C A T C H W O R D S

IMMIGRATION - refugees - refusal of refugee status by Refugee Review Tribunal - applicant from China - whether applicant had a well-founded fear of persecution on Convention grounds if returned to China - "real chance" of persecution - whether Tribunal applied balance of probabilities test - whether the Tribunal, having reached a positive state of disbelief about applicant's credibility, erred in applying real chance test - illegal departure - whether law penalising secret crossing of borders applied only to Chinese nationals - whether such a law and enforcement of it against Chinese nationals could amount to persecution by reason of nationality.

Migration Act 1958 (Cth) ss.31(3), 65, 166LD(2), 478(2)

Administrative Decisions (Judicial Review) Act 1977 (Cth) s.5

Migration Reform Act 1992 (Cth) s.39

Chan Yee Kin v. Minister for Immigration & Ethnic Affairs (1990) 169 CLR 379

Fuad Bin Mahboob v. Minister for Immigration & Ethnic Affairs (unreported, Lehane J, 15 March 1996, No.148 of 1996)

Singh v. Minister for Immigration and Ethnic Affairs (unreported von Doussa J, 31 January 1996, No. 17 of 1996)

Mahfoud v. The Minister for Immigration, Local Government and Ethnic Affairs (1993) 43 FCR 217

Minister for Immigration, Local Government & Ethnic Affairs v. Mok Gek Bouy (1994) 127 ALR 223

Guo Wei Rong v. Minister for Immigration & Ethnic Affairs, (Full Court, unreported 26 February 1996 No. 89 of 1996)

Wu Shan Liang v. Minister for Immigration & Ethnic Affairs (1995) 130 ALR 367

Subramaniam Muralidharan v. Minister for Immigration & Ethnic Affairs (Full Court, unreported 22 March 1996, Judgment No. 182 of 1996)

Wu Guo Xiong & Anor v. Minister for Immigration & Ethnic Affairs (Full Court, unreported, 9 August 1995, No. 595 of 1995)

SU WEN JIAN v. THE MINISTER FOR IMMIGRATION & ETHNIC AFFAIRS and THE REFUGEE REVIEW TRIBUNAL

No. WAG 127 of 1994

CARR J.

PERTH

24 APRIL 1996

IN THE FEDERAL COURT)

OF AUSTRALIA)

WESTERN AUSTRALIA)

DISTRICT REGISTRY) **No. WAG 127 of 1994**

GENERAL DIVISION)

B E T W E E N : **SU WEN JIAN**

Applicant

and

THE MINISTER FOR IMMIGRATION& ETHNIC AFFAIRS

First Respondent

and

REFUGEE REVIEW TRIBUNAL

Second Respondent

CORAM: CARR J.

PLACE: PERTH

DATE: 24 APRIL 1996

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent's costs of the application.

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

IN THE FEDERAL COURT)

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CORAM: CARR J.

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REASONS FOR JUDGMENT

Introduction

This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal") that the applicant is not a refugee within the meaning of that term in the *Migration Act* 1958 (Cth) ("the Act"). The application purported to raise two grounds of review under s.5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the *ADJR Act"*). In essence, there are two matters in issue. The first is whether the Tribunal applied the "real chance of persecution" test correctly. The second is whether persecution by reason of nationality can arise where every person of that nationality (in this case the population of the Peoples Republic of China) is the subject of the law, the content and enforcement of which are said to amount to persecution.

The *Migration Reform Act* 1992 - Whether this Court has Jurisdiction to Hear the Application

The Tribunal, in accordance with its usual practice, has not taken any part in these proceedings. At the hearing of the application the question arose whether this Court had jurisdiction to hear the matter in view of the amendments made to the Act by the *Migration Reform Act* 1992. Both the applicant and the first respondent submitted that, notwithstanding those amendments, this Court had jurisdiction to hear the application. Despite this common ground between the parties, I have a duty to consider and decide the jurisdictional question.

