED IN IRAN. SOBBI CHILDREN ARE ABLE TO ATTEND IRANIAN GOVERNMENT SCHOOLS, BUT THEY ARE OBLIGED

TO STUDY ISLAM AS PART OF THE GENERAL CURRICULUM (NB: RECOGNISED RELIGIOUS MINORITIES SUCH AS CHRISTIANS ARE ABLE TO ATTEND CLASSES IN THEIR OWN RELIGION AT SCHOOL, BUT SOBBIS DO NOT HAVE THIS PRIVILEGE). BECAUSE OF THEIR RELIGION SOBBIS CANNOT BE EMPLOYED IN GOVERNMENT JOBS AND IT IS VERY DIFFICULT FOR THEM TO ENTER UNIVERSITY. (NB: ONLY MEMBERS OF RECOGNISED RELIGIONS ARE ABLE TO SIT UNIVERSITY ENTRANCE EXAMS IN IRAN.) SOME SOBBIS ARE ABLE TO ENTER UNIVERSITY BY CLAIMING TO BE MOSLEMS (SOBBIS ARE PREPARED TO CONCEAL THEIR RELIGION WHEN NECESSARY, THIS IS NOT CONTRARY TO THEIR BELIEFS). SOBBIS CAN HAVE SIMILAR PROBLEMS IF THEY WORK IN NON-GOVERNMENT JOBS ALONGSIDE MOSLEMS. ONE SOURCE SAID THAT HE WORKED FOR A MEAT PROCESSING COMPANY IN AHVAZ FOR 8 YEARS, AND FELT OBLIGED TO CONCEAL HIS RELIGION FROM HIS WORKMATES. HE SAID THAT IF IT HAD BECOME KNOWN THAT HE WAS A SOBBI, HE COULD HAVE LOST HIS JOB. OTHER SOBBIS WHO HAVE WORKED WITH MOSLEM IRANIANS HAVE BEEN PUT UNDER PRESSURE TO CONVERT TO ISLAM.

SOBBIS IN IRAN HAVE THEIR OWN CEREMONIES FOR MARRIAGES, BIRTHS AND DEATHS AND THEIR OWN PROCEDURES FOR REGISTERING THESE EVENTS. SOBBI MARRIAGES ARE RECOGNISED BY THE IRANIAN AUTHORITIES. (NB: IT IS UNCLEAR WHY THIS IS THE CASE GIVEN THAT THEY ARE NOT AN OFFICIAL RELIGION - BA'HAI MARRIAGES, FOR EXAMPLE, ARE NOT RECOGNISED. THE SOURCES WERE NOT ABLE TO EXPLAIN THIS). ALSO, DIFFERENT RULES APPLY TO SOBBIS FOR THE PAYMENT OF "BLOOD MONEY" IN CASES OF MURDER, ACCIDENTAL DEATH OR BODILY INJURY. (NB: UNDER THE IRANIAN LEGAL SYSTEM, IF A PERSON KILLS OR INJURES SOMEONE ACCIDENTALLY OR OTHERWISE, THEY MUST PAY "BLOODY MONEY" TO THE VICTIMS FAMILY IN ADDITION TO ANY OTHER PUNISHMENT THEY ARE LIABLE FOR. THE "BLOODY MONEY" PAYABLE FOR INJURY OR DEATH OF CHRISTIANS OR OTHER OFFICIAL RELIGIOUS MINORITIES IS LESS THAN FOR MOSLEMS.) BECAUSE SOBBIS ARE NOT A RECOGNISED RELIGION, NO BLOOD MONEY IS PAYABLE IF ONE OF THEM IS KILLED OR INJURED.

