FEDERAL COURT OF AUSTRALIA

NACM of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCA 1554

MIGRATION – judicial review of a decision to refuse to grant applicant a protection visa – Head of Medical Services of the Border Forces for the Republic of Georgia opposed to the supply of Russian weapons through Georgia to Chechen recipients – sought to report corrupt General – false criminal charges laid – whether persecution for reasons of actual or imputed political opinion – failure of Tribunal to address issues raised by applicant's claims – whether persecution motivated by actual or imputed political opinion of claimant a sufficient but not necessary condition for refugee status – constructive failure of decision-maker to exercise jurisdiction

C v Minister for Immigration & Multicultural Affairs (1999) 94 FCR 366, considered

Dranichnikov v Minister for Immigration & Multicultural & Indigenous Affairs [2003] HCA 26, applied

Guzman v Minister for Citizenship and Immigration (1999) 93 ACWS (3d) 733, cited

Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex parte Shah [1999] 2 AC 629, considered

Jarrin and Ors v Minister for Immigration & Multicultural & Indigenous Affairs [1998] FCA 765, considered

Kalala v Minister for Immigration & Multicultural & Indigenous Affairs [2001] FCA 1594, cited

Klinko v Canada (2000) 184 DLR (4^{th}) 14, cited

Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559, applied

Minister for Immigration & Multicultural Affairs v Sarrazola [2001] FCA 263, cited

NAEU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002]FCAFC 259, doubted, followed

Rajaratnam v Minister for Immigration & Multicultural Affairs (2000) 62 ALD 73, considered

Ramirez v Minister for Immigration & Multicultural Affairs (2000) 176 ALR 514, considered

Refugee Appeal No 72635/01 NZ Refugee Status Appeals Authority (unreported) 6 September 2002, cited

Sarrazola v Minister for Immigration & Multicultural Affairs (No 3)[2000] FCA 919, cited

Sepet v Home Secretary [2003] 1 WLR 856, considered

Thalary v Minister for Immigration and Ethnic Affairs (1997) 73 FCR 437, referred

V v Minister for Immigration & Multicultural Affairs (1999) 92 FCR 355, applied

Vassiliev v Minister for Citizenship and Immigration(1997) 131 FTR 128, cited

Zheng vMinister for Immigration & Multicultural Affairs [2000] FCA 670, considered

International Covenant on Civil and Political Rights 1966

Universal Declaration of Human Rights 1948

Vienna Convention on the Law of Treaties 1969

NACM OF 2002 v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

N 1568 of 2001

MADGWICK J

22 DECEMBER 2003

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N1568 of 2001

BETWEEN:	APPLICANT NACM of 2002 APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	MADGWICK J
DATE OF ORDER:	22 DECEMBER 2003
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside and the matter be remitted to the Tribunal to be determined according to law.

2. The respondent is to pay the applicant's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N1568 of 2001

BETWEEN:	NACM OF 2002 APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	MADGWICK
DATE:	22 DECEMBER 2003
PLACE:	SYDNEY

REASONS FOR JUDGMENT

HIS HONOUR:

1 This is an application for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal') affirming the decision of a delegate of the respondent Minister's Department to refuse to grant the applicant a protection visa.

Background

2 The applicant, a citizen of Georgia, arrived in Australia on 9 December 1999 and lodged an application for a protection visa on 30 December 1999.

3 Attached to the application was a statement setting out the grounds for the application. These were based on claims of a well-founded fear of being persecuted for reasons of political opinion.

4 The applicant claimed that he had worked as a field surgeon during the Ossetian-Georgian conflict in 1991-92. In 1992, the then Chairman of the Georgian National Democratic Party, Mr Chanturia, used his influence to arrange for the applicant to be appointed as Head of Medical Services of the Border Forces for the Republic of Georgia. He remained in this position until 1996. He claimed that, in that position, he came to attention because of his opposition to the supply of arms by Georgia to Chechen rebels during the Russian-Chechen conflict in 1995-96. The applicant claimed that he and other

officers of the Border forces supplied relevant information to the opposition party (the People's Party) (also known as the Solhalko, Sachalcho or Sakhalko Party) about these activities.

5 The applicant claims that he was arrested on 31 July 1996 and accused of conspiring to overthrow the Georgian government. He had been on his way to a meeting with the Georgian President, Mr Shevardnadze. However, he was advised that the meeting had been cancelled. Soon after this he was arrested. Following his arrest, the applicant claims that he refused to sign a false confession, prepared by persons in authority, admitting an allegation that he had conspired to overturn the government. He was then charged with the 'criminal' offence of armed robbery. The applicant claims that, during his subsequent detention, he was subjected to physical torture and 'psychological and moral pressure' and was prevented from having any contact with his legal representatives for approximately one and a half months. He was convicted and sentenced to three years imprisonment but was released after four months, due to pressure from members of the People's Party who made speeches in parliament against his imprisonment. After his release from prison on 4 December 1997, he claims that he was 'practically placed under house arrest' and was unable to obtain employment.