In the quite recent decision of *Fuad Bin Mahboob v. Minister for Immigration & Ethnic Affairs* (Federal Court of Australia, 15 March 1996, No. 148 of 1996), Lehane J. held that this Court had no jurisdiction under the *ADJR Act* to review the decision of the Tribunal which was under challenge in that matter. In *Fuad Bin Mahboob* the applicant had applied to the Tribunal for review before 1 September 1994 but the Tribunal's decision was given after that date. The same circumstances apply in this matter. 1 September 1994 is significant because it was the date upon which Part 4B of the *Migration Act* came into effect. Part 4B provided a new regime for the review by this Court of what are now described as "judicially-reviewable decisions". The application to the Court for review in the *Fuad Bin Mahboob* matter was filed some six months after the Tribunal's decision. In those circumstances, the application could not be dealt with as an application for judicial review under Part 4B because s.166LD(2) [now s.478(2)] expressly prohibits the Federal Court from making an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period of 28 days from the time when the applicant was notified of the Tribunal's decision. As Mr Fuad Bin Mahboob's application could not be determined under the *ADJR Act*, Lehane J. formed the view that it had to be dismissed. The first respondent submitted that the decision in that case was wrong and that this Court still has jurisdiction under the *ADJR Act* to hear the present matter. The applicant's counsel submitted that there was no need to decide whether the *ADJR Act* applies to this matter because his client relied on errors of law said to have been made by the Tribunal. Error of law is a ground common to the *ADJR Act* grounds and those provided for under what has been described as the new Part 4B regime. In *Singh v. Minister for Immigration and Ethnic Affairs* (unreported, von Doussa J, 31 January 1996, No. 17 of 1996) his Honour expressed the opinion that:

"... the jurisdiction of the Court to review the decision of the Tribunal made after the *Migration Reform Act* 1992 came into operation arises under ss.475 to 486, being the legislative provisions then in force. It follows that the grounds upon which the Court may review the decision of the Tribunal are limited by the provisions of s.476."

I do not propose to revisit that jurisdictional question in this matter. If, as von Doussa J. and Lehane J. held, the Court does not have jurisdiction under the *ADJR Act* in circumstances which are relevantly the same as this matter (as I think they are, save, in respect of *Fuad Bin Mahboob*, for the time within which application was made to this Court), I consider that its jurisdiction has been engaged under Part 4B of the *Migration Act*. No objection has been taken to the fact that the application was in form an application under the *ADJR Act*. Any defect is purely procedural. In my view the Court's jurisdiction to review for error of law has been enlivened. *Mahfoud v. The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 217 is to be distinguished on that basis. There is no suggestion in this matter that the application was filed outside the 28 day time limit. The date of the Tribunal's decision was 4 October 1994 but the applicant was in Port Hedland, and there was no evidence when its decision was physically despatched to him. The application for an order of review was filed in this Court on 3 November 1994. Nevertheless, s.476 restricts the grounds of review to those set out in s.476(1). This does not present any difficulties because, as the applicant submits, the grounds upon which the applicant relies fall within that subsection. All of the grounds relied upon by the applicant rest on alleged error of law.

The Statutory Framework

Section 39 of the *Migration Reform Act* provides that applications for refugee status and for refugee-related entry permits which were made and not finally determined before 1 September 1994 are to be dealt with as if they are applications for a protection visa. Section 65 of the Act provides that if an applicant for a visa satisfies the criteria prescribed by the Act and the regulations for the grant of that visa, the Minister is to grant that visa but if the criteria are not satisfied the Minister is to refuse to grant that visa. The prescribed criteria for the grant of a protection visa are set out in Part 866 of Schedule 2 of the Migration Regulations - see s.31(3) of the Act and Regulation 2.03 of those regulations. One of the criteria for the grant of a protection visa is that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention - see Clause 866.221 of Schedule 2 of the Regulations. Clause 866.111 defines "Refugees Convention" as meaning the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees. Article 1A(2) of the Convention as so amended, defines a refugee as any person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ..."

Factual Background

The following recital of the factual background of this matter is taken largely from the Tribunal's reasons. Mr Su (to whom I shall occasionally also refer as "the applicant") was born on 30 October 1966 in Qinzhou, Guangxi Autonomous Region in the Peoples Republic of China. He completed secondary school in July 1984. Mr Su was

unemployed until 1987 when he obtained employment with the Qinzhou Traffic Department. His work involved administering traffic regulations. In September 1987 Mr Su enrolled as a student at Shenzhen University in Guangdong Province. He undertook his studies by correspondence, travelling to the University to complete examinations at the end of each semester. He was due to take his final examinations in May/June 1989. Mr Su went to Shenzhen University in April 1989 to prepare for those examinations. He told the Tribunal that he spent about two months at the University, that is from April until June 1989.

The applicant claimed that during that period at the University he became involved inpolitical activities in support of the pro-democracy students' movement in Beijing. He said that he was one of a core group of six students organising pro-democracy activities at Shenzhen University. He described himself as being in charge of propaganda. He said that his tasks included handing out leaflets and putting up posters. The applicant did not claim to be the leader of that group but claimed to have a significant profile in pro-democracy activities.

