CATCHWORDS

IMMIGRATION - review - whether inability to obtain a government position for reasons of religion and political belief amounts to persecution - whether in the circumstances it is reasonable for the applicant to relocate to another part of her country of origin - whether *'single women in India'* constitutes a social group - whether denial of the *'right'* to proselytise amounts to persecution - application allowed and matter referred back to Tribunal for further findings.

Migration Act 1958 ss 476(1)(e), 476(1)(f), 476(1)(g) and 476(4)(a) and (b)

Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, January 1992

The Law of Refugee Status, Professor Hathaway, Chapter 4, Butterworths 1991

Minister for Immigration and Ethnic Affairs v Mohinder Singh (Full Court, Federal Court, 24 January 1997, unreported)

Dai Xing Yao v Minister for Immigration and Ethnic Affairs (Full Court, Federal Court, 18 September 1996, unreported)

Szelagowicz v Stocker (1994) 35 ALD 16

Western Television Ltd v Australian Broadcasting Tribunal (1986) 12 FCR 414

Television Capricornia Pty Ltd v Australian Broadcasting Tribunal (1986) 13 FCR 511

Xiang Sheng Li v Refugee Review Tribunal (Sackville J, 23 August 1996, unreported)

Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212

Applicant A v Minister for Immigration and Ethnic Affairs (High Court, 24 February 1997, unreported)

Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 39 FCR 401

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379

Randhawa v Minister for Immigration and Ethnic Affairs (1994) 35 ALD 1

No SG 45 of 1996

MARY GNANA PUSHPA THALARY v THE MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Mansfield J

Adelaide

4 April 1997

IN THE FEDERAL COURT OF AUSTRALIA)

)

SOUTH AUSTRALIA DISTRICT REGISTRY) No SG 45 of 1996

)

GENERAL DIVISION)

BETWEEN:

MARY GNANA PUSHPA THALARY

Applicant

- and -

THE MINISTER FOR

IMMIGRATION AND ETHNIC

AFFAIRS

Respondent

MINUTES OF ORDER

CORAM: Mansfield J

PLACE: Adelaide

DATE: 4 April 1997

THE COURT ORDERS THAT:

1. The application be allowed.

2. The matter be referred back to a differently constituted Tribunal for reconsideration of the applicant's claim in accordance with my reasons for judgment published this day.

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

IN THE FEDERAL COURT OF AUSTRALIA)

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SOUTH AUSTRALIA DISTRICT REGISTRY) No SG 45 of 1996

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BETWEEN:

MARY GNANA PUSHPA THALARY

Applicant

- and -

THE MINISTER FOR

IMMIGRATION AND ETHNIC

AFFAIRS

Respondent

REASONS FOR JUDGMENT

CORAM: Mansfield J

PLACE: Adelaide

DATE: 4 April 1997

By application dated 11 June 1996, but subsequently amended, the applicant seeks review of the decision of the Refugee Review Tribunal ("*the Tribunal*") given on 8 May 1996, affirming the decision of a delegate of the Minister for Immigration and Ethnic Affairs ("*the Minister*") of 13 July 1993 finding that she was not a refugee.

Applicable Law

The applicant, who was born at Dornakal in the State of Andhra Pradesh in India on 4 November 1958, came to Australia as a visitor, with a valid entry permit, on 28 September 1992. During the currency of that permit, on 2 February 1993 she

applied to be granted refugee status under the then provisions of the Migration Act 1958 ("*the Act*"). At the time of that application, s22AA of the Act provided the legislative foundation for her application, and eligibility for the status of refugee fell to be determined by reference to the definition of "*refugee*" in s4 of the Act. The definition adopted the definition of "*refugee*" in accordance with the Convention, as identified below. That application was rejected on 13 July 1993. On 5 August 1993 she applied for the review of that decision. Following the coming into effect of the Migration Reform Act 1992, and at a time when that application for review had not been finally determined, it was referred to the Tribunal for determination and it was treated as an application for a protection visa: s39, Migration Reform Act, 1992. On 8 May 1996 her application for review of the decision was rejected and the decision of the delegate of the Minister to refuse to grant the applicant a protection visa was affirmed.

