Bouncing the Ball between the Courts and the Legislature: What is the score on refugee issues?

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Abstract

The broad purpose of this paper is to examine recent developments in refugee law and policy and the interaction between the Australian courts and the legislature. I examine the role of the courts and the extent to which they have acted and can act as guardians of human rights on these issues.

In particular I examine how the courts have responded to recent legislative measures to limit the application of the Refugees Convention in Australian law by narrowing the refugee definition, and to restrict judicial review. Paradoxically these measures coincide with a judicial broadening of the refugee definition by the High Court in the Khawar *decision and an expansion of the concept of jurisdictional error as a result of* S157 \ 2002 v Commonwealth.

I argue that the legislative measures to limit the refugee definition are inconsistent with international law and international jurisprudence. I demonstrate that they have led to much confusion and increased litigation. In my view these legislative measures should be repealed, and the application of the refugee definition should be left to the courts to apply in accordance with the Refugees Convention.

Background and Introduction

My brief for this paper was to examine recent important decisions of the High Court in the refugee jurisdiction. As this jurisdiction is one where in recent years we have seen an open tension between the courts and the executive, it is appropriate to declare my hand at the outset. My view is that the courts are the 'Third Arm of Government' in partnership with the other branches of government.[1] I see their role as essentially to uphold the values of the common law and human rights. This is an essential role in this setting

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[1] S Kneebone, 'What is the Basis of Judicial Review' (2001) 12 *Public Law Review* (No 2) 95-112.

where the rights of non-citizens are in danger of being eroded as a response to 'popular politics'.[2] Clearly this view implies a particular view of democracy. Thus as summer approaches, the tennis metaphor seems an appropriate one – let us watch the ball bouncing back between the legislature, expressing the wishes of the executive, and the judicial 'courts'.

The background to this paper begins in August 2001 with the *MV Tampa* episode and the subsequent passage of a package of far – reaching legislation passed in haste. This legislation included the Migration Legislation Amendment (Judicial Review) Act 2001 which replaced Part 8 of the Migration Act 1958 (Cth) with a general privative clause on judicial review of decisions of the RRT. It also included the Migration Legislation Amendment Act (no 6) (MLAA (no 6))[3] which purports to amend the definition of refugee under Article 1A(2) of the 1951 Convention Relating to the Status of Refugees[4] (Refugees Convention). In particular, s91R defines the meaning of 'persecution', stipulates the nature of the causal link required to establish 'persecution' for a Convention reason, and limits the bringing of *sur place* claims. Section 91S attempts to limit the application of the ground of 'membership of a particular social group' in relation to family members. I will consider the impact of these amendments.

I will also consider the application of the potentially expansive decision in *Minister for Immigration v Khawar*,[5] (*Khawar*) which the High Court handed down in April 2002. In that case it was held that a married woman from Pakistan who claimed that she was the victim of serious and prolonged abuse by her husband, and that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, could arguably satisfy the test for a 'refugee' within the meaning of the Refugees Convention as a 'member of a particular social group'. In the *Khawar* decision, McHugh and Gummow JJ stress the Refugees Convention context of Australia's protection obligations as incorporated into the Migration Act.[6] They also emphasise the Convention's concern with *non-refoulement*. Typically in previous decisions the dissenting judges would refer to the human rights framework of the Refugees Convention, but the majority view was typified by the judgment of Gummow J in *Minister for Immigration v Ibrahim*[7] who emphasised the domestic legislative context as the source of rights.[8] He said that 'the right of asylum is a right of States, not of the individual'.[9]

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2 A Millbank, *The Problem with the 1951 Convention* (Canberra, Department of the Parliamentary Library, Research Paper 5 2000–01), http://www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm; H Pringle and E Thompson, 'Tampa as metaphor: Majoritarianism and the separation of powers' (2003) 10 *AJ Admin L* 107.

3 This Act came into effect on 1 October 2001.

4 A refugee is defined in Art 1A(2) as:

... any person who ... owing to a 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 unwilling to avail himself of the protection of that country; ... .

5 (2002) 67 ALD 577.

6 Although they also stress the legislative context. Ibid para [48].

7 (2000) 204 CLR 1.

8 Ibid at 34 para [107], referring to ss36 and 65 of the Migration Act.

9 Ibid at 45 [para 137].

The next important development was the decision of the High Court in February 2003 in *S157 \ 2002 v Commonwealth*[10] which settled the controversy which had raged in the Federal Court since October 2001 over the validity and interpretation of the new privative clause. In *S157 \ 2002* the High Court determined that the clause was valid, and that it should be interpreted according to ordinary notions of 'jurisdictional error'. This potentially allows for the review of decisions in a broad range of circumstances where there is loosely, an 'error of law'.[11] The significance of this decision is that it married the emerging jurisprudence over the central importance of s75(v) of the Constitution for the High Court's judicial review jurisdiction,[12] and established notions of civil liberties with an understanding of the importance of human rights, and international obligations in the refugee context.[13] This contrasts with previous High Court decisions on the validity of Part 8. For example, in both *Abebe v Minister for Immigration*[14] and in *Minister for Immigration v Eshetu*[15] the High Court relied heavily on principles of interpretation in concluding that Part 8 did not affect the High Court's s 75(v) jurisdiction.

To complete the background picture, I should mention *Al Masri*[16]and related decisions in which the courts have clipped the wings of the executive by imposing limits on the statutory powers to detain non-citizens and children. This issue is very much in the public eye and is aired by the media. Here I will concentrate on the more subtle but extremely significant play between the courts and the legislature over the refugee definition. This also involves the relationship between the Refugees Convention and other human rights treaties and the Migration Act. But here my discussion is specifically about the application of MLAA (no 6) and *Khawar* and the play between the courts and the legislature.

For the purpose of this paper a search was done of all decisions in which s91R or s91S of MLAA (no 6) was discussed[17] and of all decisions in which *S157 \ 2002* was applied in relation to the refugee definition.[18] Thus the following paper is a report or audit on decisions relating to the refugee definition in recent times.

Executive versus Judiciary: Migration Legislation Amendment Act (no 6)

Let me begin with an analysis of MLAA (no 6) s91R (which is set out in Appendix 1). The Explanatory Memorandum for the Bill states:

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10 (2003) 195 ALR 24.

11 Eg *NACP v Minister for Immigration* (2003) 74 ALD 83 (failure to address a substantial part of the applicant's case); *Applicant VEAL of 2002 v Minister for Immigration* (2003) 74 ALD 97 (failure to afford procedural fairness).

12 Kneebone, above n1.

13 (2003) 195 ALR 24, per Gleeson CJ at para 27.

14 (1999) 197 CLR 510.

15 (1999) 197 CLR 611.

16 *Minister for Immigration v Al Masri* (2003) 197 ALR 241.

17 Approximately 24 decisions on s91R were examined and 7 on s91S. 'Approximate' because some cases dealt with both the legislation and *S157 \ 2002*.