The applicant told the Tribunal that he had contact with other students at tertiary institutions in Shenzhen to discuss ways in which they could support the students in Beijing. In particular, a demonstration was planned with other students and held on 28 May 1989 which attracted several thousand students and members of the community. The participants marched along the streets to the Shenzhen government office. The applicant told the Tribunal that a student union existed at Shenzhen University but he was not part of the union. He told the Tribunal that he did not know if the students' union organised other pro-democracy demonstrations as he was a correspondence student. The applicant told the Tribunal that his group organised another demonstration on 3 June 1989 which attracted about 7,000-8,000 participants. The applicant said that he did not know of any other pro-democracy demonstrations during the period he was in Shenzhen. As will be seen, that was one of several factors which led the Tribunal to disbelieve the applicant. The Tribunal put to the applicant information concerning a pro-democracy demonstration of more than 100,000 participants in Shenzhen on 22 May 1989. That march was organised by the Shenzhen University Students' Union. The march started off with 100,000 demonstrators but on-lookers were also involved. A news report described the march as well-organised and stated that there was no trouble as the procession wound its way through the streets of Shenzhen. The march apparently attracted more than one fifth of the population of Shenzhen. Mr Su told the Tribunal that he did not recall that demonstration. The Tribunal put to Mr Su that his lack of knowledge of such a large scale pro-democracy demonstration was hard to reconcile with his claims. Mr Su reiterated his claim that he was a correspondence student. The Tribunal pointed out to Mr Su that his earlier evidence had indicated that he was in Shenzhen between April and June 1989. There was no further explanation from Mr Su regarding that issue.

Mr Su told the Tribunal that the demonstration held on 3 June 1989 was curtailed by the police. He said that he fled from Shenzhen and eventually arrived back in Qinzhou after being told by a friend that the Public Security Bureau was looking for him. The Tribunal noted that the Public Security Bureau, although primarily a police force, also plays some role in political and security investigations, border control and investigation of "counter-revolutionary" crimes, thus operating within a political framework.

Mr Su claimed that on 14 July 1989 he was arrested in Qinzhou by officers of the Public Security Bureau, detained for about 15 days in a detention centre and then detained further for investigation. Mr Su claims that, although he was not dealt with by a court, he was charged with "counter-revolution" and put into a gaol at Qinzhou for a period of two years from 20 August 1989 and was released from that prison in August 1991. Mr Su claimed that after his release in August 1991 he reported to his work unit but was asked to transfer to another work unit. Mr Su told the Tribunal that between August 1991 and October 1992 he did not work but was paid 40% of his salary from which he supported himself.

In October 1992 Mr Su left China illegally by boat and arrived in Australia (at Christmas Island) in November 1992 with a number of other Chinese nationals. Mr Su was interviewed by officers of the Department of Immigration and Ethnic Affairs but did not lodge an application for refugee status. Later that month (i.e. November 1992) Mr Su was returned to China. Mr Su claimed that on his return to China he was arrested by the Public Security Bureau, fined 500 yuan and detained until November 1993. Mr Su told the Tribunal that during this (his second) period of imprisonment he remained attached to his work unit and was paid 40% of his salary. Those moneys were paid directly to the gaol to pay for the expenses associated with his imprisonment. Mr Su stated that during the early stages of that detention he was questioned by the Public Security Bureau about what happened on his first journey to Australia and in particular what he had told the Australian authorities. Mr Su claimed that during his detention he was punched and kicked and that in November 1993 he contracted pneumonia and was transferred to hospital for treatment. He remained in hospital for about two months. At this point the hospital recommended that he be sent home to recover and that he return to prison in May 1994. Mr Su claimed that he returned home and was required to attend the hospital for medical checks and treatment. He stopped reporting to the hospital in about January 1994 and went into hiding. On 29 April 1994 Mr Su, once again, left China illegally by boat and arrived in Australia on 28 May 1994. On 13 June 1994 Mr Su applied for refugee status. On 6 July 1994 he was notified that the first respondent's delegate had refused that application. On 15 July 1994 Mr Su applied to the Tribunal for review of that decision. The Tribunal conducted a hearing on 31 August 1994 and on 4 October 1994 published its decision that Mr Su was not a refugee.

