

FEDERAL COURT OF AUSTRALIA

NAVZ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 13

MIGRATION – alleged persecution by reason of religion – application for review of decision refusing application for protection visa – where applicant was a member of the Church of Scientology in Russia – where applicant claimed mistreatment by officials because he was a Scientologist – whether failure to make findings on material matters amounted to a jurisdictional error – whether Tribunal fundamentally misunderstood legal principle in finding that the 1997 ‘Law of Religion’ in Russia was appropriate and adapted to achieving a legitimate object of the State.

Migration Act 1958 (Cth)

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

Church of the New Faith v Commissioner for Payroll Tax (1982 – 1983) 154 CLR 120 followed

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389 followed

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

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 followed

Nagaratnam v Minister for Immigration and Multicultural Affairs (1999) 84 FCR 569 referred to

Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 referred to

SCAT v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 80 followed

WAEF v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 630

WAFP v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 319 cited

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

N1465 of 2003

MADGWICK J

21 JANUARY 2005

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N1465 of 2003

BETWEEN: NAVZ
APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS
RESPONDENT

JUDGE: MADGWICK J

DATE OF ORDER: 21 JANUARY 2005

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The application be allowed.
2. The decision of the Refugee Review Tribunal ('Tribunal') of 28 August 2003 be set aside and the matter be remitted to the Tribunal to be dealt with according to law.
3. 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.

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PLACE: SYDNEY

REASONS FOR JUDGMENT

MADGWICK J:

1 This is an application made under s 39B of the *Judiciary Act 1903* (Cth) for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal') handed down on 28 August 2003, affirming a decision of a delegate of the respondent Minister made on 30 August 2002 to refuse to grant the applicant a protection visa.

Background

2 The applicant, born on 7 February 1968, is a national of Russia and an adherent of the Church of Scientology. He left Russia on 14 December 2000 and arrived in Australia on 16 December on a business visa. He lodged an application for a protection visa on 29 December 2000.

3 The applicant's claim for a protection visa was based on his membership and involvement as a supporter of the Church of Scientology in Moscow. He claimed that his role in the Church was that of an ordinary member, attending seminars, inviting people to meetings and handing out Scientology materials. He claimed to fear persecution by reason of his religion and imputed political opinion.

4 Central to the applicant's claims were events that occurred in 1999 and 2000 arising out of his activities with the Church.

5 The first event involved the applicant's distribution of videotapes and books on Scientology to senior members of the Russian government at the State Department Presidential Hotel Complex ('the hotel') in Moscow where he was employed as a barman. The applicant also distributed flyers inviting people to attend the activities of the Church but was forbidden to continue doing so by Federal Security Bureau ('FSB') officers. On two occasions, in October 1999 and December 1999 he was asked by FSB officers to submit a list of people to whom he had provided literature about the Church and who had shown an interest in the Church. The applicant refused to do so.

6 In December 1999, the police conducted a legally authorised search of his house and confiscated magazines and books on Scientology and other items, including his computer. He claims to have been struck by one of the police officers during the search. He was detained at a police station for three days for 'abusive non-obeying to police officers', was charged under Article 165 of the Administrative Code and fined. Upon his release, the applicant claimed that he was fired from his job at the hotel because of his proselytising and for bringing disgrace upon the hotel. After this event, the applicant developed gastroenteritis.

7 In February 2000, the applicant applied for a new passport. After some delays, the applicant said that he feared that he may not be issued with a passport from the Russian authorities and asked a family acquaintance, who was a high ranking official in the Ministry of the Interior in the Russian Federation, to assist him to obtain a passport and permission to exit the country. The applicant claims to have paid this officer US\$17,700. His passport was issued in July 2000.

8 In June 2000, the applicant was stopped by police in his car and detained for several hours. Again they confiscated Scientology publications from him. The applicant and his parents were also harassed and insulted by their neighbours.

9 The next event, which occurred on 28 September 2000, involved an attack on the applicant and some friends while they were tending to a classmate's grave in a cemetery. The applicant was harassed and attacked by a group of people for allegedly desecrating the grave. The applicant was struck on the back, damaging his vertebrae. When police arrived on the scene, they stood by without interfering as the assault took place. The applicant and his friends were then taken to a police station and detained for fifteen days for 'hooliganism in a public place'. The applicant required medical attention because the assault had inflamed his gastroenteritis. However, the police refused to provide him with such assistance. After losing consciousness, the applicant was eventually hospitalised where he remained for two weeks. During this period, the applicant's house was again searched by the police and various documents were confiscated including draft letters he had prepared addressed to human rights organisations.

The Tribunal Hearing

10 The Tribunal proceeded to determine the matter on the evidence before it, including the Department's file, which included the protection visa application and the delegate's decision record, the material referred to in the delegate's decision, oral evidence given by the applicant and material available from a range of sources including US Department of State Country Reports. In her reasons for decision, the Tribunal Member provided a reasonably detailed account of the applicant's claims and evidence and also of the conduct of the hearing. The Member noted, among other things that:

- the applicant had told the Department of Immigration that he joined the Church of Scientology in 1994 and, while he did not make his beliefs public, he was not mistreated. He had helped organise public events for children and teenagers and had attended 'auditing' meetings three to four times each week;
- the applicant claimed that before 1999 the Church operated legally in Moscow, but that the attitude of the authorities had changed in 1999, adversely to the Church;
- the applicant had been attending Church of Scientology seminars until September 2000, three months before his departure from Russia to Australia;
- the applicant had not thought about relocating within Russia and agreed that he could have done so, but 'sooner or later they [the Russian authorities] would have found him';
- the applicant did not think that the search of his home in 1999 was linked to a broader investigation of the Moscow Scientology Church for alleged

illegal activities, and stated that ‘they [the police] did not tell him the purpose of the search, but just produced the warrant and took everything, including his computer and address book’; and

- the Church of Scientology continued to operate openly and legally in Russia, including in Moscow where the applicant lived; the applicant agreed but claimed that people were afraid to attend the activities of the Church.