IN SOME RESPECTS SOBBIS DO NOT RECEIVE THE SAME LEVEL OF PROTECTION FROM THE AUTHORITIES THAT OTHER IRANIANS ENJOY. THE POLICE WILL GENERALLY PROTECT SOBBIS AND GENERALLY DO NOT DISCRIMINATE AGAINST THEM, BUT SOBBIS OFTEN HAVE PROBLEMS IN THE COURTS. IF THERE IS A LEGAL DISPUTE INVOLVING SOBBIS AND MOSLEMS, THE COURTS WILL OFTEN SIDE WITH THE MOSLEM PARTY, ESPECIALLY IF THE JUDGE IS RELIGIOUS. THEY ALSO SAID THERE CAN BE PROBLEMS IN CASES OF MARRIAGES BETWEEN SOBBIS AND MOSLEMS (ALTHOUGH THESE ARE RARE), BECAUSE IF A "MIXED" COUPLE ARE SEPARATED OR DIVORCED, CUSTODY OF THE CHILDREN WILL ALWAYS GO TO THE MOSLEM PARTNER. (NB: IN IRAN A MOSLEM MAN CAN MARRY A NON-MOSLEM WOMAN, BUT A MOSLEM WOMAN CANNOT MARRY A NON-MOSLEM MAN. CHILDREN OF "MIXED" MARRIAGES ARE CONSIDERED TO BE MOSLEMS. IT IS UNCLEAR HOW THE SITUATION EFFECTS SOBBIS ANY MORE THAN IT WOULD ANY OTHER RELIGIOUS MINORITY IN IRAN).

THE SOBBIS ALSO EXPERIENCE INTERFERENCE IN THEIR RELIGIOUS PRACTICES, BUT THEY ONLY GAVE ONE EXAMPLE OF THIS. THEY SAID THAT ONE OF THE PREMISES THEY USE FOR RELIGIOUS CEREMONIES IN AHVAZ WAS CONFISCATED BY THE AUTHORITIES AS A RESULT OF COMPLAINTS BY THE LOCAL BASIJ (A FUNDAMENTALIST ISLAMIC MILITIA THAT OPERATES THROUGHOUT IRAN). THE SOBBIS ARE TRYING TO GET THE PROPERTY RETURNED THROUGH THE COURTS, BUT THEY ARE NOT CONFIDENT THEY WILL BE SUCCESSFUL. THE TITLE DEEDS OF SOBBI COMMUNITY PROPERTIES ARE IN THE NAMES OF PRIVATE INDIVIDUALS RATHER THAN BEING REGISTERED TO THE SOBBI COMMUNITY ITSELF, TO MAKE IT LESS EASY FOR THE GOVERNMENT TO INTERFERE WITH THESE PROPERTIES.

(OUR SOURCES STATED THAT ECONOMIC CONDITIONS FOR SOBBIS IN AHVAZ ARE “GENERALLY GOOD, NOT BAD”).

OUR SOURCE STATED THAT COMMUNITY LEADERS ARE STRONGLY OPPOSED TO ILLEGAL MIGRATION AS THIS HAS THE POTENTIAL TO FURTHER DEplete THEIR SMALL COMMUNITY. LEADERS HAVE ADVISED COMMUNITY MEMBERS OF THE RISKS INVOLVED AND HAVE TOLD THEM NOT TO TAKE THIS OPTION. HE SAID THAT MANY SOBBIS WANT TO LEAVE IRAN AS THEY FEEL THERE IS NO FUTURE FOR THEM THERE, BECAUSE OF THE PROBLEMS OF DISCRIMINATION MENTIONED ABOVE AND ESPECIALLY BECAUSE THEY FEEL THAT THEIR CHILDREN’S FUTURES ARE LIMITED.

THE INFORMATION PROVIDED SUGGESTS THAT AS A RELIGIOUS MINORITY, THE SOBBIS EXPERIENCE DISCRIMINATION IN EMPLOYMENT AND EDUCATION AND IN THE WAY THE LEGAL SYSTEM OPERATES. HOWEVER THE SOURCES DID NOT SAY ANYTHING TO SUGGEST THAT THE IRANIAN GOVERNMENT ACTIVELY HARASSES OR ROUTINELY PERSECUTES THE SOBBIS AS A COMMUNITY).’

The report did not identify the source from which the Department of Immigration and Multicultural Affairs in Tehran obtained the above information.