The Tribunal's Findings

The Tribunal made a basic credibility finding against the applicant. It rejected his claim that he was imprisoned for a two year period as a result of his pro-democracy activities. There were three carefully-reasoned bases upon which that credibility finding was made. The first was Mr Su's lack of knowledge of the Shenzhen demonstration which involved one fifth of the population of that city. The second was that when interviewed on 1 June 1994 by the Department's Compliance Branch, the applicant told the departmental officer that on his return to China in November 1992 he was detained for three days and two nights and fined 500 yuan because of his illegal departure. He made no mention of being imprisoned for twelve months. His evidence to the Tribunal was that he was detained for twelve months and fined 500 yuan. The Tribunal referred to the applicant's explanation for not mentioning the extent of his imprisonment and certain other matters. Thirdly, the Tribunal had before it information (which it put to the applicant) about the treatment of pro-democracy activists and in particular their prospects of obtaining employment. The Tribunal noted Mr Su's claim that he had not

worked at his work unit since arrest and imprisonment in July 1989. The Tribunal contrasted this with the applicant's evidence that he retained his status as an employee of a State work unit, was paid a 40% part salary throughout the period August 1991 to October 1992 and November 1992 to November 1993, and was issued with documentation certifying the duration of an appointment as an assistant economist from December 1993 until December 1998. The Tribunal contrasted that document with another which had been in Mr Su's possession entitled "Disciplinary decision of the Peoples Government of Qinzhou in relation to the mistakes made by Wen Jian Su" issued on 21 October 1993. The relevant part of that document (when translated) stated as follows:

> "(The applicant's) status as a State employee is to be cancelled by his work unit. He will continue to be employed and will be observed for one year. During the year when his employment is continued and while he is being observed he will be given temporary pay (i.e. his basic wages, an allowance commensurate with the number of years he has been employed and 40% of his former pay). This is to be implemented from November 1993."

When the Tribunal told Mr Su that, in the light of all the independent information before it concerning labour and wage reforms in China, it was difficult to reconcile his claims of maintaining employment and payment of part salary particularly for such a long period of time, he reiterated a claim that he was treated differently because he was a Communist Party member. The Tribunal found that this claim, based on Communist Party membership, was implausible. Its reasons included an observation that the very nature of an allegation of counter-revolution is such that it brings an accused's political credentials and commitment to the Communist State into disrepute. The Tribunal also noted an internal inconsistency with claims previously made to the Department. In the compliance interview on 1 June 1994 Mr Su had suggested that he had received the maximum fine for illegal departure on return in 1992 <u>because</u> he was a party member. In written claims made to the Department on 20 June 1994 Mr Su had asserted that he did not receive a reduced sentence in 1989, even though his father was a member of the Communist Party.

Grounds of Application

At the hearing the applicant relied only on the four grounds referred to below.

1. <u>Alleged Misdirection at Law - Findings of Fact Based on Speculation</u>

The applicant contended that the Tribunal misdirected itself at law by making findings of fact based on speculation concerning two matters, namely:

- his explanation for not mentioning his imprisonment at his first interview with the Immigration Department's Compliance Branch on 1 June 1994;

- his evidence that local government authorities in China had enacted their own laws in relation to illegal departure.

In oral argument, this submission was distilled to the proposition that if the Tribunal was going to make a decision about whether a fact exists or not, then it has to do so on evidence and not on the basis of speculation. So far as the first of the two matters referred to above is concerned, I do not think that the Tribunal made findings of fact

based on speculation concerning the applicant's explanation for not mentioning his imprisonment at his first compliance interview on 1 June 1994. The Tribunal noted this omission and the applicant's explanation. It then proceeded, in a carefully- reasoned manner to make credibility findings against the applicant. The Tribunal relied upon one of the applicant's documents as suggesting that the penalties which he incurred for illegal departure comprised workplace observation for a year and a reduction in salary, not imprisonment for 12 months. This was not speculation from non-existent evidence, it was inference from documentary evidence produced by the applicant.

Similarly, the Tribunal gave four reasons for rejecting the applicant's evidence concerning the enactment by local government authorities in China of their own laws in relation to illegal departure. In summary those were:

. the fact that the applicant did not make these claims until the oral hearing;

. the fact that there was no independent evidence of this matter;

. the fact that information from the Department of Foreign Affairs and Trade ("DFAT") ran counter to the applicant's claims; and

. the fact that the Tribunal did not accept the applicant's general credibility.

It is sufficient to point to the DFAT information which was before the Tribunal concerning the penalties for illegal departure from China. In my opinion the Tribunal was entitled to prefer that evidence to the assertions put forward by the applicant. In so doing it was not engaging in speculation.

2. Alleged misdirection at law - the Department of Foreign Affairs and Trade Cables

The applicant contended that there had been further error of law on the Tribunal's part. This was said to arise out of the Tribunal allegedly misdirecting itself by giving greater weight to certain advice contained in the DFAT cables than to the applicant's claims. The Tribunal said that it did this because the DFAT agencies are charged with the responsibility of collecting, reporting and interpreting events in the international arena.

