FEDERAL COURT OF AUSTRALIA

NBFP v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 95

MIGRATION – application for refugee status – well-founded fear of persecution – effect of introduction of s 91R into *Migration Act* 1958 (Cth) – requirement in s 91R(1) that persecution involve "serious harm" to the person – effect of s 91R(2) - whether Refugee Review Tribunal misconstrued s 91R(2) by treating it as providing for an exhaustive definition of serious harm - whether Refugee Review Tribunal thereby constructively failed to exercise its jurisdiction.

Migration Act 1958 (Cth) s 91R(1) and 91R(2)

NBFP v Minister of Immigration & Multicultural& Indigenous Affairs [2005] FCA 287 affirmed

VTAO v Minister for Immigration & Multicultural& Indigenous Affairs (2004) 81 ALD 332 discussed

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 211 ALR 660 at [38] cited

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272 referred to

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 388 and 430 referred to

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 258-9 referred to

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 570 referred to

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 302-5 referred to

Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 7 and 19-22 referred to

Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 at 34-40 referred to

NBFP v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

NSD497 OF 2005

KIEFEL, WEINBERG and EDMONDS JJ

31 MAY 2005

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD497 OF 2005

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBFP APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT REFUGEE REVIEW TRIBUNAL

	SECOND RESPONDENT
JUDGES:	KIEFEL, WEINBERG AND EDMONDS JJ
DATE OF ORDER:	31 MAY 2005
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2 The appellant pay the first respondent'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	NSD497 OF 2005

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

OF AUSTRALIA

BETWEEN:	NBFP APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

	FIRST RESPONDENT REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT
JUDGES:	KIEFEL, WEINBERG AND EDMONDS JJ
DATE:	31 MAY 2005
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT

1 This is an appeal from a judgment of Emmett J (*NBFP v Minister of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 287) dismissing an application for review of a decision of the Refugee Review Tribunal ("the RRT"). The RRT had earlier affirmed a decision by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") not to grant the appellant a protection visa.

background

2 The background to this matter is as follows. The appellant is a citizen of Vietnam. He is currently aged 30. He left Vietnam, together with a number of others, including members of his family, by boat. They arrived in Australia in early July 2003. Shortly thereafter, the appellant lodged an application for a protection (class XA) visa under the *Migration Act* 1958 (Cth) ("the Act"). On 22 October 2003, he was informed that that application had been rejected. On 5 November 2003, he applied to the RRT for review of the delegate's decision. On 13 April 2004, the RRT affirmed that decision.

the appellant's claims and submissions to the rrt

3 The appellant claimed that he had been involved with a group known as "the Resistance Force" ("the RF"). Members of that group engaged in political activity in opposition to the Vietnamese government. In a statutory declaration dated 13 July 2003, the appellant said that he had been a

fisherman since the age of about 15. He claimed that his family had suffered discrimination on the part of the communist government in Vietnam because his father had been involved with the former "puppet" regime of the Republic of Vietnam. He said that his father had been a senior figure in that regime, and that he had died as a result of a landmine explosion in 1977.

4 The appellant claimed that the Vietnamese government had been aware of his father's activities, and had always treated him differently. For example, he was not permitted to join the army. In late-April 2003, he participated in the distribution of anti-government leaflets around a cemetery that contained the graves of North Vietnamese soldiers. That occurred on the evening immediately prior to Communist Party of Vietnam Day, which was intended to commemorate the fallen victims of the war. Some three weeks later, his sister rang his niece and told her that the police had discovered his involvement in distributing the leaflets, and that he and the others were in trouble. His sister suggested that they should all leave their village and flee Vietnam as they were now in danger. The appellant said that he was frightened of being accused of anti-government activities, and of being imprisoned.

5 Some time late in May, or early June 2003, the appellant and the other members of the group left Vietnam by boat. They initially travelled to Indonesia, and then on to Australia. The appellant said that he believed that he would be imprisoned or executed because of what he had done, and because of who his father had been.

6 On 4 August 2003, solicitors acting on behalf of the appellant, and also other members of the group, provided a more elaborate submission in support of their claims for protection ("the August 2003 submission"). The solicitors asserted that a number of their clients had suffered persecution stemming from their families' involvement with the pre-1975 regime. They said that the RF had been formed some time between December 2002 and April 2003, and that its goal was to replace the Communist Party of Vietnam with a democratic form of government. To that end, the RF and its 54 members had engaged in the preparation and distribution of anti-government leaflets within various cemeteries across Vietnam. Broadly speaking, those leaflets criticised the government's continued persecution of persons connected to the pre-1975 regime, called for the release of political prisoners, and attacked the prevalence of corruption throughout the country. The solicitors argued that such anti-government activities were generally severely punished in Vietnam.