6 Following the 1999 elections, the People's Party failed to win any seat in the Georgian parliament and, fearing for his life if further false charges were to be laid against him, because there would be no-one in Parliament to come to his assistance, the applicant made plans to leave Georgia. He claims that he travelled to Russia but did not stay there because of tension between Russians and people from the Northern Caucasus. He then obtained documentation to travel to Australia.

7 In a letter to the respondent's Department after the delegate found against him, the applicant claimed that he was arrested as part of an attempt to clear the Georgian army of people appointed by the former Defence Minister, Mr Kitovani, who was, by then, a political prisoner.

The claims in more detail

8 In a further statement of 23 July 2001 provided to the Tribunal the applicant elaborated his claims. He had, he said, become friendly during the 1990-92 Georgian- Ossetian war with future leaders of the Georgian government, especially Messrs Chanturia, Kitovani and Ioselliani. They belonged to the National Democratic Party ('NDP'). In 1994, Mr Chanturia, the NDP leader was assassinated and there was a split in the NDP. The applicant joined the newly formed People's Party. By 1995, Mr Shevardnadze was the Georgian President and political terrorists attempted to assassinate him. Following this, 'severe repression went through the whole of the Military System'. Mr Ioselliani and Mr Kitovani were arrested and imprisoned. Their political enemies in government knew that the applicant had a 'strong connection' with them.

9 As to arms to Chechnya, the applicant said that he and most of his fellow Border Army officers supported what was the official position of the Georgian government on the Russian-Chechen conflict, namely one of non-interference. However, the Chief of the Border Army Forces, General Chkeidze was personally involved in, and had made millions of dollars through, illegally trading Russian weapons through Georgia to Chechen recipients. The applicant strongly opposed this for a variety of reasons: it prolonged war, which he hated; and he had some special feeling for Chechnya on account of having a Chechen forebear and some acquaintance with the country. In addition and by clear inference, the applicant was suggesting that he opposed official corruption.

10 The applicant continued:

'I had a meeting with The President, Mr Shevardnadze scheduled for July 1996 to discuss plans of building the President's Hospital. This meeting would [have] been very important for both myself and the leader of The People's Party Mr Giorgadze who personally asked me to inform Mr Shevardnadze about the situation with weapon trade through Border Army Forces. At this stage some information had already leaked through different sources but it would [have] been very important if it was coming from someone like me who was very close to the source. General Chkeidze realised that his 'business' was under a threat and with [the] help of Mr Sadjaia, 'right hand' of Mr Shevardnadze, who supervised all internal political situation in the country (and still does so) and was also receiving huge profits from sales of the weapons, a warrant for my arrest was issued [and] signed by [the] Attorney General of the Georgian Republic. I was alleged to be an important member of the group that tried to assassinate the President in 1995. Later during the trial this was changed from political allegations to even more unreal case of 'banditism'.'

11 The applicant went on to explain that, in 1999, following attempts to clear his name, he was called to a parliamentary sub-committee which was considering a complaint from the main witness in the criminal case against the applicant that she had been forced to make false accusations against him; she now claimed that he was innocent of the charges. The applicant said that a

member of the sub-committee advised him that the sub-committee had found he was innocent and that the matter would need to be referred back to the Attorney-General's office for further investigations. The applicant claims that this would have resulted in again bringing him to the attention of the same people who had fabricated the original charges and that he would be at further great risk. At his request, the committee members agreed to delay notifying the Attorney-General. He then made arrangements to leave Georgia.

12 The applicant explained that he was concerned about the accuracy of the initial information submitted to the respondent's Department through his ex-adviser.

13 As the Tribunal put it, summarising his claims:

'… the basic issue is that, because he was intending to expose corruption on the part of senior officials, they arranged to have false charges laid against him. Although he was ultimately released after political intervention, his ongoing attempts to clear his name were a threat to those corrupt officials who framed him, which placed him at risk of further retaliatory repression on their part. He agreed that this was the case.

…

If he were to return and keep quiet about the injustice done to him, he might possibly have no problems, but he would feel obliged to clear his name, which would threaten those in authority who had acted improperly.

14 The Tribunal, ably if I may say so, confirmed from independent sources some important parts of the applicant's story. The People's Party has a 'right-centrist' stance. It supports Mr Shevardnadze's strengthening of ties to the West, but not his government's decisions to remain in the Commonwealth of Independent States ('CIS') and to allow Russian bases and troops on Georgian soil. There had been unofficial claims, reported by the BBC, of Georgian armed forces having sold weapons to a Chechen separatist commander.

15 An arms-length Georgian-Australian witness gave much support to the applicant's account of matters.

The Tribunal's decision

16 The Tribunal accepted that the applicant is a citizen of Georgia; that he was the head doctor in the Georgian Border Forces; that, based on the material produced by the applicant, he was in fact falsely accused by corrupt officials of armed robbery, convicted and imprisoned for that offence and that his fear of serious harm if he returned was well-founded.