18 Approximately 21 decisions were examined. As explained in the previous footnote there was an overlap between the two categories.

> 1.The purpose of the Migration Legislation Amendment Bill (No. 6) 2001 (the Bill) is to amend the Migration Act 1958 (the Act) to restore the application of the Convention …. in Australia to its proper interpretation; and promote integrity in protection visa application and decision-making processes. **….**
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> 3.Over recent years the interpretation of the definition of a refugee by various courts and tribunals has expanded the interpretation of the definition so as to require protection to be provided in circumstances that are clearly outside those originally intended.

The suggestion that Australian courts were going beyond the scope of the Refugees Convention was referring in particular to decisions on the 'social group' ground which as we will see have tested the limits of the Convention. These included decisions where the ground for refugee status was domestic abuse, or gender or sexuality, as well as situations involving what the government sees as 'private abuse' at the hands of non-state agents. The comment about 'integrity' referred in part to *sur place* claims which I will also refer to. This refers to persons who claim asylum on the basis of activities in the country of refuge or asylum.

In September 2001 I made a submission to the Senate Legal and Constitutional References Committee in which I concluded: 'In summary, my view is that none of these amendments is necessary or desirable.' I stated:

> …. it is a basic principle that international instruments should be interpreted consistently both nationally and internationally. These amendments will potentially lead to Australian jurisprudence being out of line with international interpretation of the Convention. Currently the Australian courts are interpreting the Convention in a moderate, not generous way. These amendments are simply unnecessary. They will add another layer of complexity to interpretation of Art 1A. [Next], one can query whether many of these provisions comply with the principle of 'good faith' interpretation of international obligations as required by Art 31 of the Vienna Convention.
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> A final general comment is that the High Court has emphasised on many occasions that the Refugees Convention cannot be interpreted too legalistically – that the definition in Art 1A cannot be broken up into strict components. Yet this is the effect of most of these provisions.

As I will elaborate, my concerns were justified. Further as a colleague Dr Pene Mathew of the Law Faculty at ANU predicted,[19] the legislation has led to an increase in applications for judicial review.[20]

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[19] Submission to Senate Legal and Constitutional References Committee regarding MLA Bill (No 6), copy on file with the author.

[20] Figures obtained from http://www.rrt.gov.au.

'Persecution' under s91R and human rights protection

I want to now examine the terms of s91R and the meaning of 'persecution'. This is a concept which is fundamental to the refugee definition. The explanatory memorandum suggested that the courts had expanded the scope of the Convention, so that that the legislature had to restore the proper meaning. In my view this charge was not made out. The amendment has had the reverse effect of taking the interpretive approach to the definition in the opposite direction to the Convention and the appropriate principles of statutory interpretation where a treaty is involved. Although s91R is not textually very different to the established case law, it does have the potential to bring in a 'creep' effect of ignoring the human rights framework.

The drafting history of the Convention establishes that the term 'persecution' was left deliberately undefined. The established principles of international jurisprudence under the Convention are clear that the meaning of persecution is to be determined in the human rights framework. Whilst its core meaning includes deprivation of life or physical freedom, it also means 'severe pain or suffering whether physical or mental, intentionally inflicted' taking the cue from the Convention Against Torture's definition of 'torture'. The jurisprudence suggests that the hierarchy of human rights, civil and political rights, followed by economic, social and cultural rights is relevant in assessing whether there is persecution. Persecution is for example to be distinguished from 'mere' hardship or discrimination as the courts have continued to recognise in applying s91R.[21] But it is always a matter of evaluation against the human rights background.

The language of s91R, the reference to 'serious harm', and 'systematic and discriminatory conduct' is not very different to the definition of persecution that was formulated by the High Court in *Chan Yee Kin v Minister for Immigration*.[22] In that case McHugh J gave the leading judgment. He defined persecution as involving selective harassment or systematic conduct directed at an individual or a group - but he also said that a single act[23] may suffice.[24] Although the non-exhaustive statutory definition of serious harm ('Without limiting') emphasises physical harm and subsistence and does not specifically refer to mental harm, it has been decided that it includes psychological harm.[25] On one level s91R could be said to be useful in spelling out in an non-exhaustive way the types of harms that amount to persecution. Indeed in several cases the judges have said as much. But as I argue this is at the expense of the human rights framework.

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[21] *Vinod Ram v Minister for Immigration* [2002] FCA 1572 (11 December 2002, 16 December 2002); *Korizad v Minister for Immigration* [2002] FCA 487 (27 March 2002; 22 April 2002). Eg *NAPX v Minister for Immigration* [2003] FCA 85 (7 February 2003); *NAGT v Minister for Immigration* [2003] FCA 149 (7 February 2003) - threats, including phone calls, did not constitute harm amounting to persecution.

[22] (1989) 169 CLR 379.

[23] Eg *Prathapan v Minister for Immigration* (1997) 47 ALD - an act of chemical spraying by LTTEE in France evidence of harassment for Convention reason.

[24] (1989) 169 CLR 379, 429-430. Ibid per Mason CJ at 388 the same terms

[25] *SCAT v Minster for Immigration* [2003] FCAFC 80 (19 February 2003; 30 April 2003).

The crucial difference between McHugh J's analysis in *Chan Yee Kin* and the statute, is that he related the meaning of persecution to basic human rights, as did other members of High Court.[26] More recently in *Ibrahim* McHugh J expressly moderated his comments in *Chan Yee Kin* and emphasised the human rights dimension of the concept. He described persecution as:

> …. unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason…which constitutes an interference with the basic human rights or dignity of that person or persons in the group…which the country does not authorise or does not stop, and…which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to that country is the understandable choice of the individual concerned.[27]

Gaudron J similarly described persecution as 'sustained discriminatory conduct'.[28]

The human rights framework was also emphasised by the High Court in *Chen Shi Hai v Minister for Immigration*[29] it which it was decided that a 'black child' born to a couple contrary to China's one child policy, who was denied basic rights to education, food and health was a member of a 'social group'. This policy, said the High Court, 'offends the standards of civil societies … [and] of the civilized world'.[30]

My observations about the general interpretation of s91R and 'persecution' are as follows:

- Many judges are ignoring or at least failing to articulate, the international law and human rights context of s91R. I have not seen any reference to the principles of interpretation in Art 31 of the Vienna Convention for example, which were discussed at length by the High Court in *Applicant A v Minister for Immigration*.[31]
- There is uncertainty as to the interrelationship between s91R and the Convention. In some cases the judges have confirmed that the Convention applies 'without limiting' the statute.[32] In other cases judges have queried whether s91R limits the Convention.[33] In others the judges have suggested that it does[34] but in others that the two are consistent.[35]
- Two approaches to interpretation of the meaning of 'persecution' have developed. In most cases judges examine the alleged acts of persecution individually to see