Section 36 of the Act creates the class of visa known as protection visas. The relevant criteria for the grant of a protection visa include that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention relating to the status of refugees as amended by the 1967 protocol relating to the status of refugees ("*the Convention*"): s36(2) of the Act. Section 31(3) of the Act

enables regulations to be made also specifying the criteria for visas. In the case of protection visas, reg2.03 of the Migration Regulations and clause 866.211 of Sch2 of the Migration Regulations is to much the same effect. The relevant provision of the Convention is Article 1 clause A(2) which provides that *"refugee"* applies to 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; ...".*

Thus, the relevant criterion is the same as that which applied to the applicant at the time both of her original application and of her application to the Tribunal.

The assessment of whether the applicant qualifies as a refugee is made on the facts as determined at the date of determination, rather than on the facts as determined at the date the application for refugee status is made: *Minister for Immigration and Ethnic Affairs v Mohinder Singh* (Full Court,

Federal Court, 24 January 1997, unreported). One of the grounds of the amended application for review sought to argue that the Tribunal, in making its decision based upon facts established to exist at the time of its determination, fell into error. That ground is not pursued in the light of that decision.

The grounds of review are limited to those available under s476 of Act: *Dai Xing Yao v Minister for Immigration and Ethnic Affairs* (Full Court, Federal Court, 18 September 1996, unreported). That is so even though the application for refugee status was made before the coming into effect of the Migration Reform Act 1992 which introduced Part 8 - Review of Decisions by Federal Court and including s476 of the Act. Accordingly, the Court has no power to review the decision of the Tribunal under the provisions of the Administrative Decisions (Judicial Review) Act 1977: s485(1) of the Act. It was not submitted to the contrary on this application.

Background and Tribunal's findings

The applicant is single. Her mother still lives at Dornakal in Andhra Pradesh, and her father is deceased. She has four siblings, one of whom resides in Australia.

She was educated at Dornakal, both primary school and high school, and then at University where she graduated in 1987 with a Bachelor of Education Degree. Her occupation since then has been as a high school teacher.

So far as the evidence discloses (taken from the Tribunal's findings) she worked as a teacher in two private schools between 1987 and April 1992, when she resigned from her then employment to complete preparation for her visit to Australia to see her sister. There is some uncertainty, arising from her evidence, whether the first of those two positions was in a publicly-run school or a privately-run school. What is clear is that she asserted that she had been unable to obtain employment at government schools, despite both her eligibility and her regular applications to do so, and in the government railways, again despite both her eligibility and her application to do so, because of her religion. She was born and raised in the Christian faith. Her claim was that, although qualified for such employment (government schools and in the government railways), she was told by an official that she would not be

given such employment and that it was given only to those of the Hindu faith, unless she was to pay some form of bribe. The apparent inconsistency in her evidence arises from the fact that she told the Tribunal that the school she had first worked at following her graduation was a government school, but due to her political beliefs, she was not paid for that work over many months and so eventually she left.

The applicant is a member of the Telugu Desam Party, a prominent political party in Andhra Pradesh. The Telugu Desam Party has a radical economic program, including provision of rice subsidies, and it campaigns against rural poverty and social prejudice, especially against women. The applicant is an active member in its women's auxiliary or association, as a result of which she goes to villages to teach women infant and basic health education and practices. The other, or one other prominent political party in Andhra Pradesh, and nationally, is the Congress Party. Its opposition to members of the Telugu Desam Party is said to have led to her not being paid when working in that government school. Other private school employment was, she said, hard to get and any opportunities to obtain such work would be distant from her family home. On her evidence, the salary payable to teachers in government schools is significantly greater than that payable to teachers in private schools. Discrimination in employment opportunities amounting

to persecution for reasons of religion and political belief was one of the bases for her application to the Tribunal.

The findings of the Tribunal on those matters are not entirely clear.

After reciting her complaints that she had been unable to find work in the public sector because of her religion, and that she had been prevented from preaching to non-Christians (the detail of which I refer to below), the Tribunal said:

> *"I accept that, as a member of a minority religious group, the Applicant may face certain discriminatory actions. This would not, of itself, amount to persecution."*

and later in its reasons

> *"The Applicant has demonstrated that she has been able to find work and therefore her rights (sic) to earn a living has been upheld in India. Even if I accept that she was denied employment in the public sector this does not amount*

to serious harm when she has been able to obtain work in the private sector."

and again, about those complaints

> *"The discrimination she has endured merits sympathy as does any injustice of this nature. However, the discrimination does not amount to persecution within the parameters of* Chan's *case.".*

Later in its reasons, when considering whether the conduct complained of was experienced for one of the five Convention reasons, the Tribunal accepted:

> *"... that the motivation for not paying the Applicant in 1987 was political but the Applicant was able to remove herself from that situation as I have discussed earlier."*

It did not, in that section of the reasons, advert to the question of whether her (claimed) inability to obtain employment in the government sector was by reason of her religion. Then, in its conclusions on this aspect, again the Tribunal did not advert to that question when it said:

> *"The Applicant has claimed that in the past she has been denied equal opportunities of employment by reason of her political affiliation with a particular party. This discriminatory injustice has not, however, prevented her from gaining employment in the private sector. Thus while such practices establish discrimination they do not amount to persecution."*

No reference to discrimination in employment by reason of her religion is there mentioned.

