FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZNWC [2010] FCAFC 157

Citation:	Minister for Immigration and Citizenship v SZNWC [2010] FCAFC 157
Appeal from:	SZNWC v Minister for Immigration & Anor [2010] FMCA 266
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZNWC and REFUGEE REVIEW TRIBUNAL**
File number(s):	NSD 629 of 2010
Judges:	**MOORE, BUCHANAN & PERRAM JJ**
Date of judgment:	20 December 2010

Catchwords:	**IMMIGRATION** – Visas – Protection visa – Judicial Review – Fear of persecution by reason of membership to a particular social group – Whether law persecutes group
Legislation:	*Bangladesh Merchant Shipping Ordinance 1983* ss 196, 197, 197A *Migration Act 1958* (Cth) ss 29, 36 *Navigation Act 1912* (Cth) s 100 *Statute Law (Miscellaneous Provisions) Act (No 1) 1986* (Cth) s 3, Sch 2
Cases cited:	*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 cited *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 applied *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 applied *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 applied *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 cited *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 cited

	Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 39 FCR 401 cited *Roach v Electoral Commissioner* (2007) 233 CLR 162 cited *SZNWC v Minister for Immigration and Anor* [2010] FMCA 266 affirmed *SZOFE v Minister for Immigration and Citizenship* [2010] FCAFC 79 cited
Date of Hearing:	25 August 2010
Date of last submissions:	25 August 2010
Place:	Sydney
Division:	GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	59
Counsel for the Appellant:	Mr S B Lloyd SC with Mr T Reilly
Solicitor for the Appellant:	DLA Phillips Fox
Counsel for the First Respondent:	Mr N Williams SC with Mr P Reynolds
Solicitor for the First Respondent:	Fragomen

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 629 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant/First Cross-Respondent
AND:	SZNWC First Respondent/First Cross-Appellant REFUGEE REVIEW TRIBUNAL Second Respondent/Second Cross-Respondent

JUDGES:	MOORE, BUCHANAN & PERRAM JJ
DATE OF ORDER:	20 DECEMBER 2010
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal

3. The cross-appeal be dismissed.

4. The cross-appellant pay the first cross-respondent's costs of the cross-appeal save that there be no order as to costs for the hearing.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 629 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant/First Cross-Respondent
AND:	SZNWC First Respondent/First Cross-Appellant REFUGEE REVIEW TRIBUNAL Second Respondent/Second Cross-Respondent

JUDGES:	MOORE, BUCHANAN & PERRAM JJ
DATE:	20 DECEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MOORE J:

1 I agree with the orders proposed by Perram J for the reasons his Honour gives.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 20 December 2010

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 629 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant/First Cross-Respondent
AND:	SZNWC First Respondent/First Cross-Appellant REFUGEE REVIEW TRIBUNAL Second Respondent/Second Cross-Respondent

JUDGES:	MOORE, BUCHANAN AND PERRAM JJ
DATE:	20 DECEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BUCHANAN J:

2 The first respondent is a Bangladeshi seaman who had made multiple trips to Australia but left his ship on 8 September 2008 and two days later applied for a protection visa. A delegate of the appellant ("the Minister") notified the first respondent on 2 April 2009 that his application for a protection visa had been refused. On 21 April 2009 the first respondent applied to the Refugee Review Tribunal ("the RRT") for review of the delegate's decision. At the hearing before the RRT, which took place on 14 July 2009, the first respondent was accompanied by a representative, Mr Raymond Solaiman. Both the first respondent (through an interpreter) and Mr Solaiman contributed to the hearing.

3 The first respondent claimed to have left his ship because he was being mistreated. He stated that he feared the consequences from deserting his ship if he returned to Bangladesh. The RRT summarised those matters in the following way:

35. Following the Tribunal's introductory comments, the applicant confirmed that he feared the consequences of his ship desertion, if he returned to Bangladesh. These included arrest and imprisonment, severe financial penalties (including the confiscation of his parents' property) and the inability to find future work (in his current occupation or any government employment). He also feared that the seamen's union, whose prestige is at stake, will deny him assistance and will even try to kill him.

4 Based on the circumstances which were recounted by the first respondent it was suggested on his behalf that he was entitled to be regarded as a refugee within the meaning of the Refugees' Convention. Article 1A(2) of the Refugees' Convention 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

5 The two particular respects in which, it was suggested, that the first respondent was entitled to be regarded as a refugee were summarised by the RRT as follows:

46. Mr Solaiman invited the Tribunal to consider two possible grounds for finding that the applicant's claims related to Convention-related persecution. First, he posited that there is a particular social group of 'Bangladeshi seamen who deserted as a result of their disagreement with their treatment'...