[26] (1989) 169 CLR 379, per Gaudron J at 413, per Dawson J at 399.
[27] (2000) 204 CLR 1 at 65.
[28] See UNHCR Handbook para 42 which emphasises the 'tolerability' of the applicant's situation.
[29] (2000) 201 CLR 293.
[30] Ibid at 303.
[31] (1997) 190 CLR 225.
[32] *SAAO v Minister for Immigration* [2002] FCA 1326 (13 October 2002).
[33] *SBBG v Minister for Immigration* [2003] FCAFC 121 (15 May 2003).
[34] *WADP v Minister for Immigration* [2002] FCA 672 (31 May 2002). *SAAO v Minister for Immigration* [2002] FCA 1326 (13 October 2002).
[35] Eg *VBB v Minster for Immigration* [2003] FCA 1141 (13, 21 October 2003) ; *SCAT v Minster for Immigration* [2003] FCAFC 80 (19 February 2003; 30 April 2003) per Madgwick and Conti JJ.

whether they each literally come within s91R's definition of persecution, without taking a 'global' view of the facts. And that is the essential and crucial and fundamentally worrying point about s91R's definition of persecution – that it can be applied out of context, as one judge described it, as a simple question of fact.[36] I will examine some cases on religious persecution below to show the differences in result between this approach and those decisions in which the judges apply the second approach and look at the issue globally and *implicitly* (rarely, explicitly) recognise the human rights framework of the Convention and the setting for interpreting s91R.

- These cases demonstrate that judges are failing to apply the refugee definition holistically. Section 91R relates to some but not all aspects of the Convention Article 1A(2) definition, but judges are allowing the statute to dominate their reasoning.

The very disturbing aspect of s91R arises from the fact that refugee law is international. Up to this point the jurisprudence of the Australian High Court on refugee issues has been highly regarded in the top courts in the United Kingdom and the USA. For example the decision in *Applicant A* was referred to as authority in the House of Lords decision of *Islam v Home Department; R v Immigration Appeal Tribunal ex parte Shah*[37] (*Islam and Shah*) (and in turn that decision was applied in *Khawar*). But with the intrusion of the statute onto the Convention definition, the value and authority of Australian jurisprudence will wane. Conversely, the scope for application of international jurisprudence in Australia will be lessened, and our isolation, our 'unilateral' approach to refugee issues, will be compounded.

Finally, whilst still on the level of generality, let me take one issue which goes to the heart of the rules of the game in this context. As I mentioned, the comment about 'integrity' in the explanatory memorandum referred in part to *sur place* claims. It is not uncommon for a refugee who flees a place where she has been repressed to become outspoken or active in the country of refuge or asylum. In a number of cases the courts have recognised *sur place* claims arising as the consequence of the refugee's own activities. They have resisted the imposition of a 'good faith' requirement in relation to *sur place* claims on the basis that this is a 'gloss' on the refugee definition.[38] The courts have emphasised that natural justice applies to such claims. In *Somaghi v Minister for Immigration*,[39] Gummow J stressed that the crucial question is whether a person holds a well-founded fear of persecution. This approach is consistent with the fundamental principle of *non-refoulement*.

Section 91R(3) of the Act now states that in determining whether a person has a well-founded fear of being persecuted, the conduct 'engaged in by the person in Australia' is to be disregarded unless the person satisfies the Minister that the conduct was not 'for the

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[36] *SCAT v Minster for Immigration* [2003] FCAFC 80 (19 February 2003; 30 April 2003) per Gyles J.

[37] [1999] 2 AC 629.

[38] *Minister for Immigration v Mohammed* (2000) 98 FCR 405; *Minister for Immigration v Farahanipour* (2001)181 ALR 535.

[39] (1991) 31 FCR 100 at [28].

purpose of strengthening the person's claim'. This provision imposes an additional burden on an applicant to establish not only a well-founded fear of being persecuted for Convention reasons, but also that conduct in Australia was bona fide. This arguably adds an element to the 'real chance' of persecution test which requires a weighting of evidence and the prediction of future probabilities. It potentially collides with the principle of *non-refoulement*.

The validity and scope of s91R(3) was challenged in *SAAS v Minister for Immigration.*[40] In that case the applicant, a citizen of Iran, claimed to be a refugee *sur place* by reason of his conversion to Christianity since leaving Iran. He claimed a well-founded fear of persecution on the ground of his religion. However the RRT was not satisfied that the applicant had engaged in Christianity otherwise than for the purpose of strengthening his claim to refugee status. Mansfield J upheld this decision and also rejected an argument about the validity of the provision. Mansfield J found that s91R(3) could be supported by both the 'aliens'[41] and 'immigration'[42] heads of power, and is a valid exercise of legislative power. He said however that s91R(3) 'qualifies or restricts the criterion for a grant of a protection visa'[43] in comparison to the previous case law. I query whether this is consistent with the Refugees Convention.

That case is a good lead in to the study I now want to make of five cases involving religious freedom. The purpose of this is to illustrate the general point made above, namely that in determining whether there is 'persecution' within the meaning of s91R(1) and (2) it matters whether the human rights framework is taken in account.

Religion as a ground for persecution and s91R

The ground of religion is one of the five Refugees Convention grounds referred to in the Article 1A(2) definition. MLAA (no 6) s91R does not attempt to define the grounds, although it does says something about the nexus that must exist between the ground and the persecution as we shall see next. That in turn affects how the grounds are applied as I will explain. Leaving that issue aside for one moment, it is clear that the courts are concentrating upon the meaning of 'persecution' in s91R, rather than upon the scope of the ground, in determining whether the applicant comes within the refugee definition.

Let me begin by explaining the significance of the human rights background. The meaning of religion and religious freedom takes its measure from Article 18 of the ICCPR which states:

> Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in

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40 [2002] FCA 726 (11 June 2002).
41 That is, s 51(xix) of the Constitution.
42 That is, s 51(xxvii) of the Constitution.
43 Ibid para 48.