34 The RRT put to the applicant and his wife the statement that the most recent information from the Australian Embassy was that ‘*Sobbis do not have problems with members of the general community*’. In the oral hearing before the RRT, the following exchange took place:

“MR KISSANE: Um ... ‘Cause Sabien Mandians have liked [sic] in that area in Arwaz for a long time haven’t they?

[MRS SBAS]: Yes, but with, ah, always with ah, anxiety and fear and ah, what sort of life is that? Tell them what, what sort of life do you call this?

MR KISSANE: All right. The most recent information that I’ve, that I have from the Australian Embassy ...

[SBAS]: Ah, they accuse us of being unclean, untouchable. Are we ...

MR KISSANE: The most recent information that I have from the Australian Embassy in Iran says that the Sabien Mandians in Arwaz keep very much to themselves. And it says that the Sobis do not have problems with the members of the general community. It says they get along well with most ordinary Iranians. They do not get involved in politics and are law abiding. And it says that the main area of concern of the Sobis in Arwaz is to preserve their religion and their separate identity which they feel are under threat.

[SBAS]: Will they allow me to say something? The aim of, the aim of the regime in Iran is that, to convert all of the minorities into Islam. One of the Mandois here has a tape which is in the property. The tape is the speech by the Yasdi, the head of the judiciary in Iran who say that some people regard even a book claiming to have a religion. The Mandois do not have a right to, to claim as such. They shouldn't do that. When the head of the judiciary says that, what would the ordinary and the revolutionary guard treatment of us would be? Each year um, all the human rights activists around, try to (inaudible), condemn Iran for the lack of observance of human rights. The, to the treatment of minority religions. If it was not for the existence of the United States and countries like Australia, England and some others, they would have massacred us like they did in Shustar. There is in the history of, in Shustar the Mandois were massacred.

MR KISSANE: After the Iranian revolution in 1979, there was very little contact between Iran and the outside, outside world and it seems like there is still a large number, still a sizeable community of Mandians in Arwaz and other areas in the south of Iran.

[SBAS]: Yes, but the number has dwindled, and most of them are fleeing to different parts of the world.

MR KISSANE: Mm. In our -

[SBAS]: Many of them have gone to Australia. Ah, and um, it's not easy for one to just go and ah, to a foreign country and live there. They, they have problems that they are living.

MR KISSANE: Yeah. In our information ...

[MRS SBAS]: You will excuse me, would you allow me also?

MR KISSANE: Yes, certainly.

[MRS SBAS]: They um, they do a lot of um, field trips with our young daughters. When they are at school they are told the teacher would say that the Mandois go to hell and when my children come home, they are in tears, what's our fault that we are Mandais, why should we go to the hell. And also they deceive young children, young Mandoi girls and marry them, and then after having a child, they desert them, they say we want a wife who is converted to Islam, and things like

that. And also the boys are circumcised and also they arrange um, for the marriage with the remaining ah, wives of the martyrs. You should look at us like a human being. I also the hospitals are not safe for the Sobi women because they fear that they could be raped in the hospital, and sometimes despite some severe illnesses they ah, fear going to the hospitals.

MR KISSANE: Mm. All right. Well, one of the um, things that the most recent information from the Australian Embassy says is that, the leaders of the Sobi community in Avaz are strongly opposed to illegal [sic] migration, um and ah, but that they feel that people are leaving because of problems of discrimination, and because they feel their children's futures are limited.

[MRS SBAS]: All the religious leaders are very frightened to speak out about the plight of the Sobis, and our, one of our religious leaders was even arrested for three days a few years ago.

MR KISSANE: Right. Um. The ah, sorts of discrimination that they were referring to were the closing of the ah, religious premises that you referred to before. Ah, also judges ah, often, been seen to side with Muslim parties in disputes, um and ah, not being able to enter university.

[SBAS]: The difficulties are even much more that [sic] what we stated.

[MRS SBAS]: Our religion is not recognised in Iran. We are not one of the four religion in Iran, our children, our husbands, they cannot go to universities. They cannot have enter, they cannot enter the public service. We are not, we don't have any rights. We are not respected in Iran. We are not regarded as human beings.

[MR KISSANE]: All right.