17 The critical issue, in the Tribunal's opinion, was whether the applicant's fear was based on persecution for a Convention reason. The Tribunal noted that the applicant had said that there were two possible reasons why the false charges were laid against him: firstly, his knowledge of the illegal arms supply by the General and the applicant's intention to inform the President of such wrong doing and; secondly, his having refused certain homosexual overtures by Sadjaia, Secretary General of the Georgian National Security Council, in consequence of which Sadjaia had threatened to destroy him. Addressing the second possible reason first, the Tribunal considered that any revenge taken by Sadjaia would be for personal reasons and not based on a Refugees Convention reason.

18 The Tribunal then considered whether the feared persecution would occur because of the applicant's intention to report on illegal arms sales and whether it could be said that his persecutors would impute a political opinion to the applicant. The Tribunal Member accepted that the applicant had 'close links' with the leader of the People's Party and sympathised with that party's political views. The Tribunal also acknowledged that he may have owed his appointment as Head of Border Forces to his close friendship with that Party's former leader and that two people who, the applicant claims, were instrumental in his appointment, were imprisoned following an assassination attempt on the President in August 1995. However, in respect of his association with those men, the Tribunal considered that, if the applicant was 'tainted' by that association, then action would likely have been taken against him in 1995 and, if such claims were correct, it was not plausible that he would be able to arrange a personal meeting with the President in 1996, as claimed.

19 The Tribunal considered the motivation of General Chkeidze and reached the conclusion that 'the motivation of those who connived to have the applicant framed and convicted was not political in nature'. Any revenge would be taken on the basis that the General's business was threatened by the applicant's intention to disclose these activities to the President. The Tribunal made reference to the applicant's own opinion that, as the Tribunal put it, 'the General realised that his 'business' was under a threat and acted to neutralise the threat posed by the applicant.' The Tribunal found that, whilst the applicant was initially charged with a political offence, this had been quickly replaced by criminal charges and it was clear, in the Tribunal's opinion, that these actions were not a response to any political opinion genuinely attributed to the applicant, but an excuse for his arrest. The Tribunal concluded that, whilst it may be common for 'political' prisoners to be charged with criminal offences, the motivation in this case 'of his persecutors was to protect their criminal business' and not because of any political opinion held by the applicant.

20 The Tribunal noted that the applicant had raised the issue of his Ossetian ancestry as being a factor in relation to his persecution. The applicant claimed that details of such background were provided to officials after his arrest. The Tribunal did not consider that the applicant's ethnic background was an essential and significant reason for the false charges: see s 91R(1)(a) of the *Migration Act 1958* (Cth) ('the Act'). In the absence of this being such a factor, the Tribunal Member considered that he was constrained from considering that issue further.

21 The Tribunal also did not accept the applicant's claim that he would face persecution for a Convention reason if he returned to Georgia merely because he had left illegally. If he should be prosecuted for not complying with travel requirements, then any prosecution would be for violating a law of general application. If the applicant should be prosecuted with more than usual vigour, then the motivation, in the view of the Tribunal, would be for the reasons outlined earlier, that is either for reasons of personal revenge by Sadjaia or because he threatened the success of the General's illegal arms business.

22 The Tribunal concluded that the applicant's well-founded fear of harm was not the result of persecution for a Convention reason.

Application for judicial review

23 The applicant sought judicial review claiming that he was aggrieved by the Tribunal's decision because:

'The Refugee Review Tribunal erred in law by not considering, allowing for, or giving any weight to the possibility that asylum could be granted because of the applicant's fear of persecution for the reason of his ethnicity.'

24 The ground for review was framed as follows:

‘The Tribunal’s failure to allow the claim on the ground of ethnicity was due to its erroneous understanding of the decision in Thalari.’

The reference to ‘the decision in Thalari’, is to a decision of Mansfield J in *Thalary v Minister for Immigration and Ethnic Affairs* (1997) 73 FCR 437, before the enactment of s 91R.

25 In written submissions, the applicant again said that the Tribunal had failed to consider whether his ethnic background was a motivating factor behind the actions of the applicant’s persecutors.

Ethnicity

26 The difficulty that the applicant faces as to his ethnicity argument is that amendments to the Act require that the reason (or reasons) relied upon for the granting of a protection visa must not only fall within the Refugees Convention definition but must also be ‘the essential and significant’ reason (or reasons) for that persecution. Section 91R(1) of the Act (as amended by Act No 131 of 2001) relevantly provides:

‘(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.’ (emphasis added)

27 The Tribunal Member, noting that this was the relevant test, found as a matter of fact that the applicant’s ethnic background was not the ‘essential and significant’ reason for false charges being laid against the applicant.