> community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

It has been stressed that this involves the ability to live freely in accordance with that creed. The recent decision of the Full Court of the Federal Court in *Wang v Minister for Immigration*[44] contains a full discussion of the ground. In that case a Christian member of the Chinese Presbyterian Church in China who attended an unregistered church was persecuted. The RRT decided that he was not a refugee as he could avoid the persecution by going to a state controlled church. The Full Court disagreed with this interpretation of the ground. It concluded that the RRT was in error as it did not answer the question of whether the applicant had a well-founded fear. Merkel and Gray JJ who relied upon Article 18 of the ICCPR pointed out that the right to religious freedom involved two elements. First, it involved a manifestation or practice of personal faith or doctrine, and secondly this right is to be exercised in a like-minded community. They thought that the RRT had ignored the latter element. Wilcox J came to the same conclusion but without relying on Article 18. He doubted the relevance of Article 18 to an 'Australian statute' (and this was pre s91R – he was referring to the incorporation of the Refugees Convention) but was in any event able to come to same view by applying a dictionary definition of 'religion'.[45] Notably, Merkel J (with whose approach Gray J agreed) relied upon evidence in Human Rights Watch about China's regulatory regime, as well as international jurisprudence to interpret the ground in accordance with the human rights framework.[46]

This ground has become very important as demonstrated by a large number of cases from China[47] and Islamic countries. In many countries with authoritarian and theocratic regimes this ground overlaps with the political opinion ground.[48] There are a number of Falun Gong supporters from China who seek asylum. A typical response was given in *NAJT v Minister for Immigration*.[49] In that case the applicant, a citizen of China claimed to have a well-founded fear of persecution on religious or political grounds due to her association with, and the practice of Falun Gong, which is banned under Chinese law. Hely J said that it was open to the delegate to conclude that the applicant being only a practitioner and activist within Falun Gong would not likely come to the attention of authorities. However there was no discussion of the right to religious freedom. As with cases on 'political opinion' the RRT is concerned with characterising the 'profile' of the applicant rather than assessing the breach of human rights.[50]

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44 (2001) 62 ALD 373.
45 Ibid at 375.
46 Ibid at 388-389.
47 The RRT bulletins indicate that China is still the largest source country for refugee claims in Australia.
48 Eg *Omar v Minister for Immigration* (2000) 104 FCR 187 ; [2000] FCA 1430.
49 [2003] FCA 487 (29 April 2003; 21 May).
50 Eg N02/42029 (9 May 2003) – 'high' profile practitioner of Falun Gong successful.

I looked at five cases in which s91R was relevant and which involved Iranians of the Sabean Mandaean faith or religious sect.[51] According to the discussion in *SCAT v Minster for Immigration*[52] there are about 25,000 of such people of whom 20,000 live in Iraq. They are followers of the teachings of John the Baptist and are regarded by some as Christians and as others as of the ancient Jewish Essenes. Three out of the five were successful.[53] In none of the five cases was there any discussion of the nature of religious freedom or *Wang's* case on that issue, even though the facts clearly established a lack of religious freedom. In one of the successful cases, *SCAT v Minster for Immigration*,[54] there was a submission about religion but the decision turned upon a discussion of s91R and whether the acts alleged constituted 'serious harm' or persecution.[55]

In *SBBG v Minister for Immigration*[56] and *SBAS v Minster for Immigration*[57] evidence was given of 'general institutionalised discrimination' against all Mandaeans in Iran:

- The Mandaean religion is not recognised under the Iranian Constitution, Mandaeans thus have no legal rights in respect of their religious beliefs.
- Under the official religion of Iran, Islam (Ja'fari Shi'ism), Mandaeans are treated as infidels and defiled persons who are unclean. Thus Mandaeans often suffer general abuse and vilification from their Moslem neighbours. Women, in particular are often raped and assaulted.
- Mandaeans are denied employment in the government service and have severe problems in gaining employment in the private sector. Thus Mandaean men were generally limited to working with jewellery, especially goldsmithing.
- Medical services were withheld from, or provided at a minimal level to Mandaeans.
- Mandaeans suffered discrimination under the legal system as some remedies available to Islamic citizens are not available to Mandaeans. Further the police will often withhold protection.
- Evidence was given of discrimination in education – that Mandaeans were unable to attend university and that at school they were forced to convert to Islam.

In *SBBG v Minister for Immigration* the applicant, his wife and children were successful in their applications for protection visas. They made specific claims of persecution to which they were individually subjected, in addition to general claims of discrimination. For instance, the appellant claimed that he had been assaulted for wearing a cross, and that his wife was harassed for non-compliance with the Islamic dress code for women and assaulted by an officer when trying to enrol her daughter in school. The Tribunal found

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[51] Note *SBBA v Minster for Immigration* [2003] FCAFC 90 (9 May 2003) where there was some dispute over his nationality. The applicant claimed to be an Iraqi but the RRT found him to be an Iranian national.

[52] [2003] FCAFC 80 (19 February 2003; 30 April 2003).

[53] Note also *SBAU v Minster for Immigration* [2002] FCA 1076 (Mansfield J, 24 May; 13 September 2002) where a finding of bias was made out.

[54] [2003] FCAFC 80 (19 February 2003; 30 April 2003).

[55] In that case the harm alleged was psychological damage and the decision turned upon whether that came within s91R.

[56] [2003] FCAFC 121 (15 May, 6 June 2003).

[57] [2003] FCA 528 (30 May 2003).

that the appellant and his family suffered societal discrimination due to their faith but was not satisfied that such treatment constituted persecution.

On review, the Full Court (Grey, von Doussa and Selway JJ) held that these acts amounted to 'serious harm' within the meaning of s91R. They were however undecided about the effect of s91R on the Convention definition. The court decided that on the authority of *Chan Yee Kin* it was arguable that what the Tribunal considered to be 'inconveniences, disruptions and limitations' were acts of persecution under the Convention and also 'serious harm'. In this case the Full Court seemed alive to the human rights dimension, although it queried whether the statute had limited the definition of persecution under the Convention.

The decision in *SBAS v Minster for Immigration*[58] is another case where the applicants succeeded. In that case the applicants (husband, wife, and two daughters) claimed persecution on the grounds of their religion, and the imputed political opinion of the husband. The claim of political opinion arose out of an incident which the applicants claimed to have occurred at their home on 18 February 2001 when two Muslim men robbed them, and the police refused to investigate the incident even though aware of the identity of the offenders. Other specific claims of individual incidents of persecution included:

- Regular abuse and vilification by Muslin neighbours,
- Threatening letters and phone calls,
- Physical assault of the wife by police when she refused to disclose the whereabouts of her husband.

The Tribunal did not accept that these events together or taken separately constituted persecuted. However on review Cooper J found that the Tribunal should have considered how the event of 18 February 2001, along with the other general evidence impacted on the treatment of the applicants, that impact being cumulative with the other events the applicants claimed has impacted adversely on their lives due to their religion and membership of the Mandaean community. That is Cooper J appeared to take an overall view of these events. Although he did not refer specifically to Article 18 or *Wang's* case, he cited at length from McHugh J's judgments in *Chan Yee Kin*. He was clearly alive to the human rights dimensions. Cooper J found that the RRT had made a jurisdictional error.

The decision in *SGJB v Minister for Immigration*[59] is an example of an unsuccessful claim where the court focused upon the scope of s91R. In this case the applicant, a 24 year old Iranian man, claimed to have a well-founded fear of persecution on religious and political grounds. He gave evidence about discrimination against himself and his family in relation to medical treatment, education, employment and in the exercise of his faith (particularly on holy days). In addition, the applicant claimed he had a Muslim girlfriend and that he feared persecution at the hands of her family if he returned to Iran. The RRT accepted that Sabeans were subjected to some discriminatory treatment. Overall, the

[58] [2003] FCA 528 (30 May 2003).
[59] [2002] FCA 1601 (19 December 2002).