[SBAS]: We are in a country that the constitution even doesn't respect us. We are not accepted in the constitution. We have no security. Ah, ah, ah, I hope that the member would consider us, ah, ah, consider that we have had a life of misery. I would like at least at the age of 42, from then on, to feel like I'm a human being. And ah, I would like to see that my children when they come back from the school, that they are happy to be at school, they are coming back from school.

MR KISSANE: All right. Um, anything else you want to um, I'm going to talk to your wife in a moment, Mr um, [SBAS], but um, anything else you want to say?

[SBAS]: I would like to seek your assistance to help us and also if there are anything that is ambiguous [sic] that you want us to clarify, please?

35 The newspaper article to which the RRT referred in its reasons appeared in *The Australian* newspaper on 3 December 2001. So far as presently relevant, it said:

'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 subjected 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.'

## the application for review of the rrt decision

36 By amended application filed on 14 August 2002, the applicants sought, pursuant to s 39B of the *Judiciary Act 1903* (Cth), a declaration that the decision of the RRT dated 11 December 2001 affirming the decision not to grant protection visas, was invalid and of no effect. The grounds relied upon were:

'1. The Tribunal did not make the decision in good faith. The Tribunal was not open to persuasion that the Applicants had a well founded fear of persecution.

### Particulars

- (a) The Tribunal had pre-determined the issue of whether the Sabian Mandaean community faced persecution in Iran.
- (b) The Tribunal made credibility findings against the Applicants without regard to the material facts.
- (c) The Tribunal ignored the substantive factual basis upon which the applicant family claimed persecution as members of the Sabian Mandaean community.



- (d) The Tribunal cited boilerplate “country information” selectively, omitting relevant quotations from the authors cited.
  - (e) The Tribunal did not consider in its reasons the relevant “country information” and other independent information relevant to the material facts.
2. The Tribunal exceeded, alternatively failed to exercise, its jurisdiction by the decision.

### **Particulars**

- (a) The applicant relies on the particulars to ground 1 above.
  - (b) The Tribunal identified a wrong issue, asked itself a wrong question, ignored relevant material and relied on irrelevant material in such a way as affected the exercise of its powers by an erroneous understanding of what constitutes a “well-founded fear of persecution”.
  - (c) The Tribunal failed to consider all the claims of the Applicants as to why they faced persecution in Iran.
  - (d) The Tribunal made the decision in breach of indispensable conditions or imperative duties for the exercise of jurisdiction or power under the Migration Act 1958, specifically s 424 and s 424A.
  - (e) The decision of the Tribunal was so unreasonable that no reasonable person could have come to it.
3. The Tribunal failed to accord procedural fairness in not providing the Applicant with a reasonable opportunity to answer material or information in the possession of the Tribunal.

### **Particulars**

- (a) The Tribunal failed to provide to the Applicant for comment a prepared template of “Country Information” on which it relied.
- (b) The Tribunal failed to provide the unedited material from which the template was constructed.
- (c) The Tribunal failed to provide all material in its possession.’

(Original emphasis)

37 The decision in the present case was 'a *privative clause decision*' as defined by s 474(2) of the Act, the application for review having been lodged after 1 October 2001.

38 The case was argued originally on the basis that the effect of the privative clause was to remove the decision from judicial review, save in respect of the circumstances identified by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616. Those circumstances were that:

- (a) the decisionmaker did not make a bona fide attempt to exercise its power;
- (b) the decision does not relate to the subject matter of the legislation; and
- (c) the decision is not reasonably capable of reference to the power given to the decisionmaker.

39 Immediately before the hearing, the decision of a Full Court of this Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228 was delivered. This decision confined judicial review of privative clause decisions to the subject matters identified in *R v Hickman*.

40 After the conclusion of the hearing, Mansfield J delivered judgment in *SBAU v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1076. That judgment concerned the outcome of an application for judicial review of a decision of the RRT constituted by the same member who constituted the RRT in these proceedings. Both decisions concerned Mandaeen families. The RRT gave both decisions on the same day, rejecting both applications for fundamentally the same reasons, which included, in part, a boilerplate presentation of reasons for decision, including identical introductions, statements of relevant legal principles and applicable country information. It was the fact of substantial coincidence in approach, consideration, expression and outcome which formed part of the submission in the present application that the decision was not a bona fide exercise of the power to review under the Act. The applicants submitted that the failures which persuaded Mansfield J to find a want of bona fides were similarly evident in the reasons in the decision under review. The respondent made further submissions in response to each of the matters raised.