7 The submission then went on to summarise the applicable law relating to protection obligations under the Refugees Convention. It is important to note that the solicitors specifically addressed the meaning of "persecution". In that context, they referred to s 91R(1) of the Act, and at least by implication, to s 91R(2) as well. Those provisions were introduced by the *Migration Legislation Amendment Act (No 6)* 2001 (Cth), and are in the following terms:

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

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

8 The solicitors referred to the views of Professor Hathaway, *The Law of Refugee Status* (1991) at pp 104-5, regarding the meaning of "persecution". They then went on to say:

"Under sub-section 91R(1) of the Migration Act 1958 ("the Act") persecution is defined as involving "serious harm" and "systematic and discriminatory conduct". **The expression "serious harm" is defined as including:**

a. threats to life and liberty;

b. significant physical harassment or ill-treatment;

c. significant economic hardship that threatens the person's capacity to subsist;

d. denial of access to basic services, where the denial threatens the person's capacity to subsist; and

e. denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

The Applicants have all lodged statutory declarations outlining their particular fears of persecution. Some of those fears are outlined below." (emphasis added)

9 The solicitors then set out in greater detail the claims made on behalf of their clients. These included persecution by reason of religion, membership of a particular group, and political opinion. They focussed on the leaflet distribution, noting that the applicants feared that they would be arrested, tortured, in some cases raped, and ultimately imprisoned or executed for their actions. They submitted that such consequences would amount to "serious harm" in accordance with s 91R, plainly amounting to "threats to life or liberty" and "significant physical harassment" or "significant physical ill-treatment". These are, of course, all concepts specifically addressed in s 91R(2)(a), (b) and (c), although as can be seen, those paragraphs were not cited in terms.

10 There was then a separate claim made in relation to those with direct or indirect links with the pre-1975 regime. It was submitted that even prior to their involvement in the leaflet distribution, these persons had been the victims of ongoing discrimination and harassment by the Vietnamese authorities. Several forms of discrimination and harassment were identified, including the need to pay bribes for household registration papers, and various discriminatory taxes and charges. There then followed this statement:

"All of these persecutory acts amount to "serious harm" as they include threats to life or liberty; significant physical harassment or ill-treatment; significant economic hardship; denial of access to basic services; and denial of capacity to earn a livelihood."

11 Finally, there were claims made regarding several members of the group who were said to be either practising Buddhists, or practising Catholics.

12 The August 2003 submission was followed by a further submission dated 24 September 2003. That further submission responded to country information that had been provided by the delegate. However, as previously indicated, on 22 October 2003, the delegate refused the appellant's application as well as those lodged by all other members of the same group.

13 The appellant's solicitors filed an application for review on 29 October 2003. Several sets of submissions were lodged, both before and after the hearing before the RRT on 9 December 2003. In a submission dated 6 January 2004 that related solely to his own position, the appellant

maintained that he had been a sub-group leader within the RF. He also informed the RRT that on 18 September 2003 his name had been removed from the "household register". The solicitors noted, in a subsequent submission, that in Vietnam a family registration card, known as a "*ho khau*", is issued by the authorities. It operates as a residence permit, and also entitles the bearer to a series of important rights and privileges linked with education, employment, business licences, marriage registration and birth certificates.

14 In a further lengthy submission dated 8 January 2004, filed on behalf of all members of the group, there was a detailed analysis of the leaflet incident, and also a discussion of the effect of having had household registration cancelled. The solicitors observed that many returnees had reported denial of *ho khau* that in some instances had seriously affected their families' livelihood and welfare. In particular, a person without *ho khau* would not be able to obtain lawful employment, apply for a business licence, file for a legal marriage certificate, or send his children to regular schools. The submission contained a summary of what were said to be the relevant legal principles. It is important to note that the submission did not address the meaning of "persecution" for the purposes of the Refugees Convention as expounded under the general law. Nor did it address the effect, if any, that s 91R may have had upon that concept.

15 On 20 February 2004, the solicitors filed yet another lengthy submission on behalf of the members of the group. It elaborated still further upon conditions in Vietnam, and purported to respond to various concerns that were expressed by the RRT. Once again, however, this submission made no specific mention of either the general law regarding persecution, or the operation of s 91R.

the decision of the rrt

16 On 2 April 2004, the RRT published its reasons for decision. After summarising the appellant's background, and referring to the definition of "refugee" in art 1A(2) of the Refugees Convention, the RRT noted that ss 91R and 91S of the Act now qualify some aspects of art 1A(2). Having then identified what it described as the four key elements of the Convention definition, the RRT dealt with the requirement that an applicant "fear persecution", *inter alia*, in the following way:

"Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). **The expression "serious harm" includes, for example,** a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act." (emphasis added)

17 Mr Lloyd, counsel for the appellant, referred to this passage (and those surrounding it) as a "boilerplate summary" of the law. By this pejorative

description he meant that it was produced as a "template", without any real appreciation of the meaning to be ascribed to the various concepts discussed. Emmett J seems to have taken a somewhat less pejorative view, although he did refer to the passage as a "nominal acknowledgment" of the effect of s 91R(2) as a non-exhaustive statement of the meaning of "serious harm".

18 Having summarised the appellant's claims, and the evidence led in support of them, the RRT turned to its findings and reasons. It is important to set out in some detail several passages from its reasons for decision.

19 The RRT found:

"…that individuals considered to be a threat to the government, and those who seek to confront the authorities, risk harm by the authorities. The Tribunal is satisfied that such individuals, which Human Rights Watch refers to as key dissidents, are at risk of being subjected to serious human rights violations, including imprisonment, because they actively oppose the government of Vietnam…"

20 The RRT then went on to say:

"The Tribunal has formed the view that two from the nine applicants are committed political activists, at risk of harm by the authorities in Vietnam, while the other seven applicants are neither committed political activists or persons at risk of harm by the authorities in Vietnam for reasons of political opinion.