It is difficult to know what the Tribunal has found. The references above suggest that it has accepted that she did suffer discrimination in employment, but not all of those references do so; nor are the references clear as to whether

the claim for discrimination by reason of religion has been accepted, or rejected, or treated as not relevant. The Tribunal seems not to have focussed specifically on those matters because it concluded that, as the applicant was able to get employment as a teacher in private schools, any discrimination she has, or may have, suffered does not amount to persecution. If it is correct in law, the lack of clarity as to its findings may not matter; if it is not, it will be necessary to determine firstly whether, taking the above expressions as findings of fact as contended for by the applicant, that is as findings most favourable to her, then that error of law would lead to a reversal of the Tribunal's conclusion and, if so, it will then be necessary to decide what course of action is appropriate in the light of the Tribunal's remarks referred to. The uncertainty as to its findings is illustrated by the fact that counsel for the parties on this application made quite inconsistent submissions as to what the Tribunal had in fact found on those matters; it is not desirable that its findings should be left in such a state of ambiguity.

There were other grounds asserted in support of the applicant's claim to be a refugee.

The applicant's religion was identified in another context, again in some degree it intertwined with her political beliefs. The applicant was able to practise her Christian religion in her own church, and could preach there without adverse consequences. As a Sunday school teacher, she also visited other churches, including village churches and womens' christian fellowship groups. In addition, however, whilst visiting other provinces and other villages as part of her role in the Telugu Desam party to teach women infant and basic health practices, she often used the opportunity of such visits to preach to the women, although they were not Christians. Although the women often listened to her, their husbands on occasions became angry and she would be ordered out of the village. Sometimes young boys or youths would throw stones at her and chase her away. The Tribunal accepted those complaints.

She also complained that many people who have converted to Christianity are subjected to verbal abuse, including death threats, and children throw stones at them. Those things have happened to her. It seems to have been accepted that tensions over religious differences are a problem within Indian society, and that incidents of communal violence occur from time to time. The Tribunal concluded that such incidents are neither promoted nor tolerated by the government, which has enacted laws to prevent discrimination and has imposed strict law and order

measures to curb violence. India is a secular State in which all faiths enjoy freedom of worship. There is no national law to bar proselytising. She did not demonstrate a profile within her religion that might lead to her being specifically targeted for harassment or violence by members of opposing groups. The Tribunal found that the risk of her suffering substantial abuse of human rights in the context of her general complaints, in a situation where the government would be unable to afford her protection, would be remote.

Specifically, with respect to the accepted impediments to her preaching to non-Christians to attempt to convert them, the Tribunal concluded that her right to practise her religion, and thus to enjoy freedom of religion, is not circumscribed or denied to her and is protected through the constitution. The right, it was found, did not extend:

> *"to a right to proselytise or to attempt to cause another person's freedom of their own religious belief to be interfered with in any way."*

Its conclusion about that was drawn from Article 18(3) of the International Covenant on Civil and Political Rights which states:

> *"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."*

The Tribunal found that because proselytising is not a right, being denied the right to proselytise is not tantamount to losing the right of religious freedom. It rejected the contention that there was a real chance of persecution by reason of religion, or by being denied the right to freedom of religious opinion.

A separate aspect of the applicant's claims related to her membership of Telugu Desam. She complained that five supporters of the Congress Party in her village, whom she knows to be involved in criminal activities, had threatened her and her colleagues. At a ceremony on 26 January 1992, Indian National Day, she was abused and threatened with physical violence. Those persons were adversely affected by liquor at the time. She reported that to the police. They were arrested, but released shortly afterwards. She is fearful of those five Congress Party

supporters. Other members of Telugu Desam have been threatened by them. Following that incident, those men had subsequently come to her house using bad language, and when she went outside one of them grabbed her. She said she was very afraid after this and this caused her to decide to leave the country. Her complaints about these people had led to no other action on the part of the local authorities. Her explanation for why the men were harassing her specifically was that they were jealous of her as she did good work. She had been unable to get any institutional help in respect of that harassment. She said that she could not move to another part of India because it was difficult for a single woman in India to do so. She therefore presented a claim based upon fear of suffering further such harassment and discrimination.