The essence of this complaint is that the Tribunal engaged in the balancing of probabilities when deciding matters of existing fact, in this case whether there are local laws specifying lengthy terms of imprisonment for illegal departure.

As this ground overlaps with the next ground, referred to below, it is convenient to deal with it as part of that ground.

3. Whether the Tribunal erred in law in its method of reaching conclusions of fact

The full text of this ground reads as follows:

"The Second Respondent misdirected herself at law by reaching conclusions of fact crucial to a determination of whether there was a real chance that the Applicant would be persecuted by applying a standard of proof of such facts on the balance of probabilities, in particular by

(i) giving "greater weight to the advice from DFAT than the unsupported assertions of the Applicant" as to the length of terms of imprisonment imposed for illegal departure from China;

(ii) seeking to "reconcile" with "independent evidence" or support with independent evidence the claims of the Applicant before being "satisfied" as to the Applicant's claims or "general credibility"."

The applicant submitted that the Tribunal erred in law by weighing up, on the balance of probabilities, the evidence before it concerning matters of historical fact either generally relevant or particularly relevant to him. It was wrong, so it was put, to reach a finding of credibility against the applicant, in respect of a claim concerning what had happened to him in China, by weighing up competing evidence in respect of that claim and on the balance of probabilities preferring that competing evidence to the applicant's evidence. The submission went further and extended to a criticism that the Tribunal preferred to accept what was said to be evidence of a very general nature to the more particular evidence of the applicant. I will deal with this latter argument first. It is not for this Court to assess whether one body of evidence before the Tribunal is more cogent than another. That exercise would involve a review of the merits, not for error of law. This part of the submission boiled down to an attack on the Tribunal for relying on information obtained from the DFAT about matters of historical fact concerning events which had happened in China, in preference to the applicant's evidence. The Tribunal was clearly entitled to make up its own mind which evidence to prefer. In my view it did not err in law when it made that choice.

The next question which extends to the issue referred to immediately above, is whether the Tribunal erred in law by assessing matters of historical fact or the applicant's credibility on the balance of probabilities. The first respondent disputed that this had been done. Counsel for the first respondent pointed to the fact that the Tribunal had used the expression "greater weight" only once throughout its reasons (which were 23 pages in length). He submitted that when those reasons were read as a whole it was clear that the Tribunal applied what has come to be known as the "real chance" test.

The "real chance" test has its Australian origin in the High Court decision of *Chan Yee Kin v. Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 379 and in particular in the well-known passage from the judgment of Mason CJ at p.389. It has now been generally accepted that a real chance can be as low as one in ten - see McHugh J's reasons for judgment at p.429 citing the United States Supreme Court decision in *Immigration & Naturalization Service v. Cardoza Fonseca* (1987) 480 US 421; see also *Minister for Immigration, Local Government& Ethnic Affairs v. Mok Gek Bouy* (1994) 127 ALR 223 at p.251. As Einfeld J. pointed out (in *Guo Wei Rong v. Minister for Immigration& Ethnic Affairs*, Full Court, unreported 26 February 1996 No. 89 of 1996 at p.17) it was not necessary for the High Court in *Chan* to decide "... whether the real chance test should or should not be applied to past events". As appears from a passage in Mason CJ's reasons for judgment in *Chan* at p.388, the delegate accepted Mr Chan's account of the measures taken and threatened against him and it was not necessary for the Federal Court to review the delegate's finding concerning the state of affairs prevailing in China.

However, in many refugee cases there have been such factual matters in issue. Inevitably the assessment of whether there is a real chance of persecution for a Convention reason if the applicant is returned to a foreign country, involves ascertaining what has happened in the past. An examination is made of the present situation in the country concerned (including such matters as the political climate, any relevant laws and how they are enforced) and then an assessment is made of whether there is a real chance of such persecution. Sometimes the delegate or Tribunal, in resolving some of the factual issues, has to make assessments of credibility. The question is the degree to which the decision-maker must be satisfied when resolving such issues.

It was not until fairly late in the piece that a series of cases decided by the Full Court of this Court, starting with *Mok*, dealt with this problem. In *Mok* (at pp.252-253) Sheppard J. (with whom Black CJ and Lockhart J agreed) referred to certain passages of the delegate's decision. His Honour made it clear that these were only examples. The examples chosen were passages in which the delegate used the expression "I gave greater weight" to certain DFAT material than to a report compiled by a Dr Shoesmith concerning the continuing Vietnamese military presence in Cambodia. At p.253 his Honour said:

> "In the present case, it seems to me that either there was nothing to be said for Dr Shoesmith's view or, although there was something to be said for it, the predictions of the Department of Foreign Affairs were more likely to be correct. But that did not mean that Dr Shoesmith's report should have been dismissed out of hand. It was a factor still to be taken into account not as a probability but as a possibility and thus as providing, perhaps, a basis for saying that there was a real chance of persecution in the sense in which that expression has been explained by the judges in *Chan*. In my opinion this is enough to infect Mr Paterson's reasons with error."