47. Second, Mr Solaiman said that the applicant had deserted the ship because of his disagreement with the treatment that he had received. He referred in general terms to case law indicating that the applicant's opposition to such treatment was a political opinion, and that the act of desertion was viewed as a political act.

48. The Tribunal undertook to consider each of these arguments, but advised that it had serious concerns about them. It noted that, while there may be a particular social group consisting of Bangladeshi ship deserters, the Bangladeshi law appeared to punish persons for the act of desertion, and not their membership of any such group.

6 The RRT also took into account a report from a Dr C J Lennings, Psychologist. The RRT made the following observations about Dr Lennings' report:

58. The Tribunal has considered carefully Dr Lennings' psychological report. For the main part, the report summarises the applicant's background and refugee claims, as relayed to Dr Lennings through Mr Sirajul Haque, a registered migration agent who also acted as the applicant's interpreter during the consultation. The report states, in somewhat guarded terms that, 'on the whole, [the applicant] satisfies criteria for post-traumatic stress disorder although it is also likely that he is experiencing significant depression'. It also includes reference to the applicant's reported 'constant rumination about trying to kill himself' although, surprisingly (in the Tribunal's view), recommends only that the applicant be given counselling in the event that he is granted a visa.

Overall, the Tribunal places little weight on the report as independent verification of the applicant's refugee claims, or that he has any medical condition requiring ongoing treatment.

59. The Tribunal does not detect in the report anything to cause it to doubt the applicant's competency. It is consistent, however, with the Tribunal's observation that he was anxious about the application, and the Tribunal has taken this into account when evaluating his evidence. The Tribunal is satisfied that the applicant, with the assistance of his representative, has had a full opportunity to present his refugee claims.

7 The RRT was not persuaded that any repercussions for the first respondent would constitute harm for a reason identified by the Refugees' Convention. Although it accepted that "there is a particular social group of Bangladeshi ship deserters, or similar" the RRT concluded that any action taken against the first respondent would be because of his conduct rather than "any identity as a ship deserter as such". The RRT did not accept either that the first respondent's conduct should, in the circumstances, be viewed as the expression of a political opinion, as had been argued on his behalf. As to the possible reaction of the seamen's union the RRT recorded the following:

72. The applicant suggested at the hearing that the seamen's union will deny him protection and perhaps even try to kill him because his actions will have tarnished their reputation. He later clarified that he sees no prospect of them assisting him should he require it on his return, but does not fear that they will kill him. The Tribunal accepts that the seamen's union is unlikely to assist the applicant, as he is presumably no longer a paid-up member. In any event, the Tribunal is of the view that the applicant has not suffered persecution or other mistreatment that would merit the union's particular attention, given the generally difficult conditions facing merchant seamen on livestock and similar vessels.

8 Taking all its conclusions into account the RRT was not satisfied that the first respondent had "a well founded fear of Convention-related persecution, now or in the reasonably foreseeable future, if he returns to Bangladesh".

9 The decision of the RRT was given on 5 August 2009. The first respondent, on 26 August 2009, made an application to the Federal Magistrates Court of Australia ("the FMCA"), for judicial review of the decision of the RRT. In a judgment delivered on 13 May 2010 (*SZNWC v Minister for Immigration and Anor* [2010] FMCA 266) the FMCA concluded that a jurisdictional error had occurred and made an order remitting the matter to the RRT for further consideration.

10 There were five grounds relied upon by the first respondent in a further amended application which was before the FMCA. The first of those grounds suggested that the first respondent had been denied an adequate hearing before the RRT, contrary to s 425 of the *Migration Act 1958* (Cth) ("the Act"), because the RRT had failed to enquire whether defects in his evidence were attributable to mental impairment. The FMCA found it unnecessary to deal with this issue or with a recent judgment of a Full Court of this Court in *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575.

11 The FMCA found it also unnecessary to deal with the fourth and fifth grounds which were relied on which were to the effect that the RRT had "confounded the separate questions of Convention nexus and persecution" and that it had failed properly to consider the first respondent's evidence and claims.