The Tribunal has found that two applicants (Tribunal files N03/47658 and N03/47649) are committed, persistent, and outspoken activists. They were able to provide meaningful information at the hearings regarding their political opinion and activities. They held leadership roles in the RF and were actively involved in organising the group's activities. These applicants also clearly understood the group's aims and were influential in the direction it took. The applicants stated that they were committed political activists who will seek to express their political views in the future and indeed have persisted in expressing those views after they arrived in Australia. The Tribunal is satisfied that these applicants will be seen as key dissidents, by the authorities in Vietnam, and the government will seek to prevent them from expressing their political opinion.

However, the Tribunal is not satisfied that the other seven applicants are or ever have been committed political activists."

21 In dealing with the appellant's involvement with the RF, the RRT said:

"The applicant had no previous involvement in political activities before he joined the RF and he has not expressed an interest to participate in similar activities in the future. The Tribunal finds that the applicant is not a committed activist and he does not have the profile of a political dissident. The Tribunal is satisfied that the applicant

was only following instructions from the RF leadership and his involvement in political activities is now effectively over. The Tribunal finds that the applicant's fear, that he will be subjected to persecution by the government in Vietnam because he was involved with the RF, is not well-founded. The Tribunal is satisfied that only committed and outspoken activists risk harm by the authorities in Vietnam and it finds that the applicant is not such an activist nor will he be considered to be such an activist by the authorities in Vietnam."

22 The RRT next dealt with the appellant's claim regarding discrimination by reason of his family background. It said:

"The Tribunal finds that the circumstances of Nguyen Van Hoa are indicative of the government's more tolerant attitude towards individuals with strong links to the former regime. Mr. Nguyen was a known political activist convicted of crimes against the state and sentenced to twenty years in prison. He was also a person who escaped from prison and sought asylum overseas. He was however, despite his background, able to return to Vietnam in 2002 and 2003 without apparent interest from the authorities. The Tribunal noted comments at his trial that he was discreet during his visits to Vietnam and that he took steps to disguise himself. However, the Tribunal is satisfied that the authorities in Vietnam, including immigration officers and local government officials, knew he was in Vietnam but had no interest in him. The Tribunal is satisfied that the authorities in Vietnam are only concerned with individuals who are currently involved in political activities and Mr. Nguyen's previous political activities were of no apparent interest to the authorities in Vietnam when he visited in 2002 and 2003.

The Tribunal considered the applicant's associated claim that he was discriminated against by the government of Vietnam because of his family background and his anti-communist views. When the Tribunal asked the applicant to describe the discrimination, he stated that he was not given a license or financial assistance to operate a larger fishing boat. The applicant claims that he suffered economic disadvantage because he was known to be anti-communist. The Tribunal accepts the applicant's claim that he was denied government assistance which would have enabled him to earn more income. However, it finds that **the discrimination he suffered did not amount to persecution as defined by S91R(2) of the Act**. The Tribunal is satisfied that he was not prevented by the government from earning a living and supporting his family."(emphasis added)

23 The RRT next considered the claim arising out of cancellation of the appellant's *ho khau*. It said:

"The Tribunal accepts the applicant's claim that his household registration was cancelled after he left the country. The Tribunal is satisfied that it is a normal administrative procedure in Vietnam to cancel household registration when a resident leaves his or her registered address without informing the authorities.

The applicant stated at the hearing that without household registration he will be denied citizenship rights in Vietnam. The Tribunal accepts that household registration

in Vietnam enables citizens to access government resources and services. The so called “Mistreatment Report” provided by the applicant’s adviser, indicates that a ho khau is “a residence permit and also entitles the bearer to a series of important rights and privileges linked with education, employment, business licenses, marriage registration, issue of birth certificates”. The Tribunal has also noted information which indicates that persons returning to Vietnam, after leaving the country illegally, have found it difficult to regain their household registration. The above report states that “many returnees have reported denial of ho khau, which in many instances seriously affects their families' livelihood and welfare” (Tribunal file folio 379). The Tribunal accepts that the applicant may experience difficulties and delays in regaining his ho khau when he returns to Vietnam. However, it does not accept that his life will be very different to the life he had before he left the country. The applicant worked as a fisherman in Vietnam and he will be able to work as a fisherman again with or without a ho khau. The Tribunal accepts that if the applicant wants to obtain government employment, seek further education, or establish a business, he will have difficulty doing so without household registration. However, the Tribunal finds that **the disadvantage which the applicant will suffer before his household registration is reissued will not constitute serious harm amounting to persecution as defined by S91R (2) of the Act**. The Tribunal is satisfied that the applicant will be able to support himself and his family as he did previously. The Tribunal is also satisfied that in time, as with most returnees to Vietnam, the applicant’s ho khau will be reinstated.”(emphasis added)

24 Finally, the RRT considered and rejected claims by the appellant that he was at risk of persecution by the Vietnamese authorities by reason of his activities in Australia, his religious practices, and his membership of a particular social group that he described as “anti-communist”. It is of some significance, for the purposes of this appeal, to note that in rejecting these claims, the RRT characterised them in traditional terms as involving fear that he was “at risk of harm”. It did not preface the word “harm” with the adjective “serious”. Nor did it use the language of s 91R(2).

the decision at first instance

25 In his reasons for judgment, Emmett J considered a number of challenges to the RRT’s decision. These included an argument that the decision was based upon a jurisdictional fact that did not exist. They also included the contentions that the decision was not reasonably open, that the RRT had failed to consider a critical claim by the appellant and material submitted in support of that claim, and that it had failed to ask itself the correct question. The last of these challenges, though expressed in broad terms, was actually unrelated to the issue raised on the appeal to this Court. His Honour rejected all these grounds of review, and his reasoning in relation to them is not the subject of the appeal.