41 More recently, the High Court of Australia delivered judgment in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1; (2003) 195 ALR 1 and *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; (2003) 195 ALR 24. In the light of the High Court decisions, the majority decision in *NAAV* in this Court was no longer correct, and s 474 was given a construction which read down its otherwise broad terms.

42 The parties were invited to make further submissions in light of the High Court decisions, which they have done.

43 The applicants submitted that Ground 2 of the amended application raises as a ground of review, the failure of the RRT to exercise the jurisdiction to review the decision of the delegate, which amounts to a jurisdictional error within the jurisdiction of this Court, unaffected by the existence of the privative clause: see *Plaintiff S157* at [76]. There was, it was submitted, prejudgment of the issues, a failure to hear the claims as put by the applicants, and a failure to apply the correct test of a well founded fear of persecution.

## the law

44 In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, McHugh J dealt with the concept of persecution in the following way (at 429.- 431):

‘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. He or she may be “persecuted” because he or she is a member of a group which is the subject of systematic harassment: ... . 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 purposes of the Convention. The threat need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution: ... . 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: ... . The Federal Court of Appeal of Canada rejected the proposition that persecution required deprivation of liberty. 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: ... .’

See also Mason CJ (at 388).

45 In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, McHugh J said (at 258 - 259):

‘Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other

members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. (*Yang v Carroll* (1994) 852 F Supp 460 at 467). Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group. Thus, a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race. (cf *Korematsu v United States* (1944) 323 US 214. But the sanction must be appropriately designed to achieve some legitimate end of government policy. Thus, while detention might be justified as long as the safety of the country was in danger, lesser forms of treatment directed to members of that race during the period of hostilities might nevertheless constitute persecution. Denial of access to food, clothing and medical supplies, for example, would constitute persecution in most cases. It need hardly be said that a law or its purported enforcement will be persecutory if its real object is not the protection of the State but the oppression of the members of a race, religion, nationality or particular social group or the holders of particular political opinions.)

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. (cf *Shapiro v Thompson* (1969) 394 US 618 at 634; *City of Cleburne v Cleburne Living Center Inc* (1985) 473 US 432 at 440.) In cases coming within the categories of race, religion and nationality, decision-makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.'

Gummow J said (at 284):

'In ordinary usage, the primary meaning of "persecution" is (Oxford English Dictionary, 2nd ed (1989), vol 11, p 592):

“The action of persecuting or pursuing with enmity and malignity; esp the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it; the fact of being persecuted; an instance of this.”

Accordingly, I agree with the following formulation by Burchett J in giving the judgment of the Full Federal Court in *Ram v Minister for Immigration and Ethnic Affairs* ((1995) 57 FCR 565 at 568. Judgment in *Ram* was delivered after that of the Full Court in this case):

“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.”

46 In *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) said (at 302 - 303):

[24] As already indicated, there is a common thread linking the expressions “persecuted”, “for reasons of” and “membership of a particular social group” in the Convention definition of “refugee”. In a sense, that is to oversimplify the position. The thread links “persecuted”, “for reasons of” and the several grounds specified in the definition, namely, “race, religion, nationality, membership of a particular social group or political opinion”. (Art 1A(2)).

[25] As was pointed out in *Applicant A*, ((1997) 190 CLR 225 at 232-233, per Brennan CJ; at 257 - 258, per McHugh J; at 284, per Gummow J. See also *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568, per Burchett J, with whom O’Loughlin and R D Nicholson JJ agreed), not every form of discriminatory or persecutory behaviour is covered by the Convention definition of “refugee”. It covers only conduct undertaken for reasons specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct.