12 The FMCA appears to have found jurisdictional error arising from two circumstances. First, it concluded that acceptance by the RRT that the first respondent was a member of the particular social group of Bangladeshi ship deserters rendered unavailable a conclusion that he would be punished for his past acts rather than for his identity as a ship deserter. The FMCA appears to have reasoned that membership of the social group was sufficient to connect the risk of punishment with persecution for a Convention reason.

13 Secondly, the FMCA concluded that the RRT had failed to consider whether the Bangladeshi laws to which the first respondent would be subject were "appropriate and adapted", "in the sense of proportionate in the means used to achieve" the object to which they were directed. The FMCA said (at [45]):

45. In my opinion, a fair reading of the Tribunal's statement of reasons suggests that it overlooked the need to assess the proportionality of the means adopted in Bangladesh to discourage ship desertions, and for that reason it did not enter upon that assessment.

14 The Minister has appealed against the judgment of the FMCA. The first respondent cross appealed and also filed a notice of contention seeking to support the judgment of the FMCA on additional grounds. The grounds of appeal relied upon by the Minister were stated as follows:

1. His Honour erred in finding at [21-36] that it was not open for the Refugee Review Tribunal (the Tribunal) to find that the First Respondent did not face prosecution for a Convention reason under a Bangladeshi law criminalizing ship desertion.

Particulars

It was open for the Tribunal to so find based on its finding at para 67 that it was the First Respondent's past acts, rather than his membership of a particular social group, that would be the reason for any such prosecution. The Tribunal's acceptance at para 61 that there was a particular social group of Bangladeshi ship deserters did not necessitate a conclusion that any prosecution of the First Respondent would be "for reason of" his membership of that social group.

2. His Honour erred in finding at [37-46] that the Tribunal had erred in failing to consider whether the Bangladeshi law was "appropriate and adapted" to a legitimate national objective.

Particulars

The Tribunal did not need to consider this issue as it had found at para 67 that any prosecution would not be for a Convention reason. Moreover if it did need to consider the issue then it has implicitly done so in finding at para 70 that the law had a legitimate national objective and was not designed or enforced or had an impact based on Convention-related discrimination.

15 The cross appeal sought to rely upon contentions which were, shortly after the cross appeal was filed, rejected by a Full Court in *SZOFE v Minister for Immigration and Citizenship* [2010] FCAFC 79. Written submissions filed for the first respondent subsequently indicated that the cross-appeal was not pressed and it need not, therefore, be further considered.

16 The notice of contention initially relied upon the three grounds which were not dealt with by the FMCA and a further ground which suggested that the RRT's decision to place little weight on the report of Dr Lennings was "irrational, illogical or not based on the findings or inferences of facts supported by logical grounds". Written submissions filed on behalf of the first respondent limited the notice of contention to a complaint that the RRT had wrongly failed somehow to act on Dr Lennings' report. I shall deal with this issue after the grounds of the appeal have been addressed.

17 The RRT's acceptance that there existed a particular social group of Bangladeshi ship deserters appeared in the following paragraph:

61. The Tribunal accepts that there is a particular social group of Bangladeshi ship deserters, or similar. These people share many characteristics – their nationality, their employment on ships, the particular circumstances in which they are employed (often in menial tasks, through recruitment agencies, with their families relying on remittances and the community expecting that they maintain the reputation of Bangladeshi seamen), and their subsequent decision to abandon their vessels and their contracts. The Tribunal is satisfied that **all** members of the group share these characteristics, that they distinguish the group from Bangladeshi society at large, and that the common characteristic is not any shared fear of persecution: *Applicant S v MIMA* (2004) 217 CLR 387 at [36].

(Emphasis added)

18 Acceptance by the FMCA of the finding by the RRT that there was, in this case, a particular social group of "Bangladeshi ship deserters, or similar" was a fundamental plank in the reasoning and conclusion of the FMCA that the RRT, in its further conclusions, had committed jurisdictional error. The FMCA appears to have accepted the finding of the RRT as a starting point because it was common ground that it should do so. The FMCA said (at [14]), after setting out the paragraph in which the finding was made:

14. The Tribunal did not explain how it arrived at the findings of fact in this paragraph. However, no challenge was made by either counsel before me that there was no evidence to support the findings, nor that they reflected a misunderstanding of the principles summarised by the High Court in *Applicant S*, which the Tribunal had quoted.

19 At the hearing of the appeal also no challenge was made to the acceptance by the RRT that there was a particular social group of Bangladeshi ship deserters. In my view, the approach taken by the RRT, of accepting the existence of a particular social group of Bangladeshi ship deserters, paid insufficient attention to the fact that persecutory conduct cannot, of itself, define a social group.