26 It is the final contention that his Honour considered and rejected that is raised again in the appeal to this Court. In substance, it was submitted that

the RRT had misapplied the definition of persecution in the Refugees Convention by misconstruing s 91R(2) of the Act.

27 The appellant relied upon two passages in the RRT's reasons for decision in support of that contention. They are set out in full at [22] and [23] of these reasons for judgment, with the critical words emphasised, just as Emmett J had done. The appellant contended before his Honour that, in those passages, the RRT misconstrued s 91R by treating s 91R(2) as a definition of "persecution" for the purposes of the application of the Refugees Convention, in circumstances where that subsection clearly did not provide an exhaustive definition of anything.

28 His Honour noted that the RRT had referred to s 91R in its reasons at several places, and in particular, in the section headed "DEFINITION OF '*REFUGEE*"". He characterised its discussion of that section as "*pro forma*", and as we have already indicated, said that at least at that point in its reasons the RRT "nominally acknowledged the effect of s 91R(2) as a non-exhaustive statement".

29 His Honour went on to say:

"It is clear that s 91R is intended to modify the operation of Article 1A(2) of the Refugees Convention. Section 91R(1) says so in express terms, namely, that Article 1A(2) does not apply in relation to persecution unless each of the three pre-requisites is satisfied. In one sense, that provision is intended to narrow the meaning of persecution as that term might otherwise be understood and as it has been interpreted in successive decisions both by this Court and by the High Court of Australia. However, s 91R(2) does not itself contain a definition of the term **persecution** or, indeed, the term **serious harm**. It makes clear in the preamble that it is not intended to be an exhaustive statement of anything. Rather, it simply gives instances of what **must** be taken to be serious harm but without limiting what is meant by serious harm." (emphasis in original)

30 His Honour then observed:

"However, there will be instances of persecution involving serious harm other than the instances set out in s 91R(2). It may be that it would be very rare that economic hardship that threatens a person's capacity to subsist, that was not significant, would be an instance of serious harm. However, as a matter of English syntax, s 91R(2) does not say that the **only** instance of economic hardship that threatens a person's capacity to subsist that could constitute an instance of serious harm is a **significant** economic hardship that threatens the person's capacity to subsist." (emphasis in original)

31 Emmett J referred to the submissions made by the appellant's solicitors to the RRT on behalf of all of the members of the group in January and February 2004. He observed that in those submissions, the solicitors made clear that they relied upon the August 2003 submission which had been

made to the delegate. In that submission the solicitors had referred to s 91R in the manner set out above at [8] of these reasons for judgment. His Honour noted that in so far as the RRT was being invited to have regard to that submission, it was clear enough that its attention was being drawn to s 91R(2). While that subsection was not identified in terms in the passage cited, the language employed clearly reflected its terms.

32 His Honour expressed his conclusions as follows:

"53 It is sufficiently clear that in the submission of 4 August 2003, which was effectively incorporated into the subsequent submissions to the Tribunal, the applicant's solicitors were advancing contentions in support of a conclusion that the requirement of s 91R(1) that persecution must involve serious harm, was satisfied by reason of the matters summarised above. The contention was that those matters satisfied one or other of the paragraphs of s 91R(2).

54 I do not consider, on a fair reading of the Tribunal's reasons, that the Tribunal was proceeding on the basis that s 91R(2) defined the instances that could constitute serious harm. On a fair reading of the two passages cited above, the Tribunal was saying no more than the material before it did not lead to the conclusion that s 91R(2) applied.

55 While the language of the Tribunal in the two passages in question may be infelicitous, I consider that, in context, they should not be construed as a statement by the Tribunal that s 91R(2) contains an exhaustive definition of either serious harm or persecution for the purposes of the Act. In all the circumstances, I am not persuaded that the Tribunal approached the matter on the basis that s 91R(2) defined persecution for the purposes of the Refugees Convention. This ground is not established."

the appeal to this court

33 By notice of appeal filed on 31 March 2005, the appellant relies upon the following two grounds:

"1. The learned trial judge erred in failing to conclude that the Second Respondent ("Tribunal") had made a jurisdictional error in misconstruing and misapplying s 91R of the Migration Act 1958 (Cth) ("the Act") and thereby failing to ask itself the question required by the Act.

2. The learned trial judge should have found that the Tribunal failed to address the correct question and thereby failed to reach a state of satisfaction necessary to dispose of the matter before it."

34 In substance, the appellant contends that Emmett J erred in concluding that the RRT's references to s 91R(2) – as "defining" persecution – should be understood merely as a response to the August 2003 submission when in truth it revealed a fundamental misunderstanding, on the part of the RRT, of the operation of that subsection. In other words, the appellant

contends that the RRT erred by evaluating the harm which he claimed would befall him solely by reference to whether that harm would meet the requirements of s 91R(2), and ignoring the broader question of whether it would meet the concept of persecution as traditionally understood in the context of the Refugees Convention.