Information before the Tribunal indicated that whilst India is a functioning democracy with a strong and legally sanctioned set of safeguards for individuals, and an independent judiciary, areas of abuse of human rights remain, many of them generated by severe social tensions related to ethnic, past, communal and secessionist politics and the authorities' reactions to them. Her party is a legal political party with representation in both state and federal parliaments.

The Telugu Desam party has either been the ruling party or the major opposition party in the State of Andhra Pradesh from 1983 to the present. The applicant's role was as an ordinary member in the womens' auxiliary, as a result of which she sometimes chaired the meetings of the womens' group in her area. It was not at *"an integral level"* of the party but was limited to assisting women and children with their health and hygiene education. I take the reference to her role as not being at an *'integral level'* to the organisational hierarchy of Telugu Desam, rather than to the significance of the work the applicant did. In my view, that is clearly what the Tribunal meant, and there is no material to suggest otherwise. The ground of appeal based upon some other interpretation of that expression is rejected.

The Tribunal found that although there is some evidence that some persons are suspected of spying for other parties, and that that is the reason why they join a political party, there was no evidence that that was the case in relation to the applicant. Consequently, it concluded on that score the evidence of such suspicion of others and of consequential physical violence was not relevant to her position. There was also some evidence of women being submitted to assaults and criminal attacks, but it was not tied to membership of that particular political group especially. The particular evidence

of the handful of men who were members of the Congress Party in her local area and who harassed her was found to be because *"they are jealous of her good work"* and because she has reported them to the authorities. The Tribunal found that such harassment because of good work was not harassment based on political opinion, and therefore not for reasons of her political opinion. It also found that, because the Congress Party was no longer in power, the applicant would have access to the same level of protection in her State as other members of her community, and that she could expect and receive better protection in respect of that type of harassment than she had experienced in the past, even accepting the examples of violence perpetrated by a few local members of the opposition party. It also found that there was no evidence to suggest that the State was in any way complicit in the behaviour of those men, or would fail to protect her at the same level as any other citizen in her State.

The Tribunal did not identify any complaint of persecution other than for reasons of religion and political opinion. In particular, it does not appear that the Tribunal perceived a complaint of persecution by reason of membership of a social group.

The grounds of appeal

The amended application for review invokes two sections of s476 of the Act, but at the hearing certain matters were not pursued and I do not need to address them. I observe however that the ground of review invoked under s476(1)(f) alleging actual bias against the Tribunal is a serious matter to allege; such an allegation should not be made without a proper foundation for it. It was one of the complaints not pursued in submissions.

Firstly, under s476(1)(g) it is submitted that there was no evidence or other material to justify the making of the decision. Section 476(1)(g) is elucidated and limited by s476(4)(a) and (b) of the Act. The particular facts ultimately relied upon under this ground of complaint (seventeen of the twenty two complaints on this topic were withdrawn at the hearing) related to the Tribunal's findings that:

. the applicant's right to earn a living has been upheld in India

. the applicant's right to practise her religion was not circumscribed or denied

. the applicant was not at risk of persecution for reasons of her religion

. the applicant's role in Telugu Desam was not at an integral level of the party (I have rejected this complaint as based upon a misinterpretation of the Tribunal's reasons, but in any event I do not think it falls within the ambit of s476(4) as interpreted)

. the applicant would have access to the same level of protection as any other citizen in Andhra Pradesh.

The second complaint alleges several errors of law, reviewable under s476(1)(e).

They are:

. failure by the Tribunal to consider whether the applicant may suffer persecution by reason of her membership of a particular social group, namely single women in India.

. failure to conclude that the discrimination the applicant has suffered in employment by reason of her religion and her political opinion amounts to persecution under the Convention (I have discussed above the difficulty of knowing what primary factual findings the Tribunal has made on this topic);

. failure to conclude that the harassment the applicant has suffered whilst proselytising does not amount to persecution by reason of her religion; and

. failure to conclude that the harassment the applicant has suffered from the conduct of certain members of the Congress Party in Andhra Pradesh does not amount to persecution by reason of her political opinion.