20 The reasoning employed by the RRT to conclude that the first respondent was a member of a particular social group is contrary to the observations of Black CJ (with whom French J agreed) in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 when his Honour pointed out (at 404 - 405) that a social group should not be defined by reference solely to what each suggested member has done, but rather by reference to some attribute or characteristic which each shares.

21 In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (*"Applicant A"*) Dawson J made the distinction in this way (at 243):

… a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms.

and:

The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms.

22 McHugh J said (at 263):

Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety-net.

and:

The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution.

23 There are difficulties also with the characteristics attributed by the RRT to all members of the suggested social group. Apart from desertion, the suggested shared characteristics identified by the RRT may apply equally to persons working on Bangladeshi ships who do not desert their ships. Furthermore, the suggested shared characteristics are insufficient to explain all cases of desertion and are not, on the RRT's own findings, connected with all such cases. The RRT went on to say in the following paragraph:

62. … The reasons or motivations for ship desertion may be complex, including one or more of the following: - economic betterment, flight from mistreatment and/or a spontaneous decision …

24 The first respondent's own motivation for deserting his ship was described in the following way:

64. The Tribunal finds on the material that the applicant left the *MV Al Shuwaik* for multiple reasons, including the prospects of a better life for his family, his dislike of the hard work conditions and also his personality clash with his supervisor, with the attendant bullying.

25 In my view the RRT was in error to conclude, for the purpose of the Refugees' Convention, that the suggested social group actually existed. However, despite my misgivings about the finding that the first respondent was a member of a relevant particular social group, as the Minister elected not to take any issue with the RRT's finding about that matter it is difficult to criticise the FMCA's reliance upon it. Nevertheless, even accepting the RRT's finding as an initial premise, as the FMCA did, there are two reasons why it does not lead to a conclusion of jurisdictional error. The first is that any punishment which might be imposed on the first respondent would not be as a result of membership of the social group identified. The second is that the punishment would not single out members of the social group in a discriminatory way.

26 As to the first matter, reading the reasons of the RRT as a whole, in my view it is apparent that the RRT was prepared to accept the argument advanced on behalf of the first respondent, that such a social group existed, in order to come directly to an even more fundamental obstacle which confronted the first respondent.

27 McHugh J pointed out in *Applicant A* that the enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor can the severity of the sanctions be taken into account unless they apply by reason of some Convention reason. In *Applicant A*, McHugh J said (at 257):

Discrimination – even discrimination amounting to persecution – that is aimed at a person as an individual and not for a Convention reason is not within the Convention definition of refugee, no matter how terrible its impact on that person happens to be.

28 The RRT found:

67. … what the applicant fears is punishment for the act of desertion, in violation of Bangladeshi law, rather than his membership of a particular social group such as Bangladeshi ship deserters.

(Footnote omitted)

29 In my view, the RRT did not make a jurisdictional error when it concluded that the first respondent was not liable to be punished by reason of his membership of a particular social group, but only for his conduct as an individual.

30 The second reason why the FMCA's conclusion of jurisdictional error should not be accepted is that the FMCA appears to have proceeded upon an incorrect premise about the operation and effect of the Bangladeshi law in question. It does not appear to me that the law operates in any discriminatory fashion, even if there is a particular social group of Bangladeshi ship deserters. The FMCA said (at [31]):

31. I consider that the Tribunal was probably distracted by a distinction taken from a different context, into failing to appreciate that necessarily any penalties inflicted on the applicant under the Bangladeshi ship deserter laws would be the result of his membership of the group which the Tribunal accepted. **The laws in their own terms were directed at only members of this group, and for that reason involved a discriminatory infliction of harm on members of that group and not on any other members of Bangladeshi society**. Any prosecution of the applicant would, therefore, be the result of his act of ship desertion, which the Tribunal accepted was characteristic of all members of the particular social group, distinguishing the group and its members from Bangladeshi society at large.

(Emphasis added)

31 The sanctions to which the first respondent might be exposed were said to arise under the combined operation of ss 196, 197 and 197A of the *Bangladesh Merchant Shipping Ordinance 1983*, which were provided to the delegate and were before the RRT. Examination of those provisions shows that the FMCA must have misunderstood their context and effect.