[26] **The need for different analysis depending on the reason assigned for the discriminatory conduct in question may be illustrated, in the first instance, by reference to race, religion and nationality. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.**

[27] The position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups - for example, terrorist groups - which warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views - for example, those who advocate violence or terrorism - differently from other members of society.

[28] As McHugh J pointed out in *Applicant A*, the question whether the different treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is “appropriate and adapted to achieving some legitimate object of the country [concerned]”. (*Applicant A* (1997) 190 CLR 225 at 258). Moreover, it is “[o]nly in exceptional cases ... that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving [some] legitimate government object and not amount to persecution” (*Applicant A* (1997) 190 CLR 225 at 259).

**[29] Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.’**

(Emphasis added)

47 In *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, Gaudron J said (at 6 - 7):

‘[14] ... The difficulty in applying the Convention definition of “refugee” in circumstances such as those in Somalia lies in recognising what, in those circumstances, is involved in the notion of “persecution”.

[15] It should at once be noted that a person who claims to be a refugee, as defined in Art 1A (2) of the Convention, has only to establish a “well-founded fear of being persecuted”. That is usually established by evidence of conduct amounting to persecution of the individual concerned or by evidence of discriminatory conduct, amounting to persecution, of others belonging to the same racial, religious, national or social group or having the same political opinion. And to establish that the conduct in question is “for reasons of” race, religion, nationality, etc, the individual concerned may seek to establish that that conduct is systematic, in the sense that there is a pattern of discriminatory conduct towards, for example, persons who belong to a particular religious group.

[16] **The Convention does not require that the individual who claims to be a refugee should have been the victim of persecution. The Convention test is simply whether the individual concerned has a “well-founded fear of persecution”. Nor does the Convention require that the individual establish a systematic course of conduct directed against a particular group of persons of which he or she is a member. On the contrary, a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion.**

[17] A second matter should be noted with respect to the Convention definition of “refugee”, namely, that, as a matter of ordinary usage, the notion of “persecution” is not confined to conduct authorised by the state or, even, conduct condoned by the state, although, as already pointed out, the Convention has, until recently, usually fallen for application in relation to conduct of that kind. (Hathaway, *The Law of Refugee Status* (1991), pp 101-105; Kalin, “Refugees and Civil Wars: Only a Matter of Interpretation?”, *International Journal of Refugee Law*, vol 3 (1991) 435; cf von Sternberg, “The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status”, *International Journal of Refugee Law*, vol 9 (1997) 169; Okoth-Obbo, “Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law”, in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1996) 7, at pp 7 - 17). Nor, as a matter of ordinary usage, does “persecution” necessarily involve conduct by members of a particular group against a less powerful group.

[18] **As a matter of ordinary usage, the notion of “persecution” includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to law or by other means. That being so, conduct of that kind, if it is engaged in for a Convention reason, is, in my view, persecution for the purposes of the Convention.** And that is so whether or not the conduct occurs in the course of a civil war, during general civil unrest or, as here, in a situation in which it may not be possible to identify any particular person or group of persons responsible for the conduct said to constitute persecution.’

(Emphasis added)

48 McHugh J, after a review of the authorities in *Ibrahim*, said (at 20 - 21):

[60] All these statements are descriptive rather than definitive of what constitutes persecution for the purpose of the Convention. In particular, they do not attempt to define when the infliction or threat of harm passes beyond harassment, discrimination or tortious or unlawful conduct and becomes persecution for Convention purposes. A passage in my judgment in *Chan v Minister for Immigration and Ethnic Affairs* ((1989) 169 CLR 379 at 430) suggests that a person is persecuted within the meaning of the Convention whenever the harm or threat of 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”. Read literally, this statement goes too far. It

would cover many forms of selective harassment or discrimination that fall short of persecution for the purpose of the Convention. Moreover, it does not go far enough, if it were to be read as implying that there can be no persecution unless systematic conduct is established.