It was not contended on behalf of the Minister that any of those matters may not amount to reviewable errors of law, although the conclusions contended for were of course strongly resisted.

Section 476(1)(g) and (4)

These provisions reflect s5(1)(h) and (3) of the Administrative Decisions (Judicial Review) Act 1977, and decisions under those sections are helpful to understand the scope of their operation. Whether, by reason of s476(1)(e) of the Act which seems to be directed to excluding from the *'error of law'* ground of review the *'no evidence'* error of law, the scope of operation of s476(1)(g) and (4) might emerge somewhat from the penumbra which previously seem to have restricted its role: see e.g. the remarks of Davies and Einfeld JJ in *Szelagowicz v Stocker* (1994) 35 ALD 16 at 22, is not necessary for me presently to decide.

In respect of each of those matters, the applicant did not identify any precondition, status, eligibility or other threshold matter required by law to be established to reach a decision on the application. Her counsel did not, but faintly, press reliance on s476(4)(a). It is unnecessary to decide precisely the nature of the particular matter to be established which must be required by law: cf. *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 414; *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511. Some such matter must, in my view, be capable of identification either expressly or by implication for s476(4)(a) to be invoked, as distinct from the ultimate fact or matter in issue or the ultimate conclusion sought. Otherwise, no proper weight would be given to the alternative expressed in s476(4)(b). In my view the applicant has not successfully invoked s476(4)(a).

Sackville J in *Xiang Sheng Li v Refugee Review Tribunal* (23 August 1996, unreported) drew the distinction between a finding of fact that is critical to the making of a decision, even though not the only link in the chain of reasoning (*Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 per Black CJ at 220-224), and the ultimate conclusion on the matter in issue which there was and generally will be a conclusion as to future possibilities based on a series of factual findings. I agree

with that distinction. It means that the complaints identified, or perhaps all but the first of them, are not particular matters or findings on particular facts on which s476(1)(g) can operate.

Moreover, the applicant does not really challenge any primary findings of fact of the Tribunal, including the primary findings of fact upon which each of those general conclusions was reached. Indeed, as appears above, she urges that in certain instances the primary findings are in terms more specific and clearer than acknowledged by counsel for the Minister. Thus, if it is accepted that there was evidence to justify those primary findings, as the applicant does, it follows that her complaints under s476(4)(b) are misconceived. Her real complaints fall to be determined under s476(1)(e).

There is one particular matter I address under this section, namely the "*finding*" that the applicant's right to earn a living has been upheld in India. In its context, that is an observation based upon primary findings (if in fact they were made) uncontested by the applicant. It is not, in a relevant sense, a primary fact. Nor is it an inference drawn from other primary facts. It is a conclusion as to the legal significance of the findings of fact which the applicant contends that the Tribunal has made.

Accordingly I reject this ground of review.

Social group

Although her initial claim of 2 February 1993 positively eschewed such a claim as one of the bases for her asserted fear of persecution, her letter to the delegate of the Minister of 6 May 1993 whilst the delegate was considering her claim included the following:

"The fact that I am a woman also leaves me very vulnerable and puts great pressure on me as my hindu and Indian culture dictates that I should be submissive and stay at home and that I should not be practising my faith and helping other people out in the villages."

The delegate of the Minister, in his determination made on 13 July 1993 recognised that she had made such a claim. He accepted that her position as an active Christian may put her at some disadvantage in an Indian society in a social and cultural sense, but not that any stigma that may be associated with that role would amount to persecution. Provisions in the Indian constitution promise equality before the law and prohibit discrimination on the basis of sex. He noted recent changes to laws governing personal, criminal and labour aspects pertaining to women, and the media's more extensive reporting on such matters. These matters indicated to the delegate that the government of India was taking steps to protect women from human rights abuses. He also considered that she could take reasonable steps, such as relocating herself away from those who have harassed her, to minimise the risk of suffering adverse treatment because of her position.

The Tribunal appears not to have been asked to consider a claim by the applicant that she is a refugee by reason of a well-

founded fear of being persecuted for reasons of her membership of a particular social group.

Counsel for the Minister, whilst contending that the Tribunal had not fallen into error in not considering a matter not put to it, nevertheless - rather than needing to proceed to a determination, if necessary by report from the Tribunal or by evidence, as to whether the point was taken before the Tribunal - adopted the position that it was appropriate for me to deal with the complaint.

The applicant sought to identify the social group as *"single women in India"*. It was no more limited than that.