32 Section 196 of the Ordinance creates an offence of desertion and provides sanctions for it (initially two years, but now five years, imprisonment as well as forfeiture of wages and other entitlements). Section 197A appears to extend the possible sanctions to include the possibility of forfeiture of all property held to the state. However, s 196 is not confined in its operation to Bangladeshi nationals, or to the particular social group identified by the RRT. It applies to seamen and apprentices generally on Bangladeshi ships. In this case, it seems that the ship in question may have been a Kuwaiti ship, rather than a Bangladeshi ship. If so, the first respondent did not desert a Bangladeshi ship and s 196 did not apply directly to him. Section 197 applies the provisions of s 196 (and the accompanying sanctions) to Bangladeshi seamen and apprentices on foreign ships. This may apply to the first respondent but, whether s 196 or s 197 applies to the first respondent, it is clear that the regulatory scheme is not confined in its operation to the particular social group identified by the RRT. The legislation does not discriminate against Bangladeshi ship deserters (or Bangladeshi seamen). To repeat a point made earlier, the legislative sanctions operate in response to conduct and not in response to membership of a particular social group.

33 In my respectful opinion, for those two reasons the FMCA was in error to conclude that acceptance by the RRT of the argument that the first respondent was a member of a particular social group of "Bangladeshi ship deserters, or similar" necessitated a finding that he had a well-founded fear of persecution by reason of his membership of that social group. In the circumstances the first ground of appeal by the Minister should be upheld.

34 I would not have upheld the second ground of appeal. In my view the RRT took the view that it did not need to consider whether the Bangladeshi law was "appropriate and adapted" to a legitimate national objective and did not do so. Had such an enquiry been necessary it would have constituted a jurisdictional error not to carry it out. In those circumstances the second ground of appeal could not have succeeded. However, such an enquiry by the RRT was not necessary.

35 I would not find that the decision of the FMCA was supported by the one matter pressed in connection with the notice of contention. It was explained in oral submissions that Dr Lennings' report was relied upon, for the purpose of the appeal, to rebut conclusions by the RRT that the first respondent had exaggerated his claims of ill-treatment. Upon that foundation it was suggested that the act of desertion was properly to be seen as conduct reflecting a "political opinion" about his treatment, for which the first respondent risked punishment amounting to persecution. The RRT rejected this argument. The FMCA did not deal with it. In my view the conclusions of the RRT about the argument did not disclose any jurisdictional error. Provided the RRT understood the matters which it was required to take into account and made a faithful effort to evaluate them properly, assessment of the weight and significance of Dr Lennings' report was a matter for the RRT. I do not accept that any jurisdictional error has been identified in the way in which the RRT dealt with his report or any suggested issue arising from it.

36 The FMCA should not have concluded that jurisdictional error was committed by the RRT. The appeal should be upheld and the application for judicial review to the FMCA dismissed. The cross-appeal should be dismissed. The first respondent should pay the appellant's costs of the appeal, any costs of the cross-appeal and of the proceedings before the FMCA.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 20 December 2010

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	

GENERAL DIVISION	NSD 629 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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AND:	SZNWC First Respondent/First Cross-Appellant REFUGEE REVIEW TRIBUNAL Second Respondent/Second Cross-Respondent
JUDGES:	MOORE, BUCHANAN AND PERRAM JJ
DATE:	20 DECEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

Perram J:

37 This appeal arises from the efforts of the first respondent, who is a national of Bangladesh, to obtain a protection visa from the Australian authorities. He first arrived in Australia at the port of Fremantle while working as a merchant seaman aboard the livestock transportation ship *MV Al Shuwaik*. Sometime between 6 and 8

September 2008 he deserted that vessel and subsequently applied for a protection visa. That application was eventually processed by a delegate of the Minister and refused. The first respondent applied for a review of that decision to the Refugee Review Tribunal but that Tribunal affirmed the delegate's original decision. A subsequent application by the first respondent to the Federal Magistrates Court for the issue of writs of certiorari and mandamus directed to the Tribunal was, however, successful. It is from the orders of that Court that the Minister for Immigration and Citizenship now appeals. For the reasons which follow, the appeal should be dismissed with costs.

38 The power of the Minister to grant a protection visa is conferred by ss 29 and 36 of the *Migration Act 1958* (the Act) and arises if he is satisfied that the person applying for it is someone to whom Australia owes obligations of protection under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention). Australia ratified the 1951 treaty on 22 April 1954 and the 1967 Protocol on 13 December 1973. Article 1A(2) of the Refugees Convention defines a refugee to be, relevantly, a 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" (emphasis added).