28 This is a conclusion of fact and, even if one were to assume that the Tribunal had made some factual error in reaching this conclusion, having applied the correct legal test, it remains at most, an error of fact. The Court has no power to interfere with this finding.

29 Further issues were, however, raised in argument.

Failure to address issues raised by applicant’s claims

30 It seems to me that, despite his careful consideration of the matter, the Tribunal Member overlooked an important issue.

31 It is necessary, in the current cliché, to unpack the proposition that, because the General feared exposure of his alleged criminality, he had false charges lodged and false convictions obtained against the applicant. The General was, as a military officer, unlikely to have laid the false charges himself or to have supervised, either at all or alone, the processes of the criminal justice system attendant upon the manufacture and presentation of false evidence. One or more other persons and, one would infer, publicly employed lawyers and/or police, must have done this. There is no way of knowing, on the material before the Tribunal, whether or not the others (I assume more than one would have been involved) knew that the General's wrongdoing was his real motivation for pursuing the applicant. If they did not know that, it is unlikely that the General would have informed them of that fact. If the General did not so enlighten them, it could be inferred that he would have urged prosecution of the applicant on account of his actual or imputed, political opinions: the applicant was initially prosecuted, in terms, on that account; further, why would the officials otherwise be motivated to harm the applicant by falsehoods? If so, the applicant was clearly a refugee. Likewise, to the extent that the applicant might realistically fear revenge from the sexually rebuffed senior official, after the latter's threat to 'destroy' him, a similar process of unpacking what is clearly implicit in the prospect that that official might cause or help to cause the persecution of the applicant might reveal similar issues not addressed by the Tribunal.

32 Thus, there was implicit in the applicant's story as accepted by the Tribunal a potentially real, substantial basis for a Convention-reason being the cause of the persecution he had faced and feared, which the Tribunal did not address. An assessment should have been made of the probabilities and possibilities of such events having occurred.

33 The words of Kirby J in *Dranichnikov v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] HCA 26 at [17] are applicable here:

'This Court has repeatedly held that, for the issue of prohibition or mandamus under s 75(v) of the Constitution, it is necessary to demonstrate jurisdictional error on the part of the proposed subject of such relief. Thus, it is essential to establish something more than an error of law within jurisdiction. Difficult as it may sometimes be to differentiate jurisdictional and non-jurisdictional error with exactitude, in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction. It will be treated as a constructive failure of the decision-maker to exercise the jurisdiction and powers given to it.

Obviously, it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction. But where, as here, the mistake is essentially definitional, and amounts to a basic misunderstanding of the case brought by an applicant, the resulting flaw is

so serious as to undermine the lawfulness of the decision in question in a fundamental way.

The applicant has established a constructive failure on the part of the Tribunal to exercise its jurisdiction and power in reviewing the decision of the delegate. Prima facie, he is therefore entitled to the issue of the constitutional writs that he seeks and the associated relief of certiorari to make such writs effective.' (footnotes omitted)

It follows that the application should succeed and that a writ of mandamus should issue.

Imputed political opinion

> 34 A question also arose as to whether the Tribunal Member had fully comprehended the questions of imputed political opinion raised by his essential acceptance of the applicant's story and whether, in seeking to disclose the General's alleged corrupt arms dealing, the applicant had been or may have been giving expression to an opinion that corrupt official conduct of that kind should not be allowed and should be stamped out. Such an opinion would, in my view, be a political opinion.
>
> 35 As counsel for the applicant submitted, a number of cases indicate that, where an applicant reports or seeks to expose corruption by a person in authority and the applicant suffers persecution on this account, the persecution may be for reason of the applicant's political opinion. In the Full Court decision in *V v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 355 ('*V*') at [32], Hill J stated:

'The exposure of corruption itself is an act, not a belief. However, it can be the outward manifestation of a belief. The belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion.'

> 36 In *Ramirez v Minister for Immigration & Multicultural Affairs* (2000) 176 ALR 514 ('*Ramirez*') at [41] the Full Court of this Court referred to the above statement of Hill J with approval.
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> 37 In *Zheng vMinister for Immigration & Multicultural Affairs* [2000] FCA 670 the applicant reported to the authorities the corrupt activities of Mr He, his superior in the Heping District Branch of the government owned Construction Bank of China. Mr He then instigated threats against the applicant's life and fabricated a case of corruption against him. The Tribunal found that the action taken against the applicant by Mr He did not constitute persecution for reasons of political opinion. Merkel J (at [19]) accepted that 'exposure of corruption or whistleblowing can result in persecution by reason of an actual or imputed political opinion', although (at [34]) 'a critical issue will always be whether there

is a causal nexus between the actual or perceived political opinion said to have been manifested by the exposure of corruption and the well-founded fear of persecution'. Merkel J referred to a number of Canadian authorities which support the point that in certain circumstances opposition to corrupt or criminal acts of persons in authority may give rise to persecution for reason of political opinion. The cases (discussed at [21] to [28]) are *Vassiliev v Minister for Citizenship and Immigration*(1997) 131 FTR 128, *Klinko v Canada* (2000) 184 DLR (4th) 14, and *Guzman v Minister for Citizenship and Immigration* (1999) 93 ACWS (3d) 733. In *C v Minister for Immigration & Multicultural Affairs* (1999) 94 FCR 366 the applicant reported

activities concerning the Mafia and corrupt government officials in Colombia to the police, following which he received threats to his life. The Tribunal found that:

'… the applicant husband is being targeted as an individual because of what he knows, and what he has exposed and what he might expose, and not for reasons of his actual or imputed political opinion.'