His Honour's criticism of the delegate's reasoning continued at p.254:

> "His reasons consist of assertions in the form of findings. But findings are made in the context of ascertaining what has occurred in the past or what is likely to be a particular state of affairs in the future on a balance of probabilities. It is not the assessment of the real chance of something that has occurred or may occur in the future."

In *Wu Shan Liang v. Minister for Immigration& Ethnic Affairs* (1995) 130 ALR 367, the Full Court applied the reasoning in *Mok* when assessing a delegate's decision. At p.378 the Court prefaced that assessment with the following observation:

> "The expression `real chance of persecution' is used in the reasons ... The delegate was thus aware of the test she had to apply. Her reasons are entitled to a beneficial construction.

We should not take the view that she did not apply the correct test unless this appears clearly from what she has written."

A key factor in those reasons was the delegate's express refusal to engage in speculation about whether the applicant would be treated more harshly than in the known relevant cases. Taking that into account together with the use of the expressions "give more weight to" and "give greater weight to", the Court concluded that the delegate did not in fact apply the correct test; she had not turned her mind to what the test involved.

A similar approach to the problem can be seen in the reasons for judgment of Beaumont J. in *Guo Wei Rong* (at p.26):

"Specifically, did the Tribunal really address the question whether the conduct of Mr Guo, looked at as a whole, was capable of being perceived by the Chinese authorities as politically neutral, on the one hand, or as politically significant, on the other, in the sense described in the authorities mentioned?" (original emphasis)

Einfeld J. approached the matter slightly differently (at p.17):

"The `real chance in the future' test will be compromised if it is heavily influenced by findings about the past made on the balance of probabilities. In other words, the substance of the real chance test will be circumvented if the deciding factor is a finding on the balance of probabilities in relation to a past event and there was no analysis of the possibility that it was inaccurate. It is simply not correct to define this conundrum in terms that if something happened in the past there is a real chance that it will happen again, and if it did not there is no real chance that it will happen in the future."

And at p.18 (after citing a passage from *Mok* with approval):

"This approach could be appropriate for the circumstances of a case such as the one at hand. The Tribunal could assess past events on a balance of probabilities test to make its findings, and then engage in the speculation of "what if I am wrong". Proceeding on the basis that it was probable that events had transpired as it had found and were not Convention related, but that it was nonetheless possible that they were Convention related, the question of any real chance of persecution on Convention grounds on the appellants' return to China could be addressed."

Foster J. (at pp.11-13) described the delegate's task in the following terms:

"It requires a particular mind-set on the part of the decision-maker, different in kind from that required in determining whether a civil onus is satisfied. There is necessarily a basic question of principle to be answered: namely, whether the `real chance' test is to be applied only in the determination of the ultimate question posed by the definition, or whether it should also form the basis of the assessment of the salient facts relied upon by the applicant in establishing the objective aspects of refugee status. No doubt in the majority of cases, and the present is no exception, applicants will seek to base their claim of fear of persecution upon events which they allege occurred in their own country and which occasioned their departure for the purpose of seeking asylum elsewhere. What standard of proof should be applied in respect of these events? Is it necessary for the applicant to establish their occurrence on the balance of probabilities or is it sufficient for the decision-maker to accept the mere possibility of their occurrence as providing the required objective support for the applicant's fear of persecution on return?

Questions of the applicant's credibility as a witness are, also, obviously involved in the process. Serious concerns about the credit worthiness of an applicant's testimony can, of course, be fatal to a favourable finding on the balance of probabilities. However, a finding that he or she has failed to establish fact A on the balance of probabilities because, in all the circumstances, including matters of demeanour, the decision-maker is not prepared to accept the applicant as a credible witness does not, as a

matter of logic, necessarily mean that the possibility of the applicant's correctly asserting the existence of fact A has been entirely excluded. Mere doubts or concerns as to the applicant's credibility would not be sufficient to exclude the possibility. For this result, a positive state of disbelief would be required on the part of the decision-maker".