35 It was common ground before Emmett J, and before this Court, that had the RRT limited its inquiry to whether the harm suffered by the appellant fell within the specific examples identified in s 91R(2), this would have involved a quite fundamental error of law. It was clear that a number of the appellant's claims went beyond any of those examples. A failure on the part of the RRT to deal with those claims, as formulated, would certainly have amounted to a "constructive failure to exercise jurisdiction". See generally *VTAO v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 81 ALD 332 (per Merkel J) ("VTAO").

36 One additional point should be noted. Before Emmett J, counsel for the Minister sought to defend the RRT's decision on the basis that s 91R(2) implicitly limited the scope of "serious harm", notwithstanding the express disclaimer to the contrary embedded in the subsection. Sensibly, that contention was not pursued before this Court. Indeed, Mr Williams SC, who appeared for the Minister, indicated that although it had been advanced below, it was now expressly disavowed.

the appellant's submissions

37 Mr Lloyd submitted that it was entirely clear from the two passages in the RRT's decision (which are set out at [22] and [23]), and particularly from the words emphasised by his Honour in those passages, that the RRT had misconstrued s 91R(2). By stating that the particular harm claimed did not amount to persecution "as defined by s 91R(2)" it had plainly treated that subsection as limiting or defining the ambit of that term. That was fundamentally incorrect. Section 91R(2) was not intended to operate in that way.

38 Mr Lloyd argued that when read in context, the words emphasised could not bear the interpretation that his Honour had given them. They were not to be understood as merely a response by the RRT to the August 2003 submission. The suggestion that, on a fair reading of the RRT's reasons, it was saying no more than that the material relied upon by the appellant did not lead to the conclusion that s 91R(2) applied, was simply wrong.

39 In support of that contention, Mr Lloyd began by acknowledging that the process of judicial review should not involve "excessively fine scrutiny of the language of executive bodies and administrative tribunals": *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 211 ALR 660 at [38] and *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. He submitted, however, that where an error was apparent in a tribunal's decision, it would also be

wrong to seek to sustain that decision by giving the reasons a "beneficial" interpretation, at least when the context did not support such a reading.

40 Mr Lloyd then identified a series of factors that, he submitted, showed that the RRT's language could not be interpreted as a response to the August 2003 submission, but rather reflected a misunderstanding of s 91R(2). These factors included:

- the only reference by the appellant's solicitors to s 91R was contained in the August 2003 submission. That submission was made to the delegate, and not to the RRT;

- the August 2003 submission commenced with a general and broad statement of the definition of persecution taken from the work of Professor Hathaway;

- it accurately summarised the effect of s 91R(1) and (2), and at no stage suggested that s 91R(2) exhaustively defined either "persecution" or "serious harm";

- it expressly indicated that it was not dealing with all of the fears of persecution held by those to whom it related;

- in summarising the effect of s 91R(2) it accurately noted that "serious harm" included:

  "d. denial of access to basic services, where the denial threatens the person's capacity to subsist; and

  e. denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

- the examples of serious harm contained in s 91R(2) include the qualification that there must be a threat to "the person's capacity to subsist". However, the August 2003 submission, in outlining the discrimination and harassment that had been suffered by various members of the group by reason of their links with those involved in the pre-1975 regime, contended that this amounted to "serious harm" including "denial of access to basic services; and denial of capacity to earn a livelihood". In other words, there was no specific contention, in those claims, that these two forms of mistreatment had threatened anyone's "capacity to subsist"; and

- as the August 2003 submission did not confine itself to the working of s 91R(2), there was no justification for doing as Emmett J had done, and reading the RRT's reasons as merely a response to a submission to the effect that the harm feared fell squarely within the subsection. No

such submission had been made. Rather, the appellant had sought to rely upon the broadest possible spectrum of serious harm allowed by the Act. A finding by the RRT that certain harm that had been suffered did not fall within s 91R(2) did not, therefore, answer the statutory question of whether there was a well-founded fear of persecution.

41 Mr Lloyd submitted that Emmett J had properly given little weight to the fact that the RRT had correctly noted the non-exhaustive nature of s 91R(2) in its boilerplate summary. A statement of legal principle couched in such terms could offer little assurance that the subsection had been correctly understood, at least in the face of two express statements on the part of the RRT that suggested the very opposite. In addition, it could be inferred that had the RRT understood the correct operation of s 91R(2), it would almost certainly have gone on to make an additional finding, beyond rejecting the contention that the harm caused fell within s 91R(2), to the effect that it "did not otherwise" constitute serious harm. The RRT had not done so.

42 Finally, Mr Lloyd submitted that it should not be assumed that the RRT could not possibly have misconstrued s 91R(2) because the subsection so obviously did not provide an exhaustive definition of serious harm. The fact that the subsection was blindingly clear had not prevented counsel for the Minister, in the proceeding before Emmett J, from putting precisely that submission.

the first respondent's submissions

43 Mr Williams submitted that when the RRT's reasons were read in context, no appealable error, on the part of Emmett J, had been demonstrated. He noted that the August 2003 submission had specifically addressed the concept of persecution, and had referred to s 91R. He further noted that none of the later submissions filed on behalf of the appellant, or the members of the group, had returned to this issue.