39 The first respondent claimed that he had a well-founded fear of persecution by reason of his "membership of a particular social group". The particular social group he claimed to be a member of was the group of Bangladeshi ship deserters. The reason he claimed to be persecuted as a member of that group was, inter alia, because it was a criminal offence under the law of Bangladesh for any merchant seaman, regardless of nationality, to desert a Bangladeshi ship (s 196 of the *Bangladesh Merchant Shipping Ordinance 1983*) or for any Bangladeshi merchant seaman to desert a foreign owned ship (s 197 of the *Bangladesh Merchant Shipping Ordinance 1983*). The maximum sentence for either offence was five years imprisonment. It is not clear whether the *MV Al Shuwaik* was a Bangladeshi ship but it does not matter. The respondent was either a merchant seaman who deserted a Bangladeshi ship and committed the offence under s 196 or he was a Bangladeshi merchant seaman who deserted a foreign ship and committed the offence under s 197. In both cases, he became exposed to the risk of being sentenced to 5 years imprisonment. It is to be emphasised that what was involved with these offences was not desertion from military service but cessation of civilian employment. Such offences, however, are not unknown outside Bangladesh. In Australia, until 1986, a merchant seaman who deserted a ship was liable under s 100 of the *Navigation Act 1912* (Cth) to a fine of $200 (or loss of wages up to $200). That offence was repealed by s 3 and Schedule 2 of the *Statute Law (Miscellaneous Provisions) Act (No 1) 1986* (Cth).

40 In a case where a person applying for a protection visa claims to be a member of a particular social group which is persecuted by the operation of some criminal law, the approach to be taken by those deciding the visa application is well settled. *First*, the decision-maker must ask whether the particular social group claimed exists. *Secondly*, if the group exists then the decision-maker must ask whether the nominated criminal law discriminates against that group. This is necessary because

unless the criminal law discriminates against the group then there can be no question of the group being persecuted by that criminal law. *Thirdly*, however, discrimination although necessary is not sufficient. If discrimination be shown the decision-maker must then ask whether the criminal law is appropriate and adapted to some legitimate object of the country in question. This is a two-pronged test requiring consideration both of the legitimate object identified as well as an assessment of whether the criminal law is appropriate and adapted to the achievement of that object.

41 In this case, the Tribunal determined that a particular social group of Bangladeshi ship deserters existed. That issue was to be determined by the application of the test laid down by Gleeson CJ, Gummow and Kirby JJ in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [36]: "First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."

42 The second element of that test ensures, inter alia, that there can be no social group merely by reason of the common operation of a criminal law. All jay walkers are exposed to the risk of prosecution but that does not make them a social group. The Tribunal was well-aware of that principle. Its reasoning on the question of whether there was a particular social group was as follows:

The Tribunal accepts that there is a particular social group of Bangladeshi ship deserters, or similar. These people share many characteristics – their nationality, their employment on ships, the particular circumstances in which they are employed (often in menial tasks, through recruitment agencies, **with their families relying on remittances and the community expecting that they maintain the reputation of Bangladeshi seamen)**, and their subsequent decision to abandon their vessels and their contracts. The Tribunal is satisfied that all members of the group share these characteristics, that they distinguish the group from Bangladeshi society at large, **and that the common characteristic is not any shared fear of persecution**: *Applicant S v MIMA* (2204) [sic] 217 CLR 387 at [36].

(emphasis added)

43 The second emphasised passage shows that the Tribunal explicitly considered that the group of Bangladeshi ship deserters was, unlike the group of jay walkers, not merely united by the operation of the law criminalising the act of desertion. The first emphasised portion shows why. Those who deserted disappointed familial expectations of remittances as well as community expectations relating to the reputation of Bangladeshi merchant seamen. Even if – as is the case in Australia – it had not been an offence to desert a ship, it would have remained the fact that persons who did so would still constitute a group of persons who disappointed community sensitivities about national reputation as well as familial expectations about money. The second emphasised portion shows that the Tribunal understood that the group of Bangladeshi ship deserters was not defined by the fact that they had all committed the same offence. That was its explicit finding.