RRT found that these discriminatory practices (or 'inconveniences' as the RRT described them) did not amount to persecution. The RRT was also of the view that the story of the Muslim girlfriend was fabricated. On review Jacobson J said, referring to McHugh J's statement in *Ibrahim*, that the relevant question is whether the RRT in finding that these discriminatory practices did not constitute persecution, asked itself whether such acts were so oppressive that the applicant could not be expected to tolerate them. Jacobson J considered that overall the RRT had addressed the relevant question. Thus, there was no error of law.[60] In this case the applicant was unable to prove specific instances of discrimination, and thus unable to establish a 'well-founded fear of persecution'.

Similarly in *SBBA v Minster for Immigration*[61] the court focused upon whether the fact that different rules apply to Sobbis (part of the Sabean Mandean religion) for the payment of blood money in cases of murder, accidental death or bodily injury, amounted to'serious harm'. According to Weinberg, Stone, and Jacobson JJ, the harm arising from such discrimination did not satisfy the serious harm test under s91R.

These decisions demonstrate that the effect of ss91R(1) and (2) is to fragment consideration of claims. The courts are concentrating on the meaning of 'persecution' and not considering the refugee definition holistically. They are not taking enough care to root the discussion in the Convention context, even though s91R clearly refers to the Convention. It is simply being ignored.

But the following decision illustrates that post *S157* sometimes an applicant can succeed on procedural grounds even though the substantive ground is not made out. *NAAG of 2002 v Minister for Immigration*[62] concerned the application of s91R(3) of the Act and the rejection of a *sur place* claim by the RRT. The applicant, a woman student from Iran had been politically active in Iran. She had been imprisoned and whilst incarcerated had been raped by her captors. She fled to Australia and claimed that she was a refugee on the basis of her political opinion and religion, as well as her membership of a particular social group. She had converted to Christianity whilst in Australia. The RRT relied upon s91R(3) in rejecting her claim on the basis of religion.[63] Her claims about political activities were largely regarded as 'implausible'. In relation to her 'particular social group' claim, the RRT said the rape was 'a deeply unfortunate but *ad hoc*, opportunistic act … not indicative of how her [political] participation … was regarded.'[64]

At the RRT hearing, the applicant had difficulty in giving evidence about the rape, but the member assured her that if it were to have 'any concerns later I will … give you an opportunity to respond'. On review the Full Court of the Federal Court found that the RRT could only have described the rape in the terms used if it ignored or rejected her evidence about its circumstances. They found that this amounted to a denial of natural

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60 However, Jacobson J did conclude that the decision maker had denied procedural fairness and the case was remitted to the RRT.

61 [2003] FCAFC 90 (9 May 2003).

62 [2003] FCAFC 135 (20 June 2003).

63 See *SAAZ v Minister for Immigration* [2002] FCA 791 (Mansfield J, 20 February 2002,; 3 July 2002) for another case where the court was sceptical about the genuineness of a convert (pre s91R(3)).

64 [2003] FCAFC 135 at para 26.

justice which was a jurisdictional error in accordance with *S157 \ 2002*. The Full Court considered that the evidence indicated that the rape related to her political opinion.

The nexus requirement

The need for a nexus comes from the words 'by reason of' in Article 1A(2) of the Refugees Convention. This requires a link between the persecution and a Convention ground. In *Chen Shi Hai* the High Court described this as a 'common thread' that links the persecution and the grounds. But in that case the High Court declined to lay down a prescriptive approach to causation. Indeed, the High Court eschewed such an approach on the facts of that case. However, the legislation now *prescribes* in s91R(1)(a) that Article 1A(2) does not apply unless 'that reason (or 'reasons') is the essential and significant reason (or 'reasons')'. This was an attempt to tighten up the nexus requirement and to forestall claims on grounds such as domestic violence. The irony is that the *Khawar* decision interpreted the nexus requirement broadly in this context and has been followed in subsequent cases. At the same time there is evidence that s91R(1)(a) has tightened the approach to the nexus requirement. This simply adds to the current confusion in Australian refugee law.

The words in s91R(1)(c) requiring persecution to involve 'systematic and discriminatory conduct' are also relevant to the nexus requirement. McHugh J said in *Chan Yee Kin*, that persecution involves conduct directed at an individual or *group*. As he further explained in *Applicant A*[65] persecution requires that persons 'must be victims of intentional discrimination of a particular kind'. Such conduct or discrimination establishes the 'common thread'.

One technique which developed to require a strong causal link was to concentrate on the motivation of the persecutor. In *Applicant A* for example the High Court stressed that the 'one child policy' was not one of the central government but was rather one 'carried out by zealous local officials'. This decision and other involving actions by non-state agents suggest that unless the state or central government is involved in the persecution, it is not 'by reason of' a Convention ground. Similarly persons affected by situations of general violence or laws of 'general application' have difficulty in establishing the nexus.[66] In a number of cases persons who are the victims of general violence, as for example members of the Hazara community in Afghanistan,[67] or Tamils subject to violence in Sri Lanka[68] have been unable to establish that they are 'persecuted'.

In some Federal Court cases this need for a causal link was read as requiring a positive discriminatory motive for the persecution, thus narrowing the meaning of persecution. However the High Court in *Chen Shi Hai* disapproved this trend.

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[65] (1997) 190 CLR 225 at 257.

[66] Cf *WAEZ of 2002 v Minister for Immigration* [2002] FCAFC 341 (8 November 2002) the court found that there was no law of 'general application' involved.

[67] *WAHZ v Ministre for Immigration* [2003] FCA 594 (9 June 2003 ; 12 June 2003) ; *SFKB v Minister for Immigration* [2003] FCA 192 (13 March 2003).

[68] *WAHR v Minister for Immigration* [2003] FCA 577 (9 June 2003).

In *Chen Shi Hai* the High Court accepted a statement of French J at first instance when he said that:

> Motivation connecting persecution to the relevant attribute is sufficient. Persecution may be carried out coolly, efficiently and with no element of personal animus directed at its objects. There are too many examples of inhuman indifference of which governments are sometimes capable … The attribution of subjectively flavoured states ….to governments and institutions risks a fictitious personification of the abstract and the impersonal.[69]

The courts have recognised that there are often multiple motives for persecution by governments or their agents. Section 91R encourages decision-makers to focus upon the motivation or motivations of the persecutor contrary to established jurisprudence. The limits of relying on motivation for the causal connection with persecution are illustrated by the fact that there are often several motivations for acts of persecution. For example, in *Islam and Shah*, Lord Hoffmann pointed out that harassment of the Jewish population in Nazi Germany proceeded from dual motives, that is business rivalry and indirectly because of their Jewishness (race).