44 It was important to appreciate that one aspect of the August 2003 submission had been specifically directed towards showing that the harm suffered by the appellant was "serious harm" because it met one or more of the instances of discrimination and harassment imposed on persons associated with the pre-1975 regime. Indeed, the submission had included the contention set out at [10] in these reasons for decision:

"All of these persecutory acts amount to 'serious harm' as they include threats to life or liberty; significant physical harassment or ill-treatment; significant economic hardship; denial of access to basic services; and denial of capacity to earn a livelihood"

45 Mr Williams submitted that this passage was clearly intended to reflect the terms of s 91R(2), even though it did not speak in terms of the qualification that there be a threat of "capacity to subsist", when dealing with economic

hardship, denial of access to basic services and denial of capacity to a livelihood. That qualification is of course found only in s 91R(2)(d), (e) and (f).

46 More importantly, he submitted that there were three reasons why Emmett J was correct in concluding that, in the two passages relied upon by Mr Lloyd, the RRT had not treated s 91R(2) as containing an exhaustive definition of serious harm.

47 The first was that each of the two passages in question, in which the term persecution was said to be "defined by s 91R(2) of the Act", was immediately followed by a sentence that made it clear that the RRT was addressing the effect of the claimed economic hardship on a wider basis than that set out in s 91R(2). Thus, in the first passage, the reference to the subsection was followed immediately by a statement that the RRT was "satisfied that [the appellant] was not prevented by the government from earning a living and supporting his family". In the second passage, the reference to the subsection was followed immediately by a statement that the RRT was "satisfied that the applicant will be able to support himself and his family as he did previously". In addition, that second passage was followed by a statement that the RRT was satisfied that, as with most returnees, the appellant's *ho khau* would be reinstated.

48 As we have previously observed, s 91R(2) limits consideration of economic hardship to matters that affect a person's "capacity to subsist". However, according to Mr Williams, the fact that the RRT addressed the effect of the claimed hardship on the appellant's ability to support himself and his family meant that the RRT had plainly performed all of the statutory tasks required of it. In other words, in the sentences which used the expression "as defined by s 91R(2) of the Act", the RRT was addressing, and rejecting, the appellant's claim that he faced persecution in the specific, but non-exhaustive, sense of serious harm found in that subsection. In doing so, it was responding to one variant of the appellant's claim, as set out in the August 2003 submission. However, in the next sentence in each of the impugned passages, the RRT addressed and rejected the appellant's wider claim. Accordingly, it was submitted, the RRT had not been shown to have misunderstood the operation of s 91R(2).

49 The second factor upon which Mr Williams relied was that at another part of the RRT's reasons, when dealing with the penalties for illegal departure, it had correctly noted that harm that did not fall within any of the limbs of s 91R(2) could nonetheless amount to "serious harm" for the purpose of s 91R(1).

50 The third factor upon which he relied was the fact that, at the outset of its reasons, the RRT had correctly summarised the effect of ss 91R(1) and (2). Although Mr Lloyd had referred to the relevant passage in dismissive terms, Mr Williams submitted that it provided a powerful indication that the RRT understood full well that s 91R(2) did not provide an exhaustive definition of serious harm. He submitted that, where a benign interpretation of an impugned passage was otherwise available, that interpretation should be

preferred, particularly when it accorded with a correct statement of legal principle by the RRT, formulated at the commencement of its reasons for decision.

51 Finally, Mr Williams sought to explain why he, on the behalf of the Minister, had submitted before Emmett J that s 91R(2) operated to limit the meaning of serious harm. He informed the Court that the reason that the submission had been put in that form below was that an incorrect version of the relevant Explanatory Memorandum had been downloaded from the internet shortly before the hearing. The submission had since been abandoned. He contended that the fact that it had mistakenly been advanced on a previous occasion was of no consequence so far as the present appeal was concerned.

conclusion

52 The issue raised on the appeal to this Court is, in a sense, a very narrow one. The question is whether the RRT, in its findings, applied s 91R(2) as an exhaustive definition of "serious harm". If it did, it fell into serious error. Given that the appellant relied upon several claims that could not conceivably be brought within any of the limbs of that subsection, any interpretation that treated it as exhaustive would almost certainly give rise to jurisdictional error.

53 As noted above, Mr Lloyd put forward a number of reasons why this Court should find that Emmett J erred in giving the RRT's reasons for decision the interpretation that he did. We have given careful consideration to all of the factors upon which Mr Lloyd relied. In the end, however, we are not persuaded that his Honour erred in rejecting Mr Lloyd's contentions below.

54 It is important to understand something of the history of s 91R. The Bill, in its original form, contained a version of s 91R(2) that differed significantly from the version that was ultimately enacted. It stated:

"The reference in paragraph (1)(b) to **serious harm** to the person includes a reference to any of the following:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist." (emphasis in original)

55 The Explanatory Memorandum that was prepared for the Bill in its original form, described the purpose underlying this draft provision as follows:

"22. Under new paragraphs 91R(1)(b) and 91R(1)(c), the persecution must involve serious harm to the person and systematic and discriminatory conduct. New subsection 91R(2) sets out a non-exhaustive list of the type and level of harm that will meet the serious harm test and fall within the meaning of persecution for the purposes of the Refugees Convention. New subsection 91R(2) makes it clear that serious harm includes a reference to any of the following:

- a threat to the person's life or liberty; or
- significant physical harassment of the person; or
- significant physical ill-treatment of the person; or
- significant economic hardship that threatens the person's capacity to subsist; or
- denial of access to basic services, where the denial threatens the person's capacity to subsist; or
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

23. The above definition of persecution reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia. Persecution must constitute serious harm. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.