[61] Given the objects of the Convention, the harm or threat of harm will ordinarily be persecution only when it is done for a Convention reason and when it is so oppressive or recurrent that a person cannot be expected to tolerate it. This accords with the discussion of what constitutes a “well-founded fear of persecution” in para 42 of the Handbook On Procedures And Criteria For Determining Refugee Status ((1979); re-edited 1992) issued by the Office of the United Nations High Commissioner for Refugees:

“ In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.” (Emphasis added)

[62] Dr Hathaway in his book *The Law of Refugee Status* ((1991), p 102) thought that the Canadian Immigration Appeal Board had “succinctly stated the core of the test” of persecution when it said that “[t]he criteri[on] to establish persecution is harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government by oppression”.

49 Importantly, as appears in par [60], his Honour qualifies the observations which he made in *Chan* to make clear that a course of systematic conduct is neither necessary nor sufficient in itself to make out persecution under Art 1A(2) of the Convention.

50 The approach which the RRT must take to its task was identified by McHugh J in *Ibrahim* (at 33):

‘[102]... In this case, among the questions which the tribunal should have asked were: (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) why will the applicant be subjected to that harm? and (d) if the answer to (c) is “because of his membership of a particular social group”, would the harm constitute persecution for the purpose of the Convention?’

51 That approach was cited with approval by Lord Bingham of Cornhill in *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 (HL) at 872 in a passage which adopts for the United Kingdom the same test (see at 871 - 872). See also *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840 at 854 (HL).

52 The authorities also establish that the RRT is required, in the discharge of its duty in conducting a review of the decision of the delegate under s 414 of the Act, to address and deal with the claim actually raised by the material or evidence.



53 In *Htun v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802 (Full Court), Allsop J, with whom Spender J agreed, said:

[42] The requirement to review the decision under s 414 of the Act requires the Tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. 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 Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24; and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1. See also *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247, at [18], [19], [21] and [50]. It is to be distinguished from errant fact finding. The nature and extent of the task of the Tribunal revealed by the terms of the Act, eg ss 54, 57, 65, 414, 415, 423, 424, 425, 427 and 428 and the express reference in Regulation 866 to the "claims" of the applicant eg 866.211, make it clear that the Tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant. ...'

See also the statement of Merkel J at [7] to similar effect.

## conclusion

54 On a fair reading of the reasons of the RRT, it failed to address the claims of each of the applicants in all their aspects as it was required to do, and it failed to apply, in respect of the claims made, the test of a well founded fear of persecution under the Convention definition, notwithstanding the provisions of s 91R of the Act.

55 The applicants' claims were **not** that:

- (a) Mandaean children could not go to school;
- (b) Mandaeans could not shop in ordinary stores;
- (c) Mandaeans could not have access to the police to report the commission of a crime;
- (d) Mandaeans could not practice their religion; or
- (e) Mandaeans could not go to hospital.

56 That the RRT found that the applicants could not do these things, was no answer to the applicants' claims.

57 Rather, the claim, in part, was what happened to Mandaeans, including the applicants, when they did or attempted to do these things, the treatment which they received and the reasons for such treatment, and those

matters that are particularised in par [11] (a) to (o) above, inclusive. The RRT was required to address each of these claims which, on their face, were serious claims which if accepted as having occurred, on the basis of the approach mandated in *Chen Shi Hai* (at 302 - 303) and the various observations of McHugh J set out above, including the observations of Gummow J in *Applicant A* and Gaudron J in *Ibrahim*, are hard to explain as having been engaged in for other than a Convention reason, namely for reasons of religion or because Mandaeans were members of a particular social group.

58 If the RRT accepted, as it appears to have done, that:

- (a) rocks were thrown through the windows of the applicants' home;
- (b) Mandaeans suffered harassment when shopping;
- (c) on occasions the police took no action when Mandaeans laid complaints;
- (d) religious premises were confiscated;
- (e) Mandaeans are not able to go to university;
- (f) Mandaean children at school are forced to learn Islamic religious beliefs; and
- (g) Mandaeans have difficulty in hospitals;

then the RRT was required to ask itself why this conduct was engaged in, and if for a Convention reason, whether or not it constituted persecutory treatment. This it did not do.