In *Chen Shi Hai* the High Court made it clear that persecution covers both passive and active action. For example, it is well recognised that simply standing by when elements of the civil population smashed up the property of landowners in Communist states constituted persecution. In rejecting the motivation argument, the High Court in *Chen Shi Hai* accepted that persecution can 'result from the highest of motives, including an intention to benefit those who are its victims'.[70] The discussion of the High Court in *Chen Shi Hai* made it clear that the causal issue is one of evidence – was the state unable or unwilling to protect the individual? Is there evidence that the person is 'targeted' or sufficiently discriminated against to constitute persecution? Importantly many of these arguments were accepted in *Khawar*.

Sections 91R(1)(a) and (c) are inconsistent with the developed jurisprudence. Section 91R(1)(c) encourages decision-makers to concentrate upon conduct as such rather upon the resulting breaches of human rights. Section 91R(1)(c) requiring persecution to involve 'systematic and discriminatory conduct' contemplates positive action rather than resulting 'intentional discrimination' as McHugh J suggested.

The decision in *NACQ v Minister for Immigration*[71] illustrates the application of s91R(1)(a) and a narrow nexus approach. The applicant, a citizen of Palestine, claimed that he feared persecution from Israeli spies, due to his political opinion and membership of a social group, if he were to return to Palestine. The applicant submitted that the particular social group was membership of a family closely aligned to the PLO, through the activities of the applicant's brother. On the facts, the Tribunal found that the

69 (2000) 201 CLR 293 at 304.
70 Ibid at 305.
71 [2002] FCAFC 355 (15 November 2002).

applicant did not have a well-founded fear of persecution as the harm feared was aimed at him as a ('private') individual and was not due to a Convention reason. On the basis of s91R(a) the essential and significant motivation for the persecution was not a Convention reason. The Tribunal also found that the family was not a social group.[72] On review the Full Court found that the Tribunal committed no error.

Judiciary versus Executive: the Khawar decision

The High Court decision in *Khawar* has had a significant impact in two respects. First in relation to the nexus issue and persecution by non-state agents, and secondly in relation to the 'social group' ground.

Khawar and non-state agents / motivation

In *Khawar* the Minister's main argument was directed at the need for a causal link between the ground and the persecution. Basically the Minister's argument was that private 'persecution' in the form of domestic violence where non-state actors are involved does not come within the scope of protection obligations under the Refugees Convention. In *Islam and Shah* the House of Lords found that the causal connection was established upon proof of failure of the state taking action in relation to the persecution. The High Court in *Khawar* accepted this approach. The following cases demonstrate the application of this approach which potentially conflicts with *NACQ v Minister for Immigration* and the application of s91R(1)(a) discussed above.

In *SBBK v Minister for Immigration*[73] the applicant (an Iranian citizen), argued she would be persecuted if she returned to Iran, for reasons of her membership of a particular social group, namely women or divorced women in Iran, or women in such a grouping who are exposed to violence in circumstances where effective protection from State authorities or other agencies will not be available. The applicant had divorced her husband, but later agreed to a temporary re-marriage for one year. During the temporary marriage, the applicant fled the country. She feared return to Iran as she believed her husband would kill her. The RRT considered that if the husband were to harm the applicant it would be for purposes of revenge and that such harm would fall outside the Convention definition.

On review, Tamberlin J applying *Khawar* found that the persecution claimed in this case was the 'discriminatory inactivity' of State authorities in not responding to the violence of a non-State authority. Tamberlin J stated that if the husband was determined to cause her harm and no protection was given, this *could* amount to persecution under the Convention. Tamberlin J also said that the motivation to inflict harm is not conclusive as

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[72] This aspect of the decision is probably erroneous – it appeared to have been made with s91S in mind. The case is discussed below in relation to s91S.

[73] [2002] FCA 565 (10 May 2002).

indicated in *Khawar*, as the persecution lies in the discriminatory inactivity of State authorities and not to the subjective motivation of the non-state actor.[74]

WAFH v Minister for Immigration[75] involved an applicant who sought a protection visa on the basis that he had a well-founded fear of persecution on the basis of his political activities in Iran from State tolerated organisations including Hezbollah. The court accepted that after *Khawar*, it must be accepted that harm or discriminatory conduct need not be sanctioned by the State before it can be persecution within the meaning of the Convention. Serious harm which is either condoned or tolerated by the state could be persecution.[76] But in this case the court found that there was no evidence to suggest that the Tribunal had adopted a wrong test for the meaning of persecution. However in *SFGB v Minister for Immigration*[77] the court found that the Tribunal had made a jurisdictional error (in the *S157* sense) when it failed to properly apply this test to a Hazara applicant from Afghanistan.

Khawar *and 'membership of a particular social group'*

Subject to one exception, s91R does not directly cover the Convention grounds, although as explained above it was intended to limit the application of the grounds in the definition through restriction of the nexus requirement. The one exception is s91S which attempts to restrict the social group ground in its application to families (this is discussed below). The social group ground is regarded as the most amorphous of all the Convention grounds. It has been used to argue for refugee status on the basis of the one child policy and its effect on children, domestic abuse, violence against women, sexuality, conscientious objectors, and persons targeted by mafia type organisations. Clearly these examples involve instances of human rights abuse in contemporary society. But the Australian government is particularly keen to limit their use, regarding them as examples which go beyond what it regards as the scope of the Refugees Convention.

This is one area in which the Australian High Court has led the world in the development of jurisprudence. The High Court in *Applicant A* established that a social group must posses an 'associational' interest, that is some 'shared interest or experience in common'. A person is not part of a 'particular social group' if the group is defined by its persecution rather than an associational interest. In *Applicant A* the High Court stressed that a group cannot be defined by the external fact of persecution – that members of a social group must have associative qualities that go to identity, or as has been said in many cases, that the focus in defining a group is upon what a person is rather than what she or he does.[78]

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[74] Cf *NAFP v Minister for Immigration* [2003] FCA 241 (Branson J, 13 March 2003) – no evidence of failure of state protection of homosexual.

[75] [2002] FCAFC 429.

[76] Cf *SGNB v Minister for Immigration* [2003] FCA 885 (Selway J, 22 August 2003) – no evidence of State condoned persecution but rather of lack of resources. But note that this is dangerously close to accepting the reasoning in *Horvath v Secretary of State* [2002] 3 WLR 379 which I have critiqued in S Kneebone ed, *The Refugees Convention 50 Years On*, chap 11.

[77] [2003] FCAFC 231 (24 October 2003).

[78] (1997) 190 CLR 225 at 264 per McHugh J.

Thus the High Court stressed both the internal and the external aspects of a group’s identity. The UNHCR in its conclusions on recent consultations recognised the role of both internal and external perceptions.