38 Wilcox J set aside the Tribunal's decision on the ground that, on the basis of the Tribunal's reasons, it appeared that the Tribunal was not aware that 'resistance to systemic corruption of, or criminality by, government officers might be regarded as a manifestation of political opinion, depending on the circumstances': see [25]. It is implicit in Wilcox J's decision that his Honour accepted that threats experienced by the applicant could be for reasons of political opinion.

39 In *Rajaratnam v Minister for Immigration & Multicultural Affairs* (2001) 62 ALD 73 at [46] – [48] Finn and Dowsett JJ in the Full Court, in considering a matter where the Tribunal accepted that the applicant had experienced threats from an army officer after making a complaint about him but found that the army officer's motivation in seeking to harm the applicant was not for a Convention reason, observed:

'As this court has indicated on several occasions, care needs to be taken when considering whether extortion has been practised upon a person for a convention reason: see, eg, Minister for Immigration and Multicultural Affairs v Sarrazola (1999) 95 FCR 517 …

In a particular setting, then, extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of convention-related persecutory conduct. For this reason, the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrators interest in the extorted personal or was it convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.'

40 If the applicant was expressing a political opinion against official corruption, then the applicant's fear of being arrested might well be for reasons of such opinion, since the

expression of the political opinion and the threat to the General's business were entirely constituted by the same intended actions of the appellant.

41 The Tribunal Member considered that the applicant's attempts to disclose information about the illegal arms trade had not led his persecutors to impute a political opinion to him: their motivation 'was to protect the criminal 'business' '. However, the Tribunal Member's failure to consider whether the General's actions were or might have been a response to *both* the threat to his illicit business and the applicant's implicit political opinion on that subject, could lead to the conclusion that the Tribunal had not asked itself the correct question or failed to understand that there was an alternative finding available on the evidence: see for example *Kalala v Minister for Immigration & Multicultural & Indigenous Affairs* [2001] FCA 1594 at [24].

42 The manner in which the Tribunal dealt with the matter is inconsistent with the statement of law of Hill J in *V* at [32] [see [35] above], referred to with approval by a Full Court in *Ramirez*. For example, applying the words of Hill J, if the corruption identified by the applicant in relation to General Chkeidze 'is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion'.

43 Counsel for the respondent argued that the Tribunal Member *had* considered the question of whether the applicant's persecutors had imputed a political opinion to him: the findings of the Tribunal exclude a finding that the applicant's persecutors' actions were motivated by either an actual or imputed political opinion held by the applicant. Counsel denies that, if the General were involved in alleged arms dealing, and had known that he was about to be exposed, this must *necessarily* mean that his rage would be motivated by the applicant's political opinion. These submissions seem to me to be correct but that does not meet the point based on *V*. If, as appears to be the case, the Tribunal Member misdirected himself by his evidently inadequate appreciation of the law, and thereby failed to appreciate that inferences that might assist the applicant were open, the error is not cured by an actual failure to draw those inferences: it is still the case that the Tribunal failed to ask itself, in that respect, the right question and, had it done so, a different result might possibly have ensued.

44 On this account also, the applicant is entitled to have the Court intervene.

Persecution and persecutors' motivations

45 If that conclusion is incorrect the case exposes another difficult question. That question relates to the Tribunal's evident understanding of the Convention, so far as it concerned a 'well-founded fear of being persecuted for reasons of … political opinion'.

46 The Tribunal accepted that:

- ‘the applicant was in fact falsely accused, by corrupt officials, of armed robbery and was convicted and sentenced to a term of imprisonment’,

- the applicant’s ‘deprivation of liberty, the mistreatment [i.e. torture] he experienced and the prevention of him [from] securing employment’ were within the concept of persecution amounting to ‘serious harm’ set up by s 91R of the Act,

- ‘the reason for his arrest was because he was preparing to inform the President of corrupt actions of the General’,

- that ‘proposed course of action [by the applicant] was arrived at in consultation with Mr Giorgadze’, the leader of the People’s Party, and

- the appellant has a ‘well-founded fear of persecution in Georgia’.

47 Nevertheless, the Tribunal rejected this claim, on the basis that:

- the motivation of his persecutors was to protect their criminal ‘business’ and not because of any political opinion the applicant had;

- therefore the ‘motivation for [the applicant’s] persecution does not lie in any of the five reasons mentioned in the Convention’.