11 The Tribunal Member also made note of ‘Evidence from other sources’ which included a *US State Department Report on Religious Freedom in Russia* (2001) which the Tribunal Member said, indicated that:

‘...Russia’s Constitution provided for freedom of religion, and the Government generally respected this right in practice. Although the Constitution also provided for the equality of all religions before the law and for the separation of church and state, in practice the Government did not always respect the provision for equality of religions. Local authorities continued to restrict the rights of some religious minorities in some regions. Despite court decisions which liberalised its interpretation, the complex 1997 “Law on Religion”, which replaced a more generous 1990 law, seriously disadvantaged religious groups that were new to the country by making it difficult for them to register as religious organizations, and thus obtain the status of juridical person, which included the right to establish bank accounts, own property, issue invitations to foreign guests, publish literature, and conduct worship services in prisons and state-owned hospitals. However, individuals affiliated with unregistered faiths were entitled to rent facilities where religious services could be held. The report went on to say that **the Church of Scientology had experienced many problems with both registration and harassment from the authorities**. It was registered as a religious organization only in Moscow in 1994.

Despite repeated attempts to re-register this organization in Moscow, the Moscow office of the Ministry of Justice reconsidered reregistering the organization only after many refusals and a December 2000 court ruling. However, the Ministry, having consulted with the Procurator, decided to challenge the court’s decision. As a result, the Church was still not re-registered in 2001. **Since 1999, in particular, the Moscow Scientology Church had come under intense pressure from the authorities**. The Procurator formally charged the Church with criminal activities, including distributing medicine illegally. The case was brought to court, but in December 2000 the court returned the case to law enforcement authorities for further investigation because of irregularities in the Procurator’s case. In January 2001, the case was resumed but subsequently was dismissed for lack of evidence. The Procurator appealed; however in May 2001 the appellate court upheld the lower court’s ruling clearing the Scientologists of all charges. **The Church asserted that the authorities had “impeded the operation” of its centres in several localities.**

The report also observed that representatives of the Church of Scientology had accused the ultranationalist and anti-Semitic paramilitary Russian National Unity (RNE) and other ultra-nationalist organizations of violence or threats of violence against their activities in a number of Russian cities, including Nizhny Novgorod, Barnaul and Ekaterinburg. However the RNE by 2001 appeared to have “splintered and lost political influence” in many regions since its peak in 1998. In several regions

such as Moscow and Karelia, authorities had “successfully limited the activities of” the RNE by not registering their local affiliates.’ (Emphasis added)

12 The Tribunal Member referred to information obtained in 2002 from the Australian Department of Foreign Affairs and Trade (‘DFAT’):

‘...which in 2002 had conducted interviews with representatives from both legal and executive branches of government, as well as with “relevant non-government organisations”, the common view in Russia was that there was “no discrimination” in that country against members of the Church of Scientology. Scientology generally, however, was not well-understood by the majority of the Russian population (who were either atheists or practiced [sic] the Orthodox faith, and who often considered other churches to be sects). In Moscow the Church of Scientologists had been registered as a non-commercial organisation, while in other places it had no registration. This did not, however, signify that churches practising Scientology in Russia’s regions were not allowed to exercise their faith; rather, the organisations concerned did not have the status of a legal body. In Moscow registration could be revoked should the organisation not meet the requirements for re-registration. **Should a situation of mistreatment arise (and this was possible)** members of the church could freely apply to police or other appropriate agencies for help or actioning of a complaint, in the same manner as any other Russian citizen. The report also observed that the registration system for religious organisations was considered to be quite liberal. There were no prohibitive articles in the law on religion, dated 1997. For a body to be registered as a religious organisation, **it must have existed in Russia for not less than 15 years.** It was also important to prove that the organisation had a “religious, and not a commercial”, character. The Post had been informed that there had been instances of court cases where Scientologists had taken part as a party to the proceedings. This demonstrated that the state recognised it as an organisation. For example, in Moscow recently the Habbart [Hubbard] centre won a court case concerning a taxation dispute...’.

As to *The US Department of State Country Reports on Human Rights Practices for 2002* (released on 31 March 2003) and other sources of information received, the Tribunal observed:

‘...during 2002 many religious groups in Russia continued to contest administrative actions against them in the courts. Efforts to liquidate the Moscow branch of the Church of Scientology were defeated in the courts. At year’s end, the Church continued to be engaged in legal battles in other localities. The Moscow Department of Justice (DOJ), a branch of the Ministry of Justice, filed a liquidation suit in 2001 against the Moscow branch of the Church of Scientology, but the Church won both the suit and ensuing DOJ appeal in July [2002]. While the Moscow Church had not been cleared to reregister by October 2002, the group continued to operate. The Scientologists filed a suit with the ECHR against the liquidation order. The St. Petersburg branch of the Church of Scientology filed an application to register in February, but was refused twice. In Khabarovsk the local Department of Justice filed for the liquidation of the Dianetics Centre. The Church of Scientology lost on appeal and the case was under consideration by the federal Supreme Court. In a related case, the director of the Dianetics Centre was convicted on criminal charges of the

illegal practice of medicine and education. She lost on appeal and was given a suspended sentence of six years. Local media attention included references to “totalitarian sects” in their coverage. The case was also under consideration by the Supreme Court.