The UNHCR in its conclusions also recognised the ‘broad humanitarian purpose’ of the ground. In *Applicant A* Dawson J said:

> A fundamental human right could only constitute a unifying characteristic if persons associated with each other on the basis of that right or, it may be added, if society regarded those persons as a group because of their common wish to exercise that right.[79]

The importance of the ‘associational’ criteria for the group in establishing the nexus requirement is illustrated by the decision of the High Court in *Chen Shi Hai v Minister for Immigration*.[80] In *Chen Shi Hai* the issue was whether a ‘black child’ born to Chinese parents subject to the ‘one child policy’ would face persecution by reason of his ‘membership of a particular social group’ if he were to return to China with his parents. In that case the RRT recognised that he faced persecution but said that it was not ‘by reason of’ such membership. The RRT concluded that the nexus was lacking because there was no proof that the state was animated by ‘enmity’ or ‘malignity’. Further it was argued that this was a law of ‘general application’.

The High Court in *Chen Shi Hai* first determined that the child was a member of ‘a particular social group’ (applying the *Applicant A* methodology). It concluded that he was a member of such group which was persecuted ‘for what they are’, namely their immutable characteristics arising ‘from the circumstances of their parentage, birth and status’.[81] As stated above, the High Court rejected the argument that persecution need be animated by the ‘enmity’ or ‘malignity’ of the persecutor. It accepted however that the issue of motivation might be relevant in determining whether a person is a part of ‘a particular social group’. That goes to what the UNHCR calls the ‘visibility’ or external perception of the group. If the persecution was motivated because the applicant possesses the attributes of that group, the High Court said this was sufficient to establish the nexus.[82]

The High Court in *Chen Shi Hai* rejected the argument that this was a law of ‘general application’ because of the internal characteristic of the group – saying that black children were ‘persecuted for what they are not because of what they have done’[83]. Thus this decision potentially laid the way for an expansive reading of the ‘social group’ ground.

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[79] Ibid at 246.
[80] (2000) 201 CLR 293.
[81] (2000) 201 CLR 293 at 301, para [18] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. Kirby J gave a separate concurring judgment.
[82] Ibid at 298, para [9] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, citing the view of French J at first instance.
[83] Ibid at 301.

More recently in *Khawar* the High Court followed the even broader approach of the House of Lords decision in *Islam and Shah*. In *Islam and Shah* the applicants, two married women from Pakistan argued that if they were forced to return to Pakistan, they would be at risk of being beaten by their husbands, that the state would not protect them and that they were at risk of criminal prosecution for adultery for which the penalty could be flogging or stoning to death. The Secretary of State argued that they were not part of a particular social group which existed independently of persecution, and that they feared persecution due to the (private) hostility of their husbands rather than because of their membership of a particular social group. However, the House of Lords found that domestic abuse of women in Pakistan was prevalent, relying on an Amnesty report. It found that such abuse was either partly tolerated or sanctioned by the state of Pakistan as it did nothing to prevent it.

The House of Lords in *Islam and Shah* gave a broad meaning to ‘membership of a particular social group’, saying in response to an argument accepted by the Court of Appeal, that cohesiveness of the group was not an essential requirement. Lords Hoffmann, Steyn and Hope found that because in Pakistan women were discriminated against as a group in matters of fundamental (human) rights and freedoms in comparison to men, as the state gave them no protection, women in Pakistan constituted a ‘particular social group’.[84]

Similarly in *Khawar* Gleeson CJ said:

> …I see nothing inherently implausible in the suggestion that women in a particular country may constitute a persecuted group … And cohesiveness may assist to define a group; but it is not an essential attribute of a group. Some particular social groups are notoriously lacking in cohesiveness.[85]

Other members of the High Court in *Khawar* defined the characteristics of the women more narrowly. McHugh and Gummow JJ suggested that the group at its narrowest might be ‘married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household.’[86] Kirby J said that:

> [T]here may be a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husband’s families, unable to call on male support and subjected to … [threats].[87]

In another important recent decision subsequent to *Khawar* the High Court has indicated that it will apply the ‘social group’ reasoning to other contexts. In *Dranichnikov v Minister for Immigration; Re Minister for Minister for Immigration and Others; Ex*

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84 Lord Steyn and Lord Hutton also found they were ‘members of a particular social group’ because of other more narrowly defined characteristics such as being suspected of adultery.

85 [2000] 67 ALD 577, at para 33.

86 *Ibid*, at para 81.

87 [2000] 67 ALD 577, at para 129.

parte Dranichnikov[88] a national from Russia, successfully argued that he was a member of a particular social group constituting 'entrepreneurs and businessmen in Russia who publicly criticised law enforcement authorities for failing to take action against crime or criminals'. The applicant gave evidence that he had joined a number of business people and had made representations to the Mayor and attended public meetings to highlight corruption. He claimed to have a subjective fear of physical harm from criminal activities of unknown persons. The Tribunal rejected his application on the basis that there was no evidence to suggest that any persecution he suffered was due to his membership of a particular social group categorised as 'businessmen in Russia'. The High Court had to consider whether the Tribunal erred in misstating the particular social group of which the applicant claimed to be a member of. It was held by a majority that it had made a jurisdictional error.

Gummow and Callinan JJ in the majority said that the case was similar to *Khawar* as it involved a deliberate abstention by authorities from affording protection to a member of an identified group. They remarked that the group was smaller than in *Khawar* and thus easier to identify and define. Gleeson CJ (dissenting) disagreed. He construed the submission made by the applicant's solicitors as stressing his status as a 'businessman', and 'businessmen' as constituting the specific group. He agreed with the Tribunal that the most that could be said was that the applicant was a 'concerned citizen not part of a cognisable unit which could be considered a particular social group'. That is, he considered the nexus to be lacking.

This contrast demonstrates that it is necessary to define the group both by internal 'associational' characteristics as well as the external perception (motivation for persecution, which can include non-action by the state).[89] Curiously the argument in the High Court turned solely on the social group as the Full Court of the Federal Court had rejected an argument to expand it to include the 'political opinion' of the applicant. As Kirby J in the majority stressed, the factors which sharpened the focus of the claim included making representations to authorities, and attending public meetings. This was a case where the two grounds clearly overlapped.

In two recent cases involving women from Iran who claimed lack of state protection, it was found, applying *Khawar*, that the failure to identify the social group correctly was a jurisdictional error. In *SDAV v Minister for Immigration; Minister for Immigration v SBBK*[90] the Full Court agreed that the RRT's decision focused on whether references to possible harm could define a social group. In doing so the RRT decision failed to come to terms with the central issue of group identity.[91] The Full Court said that unless this

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88 [2003] HCA 26.

89 Cf *Minister for Immigration v Applicant S* [2002] FCAFC 244, 70 ALD 354 in which the Full Court rejected an argument that 'able-bodied men in Afghanistan' constitute a particular social group within the meaning of the Convention.

90 [2003] FCAFC 129.