48 If the matter were free of authority, I would approach this matter in the following way. The Convention definition of a ‘refugee’ is:

‘For the purposes of the present Convention, the term “refugee” shall apply to any person 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 …’

49 It is well-settled that it will suffice for a putative refugee to show a ‘real, substantial basis’ [*Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572] for a fear of persecution (even if there is considerably less than a probability of its occurring) where the would-be persecutor is motivated by the actual or imputed political opinion of the claimant.

50 Because this is a sufficient condition of refugee status associated with political opinion, it is often stated, in one form or another, as if it were a necessary condition, usually, answering that test will resolve the issue. I have perpetrated this confusion myself: see *NAEU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002]FCAFC 259 (‘*NAEU*’), on which occasion I was joined by Merkel and Conti JJ, and an earlier first instance decision, *Jarrin and Ors v Minister for Immigration & Multicultural & Indigenous Affairs* [1998] FCA 765. However, on further reflection it seems to me that neither analysis of the text of the Convention nor a consideration of its relevant context compel that conclusion. On the contrary, each tends to the

view that, in some cases, although one cannot say that a real and substantial motivation of the persecutor is the claimant's actual or imputed political opinion, it is enough if the claimant demonstrates that such political opinion is the true cause of his or her predicament, namely unwillingness to return because of the fear of persecution.

The text of the Convention

51 The Convention itself does not say that the feared persecutors must be motivated by anything in relation to the applicant for refugee status, except insofar as motivation of the persecutor might be implicit in the concept of 'being persecuted', a matter to which I shall return. Indeed, the Convention does not fasten on qualities of the persecutor at all. On the contrary, it concerns itself with the person who has the fear 'of being persecuted'. Nor does it expressly require that such person's fear be conditioned by anything to do with the persecutor's actual motivation. It is enough that there be a fear that the person concerned will be persecuted for reasons of political opinion. In using the passive voice of the verb 'to persecute', it seems to me that the Convention set up a test, conformable with dictionary definitions of 'persecute', of being seriously oppressed. That idea is also consistent with the causational expression 'for reasons of' (which introduces the Convention-proscribed attributes of the person concerned) being linked to the oppressed condition of that person. Thus, it appears textually to suffice, among other things, if it can reasonably and realistically be said that the putative refugee fears being persecuted because, in fact, he or she holds a political opinion, whether or not the persecutor knows of this.

52 The only textual indication to the contrary is, as indicated, the view that it is inherent in the concept of 'being persecuted' that the persecutor be activated by the reason or motivation that the subject person holds (or a belief that the latter holds) a political opinion, etc. But, as dictionaries confirm, the primary meaning of the verb 'to persecute' is to pursue with injurious or oppressive action. The secondary meaning, it is true, requires also the persecutor's motivation that the persecuted holds an heretical opinion or belief. However, the Convention definition itself expressly deals with the elements of causation ('for reasons of') and of the *kinds* of persecution that are relevant: it is not necessary to find them in the interstices of the phrase 'being persecuted'. Hence, having regard to the text, even without considering its broader context, the better view appears to be that conscious motivation of the persecutor by any of the Convention-proscribed grounds is not inherent in the phrase '… fear of persecution'.

53 However, in construing international treaties it is mandatory to construe the 'ordinary meaning' of the text in the light of its object and purpose: see *Vienna Convention on the Law of Treaties 1969*. The contextual considerations support the 'bare' textual analysis offered above.

54 In *Minister for Immigration & Multicultural Affairs v Sarrazola* [2001] FCA 263, the Full Court (Merkel J, Heerey and Sundberg JJ agreeing) indicated that the major international human rights instruments, the

‘International Bill of Rights’ as they are often called, were part of the context of the Convention: see also at first instance *Sarrazola v Minister for Immigration & Multicultural Affairs (No 3)*[2000] FCA 919. It is enough to refer to the Universal Declaration of Human Rights (‘UDHR’) and the International Covenant on Civil

and Political Rights 1966 ('the ICCPR'). The UDHR, adopted by the General Assembly of the United Nations in 1948, proclaimed:

'Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

55 The ICCPR, adopted in 1966, by the General Assembly, provides:

'Article 2

…

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

…

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

…

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

…

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;

   (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

56 It is clear enough that, at least for some people in some situations, an Article 19 'opinion' on political matters will also amount to 'thought' and 'belief' within Article 18. Thus, the right to hold a political opinion may well be within the category of rights so highly respected internationally that no derogation may be made from them, even in the circumstances of overwhelming public emergency that Art 4(1) contemplates.