The report also observed that, while religious matters were “not a source of societal hostility for **most** citizens”, relations between different religious organizations frequently were tense, particularly at the leadership level, and **members of individual minority religions continued to encounter prejudice and societal discrimination, and in some cases violence. Authorities usually investigated incidents of vandalism and violence, but arrests of suspects were extremely infrequent and convictions were rare. Hostilities toward “non-traditional” religious groups, including Scientologists and Mormons, sparked “occasional harassment and even physical attacks”**. As the only example of a physical attack against Scientologists, the report stated that in October 2001, police arrested five suspects believed to have been involved in tossing a Molotov cocktail into the Moscow headquarters of the Church of Scientology in 2001; the church had received bomb threats by telephone prior to the incident. In February 2002 one of the five defendants was found guilty and sentenced to 2 years in jail.

A Tribunal researcher repeatedly sought information about the Church of Scientology, by email and facsimile, from the Church of Scientology Human Rights Director, the Church of Scientology Moscow and the Church of Scientology St Petersburg. He also sent a message to the Church of Scientology Official Website’s ‘Communicate with the home page’. The questions related to membership documentation, proselytising activities, and whether ordinary Scientologists were able to participate in the normal activities of the church in Russia without difficulty and, if there were problems, how serious and widespread they were. No response was received to these requests.’

The Tribunal’s Reasoning

13 In her ‘Findings and Reasons’ the Tribunal Member accepted that the applicant was an adherent of the Church of Scientology in Russia.

14 She said she was ‘satisfied that he was able to conduct his ordinary activities as a Scientologist (attend auditing sessions, seminars and so on at Scientology premises) without any interference until his departure’. In the context, the Tribunal Member must have meant by ‘interference’, direct interference, since she did not reject his claims to have suffered at least some kinds of discriminatory harassment from other private citizens.

15 The Tribunal Member then generally appears to have accepted much of the applicant’s account of events in 1999 and 2000. As to these events, the Tribunal Member said:

‘I accept that he was giving Scientology-related leaflets to guests at [an institution] in Moscow [for a number of months], taking advantage of his position [of employment] there to do this. I am satisfied that his employer became unhappy about this ..., and consider it plausible that he was subsequently dismissed from his job because his

actions in proselytising were becoming increasingly inappropriate in [his former workplace] in light of the police investigations of the church. I also accept that his home was the subject of a legally authorised police search ... and that Scientology-related materials were confiscated from it. According to the U.S. State Department report for 1999, the church had been charged with criminal activities and was under investigation. **I do not consider that the search of [the applicant's] home in December 1999 constituted persecution, but rather was a legitimate part of an official investigation into criminal activities by the organisation of which he was an active member.** I also note that he was able to obtain much better employment ... in a new workplace immediately after his dismissal [by his former employer], from which I infer that he was not subjected to any ongoing discrimination in terms of his employment because he was a Scientologist.

[The applicant] remained in Russia for a [number of months] after this raid on his home, going to his workplace and, as I have accepted above, attending all his usual activities at the Scientology offices. I do not accept that his treatment in that year can be characterised as persecution. Firstly, I do not consider plausible his claim that he believed he would be refused the passport for which he applied [some months later]. ... There is no evidence before the Tribunal from the applicant or any other source that Scientologists have been refused passports or refused exit from Russia. It is no more than speculation, and I am not satisfied, that the Russian authorities intended to refuse [the applicant] a passport or prevent his departure from Russia in [the same year].

Secondly, I accept that after [the late 1990s] he had two further incidents of contact with the police. The first was ...when they confiscated Scientology publications from his [vehicle], and the second was [a number of weeks later]. I accept that on that occasion the police may have stood by while he was assaulted by a number of intoxicated people in a cemetery. However, at that stage the police did not know anything about him and I am satisfied that this neglect for his welfare was not for a Convention reason, but most likely attributable to laziness or incompetence. I accept that he was then detained for hooliganism in a public place, and that his medical condition was neglected by the police. Again, I infer from his evidence that this detention and neglect were unrelated to the fact that he was a Scientologist, a matter which was not initially known to the police. I also note that he was eventually sent to hospital and was not required to return to police custody, nor did he face any further charges. It is possible that his home was searched again while he was hospitalised, and various items relating to Scientology confiscated but I am satisfied that this was part of an investigation by the authorities into the Church as an organisation.' (Emphasis added)

16 The Tribunal Member proceeded to make findings as to the treatment of Scientologists under the laws of Russia. The Tribunal Member said:

'With regard to the treatment of Scientologists by the Russian state I am satisfied that **the law and its enforcement in relation to the Scientologists' organisation under its various names is appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens.** There is independent evidence from a variety of sources ... that the authorities in various countries, including liberal democracies, have been very concerned about the possible adverse

effect on members of the public of the activities and methods employed by the organisation. I note the evidence that several Scientology officials in France were found guilty of selling bogus treatments to members of the public, and that others have been found guilty of fraud and other financial offences. I infer from [the applicant]'s evidence that the Moscow police were, **in good faith if perhaps with excessive zeal**, attempting to protect members of the public from being influenced by these practices by confiscating Scientology publications from him. I do not consider that their actions in doing so could be characterised as persecutory in Convention terms, particularly as they did not prevent him from participating in any Scientology-related activities of a personal nature and did not lay any serious charges against him.' (Emphasis added)