44 Neither in this Court nor in the Court below did the Minister challenge this finding by the Tribunal. It is not now open to proceed on any basis other than that the particular social group found by the Tribunal to exist does, in fact, exist. This is so because (a) it is not challenged; (b) even if it were challenged, this Court's review over the fact finding of the Tribunal is circumscribed; and, (c) there not having been any argument as to whether the finding is correct or not, this Court has been denied the opportunity of hearing what could have been said in its favour. As the considerations outlined in the preceding paragraph suggest, the finding may well be quite rational. In any event, it is enough to say that the finding is not challenged. Contrary to the flavour of some of the submissions made on the Minister's behalf, to approach the balance of the issues in the appeal on the basis that this finding of fact is, in some unarticulated way, suspect carries with it a significant risk of procedural unfairness.

45 Having concluded that the particular social group of Bangladeshi ship deserters existed, the Tribunal was next required to ask itself whether the criminal laws discriminated against the respondent as a member of that group. It accepted, in the respondent's favour, that he did face "a real chance of criminal and/or civil prosecution for having violated the Bangladesh Marine Shipping Ordinance, and his contractual obligations, and that [the first respondent] is very concerned about the consequences". However, it concluded that there was no discrimination finding that "what [the first respondent] fears is punishment for the act of desertion, in violation of Bangladeshi law, rather than his membership of a particular social group such as Bangladeshi ship deserters". Consequently – and this finding is crucial – "the basis for any action against [the first respondent] will be his past acts, and not any identity as a ship deserter as such".

46 The Federal Magistrates Court could not embrace this reasoning and I cannot do so either. The Tribunal's finding is literally that the respondent will be punished for deserting a ship rather than for being a ship deserter. It may be accepted that the "need to show that persecution is for reasons of membership of a group, rather than for an act or acts done, tells against the argument that a particular social group may be defined by reference to the sole criterion that its members are all those who have done an act of a particular character" (*Morato v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 39 FCR 401 at 405 per Black CJ). But as the Chief Justice was careful to emphasise in the very same passage, the key word was "sole" and the "doing of an act or acts of a particular character may, in some circumstances and *together with other factors*, point to the existence of a particular social group but in this case it is only the common action of turning Queen's evidence that is said to define the group" (emphasis added). In this case, the Tribunal's finding of fact was that the group was defined by more than the fact that each member had committed the offence of ship desertion. Even if ship desertion had not been an offence the group would have existed. Where a social group is found, as this one was, to exist independently of the punishment inflicted under the allegedly persecutory criminal law it is no answer to say that what is being punished is past acts rather than membership to that group. A law outlawing homosexual conduct discriminates against homosexuals; a law criminalising homelessness discriminates against the homeless; and a law criminalising drug use discriminates against drug users. Discrimination is, in each case, the very point of the law.

47 That, of course, is not the end of the inquiry. Many discriminatory laws may be justifiable. The true question is whether a discriminatory law is persecutory and in that inquiry the fact of discrimination cannot, by itself, advance debate. The test, however, to be applied to laws which are found to discriminate against a particular social group has been authoritatively stated for this Court in *Applicant S v Minister for Immigration and Multicultural Affairs*. There the majority, having noted that the test to be applied in the case of discriminatory laws was that articulated by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258, said that (at [43]):

…the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Chen*. **As a matter of law to be applied in Australia, they are to be taken as settled**. This is what underlay the Court's decision in *Israelian.* Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.

(emphasis added)

48 The Minister submitted that the law was one of general application and hence could not be persecutory. Reliance was placed on the statement by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (at 258) that "[t]he enforcement of a generally applicable criminal law does not ordinarily constitute persecution". But it is apt to confuse if that statement is taken out of context. The full statement is in these terms:

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution.

(emphasis added)

49 His Honour was not suggesting that a finding that a law was a generally applicable criminal law prevents it from ever being able to be characterised as persecutory. Rather, in the context of applying the test of requiring the criminal law to serve a legitimate object and to be appropriate and adapted in pursuit of that object, his Honour was merely observing that laws of general application will ordinarily pass that test. That shows that the test to be applied is to ask whether the law is appropriate and adapted to some legitimate object. That is what McHugh J said in *Applicant A* and that is the unavoidable requirement of the majority's statement in *Applicant S*. The last sentence of the quote from *Applicant S* above likewise shows that there is no hard and fast rule about laws of general application.

50 Reliance was also placed on the remarks of Dawson J in *Applicant A* (at 243) that:

… a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms.

51 So much may be accepted but that principle has, so far as I can see, little to do with this case. The factual finding by the Tribunal was that the group of Bangladeshi ship deserters was defined by a common characteristic concerned, not only with economic circumstances, but with a failure to live up to community and family expectations and further, to quote the Tribunal's uncontested factual finding, "that the common characteristic is not any shared fear of persecution"; that is, to be clear, that the group was not defined by the fact that each member was liable to prosecution under the desertion laws. It was not, therefore, a group of the kind constituted by contemnors or furious drivers instanced by Dawson J.