Sackville J. referred to this problem in *Subramaniam Muralidharan v. Minister for Immigration & Ethnic Affairs* (Full Court, unreported 22 March 1996, Judgment No. 182 of 1996). Although his Honour (at pp.14-15) referred to some indications in the Tribunal's reasons in that matter which suggested that the Tribunal weighed the prospect of persecution as a matter of likelihood or probability rather than assessing whether there was a "real chance" of persecution, he decided it was unnecessary to resolve the issue. His Honour decided the matter upon the basis that the Tribunal had not complied with its statutory duty to give reasons. Davies J. agreed with Sackville's decision in that regard and Beazley J. concurred generally. At p.16 Sackville J. commented:

"In some cases it may be quite clear that, despite a reference to *Chan* and other relevant authorities, the Tribunal has misunder-stood or misapplied the correct principles. In others the position will be much less clear. If the scrutiny of the Tribunal's reasons is carried too far, it may give rise to an issue as to whether the Courts are "unduly interfer[ing] with administrative decisions"." [A reference to the transcript of proceedings of the application for special leave to appeal in *Wu Shan Liang*].

The High Court granted the Minister special leave to appeal in *Wu Shan Liang* and that appeal has been heard. The High Court reserved its decision on 7 March 1996.

On a fair reading of the Tribunal's reasons, did it assess the evidence as a whole and apply the correct test? Did it ask and answer the question whether there was a real chance of Mr Su being persecuted for a Convention reason if he were to be returned to China? As the Full Court held in *Wu Shan Liang*, this Court should not take the view that the Tribunal did not apply the correct test unless this appears clearly from what she has written. I would make one qualification. The qualification is that, I agree respectfully with Foster J's observation in *Guo Wei Rong* that a positive state of disbelief on the part of the decision-maker is sufficient to exclude the possibility of the existence of a particular fact. I now turn to the Tribunal's reasons.

The Tribunal expressly accepted the difficulties of proof faced by applicants for refugee status and accepted also that there may be statements which are not susceptible of proof. It cited the United Nations "Handbook on Procedures and Criteria for Determining Refugee Status" (UNHCR Geneva, 1992) and in particular the passages (at paragraphs 196-197 and 203-204) which state that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. It expressly recognised that it was rarely appropriate to speak of onus of proof in relation to administrative decision-making.

A careful reading of the Tribunal's reasons shows a positive state of disbelief about the applicant's claims of involvement in pro-democracy activities. This was based on the applicant's lack of knowledge of the major pro-democracy demonstration held on 22 May 1989 and the other matters to which I have referred above. At page 17 of its reasons it can be seen that the Tribunal did not believe the applicant's claim that he had been imprisoned for two years as a result of his pro-democracy activities. It was in that context (having positively disbelieved the applicant in that regard) that the Tribunal found that there was no evidence which would allow it to make a finding that the applicant faced a real chance of treatment amounting to persecution because of possible pro-democracy activities in which he may have been involved. It is clear that the Tribunal recognised that even what it described as "... a scintilla, or beginning, of evidence ..." would have made a difference in reaching a decision in the applicant's favour. Having reached a positive state of disbelief on the matter of the alleged pro-democracy activities, the Tribunal was, in my opinion, entitled to put that basis of the applicant's claims out of further consideration.

The next question is how the Tribunal dealt with the applicant's claim of imprisonment on return to China in 1992 as bearing on the question whether he is likely to be persecuted for a Convention reason if returned to that country.

The Tribunal relied upon the applicant's own document as showing that the penalties which he incurred for illegal departure comprised workplace observation for a year and a reduction in salary. It then reached another positive state of disbelief on the alternative basis that (on the assumption that the documentation was not true) the applicant was in possession of documentation which was fabricated and from which he had not sought to distance himself or admit to such fabrication. In those circumstances, once again, I consider that the Tribunal was entitled to put out of its mind the applicant's claim to imprisonment and to accept the advice from DFAT concerning penalties for illegal departure. Again in respect of the applicant's oral evidence about local laws, a significant part of the Tribunal's reasons for rejecting that evidence was the applicant's general lack of credibility. I agree that part of its reasoning in rejecting the oral evidence concerning the local laws comprised the DFAT information, but the preponderance of reasoning related to the applicant's lack of credibility.

In my view the Tribunal did not misdirect itself at law by making findings of fact based on speculation as alleged. Nor did it apply a standard of proof on the balance of probabilities to reach conclusions of fact crucial to a determination of whether there was a real chance that Mr Su would be persecuted for a Convention reason if returned to China. It reached a positive state of disbelief about the applicant's claims:

- to have engaged in the pro-democracy activities which he described;

- to have been imprisoned for two years by reason of those activities; and

. to have been imprisoned for one year upon return to China in 1992.

In my opinion, on the state of the case law to date, the Tribunal did not err in law in finding those facts. It understood the test for the ultimate issue, laid down by the High Court in *Chan* and it applied that test.