17 The Tribunal Member found that, although proselytising was encouraged by members of the organisation it was not an 'integral part of the practice of Scientology' and, although the applicant's ability to proselytise 'was limited to some extent' (because various Scientology materials were confiscated by police), this did not amount to persecution. The Tribunal Member was satisfied that '[the applicant] was able to conduct his ordinary activities as a Scientologist (attend auditing sessions, seminars and so on at Scientology premises) without any interference until his departure'.

18 The Tribunal Member also came to the conclusion that the police search of his car and the harassment he experienced from neighbours was 'an isolated incident' that did not amount to persecution. The Tribunal Member said she was 'satisfied that there is an appropriate level of State protection available to [the applicant] if he were to require it'. The Tribunal did not accept that the applicant's connection with 'important people' in Russia placed him at any increased risk of persecution over that of 'ordinary' Scientologists, or that he would face a period of enforced psychiatric treatment if he returns to Russia.

19 Overall, the Tribunal Member considered 'the chance remote that [the applicant] might face treatment amounting to persecution for the reason of his membership of the *particular social group* "Scientologists", or for any other Convention reason. I find that he does not have a well-founded fear of Convention-related persecution in Russia'. (No point was taken as to the Tribunal's failure to deal in terms with the claim that Scientology was a religion and that the applicant feared persecution for reasons of religion. I assume that the Tribunal made a positive finding that Scientology is a religion.)

20 By his amended application, the applicant seeks the following orders:

- '(a) An order that a writ of certiorari be issued quashing the decision.
- (b) An order that an injunction be issued restraining the Respondent or his officers, agents or delegates from acting upon, giving effect to or proceeding further with respect to the decision.

- (c) An order that a writ of prohibition be directed to the Respondent or his officers, agents or delegates from acting upon, giving effect to or proceeding further with respect to the decision.
- (d) An order that a writ of mandamus be issued compelling the Tribunal to re-determine the application for a visa according to law.
- (e) A declaration be made that the decision of the Tribunal was made in excess of jurisdiction and is null and void.
- (f) An order that the Respondent pay the Applicant's costs.'

21 The grounds specified in the amended application are:

'that the Tribunal exceeded jurisdiction in making the decision to affirm the Respondent's decision to refuse to grant the Applicant a protection visa.

Particulars

- (a) In relation to the Applicant's claims regarding the events that took place in late 1999:

The Tribunal failed to make any findings on Applicant's claim to have been forbidden by the Russian security forces from distributing Scientology literature in his workplace.

The Tribunal failed to make any findings on Applicant's claim that on 15 December 1999 he was pressured by the Russian security forces to inform on persons who had taken an interest in Scientology.

The Tribunal failed to appreciate, or to make findings, on the Applicant's claim that his refusal to inform was directly related to the [December] raid upon his home by the Russian security forces and his arrest and detention, and that this amounted to persecution on the grounds of both religion and political belief.

- (b) In relation to the Applicant's claim's regarding the events that took place in September/October 2000:

The Tribunal failed to appreciate, or to make findings [on,] the Applicant's claim that his detention and mistreatment while in police custody occurred at a time when the police knew that he was a Scientologist.

The Tribunal failed to make findings on the applicant's claim that while in detention the police made comments and otherwise conducted

themselves in a way that made it clear that part of the reason for his treatment was that he was a Scientologist.

- (c) In relation to the Tribunal's finding that the law in Russia and its enforcement in relation to Scientology is appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens, the Tribunal misapplied the law relating to the definition of persecution for the following reasons.

The Tribunal failed to specify the relevant law which it considered was appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens.

The Tribunal failed to identify how, and on what basis, any such law might be appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens.

The Tribunal based this finding on an irrelevant consideration, that the authorities in France were very concerned about the possible adverse effect on members of the public of the activities and methods of the Church of Scientology.'

Applicant's Submissions

22 The applicant's first contention is that the Tribunal Member misinterpreted or misstated the nature of his claims, amounting to jurisdictional error: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389. In particular, the applicant submits that the Tribunal failed to make a finding or draw a conclusion on the following matters:

- (a) the applicant's evidence that he had been questioned, warned and threatened by the FSB in October and December 1999;
- (b) the attempts by the FSB to co-opt the applicant as an informer;
- (c) the link between the applicant's failure to provide the requested information by 21 December 1999 and the raid on his home the next day; and
- (d) the claim that the three day detention for 'abusive non-obeying to police officers' was unrelated to any legitimate policing, but was an illegitimate use of police powers aimed at the applicant because of his religion and/or imputed political belief.

23 The applicant claims that the Tribunal failed to appreciate the link between the trouble he was having at work and the raid on his home. He submits that the events that took place in December 1999 were not isolated, but rather, were part of a series of interrelated incidents which began earlier in the year:

- when FSB officers had demanded that the applicant cease distributing Scientology literature at the hotel under a threat that he was 'asking for trouble';
- demands made of him in October 1999 by FSB officers to provide a list of people he had provided with such material. He claims that he was given until 21 December to become an informer for the FSB, and when he refused to do so his house was searched on the following day and he was detained for three days.