I do not need to finally determine whether categorisation of a particular social group as being comprised of single women in India, of which the applicant is a member, may be a particular social group within the meaning of the Convention, and as incorporated into domestic law. The concept of a particular social group has recently been considered by the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (24 February 1997, unreported).

The issue in that case was whether the appellant's fear of persecution was for reasons of membership of a particular social group, namely those in China who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised. The group was so defined only by reason of the particular government policy and action said to constitute the persecution. Specifically, the Court was asked to determine whether the fact that the social group, as defined, only existed because it was the object of the particular government policy precluding it from being a particular social group for the purposes of the Convention. There was no issue as to the existence of a well-founded fear of forced sterilisation. By a majority (Dawson, McHugh and Gummow JJ, Brennan CJ and Kirby J dissenting), the Court concluded that the particular social group could not be so defined or identified for the purposes of the Convention.

That decision is not, of course, directly on point. It did however discuss at some length the circumstances in which the concept of *"particular social group"* came to be included in the Convention and the general scope of its meaning (esp per Brennan CJ at 4-5, Dawson J at 19-21, McHugh J at 34-35, and per Kirby J at 80-84).

Brennan CJ (at 5) considered the ordinary meaning to refer to any group identifiable by any characteristic common to members of the group, with some characteristic which distinguishes them from society at large. He said the distinguishing characteristic may consist in any attribute, including attributes of non-criminal conduct or family life. The apparent breadth of the term he described as a *'safety net'*. His disagreement with the majority was really as to whether the characteristic had to be *"innate and unchangeable"* (an expression used by La Forest J in *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 at 33-34) or whether it could be identified from the persecutory conduct itself. Dawson J (at 13) expressed similar views on the breadth of the general concept, and he added:

> *"I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group. Nor is there anything to suggest that the uniting particular must be voluntary ... Furthermore, the significance of the element as a uniting factor may be attributed to the group by members of the group or by those outside it or by both."*

See also the observations of McHugh J at 40-42, leading to his view (at 42) that it may include:

> *"... a reasonably large group of individuals ... linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole ..."*

and the broad expressions used by Kirby J (at 91). It appears that Gummow J would take a more limited approach, requiring more than numerous individuals with similar characteristics or aspirations but also a common unifying element binding the members together.

This Court has also considered that expression in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 and in *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565. In *Morato*, Lockhart J (at 416) commented:

> *" 'Social' is a word of wide import. The* Oxford English Dictionary *states as one of its definitions "pertaining, relating, or due to ... society as a natural or ordinary condition of human life". This is a helpful guide for present purposes. In my opinion the words "social group" signify a cognisable or recognisable group within a society, a group that has some real common element. Although a voluntary association of persons may fall within the definition, it is not a requirement that there be such an association to constitute a social group within the definition of "refugee"."*

I am prepared to assume, without finally deciding, that *'single women in India'* may constitute a particular social group for the

purposes of the Convention. That assumption seems to reflect the wide interpretation of that expression generally reflected in *Applicant A* (above) and in *Morato* (above). However, in my view, there are no findings in the reasons of the Tribunal, and there were no other findings urged in submissions which it was contended the Tribunal should have made, and which would lead to the conclusion that in any relevant sense the applicant, as a member of that group, was being persecuted. The general assertion that Indian society is generally patriarchal does not really advance the matter without specific content to the conduct which might constitute persecution. It is axiomatic that the establishment of one only of several matters necessary to be established to succeed in an application is insufficient to succeed in the application. Thus, I do not think this ground of attack succeeds.

Discrimination in employment

For the purposes of this aspect of the claim, I shall assume that the applicant has established that, at least within Andhra Pradesh or parts of it, her religion and/or her political beliefs either preclude or substantially inhibit her eligibility for employment in the public sector.

The Tribunal concluded that such discrimination would not amount to serious harm, as she has been able to obtain work in the private sector (albeit at a lesser salary) and so her *"rights (sic) to earn a living has been upheld."* Any such discrimination, it found, did not amount to persecution.