52 The Minister's first ground of appeal was that Federal Magistrates Court erred by finding that it was not open to the Tribunal to conclude that the respondent did not face persecution by reason of his membership of the group. In light of the Tribunal's finding of fact that the group was not defined by the operation of the desertion laws, this finding by the Federal Magistrates Court was not only correct but inevitable. If the Federal Magistrate were wrong about that it would also follow that a law criminalising homosexual conduct was not persecutory of the group of homosexuals because what was being punished was the prior act and not membership of the group, a conclusion foreclosed by the High Court's decision precisely to the contrary in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. The only way to avert the logic of that proposition is to deny that ship deserters constituted a particular social group but that is not open to this Court. The first ground must, therefore, be rejected.

53 It being, in those circumstances, a case where a law discriminated against a particular social group the Tribunal was bound to ask whether that law served a legitimate object of Bangladesh and, if it did, whether the criminal law represented means which were appropriate and adapted to that object: *Applicant S v Minister for Immigration and Multicultural Affairs* at [43]. The Tribunal dealt with that issue this way:

…the Bangladeshi legislation appears to have the legitimate objective of securing Bangladesh's reputation as a source of merchant seamen, important for the country as a means of providing employment and for future remittances. It does so by providing penalties, which may be considered harsh.

54 Whilst it is clear that the Tribunal did identify a legitimate object it is just as plain that it overlooked examination of whether the means adopted to achieve that aim – a sentence of five years imprisonment for leaving non-military employment – were appropriate and adapted to that aim. Whether a law is appropriate and adapted invites an analysis based on notions of proportionality ("[i]n this context, there is little

difference between the test of 'reasonably appropriate and adapted' and the test of proportionality": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 fn (272); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] per Gummow, Kirby and Crennan JJ).

55 To undertake that inquiry it would have been necessary to consider the extent of the State interest identified by the Tribunal – here the object of securing Bangladesh's reputation as a source of merchant seamen and of ensuring employment as well as future remittances. How much of a problem was desertion by merchant seamen to Bangladesh? How large was the difficulty with remittances? What was the effect on employment? Once those questions were answered it would then have been necessary to have determined whether the potential five year sentence of imprisonment was, in fact, ever inflicted; what the usual range of penalties which were imposed, in fact, was; and, then, once all of that information had been garnered, to ask whether the penalties which were likely to be imposed were proportionate to the legitimate objects identified. Contrary to the submissions of the Minister, I do not accept that the Tribunal considered any of these questions. The closest it came was its view that the penalties were "harsh" but that, of course, was only half of the inquiry; the other half was whether that harshness was a proportionate solution to the problems identified.

56 It is not obvious one way or the other whether the merchant shipping laws were appropriate and adapted in that sense. That observation underscores, however, the fact that the Tribunal did not ask itself the questions which were required of it. That being so, it did not undertake the inquiry consigned to it so that there was a constructive failure to exercise its jurisdiction: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [25] per Gummow and Callinan, [88] per Kirby J, [95] Hayne J concurring.

57 The Minister's second ground of appeal was that the Federal Magistrates Court had erred in concluding that the Tribunal had not assessed whether the merchant shipping laws were appropriate and adapted to the object identified. For the reasons just given, the Federal Magistrates Court was correct to arrive at that conclusion and this ground, therefore, fails.

58 It remains to note the Minister's en passant suggestion that the implication of that conclusion will be that any Bangladeshi merchant seaman who deserts ship in an Australian port will be entitled to a protection visa. That argument should be rejected. The Tribunal is yet to determine whether the merchant shipping laws were appropriate and adapted to the object identified. It is only when the answer to that question is known will the full implications of the Tribunal's earlier factual finding be known. All that follows from this decision is that the Tribunal must now apply the test dictated by *Applicant S*.

59 The Minister's appeal must be dismissed with costs. In those circumstances, it is not necessary to deal with the first respondent's notice of contention. Had it been necessary, I would have agreed, for reasons given by Buchanan J, that the ground disclosed in it would not have constituted an alternative basis for upholding the decision of the Federal Magistrates Court. The first respondent's cross-appeal was

not pressed at the hearing of the appeal. It should be dismissed with costs save that there should be no order as to costs for the day of the hearing.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 20 December 2010