24 The applicant also submits that the Tribunal failed to appreciate that his detention and mistreatment in September 2000 was related to his involvement with the Church of Scientology. He contends that although he may not have been known to the police when he was arrested, the police mistreated him once in detention because of his beliefs, which soon became known to them.

25 The applicant also submits that the Tribunal failed to give proper consideration to whether the laws relating to Scientology in Russia were 'appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens': *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258-259; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 303.

Respondent's Submissions

26 The respondent correctly submits that the Tribunal's reasons have to be read beneficially and not 'minutely and finely with an eye keenly attuned to the perception of error': *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

27 The respondent contends that the Tribunal was aware of the facts in support of the applicant's claims, namely that:

- he was forbidden by the Russian security forces from distributing Scientology literature in the workplace;
- on 15 December 1999 he was pressured by the Russian security forces to inform on persons who had taken an interest in Scientology;
- on 22 December 1999 police conducted a search of his home and confiscated his Scientology publications;
- in September/October 2000 his detention and mistreatment while in police custody occurred at a time when the police knew that the applicant was a Scientologist; and

- while in detention the police made comments and otherwise conducted themselves in a way that made it clear that part of the reason for his mistreatment was that he was a Scientologist.

28 Although the Tribunal did not make a specific finding as to the Russian security forces' attempt to co-opt the applicant as an informer, the respondent claims that the Tribunal was not required to, because it was not a material question of fact: see s 430(1)(c) of the *Migration Act 1958* (Cth); whereas the Tribunal did make a finding that, although the applicant's ability to proselytise was limited, this did not amount to persecution.

29 Finally, the respondent submitted that if the Tribunal was referring to the 1997 Law on Religion, which governs the registration of religious minorities, as being appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens, then that finding in no way affected the ultimate decision reached by the Tribunal.

30 Further supplementary submissions by the respondent, which I allowed, addressed the allegation that the Tribunal failed to make findings as to whether the assaults by officials constituted persecution. The respondent further contended that the Tribunal made findings open to it on the facts that the police conducted a legally authorised search of the applicant's home in December 1999; that the applicant had obstructed police officers in the course of the search; and that the Tribunal was not required to accept the applicant's evidence that he had been struck by a police officer. The Tribunal did not identify a wrong issue or ask a wrong question or ignore relevant material (see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323), because the Tribunal was aware of the applicant's claim that he had been struck.

31 As to the applicant's claim that the Tribunal failed to make a finding as to the reason why he was mistreated and denied medical attention while detained by police in September/October 2000, the respondent submits that the Tribunal Member quite clearly made a finding about this matter in her reasons for decision:

'I infer from his evidence that his detention and neglect were unrelated to the fact that he was a Scientologist, a matter that was not initially known to the police.'

The Tribunal is not required to set out why it so found: *Minister for Immigration and Multicultural Affairs, Re; Ex parte Durairajasingham* (2000) 168 ALR 407 at [423].

32 Finally, the respondent submits that the Tribunal had considered the 1997 Law of Religion in determining whether Russian law was appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens. The Tribunal found that it was so adapted and determined that the

Law of Religion was a law of general application that applied to all organisations seeking religious status and was therefore not persecutory.

Applicant's reply

33 In reply, the applicant further elaborated his claim that the Tribunal either misinterpreted or misrepresented the events of 1999 and 2000 by failing to treat them as a series of interconnected events beginning with the approach from the FSB to the applicant in October 1999, the threats against him, the attempt to recruit him as an informer and the raid on his home and his treatment in detention in 2000; all, he claims, the result of his involvement with the Church of Scientology. The applicant submits that although the Tribunal recited his claims in respect of these events, it did not discharge its obligation to make findings as to the *reason* for his dismissal from the hotel or the subsequent search of his house, his claim that he was beaten by the police when detained in late 1999, or that he was mistreated by the police while detained in late 2000 after his involvement in the Church of Scientology had become known to the police. The applicant accepts that a wrong finding of fact will merely amount to an error within jurisdiction, but submits that the case is one of a failure to deal with a claim so as to amount to a failure to exercise jurisdiction: *Dranichnikov* at 408, per Hayne J.

34 As to the application of the 1997 Law on Religion and the claims the applicant made about the events of 1999 and 2000, the applicant submits that, simply because a law may be of general application and apply equally to all persons, that does not necessarily mean that it is not persecutory. In any case, the 1997 Law on Religion clearly discriminates against 'new' religions, including Scientology, because it refuses registration of any religion that has not been in existence for fifteen years.

Consideration

(i) Misinterpretation or misrepresentation of applicant's claims

35 In *Dranichnikov*, the applicant claimed to have a well-founded fear of persecution by reason of membership of a particular social group, namely businessmen publicly opposed to law enforcement authorities for failing to take action against crime or criminals. The High Court held that the Tribunal had mis-stated and failed to deal with the case presented to it; the Tribunal had erred in law by determining the claim on the basis that the relevant social group was businessmen when the claim was in fact of membership of a more conceptually limited group. The Court held that the Tribunal's error amounted to a failure to accord natural justice and a constructive failure to exercise jurisdiction. Kirby J expressed that principle at 407 as follows:

'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.’ (emphasis added; footnotes omitted)

36 In my view, the Tribunal did not fundamentally misunderstand the nature of the claim brought by the applicant in the present case. The Tribunal clearly understood the applicant’s claim to have been subjected to persecutory treatment in Russia because he was a member of the Church of Scientology and dealt with his case on that basis. The applicant remains aggrieved, however, that the events that took place in 1999 and 2000 were a connected series of events amounting to persecution. The Tribunal did not uphold that contention, if indeed it was clearly made to her. In any case, she was not obliged so to conclude. She may, within the available, broad scope for fact-finding, have preferred coincidence over conspiracy as an explanation.