57 The quoted treaty provisions indicate that the ability of people to hold *and to express* their subjective thoughts, opinions and beliefs was sought to be guaranteed by the international community. As the Preamble to the Refugees Convention puts it, '… the United Nations has, on various

occasions, manifested its profound concern for refugees and endeavoured to assure refugees the *widest possible exercise* of [the UN affirmed] fundamental rights and freedoms' (emphasis added). The Preamble as a whole also makes it clear that the aim of the Refugee Convention was international cooperation for the 'protection of refugees'. That is, the focus is on the plight of the refugee, not punishing or even shaming his or her persecutor. If the putative refugee's politically motivated act results in his or her illegitimate oppression, it is of no comfort that the oppressor is not actually motivated by an appreciation of what drives the refugee. Indeed, it would make a mockery of the international human rights guarantees if a person in fear of oppression because he or she has acted or threatened to act on a political conviction could be denied refugee status merely because an official oppressor is motivated by an intention to prevent, or to seek revenge for, the act impelled by the victim's political conviction, but is too distracted or for other reasons fails to appreciate also that the person fearing oppression had been motivated by such conviction, or where the victim's motivation simply does not concern the oppressor. The putative refugee is nevertheless in his or her predicament because of political belief. The only way to avoid (in this case, to have avoided) the persecution would be to deny oneself the expression of the political opinion. But that is to ask of a committed person that he or she deny what accepted notions of human dignity assert need not be denied. Such is exactly what international human rights law seeks to guard against. The right to hold an opinion is nothing if there is no right lawfully to express it, including by acting on it.

58 The Convention is of course not only concerned with political opinion: it also seeks to relieve persecution for reasons of race, religion, nationality and membership of a particular social group. An unwarrantedly narrow view of 'being persecuted' is likely to disadvantage people in relation even to the expression of their natures or innate characteristics, which might be regarded as even more fundamental to human dignity than freedom of thought. See now *Appellant S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] HCA 71. Thus any narrow, literalist approach (assuming my preferred literalist analysis to be mistaken) to the notion of being 'persecuted' for reasons of political opinion appears disconsonant with the concerns properly to be imputed, as a matter of interpretation, to the framers of the Convention.

59 From first principles, to borrow and extend an expression from *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex parte Shah* [1999] 2 AC 629 per Lord Hoffman at 653: 'persecution = harm + failure of state protection + discrimination'. Discrimination law, both nationally and internationally, treats as uncontroversial the proposition that discrimination may be legally established where either the intent or effect of conduct is discriminatory. Domestically, see for example *Disability Discrimination Act 1992* (Cth), s 6.

60 Internationally,

'[T]he term "discrimination" as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose **or effect** of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (emphasis added): UN Human Rights Committee, "General Comment No. 18: Non-Discrimination" (1989), at para 7, UN Doc. HRI/Gen/1/Rev.5, Apr 26 2001.'

61 Powerful support for the approach I favour is provided in an erudite judgment given by Messrs RPG Haines QC and DJ Plunkett in a New Zealand case: *Refugee Appeal No 72635/01* NZ Refugee Status Appeals Authority (unreported) 6 September 2002 paras 167-176 (available at www.refugee.org.nz). See also (2002) 23 *Michigan Journal International Law* 207ff, where Professor Hathaway introduces articles supportive of the analysis that I find persuasive.

62 Here, the 'reason in the mind of the persecutor' and the 'real reason for the persecutory treatment' depends on who is regarded as the persecutor. On the 'unpacking' analysis offered above, the persecutors are or include the legal/police functionaries. Otherwise, the persecutor was the General. No doubt the reason in his mind was to rid himself of or to discredit an informant as to his criminal activity. But were it not for the willingness of State functionaries to pervert State legal processes, the persecution as feared by the applicant could not occur. Hence the 'real reason' still requires that regard be had to those the General managed to influence. And, finally, the 'real reason for the persecutory treatment' might well be thought to be the applicant's expression of a political opinion.

63 The question conventionally asked has been: Is the motivation of the persecutor the actual or perceived political opinion of the claimant? A more practical and properly inclusive question would appear to be: Is it the claimant's actual or perceived political opinion that accounts for the persecution the claimant fears? The latter question includes the former and is a closer paraphrase of the actual Convention language. It also better fastens attention on the necessity, in the interests of the vindication of human dignity, to rescue the claimant from the fearful predicament in which the combination of his/her political opinion (or other

Convention protected attribute) and the lack of effective state protection of the right to express such opinion puts him or her.