56 As previously indicated, and as set out at [7], s 91R(2), as enacted, differed significantly from the version contained in the draft Bill.

57 We were told by Mr Lloyd, from the bar table, that the changes to s 91R(2) were brought about by a concern on the part of some members of Parliament that the Bill, in its original form, might be thought to "raise the bar"

too greatly when considering whether a person was exposed to the risk of "serious harm". That may indeed have been the intention of the Government when it introduced the Bill in that form. However, that intention was not ultimately realised. The subsection, as amended, made it abundantly clear that the matters set out therein were merely examples of what would constitute serious harm. Of course, they operated "automatically" if the conditions described were satisfied. That was potentially beneficial to a claimant. However, it was not intended, by those examples, to narrow the scope of "harm", whether "serious" or not, as that concept had been developed by the High Court. See generally *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 per Mason CJ, and 430 per McHugh J; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258-9 per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 302-5; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 7 per Gaudron J, and 19-22 per McHugh J; and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 34-40 per Kirby J.

58 Mr Lloyd submitted that the only limiting effect that s 91R was intended to have lay in ss 91R(1)(a) and (c), namely the requirements that one or more of the reasons mentioned in art 1A(2) of the Refugees Convention be "essential and significant reasons" for the persecution, and that the persecution involve "systematic and discriminatory conduct".

59 The revised Explanatory Memorandum dealing with the subsection, as it was finally enacted, supports this view. The relevant passages are as follows:

"23. The purpose of this amendment to proposed subsection 91R(2) is to clarify that it provides a non-exhaustive list of what is "serious harm" for the purposes of proposed paragraph 91R(1)(b). It also makes it clear that proposed paragraphs 91R(2)(a) to 91R(2)(f) do not prevent other things from amounting to "serious harm".

24. The examples in proposed subsection 91R(2) are not exhaustive and do not prevent other examples of persecution from amounting to serious harm. For instance, "serious harm" may be established where the cumulative effect of persecutory laws is sufficiently serious, such as occurred to the Jewish people in Nazi Germany between 1933 and 1938. The references in proposed paragraphs 91R(2)(d) to 91R(2)(f) to denial of a person's capacity to subsist illustrate the serious nature of the harm but does not mean that "serious harm" cannot be established by showing other serious disadvantage in a particular case."

60 This interpretation of s 91R(2) is further supported by the judgment of Merkel J in VTAO. That case concerned a claim by two applicants that, as a result of their two contraventions of China's family planning laws, they would be subjected to persecution on their return to that country. The persecution allegedly feared included forced sterilisation of the first applicant, liability for payment of a substantial financial penalty, and limitations on the applicants' ability to find employment. In relation to the applicant child, it was claimed

that, as a "black child", he would not be able to obtain household registration unless his parents paid the relevant financial penalty and that without registration, he would be unable to access public health and education services. That meant that he would be unable to obtain work, particularly in the public sector, when older.

61 When dealing with the applicant child's claims, his Honour was confronted with an argument, similar to that advanced by the appellant in the present case, that the RRT had addressed the question whether the harm feared fell within the instances set out in s 91R(2) rather than whether the harm feared constituted "serious harm". That argument ultimately succeeded before his Honour.

62 It is useful to set out, in detail, Merkel J's reasons for arriving at that conclusion:

"57. The more difficult issue the RRT was required to consider was whether the harm fell within s 91R(1). Although s 91R(2) specifies instances of serious harm it does so "[w]ithout limiting what is serious harm for the purposes of paragraph (1)(b)". It follows that s 91R(2) does not lay down the criteria that must be satisfied before conduct can involve serious harm, nor does it provide an exhaustive statement of what amounts to "serious harm" for the purposes of s 91R(1)(b). Yet, the RRT's consideration of that issue was expressed by reference to the instances of serious harm set out in s 91R(2). For example, it stated:

> "49. Further, I am not satisfied that for the third named applicant in the future to be excluded from public sector employment amounts to a denial of his capacity to earn a livelihood of any kind such that it threatens his capacity to subsist, as required by subs.91R(2).
>
> …
>
> 51. I accept the independent information set out above that there is no social stigma attached to 'black children', and certainly no reports of discrimination or abuse serious enough to amount to persecution within the meaning of the Convention and s.91R(2) of the Act."

58. In its final conclusion at [55] the RRT stated:

> "For the reasons I have given above, I am satisfied that the financial burden which the applicant parents have attracted by reason of their family planning choices, although serious, does not amount to persecution within the meaning of the Convention or of s.91R(2) of the Act."

59. Further, in [46] and [48] the RRT expressed its conclusions in terms of harm which was not sufficient to threaten the applicant child's and the applicant family's, "capacity to subsist": cf s 91R(2)(c), (d) and (e).