(ii) Failure to make findings

37 Where the Tribunal has erred, however, in my opinion, is in failing to make findings on several material questions of fact which go to the heart of the applicant’s claim as to whether he faced persecution in Russia.

38 It seems to me that the Tribunal Member failed to make findings as to: (1) the applicant’s claim that he had been questioned, warned and threatened by the FSB, that is by persons concerned with the security of the State, rather than merely by his employer, in October and December 1999; (2) the claimed attempts by the FSB to co-opt the applicant as an informer against his actual or potential co-religionists; (3) the applicant’s claim that he was struck by a police officer during the raid on his home on 22 December 1999; and (4) the applicant’s claim that he was seriously mistreated by police during his fifteen day detention in 2000, and *because* he was a Scientologist. A finding in the applicant’s favour on one or more of these issues might have had an important bearing on his claim that he had a well-founded fear of persecution for reasons of his religion. All these issues are relevant to possible persecution by State-employed actors and to the reality of the supposed availability to him of State protection if he should fall prey to non-State actors’ persecution of him.

39 Section 430 of the *Migration Act 1958* (Cth) ('the Act') provides that:

'(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

...

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.' (Emphasis added)

40 In *Yusuf,McHugh, Gummow and Hayne JJ* observed (at 346), as to s 430, that:

'It is not necessary to read s 430 as implying an obligation to make findings in order for it to have sensible work to do. Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, **a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion. The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review ...in proceedings brought under s 75(v) of the Constitution. ... It may reveal jurisdictional error.** The Tribunal's identification of what it considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration.' (emphasis added; footnotes omitted)

41 In that part of her decision entitled (and recounting) 'Claims and Evidence', the Tribunal Member sets out the applicant's account of events during the 1999 search of his home, specifically noting that '[o]n 22 December 1999 five police conducted an authorised search of his home, and one struck him'. However, no finding is recorded in the Member's 'Findings and Reasons' as to whether the assault actually took place and no consideration is given as to whether the assault might have amounted, or pointed, to a risk of persecution.

42 Similarly, the Tribunal Member made no finding in response to the applicant's claim that he was abused and denied medical attention in prison in 2000 *after* it became known to the police officers that he was a

Scientologist. The Tribunal Member instead inferred only that his 'neglect' was unrelated to his involvement with the Church because the police officers had not *initially* known that he was a Scientologist. 'Neglect' is a somewhat anodyne term if the applicant's claims were accepted, but an overstatement if they were not. In any case, the applicant's claim that he was abused after the police were well aware he was a Scientologist was not dealt with.

43 Both incidents involve an allegation of physical abuse of the applicant at the hands or with the connivance of the law enforcement authorities, because he was a Scientologist. These alleged events go to the heart of his claim to have been persecuted by the Russian authorities and could cast important light on a broader set of alleged incidents concerning the applicant, the police and the FSB. Among other things where serious harm going beyond acceptable bounds of legitimate criminal prosecution or investigation is caused to an applicant, for a reason caught by the Convention, such will be regarded as persecution: *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 39-40, 47, 57; *Nagaratnam v Minister for Immigration and Multicultural Affairs* (1999) 84 FCR 569, 577, 579. See also *Applicant A* at 258-259.

44 Likewise, FSB interrogations and threats and the effort to coerce him into becoming a sort of Scientologists' version of Judas are clearly relevant in similar ways.

45 Since these matters were not dealt with, then it is to be inferred that the Tribunal Member did not consider them to be material. But, as I have endeavoured to explain, they were. Thus, there has been 'a failure to have regard to relevant material which is so fundamental that it goes to jurisdiction', a phrase used by the Full Court in *WAFP v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 319 at [21]. See also *Yusuf*, per McHugh, Gummow and Hayne JJ at [82].

46 I do not understand there to be any difference of substance between that formulation and the following passage from the decision of another Full Court: *WAE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630 at 641:

'It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.'

47 If factual issues which could reasonably affect the result have not been resolved and no adequate explanation is apparent, the effect is no different than if those issues had been overlooked. The failure in each case is sufficiently fundamental to amount to a jurisdictional error.

(iii) Trivialisation of the applicant's complaints

48 The applicant's other grievance was that the Tribunal 'trivialised' his complaints. The Tribunal has considerable scope to draw inferences. It may be acknowledged that, allowing for this, the very limit of the permissible scope was apparently reached here. Nevertheless, no jurisdictional error is revealed on that account.

(iv) The Tribunal's treatment of the Russian law and religion

49 It seems to me that the applicant's submissions on this point must also be upheld.

50 It is apparent that the 'Church of Scientology in Russia', of which the Tribunal Member found the applicant to be a member, does not have materially different practices and beliefs from those of the Australian body which was held to amount to a religion by the High Court in *Church of the New Faith v Commissioner for Payroll Tax* (1982 – 1983) 154 CLR 120. As Mason ACJ and Brennan J put it: 'Under our law, the State has no prophetic role in relation to religious belief.'