59 Moreover, the RRT did not address at all the claims of personal violence, and threats of violence to Mandaean women in their homes and in hospitals from Islamic men, nor the reasons for such violence or threats of violence to them (see the claims in pars [11] (l) and (m) above). Nor did it address the claims that children were denied the right to be taught their religion at school, were denigrated for their beliefs and put under pressure to convert to Islam in order to get access to a university education and employment in government service (see the claims in pars [11] (e), (f), (g) and (h) above). Nor did the RRT deal with the claim that because Mandaeans are regarded as unclean, they are denied access to a range of occupations which involve personal contact with food or goods or the provision of medical or other services which require close personal contact with the person (see the claims in pars [11] (g) and (i) above).

60 The RRT did not deal with all of the matters which the applicants referred to as a history of past events and an account and justification of their present fears as claimed in par [12](a) to (g) above, which matters touched their personal lives directly over and above the treatment they suffered in general with all members of the Mandaean community.

61 The RRT has accepted the account given by the applicant and his wife of the events which occurred on 4 February 2001. However, what the RRT failed to do, as it was required to do, was to ask why the police reacted in the way which they did and why the male applicant was threatened as he was by the alleged burglar, in company with a member of the Sepah an official body, and to consider the nature of the demands made at that time. The RRT was also required to consider how this event, with others, impacted on the treatment of the applicants, that impact being cumulative with the other events which they claimed impacted adversely on their lives by reason of their religion and their membership of the Mandaean community.

62 Although the RRT rejected the applicants' claim that the events of 18 February 2001 constituted an attempt to set him up with imputed political opinions contrary to the government and the Islamic authority as far-fetched and thus did not occur, it did not deal with the wife's claim to being physically assaulted and threatened on that night by police officers in front of her children, with ongoing emotional consequences to them. Nor did the RRT deal with the particular claims of the wife as reproduced in par [12] above. For example, the statement:

'The applicant wife claimed that after the birth of her second child she was not treated appropriately at the hospital. Whatever complaints she may have about her treatment at hospital the Tribunal finds that such problems do not amount to serious harm amounting to persecution.'

does not adequately address the claim that the wife was refused medical services by nursing staff at a hospital when her second daughter was born because she was Mandaean and in the view of the Muslim hospital staff, dirty and defiled (see par [12](d) above).

63 Finally, there were the claims of the children, as articulated by their parents and corroborated by the weight of material available to the RRT, including the country information report upon which it relied. The claim made was that it was the official policy of the Iranian government to force children to study Islam at school and to be denied access to further education and employment opportunities unless the children abandoned their Mandaean religion and embraced the Islamic faith. There was evidence that the policy was implemented in a way that denigrated and scared young children and discouraged or hindered them in the obtaining of a school education in contradistinction to that which was made available to Muslim children. To suggest, as the RRT did, that distress caused to a child by a teacher on account of a child's religious beliefs as an incident of governmental educational policy was a matter *'to be dealt with by parents and does not indicate to the Tribunal that the situation at school for young Sabaeans is so bad as to be considered persecutory'*, is to fail totally to understand the nature of the claim advanced, or to consider it in the manner required by the Act and the authorities to which I have referred earlier in these reasons.

64 For the reasons set out above, the decision of the RRT must be declared to be null and void and of no effect and the RRT, differently

constituted, be directed to hear and determine the applicants' application under s 414 of the Act for review of the delegate's decision according to law and these reasons.

65 I have not dealt directly with the case advanced on the basis of a lack of good faith on the part of the RRT as submitted by the applicants. In the view which I take of the demonstrable jurisdictional error in the failure of the RRT to hear and determine the claims of the applicants, it is unnecessary for me to do so, and I express no opinion as to the validity of the complaints made by Counsel for the applicants. As there were other matters argued which it was unnecessary to address in the view which I take, it should not be taken that I express any view in relation to them. The applications for review in the RRT must be considered afresh in their entirety, having regard to the materials then available to the RRT.

66 Costs should follow the event.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper.

Associate:

Dated: 30 May 2003

Counsel for the Applicants:	AM Sheehan
Solicitor for the Applicants:	Galbally Rolfe
Counsel for the Respondent:	MJ Roder
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	19 August 2002
Date of Judgment:	30 May 2003