4. Nationality

There remains ground 2(d) of the application which concerns whether punishment for the infraction of illegal departure laws is persecution for a Convention reason. That ground reads as follows:

"The Second Respondent misdirected herself at law in reaching a conclusion that punishment for the infraction of illegal departure laws is not persecution for a reason set out under the Refugee Convention and, in particular, erred in not considering or concluding that the laws in relation to illegal departure were applied to the Applicant on the basis of his nationality."

Mr G McIntyre, who appeared, without fee, as counsel for the applicant, submitted that the Chinese laws applying sanctions against Chinese nationals for departure from China without permission, did so on the basis of nationality and thereby negated what was described as a fundamental right to leave and return to one's country of nationality. This, so it was put, was discrimination on the grounds of nationality which resulted in persecution in the form of punishment by imprisonment. Mr McIntyre said that he was not aware of this view of the matter having been put before. The Tribunal dealt with the subject of illegal departure in the following manner:

"In relation to illegal departure, there is no connection between the Convention grounds and the punishment the Applicant may face for illegal departure. There is no credible evidence before the Tribunal that laws in relation to illegal departure, are not applied to the Chinese population in general and are differentially based. The Tribunal is not persuaded from the evidence before it that the range of penalties for illegal departure are (sic) so severe as to suggest that the laws themselves serve a political purpose. The Tribunal concludes that generally laws related to illegal departure are ordinary offences. If returned to China the Applicant's penalty for illegal departure may not be at the low end of the range because he is a repeat offender, but such punishment is not for a Convention reason."

Mr McIntyre's submission was that the applicant was subject to persecution because of his nationality and there was no need to show membership of any national group forming a minority in China. He acknowledged that the applicant was "part of the mainstream national group". His submission was that any suggestions in Hathaway "The Law of Refugees" at pp.40-41 to the contrary were not correct. The persecution, so it was submitted, arose out of failure to accord fundamental human rights. Mr McIntyre acknowledged, in response to a question from me, that his proposition amounted to a claim that any Chinese national who leaves the Peoples Republic of China illegally must automatically become a refugee within the Convention.I reject the applicant's submissions on this point for two reasons. First, the evidence does not establish that these laws are applied only to Chinese nationals. A translation of the relevant law was in evidence and it reads:

> "Those who secretly cross national territories (borders) shall be either detained by public security organs for less than 15 days, or fined from 1,000 to 5,000 yuan, or punished with a combination of both. When the circumstances are odious, they shall be punished by a fixed term imprisonment or detention of less than two years. In addition, they shall be fined."

There is no evidence from which one may infer that those who are not Chinese nationals are exempt from liability under this law. As Tamberlin J. observed in *Wu Guo Xiong& Anor v. Minister for Immigration & Ethnic Affairs* (unreported, 9 August 1995, No. 595 of 1995):

> "Although not decisive it is significant, in this case, that the Chinese government's migration controls are of general not selective application. On their face they affect all persons who breach the departure laws. The Tribunal did not make any finding that although of general application on their face, the migration controls against illegal departure were discriminatory or were in reality directed to person who expressed any particular political opinion."

[The date of the Tribunal's decision under review in that matter was 12 April 1995]. Nor does the evidence point to the fact that if Mr Su is imprisoned on return to China for having departed secretly, such treatment will be because he is a Chinese national. If he is sent to prison it will be because he has contravened the law, not because he is a Cinese national.

Secondly, as a matter of law there is implicit in the very word "persecuted" an idea of selective harassment. In *Chan* at p.429 McHugh J. explained:

> "The term `persecuted' is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes `being persecuted'. The notion of persecution involves selective harassment."

Finally, in *Minister for Immigration and Ethnic Affairs v. Respondent A* (1995) 130 ALR 48 at p.56 there is the following observation from the Full Court of this Court:

> "Since a person must establish well-founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention."

In my view, even if the secret departure laws apply only to Chinese nationals, imprisonment or fines for their contravention would not amount to persecution for reasons of nationality within the meaning of that expression in the Convention.

Conclusion

The application will be dismissed with costs.

I certify that this and the preceding twenty-seven

(27) pages are a true copy of the Reasons for Judgment

of Justice Carr.

Associate:

Date: 24 April 1996

Counsel for the Applicant: Mr G M McIntyre

Solicitors for the Applicant: Dwyer Durack

Counsel for the Second Respondent: Mr P R Macliver

Solicitors for Second Respondent: Australian Government Solicitor

Date of Hearing: 25 March 1996

Date of Judgment: 24 April 1996