The measure of discrimination sufficient to constitute persecution arose for consideration in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. Mason CJ (at 388) referred to:

> *"... a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns. ... The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether* any *(his emphasis) deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason."*

Dawson J expressly declined to explore that issue, as on the facts before the Court the applicant faced a threat to his freedom which, on any view, would amount to persecution (at 399-

400) and Gaudron J also limited her consideration of the question to the particular facts (at 416). McHugh J addressed the question at greater length (at 429-431). He said:

> *"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 ... As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention ...*
>
> *Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution: Weis "The Concept of the Refugee in International Law",* Journal du Droit International, *(1960), 928, at p. 970. Thus the U.N.H.C.R. Handbook asserts that serious violations of human rights for one of the reasons enumerated in the definition of refugee would constitute persecution: par. 151. In* Oyarzo v. Minister of Employment and Immigration *[1982] 2 F.C. 779, at p. 783 the Federal Court of Appeal of Canada held that on the facts of that case loss of employment because of political activities constituted persecution for the purpose of the definition of "Convention refugee" in the* Immigration Act *1976 (Can.), s. 2(1). The Court rejected the proposition that persecution required deprivation of liberty [1982] 2 F.C., at p. 782. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: Goodwin-Gill, pp. 38 et seq."*

In the Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) at 15, reference is made to discrimination of a substantially prejudicial nature for the person concerned e.g. *"serious restrictions on his right to earn his livelihood ..."*. Chapter 4 of Professor Hathaway's book *"The Law of Refugee Status"*, Butterworths 1991, discusses the nature of persecution at some length esp at 116-124. Included in the *'basic and inalienable rights'* are those in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (United Nations' General Assembly, Resolution 2200 A (XXI), 16 December 1966) protecting the

right to work, including just and favourable conditions of employment remuneration, and rest.

In my view, the Tribunal erred in concluding that the ability to obtain work in private enterprise reflects the State upholding the "*right to work*", where the State either imposes or tolerates a system which precludes certain of its citizens from working in government employment for reasons of religion or political beliefs. Far from treating its citizens equally, the State then is sanctioning discrimination against some of them for Convention reasons. It is difficult to envisage circumstances where such discrimination may, in a practical sense, be insignificant. That is the more so when there is a significant economic disadvantage consequent upon that restriction, although actual economic disadvantage in an immediate personal sense is not per se the critical matter. It is unnecessary to resort specifically to relatively recent historical examples to make the point. To characterise the circumstances as not sufficiently serious to constitute persecution in my view fails to acknowledge the fundamental significance of the State positively excluding certain of its citizens for Convention reasons from employment by the State and its organs.

As I have said above, I am unclear whether the Tribunal in fact found that to be the case in any event. It would, therefore, but for the further point raised by the Minister, be necessary to refer this matter back to the Tribunal for further consideration.

The Minister's submission is that, even assuming such institutional policy or tolerance in Andhra Pradesh, it is not shown to be a position which obtains throughout India. The Tribunal did not address that question. In *Randhawa v Minister for Immigration and Ethnic Affairs* (1994) 35 ALD 1, the Full Court (Black CJ, Beaumont and Whitlam JJ) rejected an application for refugee status as the applicant, a Sikh vulnerable to persecution for a Convention reason should he return to Punjab in India, could settle and reside peacefully in many other areas of India. Black CJ (at 4), with whom Whitlam J agreed, stressed that the focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. In affirming what is called variously *'the internal protection principle'*, *'the relocation principle'* and *'the internal flight alternative'*, Black CJ referred to both text and authorities to make the point that refugee law is intended to meet the needs of only those who have no alternative to seeking international protection.

It is important to note, however, the additional and '*important*' question as to whether the applicant for refugee status could, in all the circumstances, reasonably be expected to relocate. As Black CJ explained (at 5-6):

> *"... notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.*

> *Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in* R v Immigration Appeal Tribunal Ex parte Jonah *[1985] Imm AR 7. Professor Hathaway, op cit at 134, expresses the position thus:*

> > *The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad. It should be restricted in its application for persons who can* genuinely access *domestic protection, and for whom the reality of protection is* meaningful. *In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where*

> *internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognised. [Emphasis in original text.]*

> *It is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded."*

Burchett J expressed similar views.

The Tribunal did not address that question. There was apparently some evidence on the topic, as it noted in its reasons that the applicant had said that it was difficult for a single women to move in India. No doubt the Tribunal did not take the question further in view of its decision that there was, in the circumstances, no relevant persecution. But, on my conclusion, the Tribunal was obliged to address that matter. It is not for the Court to do so, as it is not apprised of all the factual material before the Tribunal. Despite the submission that I should assume, or conclude, to the contrary in the absence of any finding on the topic, I do not think I should do so. The circumstances applicable to the applicant personally will be relevant to that question, and I am not in a position to conclude

that a particular answer to the question is in effect inevitable or very likely.