60. The RRT's references to s 91R(2) and to instances of harm described in s 91R(2)(c), (d) and (e) suggest that it was addressing the question of whether the harm feared fell within the instances set out in s 91R(2), rather than whether the harm feared constituted "serious harm". That view is reinforced by the following matters. The RRT did not consider how the phrase "serious harm" is to be interpreted. In [49] the RRT referred to what s 91R(2) "required" and in [51] it found the harm did not amount to persecution "within the meaning of s 91R(2)". In [46], [48] and [49] the RRT applied the language of the examples contained in s 91R(2)(c), (d) and (e) as if those examples represented the appropriate legislative test. Also, in its reasoning the RRT made a number of references to s 91R(2) but it did not refer to s 91(1) or 91R(1)(b).

61. Under the earlier section in its reasons headed "Legal Principles" the RRT accurately set out s 91R(1) and accurately stated its relationship to s 91R(2), but it does not appear to have applied s 91R(1) in the reasoning employed by it in reaching its ultimate findings. While the reasons of the RRT are not to be construed 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) that approach does not authorise a court to read into the reasoning of the RRT the application of a criterion which, on a fair reading of the reasons as a whole, does not appear to have been applied by it. In arriving at my conclusion I have taken into account that the RRT referred, in general terms to the seriousness of aspects of the harm (see for example [51], [52], [53] and [55]) but those references are also consistent with it accepting the requirement of serious harm specified in the examples provided as laid out in s 91R(2). Further, those general references are not sufficient to overcome the views I have formed, on the basis of the reasoning of the RRT, that it applied s 91R(2), rather than s 91R(1).

62. There is a further matter that suggests the RRT applied s 91R(2), rather than s 91R(1). To apply s 91R(1) the RRT would have to consider whether the claims of the applicant child, cumulatively, constituted persecution that involved "serious harm". That follows from the duty of the RRT to consider the "totality of the case put forward" (see Khan v Minister for Immigration & Multicultural Affairs [2000] FCA 1478 at [31]) and in doing so consider each of the integers of the claim: see Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 at 247-248 [8]-[12] and 259 [41]-[42] and SCAT v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 76 ALD 625 at 636-637 [29].

63. On the evidence and material before the RRT, which it accepted or did not reject, the following forms of harm were claimed to be feared in respect of the applicant child if he returned to China:

- deprivation of access to China's free education and medical services;
- deprivation of ability to acquire public sector employment in adulthood;
- denial of official registration with its consequential ramifications; and

- imposition of a significant financial penalty on the applicant parents in order to remove or mitigate the above forms of harm.

64. In relation to the last item it can be accepted that the means of the parents "to mitigate the consequences of [their child's] adverse treatment" is relevant to whether "the treatment in question could be viewed as appropriate and adapted to the implementation of China's 'one-child policy' and not as persecution": see Chen at 305 [36]. Further, it may be that where parents have such means there may be no real chance of the child suffering those consequences. Nonetheless, for so long as the applicant child is unregistered, and therefore a "black child", all four forms of apprehended harm are capable of being relevant to his claim.

65. The RRT considered the likelihood of the financial penalty being paid. However, it failed to consider the cumulative effect of all of the forms of harm which on its findings of fact the applicant child might suffer, and then address the question of whether the totality of that treatment met the legislative criterion of persecution involving serious harm. Plainly, if s 91R(1), rather than s 91R(2), was being applied the RRT could have been expected to have addressed that question.

66. In my view a fair reading of its reasons as a whole establishes that the RRT failed to address the question of whether the conduct feared by the applicant child constituted "serious harm" but, rather, it addressed whether that conduct fell within s 91R(2). Thus, the RRT failed to address the correct issue and question required to be addressed."

63 In our view, VTAO is plainly distinguishable from the present case. In VTAO the RRT made it clear that it rejected the third applicant's claims because they did not threaten his, and his family's, "capacity to subsist", as required by s 91R(2). At no stage did it consider how the phrase "serious harm" was to be interpreted. It repeatedly used language that suggested that the examples contained in s 91R(2)(c), (d) and (e) represented the appropriate legislative test. In addition, there were other factors present, such as those referred to in [62], [64] and [65] of Merkel J's judgment that led his Honour to conclude that the RRT had failed to address the correct issue.

64 In the present case, there are only two passages that can be called in aid in support of the appellant's primary contention. Each of those passages can readily be understood as a response to a specific claim, on the part of the appellant, that his case fell within one or more limbs of s 91R(2). Those claims were considered, and rejected, as they had to be, having regard to the findings of fact made by the RRT. The sentences that immediately followed those passages are clearly susceptible to a construction that involves a broader reading of the term "serious harm", and a rejection of the claims made in the context of that interpretation.

65 In addition, and specifically in relation to the second passage, the finding by the RRT that the appellant would be able to support himself and his family as he did previously, and that his *ho khau* would be reinstated seems to

us to provide a complete answer to any claim that an incorrect interpretation of the expression "serious harm" gave rise to jurisdictional error. It is clear therefore, that any error on the part of the RRT in that passage, was in no way material. The finding of fact meant that there was no harm of any kind sustained by the appellant, still less of serious harm, in relation to the loss of *ho khau*. It goes without saying that an error that is immaterial, having regard to the findings of fact made, cannot form the basis for a successful application for judicial review.

66 We are therefore not persuaded that Emmett J erred in rejecting the appellant's contention that is the subject of this appeal. The appeal must be dismissed, with costs.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kiefel, Weinberg and Edmonds JJ.

Associate:

Dated: 31 May 2005

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Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	11 May 2005
Date of Judgment:	31 May 2005