51 It is perfectly clear from the materials referred to by the Tribunal that the 1997 'Law on Religion', as the Tribunal Member herself put it, 'seriously disadvantaged religious groups that were new to the country [such as Scientologists, Mormons and the Salvation Army] by making it difficult for them to register as religious organisations, and thus obtain the status of juridical person, which included the right to ... own property ... [and] publish literature ...'. That is, the law plainly discriminated against Scientologists among others. Yet the Tribunal Member said:

'With regard to the treatment of Scientologists by the Russian state I am satisfied that the law and its enforcement in relation to the Scientologists' organisation under its various names is appropriate and adapted to achieving the legitimate object of protecting the welfare of Russia's citizens.'

52 In support of this the Member relied on concerns expressed in various countries about the '*possible* adverse effect on members of the public of the activities and methods employed by the organisation' (emphasis added). In fact, as the applicant points out, the only concrete example of a country which made changes to its general law based on an examination of Scientology was France. Even there, the change in the law was not *in its terms* discriminatory against any religion. A new generally applicable criminal offence of fraudulent abuse of a state of ignorance or weakness was created. Nothing was cited by the Tribunal as to the possible application in France of such law.

53 This treatment of the matter betokens a serious misunderstanding of the nature of the relevant interest, namely a human right not to be subjected to seriously discriminatory harm in relation to certain matters vital to human dignity, which the Convention seeks to protect. As the applicant's submissions put it:

'This curious finding appears to have been based on a principle that conduct will not constitute persecution if it is "appropriate and adapted to achieving" some legitimate object of the country of nationality of an applicant. The phrase, "appropriate and adapted to achieving", appears in the [judgment] of McHugh J in Applicant A v Minister for Immigration [& Ethnic Affairs] (1997) 190 CLR 225 at 258-259, where his Honour goes on to more fully explain the concept (emphasis added):

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 ... 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 ... 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 ... 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.

The principle was further considered by the High Court in Chen Shi Hai v Minister for Immigration (2000) 201 CLR 293 [at 303]:

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 civilized 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.

In Appellant S395/2002 v Minister for Immigration [& Multicultural Affairs (2003) 203 ALR 112], the issue before the High Court was whether laws against homosexuality in Bangladesh were “appropriate and adapted to achieving” a legitimate object. McHugh and Kirby JJ, [at 123], suggested that the test of whether persecution is made out in these circumstances will be as follows:

If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters. If the first of these questions is answered: Yes, and the second: No, the claim of refugee status must be upheld even if the applicant has conducted him or herself in a way that is likely to attract prosecution.’

54 It ought to be unnecessary to dilate upon these statements of principle and their express or necessarily analogical relevance to claims of religious persecution. Yet it seems clear that the Member has misunderstood what underlies those expressions of principle in their proper application to matters of religion.

55 The leaders of countries predominantly with Christian traditions were appalled by the Nazi slaughter of the Jews. That reaction was one of the main driving forces behind the adoption by the Refugees Convention as amended by the Refugees Protocol of religious persecution as one of the criteria for requiring States to afford protection to refugees: see R Germov and F Motta: *‘Refugee Law in Australia’* OUP, Melbourne, 2003, pp 4 – 18. Likewise Western concern over protection of the Jews was a major factor in the development of the other main international instruments concerning human rights, more or less coinciding with the adoption of the Convention: N O’Neill et al: *‘Retreat from Injustice – Human Rights Law in Australia’*, Federation Press, 2nd ed, Sydney, 2004, pp 13, 15 – 16. Christianity generally has always asserted as a central tenet the divinity of Jesus Christ. Judaism denies it, as do various other religions and atheism. Agnosticism necessarily does not admit it. Such a denial or non-admission is an anathema, and deeply offensive, to many adherents of the main versions of Christianity. Religious intolerance has permeated much of history in the West and elsewhere. Thus, the protection of religious freedom, encompassing all bona fide belief on religious matters, by the Convention, the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, was and is a profoundly significant assertion of religious tolerance as a norm of international law and practice. It represented a notable development in shared international conceptions of morality. Implicit in that assertion is the centrality

to human personality and dignity of individual choice of a religious belief or the lack or denial of any such.

56 As has lately been seen in relation to child molestation and terrorism, and history is replete with other examples, even the greatest and most respected of religions are apt to be professed by people who, in purported pursuance of their religious duties, engage in frankly anti-social behaviour of kinds generally regarded as criminal. Thus, great care needs to be taken in characterising any law, let alone its alleged enforcement, as non-discriminatory when it is, in terms, aimed at some religions but not others.

57 It is such considerations that underlie McHugh J's observation in *Applicant A* at 259 that '[o]nly in exceptional cases is it likely that a sanction aimed at persons for reasons of race [innate], religion [**chosen**] or nationality [usually innate] will be an appropriate means for achieving a legitimate government object'.

58 Nor does the 'good faith' attributed by the Tribunal Member to the Moscow police inspire any confidence in the Tribunal Member's understanding of the nature of possible religious persecution. The applicant's Scientology publications were confiscated from him. There was no evidence of any complaint of a breach of a *general* law constituted by his possession and intended distribution of them. That a policeman may have sincerely believed that one or more members of the public might be harmed by such distribution is quite irrelevant to whether confiscation of the publications amounted to religious discrimination, tending or pointing to a fear of persecution. The Third Reich embarked on the extermination of the Jews because a good many of its citizens genuinely believed that their society, indeed the world, would be benefited thereby.