Discrimination in proselytising

The Tribunal's findings on this topic, are as set out in its conclusion and in part in the body of its judgment. In my view there are two questions to address:

1) whether the Tribunal is correct in concluding that there is no right to proselytise, so the inability to do so does not establish a denial of her right to freedom of religious opinion, and

2) if contrary to the Tribunal's view, there is such a right, is the decision sustainable on the alternative grounds contended for by the Minister to support the decision, namely:

a) that the discrimination was not persecution because it was not "*institutional*", that, it was

not imposed by nor condoned nor tolerated by the State nor in a context where effectively the State was powerless to protect it, and

b) that any such discrimination is localised only, so the applicant could avoid such discrimination by moving elsewhere within India.

No doubt because the Tribunal concluded that, because proselytising *"is not a right"*, being denied the right to proselytise is not *"tantamount"* to losing the right of religious freedom, it did not specifically make a finding on either of those matters. It noted her evidence that:

> *"... she would sometimes be ordered out of the village ... and sometimes young boys or youths would throw stones at her and chase her away."*

It also noted the evidence that, although there is friction between religious groups in India, India is a secular State and freedom of religion is practised and is part of the

Indian Constitution, so such conduct was not condoned by the Indian Government, and further that there is a well organised legal and judicial system and citizens have access to that system.

There is some basis for the applicant's claim that the Tribunal erred in law in concluding that the practise of proselytising is not relevant to her right to practise her religion. Professor Hathaway (above) at 146-147 says:

> *"Alternatively, because religion includes also behaviour which flows from belief, it is appropriate to recognize as refugees persons at risk for choosing to live their convictions. This proposition is constrained only by the limitation expressed in the International Covenant on Civil and Political Rights:*
>
> > *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
>
> *While the scope of this restriction is arguably broad, the assertion in one Board decision that "[g]iven the applicant's religious attitude ... one might reasonably expect that he will 'keep his mouth shut'" is simply wrong. The peaceful expression of one's beliefs, including engaging in worship, playing an active role in religious*

affairs, and proselytizing may give rise to a genuine need for protection."

No Australian authority was referred to. The footnote to proselytising refers to *Orhan Demir*, Immigration Appeal Board Decision (Canada) 6 January 1983 but see *Panagiotis Billias*, Immigration Appeal Board (Canada) 7 July 1980; those decisions are not available to me. Professor Hathaway's text is capable of providing some guidance, but of course is not definitive.

I do not finally need to decide that question. It was not suggested that the Tribunal had inaccurately or incompletely referred to the applicant's evidence on this topic. On the basis of it, in my view, she would fail in any event as it would not be established that such behaviour as she complains of is institutional in any relevant sense. The behaviour of some men and boys in some villages in which the applicant has preached to some extent is, or may be, criminal conduct. It was not suggested that such conduct was initiated by the State, nor that it was either officially or unofficially tolerated by it. Nor does the finding of such conduct amount to a finding that such conduct is effectively uncontrollable by the Indian authorities.

Political harassment

For the same reason and for one other reason, in my view the applicant cannot succeed on this aspect of her complaint. The step of converting the clearly offensive and apparently intimidating behaviour of a few members of the Congress Party towards the applicant because of her good work, or because of her complaining about them to the police, into persecution for a Convention reason cannot be taken. It is not shown either to be persecution by any form of institutional conduct on the part of the State in any sense nor is it shown to be conduct engaged in by reasons of the applicant's political beliefs.

In my view, no reviewable error is shown in how the Tribunal approached this aspect of the applicant's claim.

Conclusion

For the reasons given, in my view this application should succeed. It should be referred back to a differently constituted Tribunal for consideration of the applicant's claim for persecution for reasons of her religion and her political beliefs in respect of the alleged conduct concerning her employment, and of course if the discriminatory conduct complained of is established in fact, for consideration of whether any well-founded fear of persecution which she holds on that score in relation to returning to Andhra Pradesh is such that she is entitled to refugee status in relation to India itself.

I certify that this and the preceding pages are a true copy of the Reasons for Judgment of the Honourable Justice Mansfield.

Associate:

Dated:

Counsel for the applicant	:	Mr M Clisby
Solicitors for the applicant	:	Gilbert Santini
Counsel for the respondent	:	Ms S Maharaj
Solicitors for the respondent	:	Australian Government Solicitor
Hearing Date	:	3 March 1997