> 64 Some caveats may be immediately entered (and experience might well suggest others). It is not in every case where a persecutor is a public official that his or her persecution of the victim has been stimulated by any political opinion held by the latter. An aspect of the present case furnishes an example. If the official whose sexual advances the appellant rebuffed sought revenge on the appellant by entirely private means, nothing in that scenario would indicate or implicate any political opinion on the part of the appellant, who merely expressed a preference, quite private in nature, to reject those advances. Next, there are cases where the logic of the Convention definition, as I suggest it should be understood, should avail a person who has, out of fear, never done anything to express his or her political opinion – a conscientious objector to participation in a war involving war crimes, who would be shot as a mutineer, might be an example, c.f. *NAEU* supra. In an era when so many claims of refugee status are rejected as factually false, decision-makers can be relied upon to accept such claims as having a 'real, substantial basis' only after considering the extent to which the claims must be taken with a grain of salt.
>
> 65 Unfortunately, however, it seems to me that a single judge of this Court cannot give effect to these views. In light of the authority of *NAEU*, that can only be done at an appellate level by a Full Court. In that case, the other members of the Full Court joined me in saying:

'…it is not sufficient, as submitted by counsel for the appellant, that the appellant need only establish that there was a fear of harm and a Convention reason (in this case, his political opinion) for that harm to qualify for protection under the Convention. The appellant was also required to establish that his persecutors had actual or imputed knowledge of his political opinion and would exact punishment at least partly because of that political opinion. In Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559, a case involving a fear of persecution because of the respondents membership to a particular social group of Chinese citizens who opposed the government's "one child policy", the following comments were made by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (at 570-71):

> "An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A(2) of the Convention. The first respondents claimed before the Tribunal that they feared persecution in the form of punishment for contravening the PRC government's 'one child policy' and for their illegal departures and that such persecution would be inflicted for the Convention reason of 'political opinion' and/or 'membership of a particular social group'.
>
> For the purposes of the Convention, a political opinion need not be an opinion that is actually held by the refugee. It is sufficient for those purposes that such an opinion is imputed to him or her **by** the persecutor. In Chan Gaudron J said:

> ‘persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief.’

In the same case, McHugh J said that:

> ‘It is irrelevant that the appellant may not have held the opinions attributed to him. What matters is that the **authorities identified [Mr Chan] with those opinions** and, in consequence, restricted his liberty for a long and indeterminate period.’ (emphasis added)

Counsel for the appellant, correctly in my view, conceded that the act of desertion per se is politically neutral, that is, no inference of any particular political opinion should be drawn from it. Thus, to establish that the appellant was a person to whom Australia owed protection obligations, it was necessary for the appellant to point to evidence that would establish that any punishment for his desertion would be exacted, in part or in whole, because of his political opinion. This required that there be material showing that the Sri Lankan authorities (the alleged persecutors) were aware of the applicant’s claimed political opinion or had imputed such an opinion to him. There simply is no evidence to support the existence of such knowledge or imputation.

Counsel for the respondent submitted that Guo does not support the proposition that it is sufficient for protection as a refugee simply to show that there is a real chance that an applicant will be subjected to harm because he or she has broken a law of general application in circumstances where it is not established that the persecutors are aware that he or she has done so for reasons of political opinion (or other Convention related reason).

I agree. The persecution must be “for reasons of” a Convention related ground of persecution. In Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225Brennan CJ (at 233) considered that this excluded persecution that is no more than:

> “punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of ‘refugee’ ”

Dawson J said (at 240):

> "The words 'for reasons of' require a causal nexus between actual or perceived membership of a particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person's membership or perceived membership of the particular social group."

Likewise, McHugh J said (at 257):

> "When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group."

In this case, the appellant has failed to establish that there is a nexus between the harm feared and persecution for a Convention reason. There simply is no evidence to support that the authorities would exact punishment for his desertion, in whole or in part, because of his political opinion.'

> 66 I have suggested that *NAEU* is in need of reconsideration. Even so, a Full Court would need to be prepared not to give full force and effect to statements, albeit in a different context, by High Court justices that conscious motivation by a persecutor is necessary. In the light of the High Court's recent decision in *Appellant S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] HCA 71 however, a reading of the earlier cases confined to their own kinds of factual contexts appears appropriate.
>
> 67 The House of Lords has recently adopted an approach that, as it were, comes half-way to what I propose. It might also, as an alternative to my suggested formulation, assist the applicant. Their Lordships expressed the view that the relevant test is what 'operates in the mind of the persecutor' *Sepet v Home Secretary* [2003] 1 WLR 856 at 871. However, they added an important rider at [23]:

'However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. … **But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason.** The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason **for the persecutory treatment**.' (emphasis added)

Difficulties with interpretation

68 The applicant also raised a question as to the interpreter's ability to translate, because she is a Russian/English interpreter, as opposed to an interpreter in the applicant's first language, Georgian. Whilst the interpreter may have had difficulty with a particular passage, I do not accept that there was any effective difficulty in an overall sense for the applicant, who speaks and writes Russian. The applicant was not, by any such difficulty, denied a right to be heard.

Conclusion

69 The Tribunal's decision will be set aside and the matter remitted to the Tribunal to be determined according to law.

70 The respondent is to pay the applicant's costs.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment of Justice Madgwick.

Associate:

Dated: 22 December 2003

Counsel for the applicant:	Mr Zipser
Solicitor for the applicant:	Kah & Associates
Counsel for the respondent:	Mr Smith
Solicitor for the respondent:	Sparke Helmore
Date of Hearing:	12 June 2002
Date of Judgment:	22 December 2003