59 In *Chen Shi Hai (an infant) by his next friend Chen Ren Bing v Minister for Immigration & Multicultural Affairs* [1998] FCA 622, French J said:

'Persecution may be carried out coolly, efficiently and with no element of personal animus directed at its objects. There are too many historical examples of the inhuman indifference of which governments are sometimes capable in the pursuit of persecutory policies so to narrow the concept. The attribution of subjectively flavoured states such as "enmity" and "malignity" to governments and institutions risks a fictitious personification of the abstract and the impersonal.'

60 This view was specifically approved by the High Court in *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [305]:

'Persecution can proceed from reasons other than "enmity" and "malignity". Indeed, from the perspective of those responsible for discriminatory treatment, it may result from the highest of motives, including an intention to benefit those who are its victims. And the same is true of conduct that amounts to persecution for a Convention reason.'

61 Further, there was nothing to indicate that the applicant was a leader, as distinct from an enthusiastic proselytiser, of his faith. The Tribunal Member found, again on scant evidence, that the search of the applicant's home in December 1999 and the confiscation then of Scientology-related materials was 'a legitimate part of an official investigation into criminal activities *by the organisation* of which he was an active member' (my emphasis). That is, identifiable criminality by identifiable *persons* was not alleged: unspecified criminality by one Church was. Further, this occurred in a country in which a large traditional Church was claiming semi-official rights and, in some instances, being discriminatorily accorded them by important State instrumentalities. That same country, it is notorious, has a history of hundreds of years of suppression of heterodoxy .

62 In my view, the Tribunal's reasons exhibit both an absence of recognition of the caution legally due for an examination of a law plainly discriminatory against some religions and the allegedly discriminatory application of it, as amounting to, or pointing to a risk of, persecution and an absence of an attempt at the legally necessary demonstration of exceptionality of circumstances in the applicant's country of nationality. Such, in my opinion, inescapably betokens a misunderstanding of relevant concepts of religious discrimination which might amount to or shade into persecution or, with other materials, point to a well-founded fear of it. The Tribunal Member fundamentally erred by asking herself the wrong questions. This can amount to jurisdictional error: *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Craig v South Australia* (1995) 184 CLR 163 at 179; *Yusuf* at 351.

(v) Material error?

63 It must be recalled, however, that the Tribunal Member found the applicant was able 'to conduct his ordinary activities as a Scientologist until his departure' and that the applicant's 'limited' ability to proselytise did not 'amount to persecution in itself' because, 'although it is encouraged by members of the organisation proselytising is not an integral part of the practice of Scientology'.

64 At first sight these findings might perhaps be thought to be an answer to the applicant's criticism of the Tribunal's reasoning which I would sustain; the defects might be thought irrelevant to those findings, which might be able to stand alone, so that any error of approach, however serious, was not ultimately an operative one productive of jurisdictional error in the decision.

65 However, those findings depend on the acceptance of the literal terms of some of the evidence given by the applicant himself, arguably taken out of context, and apparently contradicted by other evidence before the Tribunal. For example, if he was at risk of being assaulted by right wing social elements or by merely excitable adherents of the Russian Orthodox Church, as he claimed, he could hardly be said not to hold a well-founded fear that he would be unable to conduct his 'ordinary' activities as a Scientologist. Likewise, proselytising was indicated, by one source otherwise relied on by the Tribunal Member, to be a *practically* necessary adjunct of active membership as a Scientologist.

66 Neither should one view in an overly artificial way the capacity of a decision-maker to quarantine the influence of mistaken conceptions from other elements of a complex problem falling for decision. In some cases, it is quite clear that the mistaken conceptions can have had no influence on the decision-maker's overall cast of mind towards an applicant's position; in others, it is not. In my opinion, this case falls into the latter category. The Tribunal Member found in effect that the Church of Scientology was reasonably suspected by Russian authorities of being a criminal organisation. I lack any confidence that this conclusion, founded on slender evidence and on misconceptions about the nature of religious persecution and the extreme caution to be brought to any such judgment, failed to influence the other judgments of the Tribunal in the matter.

67 Accordingly, there is no warrant to deny the relief otherwise appropriate, and I will order accordingly.

ADDENDUM

68 In *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 80, speaking of a claim of religious persecution by Iranian Mandeans, Gyles J said:

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

69 I would respectfully draw the current Minister's and the Tribunal's attention to his Honour's point which is of general application. Whether all persons in a particular country, or some classes, and if so which of them, following (or declining to follow) a particular faith are at risk of religious persecution for the purposes of the Convention (as operative in Australia), and therefore entitled to protection as refugees, is a question of importance. Individual case-by-case analysis by Tribunal Members is clearly not the optimal means of determination of such a question. Without any change to institutional arrangements, experienced persons clearly independent of the executive government and pressure groups, and therefore

likely to inspire confidence, could, for example, be authorised by the Minister to examine the matter, including if thought fit, by visiting that country. Their reports would then be available as evidence for the use of Department officers and Tribunal Members in particular cases. No doubt other means to a similar end could be employed.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 21 January 2005

Counsel for the Applicant: Mr N Poynder

Counsel for the Respondent: Ms S Kaur-Bains

Solicitor for the Respondent: Blake Dawson Waldron

Date of Hearing: 16 March 2004

Date of Judgment: 21 January 2005