91 Cf *NAFF v Minister for Immigration* [2003] FCA 301 where the applicant's claims were categorised as 'domestic violence', as they involved physical violence from her stepbrother. In this case applying *Khawar* it was found that there was no singling out of a particular social group of which the applicant was a member.

issue is addressed it is not possible for a decision to be made as to whether there is a chance of persecution as a result of being a member of that group. That is, they recognise the importance of both the internal and external factors. Following *S157* and in light of *Khawar*, the decisions of the Tribunal involved jurisdictional errors and were not privative clause decisions.

Finally in *SGBB v Minister for Immigration*[92] Selway J suggested that applying the approach of *Khawar*, *Dranichnikov*, and *SBBK*, there is no reason why unaccompanied Hazara youths or unaccompanied youths without familial support could not constitute a particular social group.

Thus the combination of *Khawar* plus *S157* has ensured that the courts have control over the meaning of 'social group' and the Convention's application to contemporary human rights abuses.[93] That is, unless the government decides to introduce legislation to overturn the effect of *Khawar* as it has done in another type of 'social group' to which we now turn.

The family as a social group: Section 91S

Section 91S is a direct response to the decision in *MIMA v Sarrazola*.[94] In that case the applicant claimed that her family was targeted by thugs who sought to extort protection money from her. She claimed that this arose from her deceased brother's criminal activities. The RRT applied a 'motivation' test and found that the persecution was for a 'private' reason, namely money, and thus that the applicant was not entitled to refugee status. The Full Court of the Federal Court disagreed and found that the family could be described as a social group, and thus that she was targeted because of her membership of that group.[95] A second Full Court upheld this decision, on the basis that the question to be asked by the RRT was whether 'the family unit considered to be a social group is *publicly* recognised as being set apart as such'.[96] By contrast, the RRT had erred by considering whether the *particular* family was differentiated in the Columbian community by reason of its fame or notoriety.

This decision was followed in other cases[97] and applied in two further extortion cases. In *Rajaratnam*[98] it was applied to a Tamil harassed by the Sri Lankan army and in *Ramirez*[99] to a person harassed by Colombian guerillas.[100]

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92 [2003] FCA 709 (30 June: 16 July 2003).

93 Note: judgment in *S395 / 2002 and S396 / 2002 v Minister for Immigration* [2003] HCA 71, an appeal by a gay couple to the High Court, was handed down in their favour on 9 December 2003.

94 (1999) 95 FCR 517; (*Sarrazola No 2*) (2001) 107 FCR 184. The history of this litigation is discussed by A. de Costa, 'Assessing the Cause and Effect of Persecution in Australian Refugee Law: *Sarrazola*, *Khawar* and the *Migration Legislation Amendment Act (No 6) 2001* (Cth) (2002) 30 FLR 534.

95 The court also dismissed the motivation argument suggesting that it was unreliable as motivations often involve mixed purposes.

96 *Sarrazola No 2* (2001) 107 FCR 184 at 195 per Merkel J. Emphasis added. Note that at ibid 193 Merkel J stressed Art 16.3 of the UDHR.

97 *C v MIMA* (Wilcox J) (2000) 59 ALD 643. See also *Mocan v RRT* (1996) 42 ALD 241

98 [2000] FCA 111.

In s91S the Australian government attempted to legislate away the effect of *MIMA v Sarrazola* which the Australian government regards as a case involving 'privately' motivated persecution which is not persecution for a 'Convention reason'. Section 91S states that in claims on the basis of membership of a family group, decision-makers are to 'disregard any fear of persecution, … that any other member … of the family has ever experienced, where the reason for the fear' does not come within the refugee definition. The express intention of this legislation is acknowledged in the Explanatory Memorandum to the Bill and in the Bills Digest.[101] Despite the recognition by Dawson J in *Applicant A*[102] that a family could constitute a social group, and the support for this view in international jurisprudence, the Australian government considers that the courts have expanded the scope of the refugee definition beyond its original meaning. This section has been applied in several recent decisions to exclude claims based upon family membership which might otherwise have been found to come within the Refugees Convention.

For example, in the recent decision of *WAHB v Minister for Immigration*[103] a young man claimed that as the member of a family of Tajik ethnicity and a minority religion he was targeted by the Taliban in Afghanistan, and that he was a refugee. However, one aspect of the evidence for his claim related to his teenage sister and the desire of an elderly Taliban warlord to marry her against her wishes. This, said the court did not constitute a Convention reason, and applying s91S his application for refugee status was rejected. In that case the Tribunal, referred to S91R(1)(a) and rejected the applicant's argument that the actual or imputed political opinion was the essential reason behind the Commander's actions. On review French J said that s91S did not exclude the possibility that a person could claim a well-founded fear of persecution by reason of membership of a family group where the reason for such persecution falls within the definition of the Convention. Thus, if members of a family group are in fear of persecution due to the political views of one of their members, such a fear is not to be disregarded by reason of s91S. Also, if a member of a family is a member of a particular social group and as a result is persecuted, and where other members of the family are at risk of persecution on account of their membership of that family, s91S does not apply. However French J said that in this case the Tribunal was not obliged to consider whether the sister was a member of a social group defined as 'young girls' as he doubted whether such a group could have been established on these facts. However, it is not clear that this is consistent with *Khawar's* case and the 'social group' approach outlined above.

My observation is that s91S is being applied mechanically without proper consideration of the social group ground. The decision in *NACQ v Minister for Immigration*[104]

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99 [2000] FCA 1000.

100 See also *Giraldo* [2001] FCA 113.

101 Commonwealth of Australia, Department of the Parliamentary Library, Information and Research Services, Bills Digest No 552001-02, *Migration Legislation Amendment Bill (No 6) 2001*, 18 September 2001.

102 [1997] 190 CLR 225 at 241 per Dawson J.

103 [2003] FCA 299 (per French J, 3 April 2003).

104 [2002] FCAFC 355 (15 November 2002).

discussed above is a relevant example. Further, in *SCAL v Minister for Immigration*[105] the applicant was a citizen of Albania. He contended that he would be killed as a result of the blood feud with another family in Albania. He argued that he was a member of a particular social group, namely a family where the male members were targets of the blood feud. He submitted that the social group was 'citizens of Albania who are subject to the operation of the customary law known as the Kanun.' He gave evidence that the rules of the blood feud required a male member of one family to be killed as a matter of honour where a member of that family had been involved in the killing of another family. The applicant claimed his family still owed blood and he was the only person left to be killed. On review von Doussa J upheld the decision of the Tribunal to reject his claim. von Doussa J's view was that the applicant's definition of social group embraced everyone in the geographic areas of Albania where the customary law was applied.[106] A similar decision was reached in *SZABL & Anor v Minister for Immigration*[107] following *SCAL*.[108] In another Albanian blood feud case the judge rejected an argument that s91S limited the Refugees Convention and was unconstitutional.[109]

In my view the application of s91S puts applicants at risk of *refoulement* and is contrary to the Refugees Convention.

Conclusion

In this paper I have argued that application of s91R and s91S of the Act is resulting in mechanical constructions of the refugee definition, without reference to the human rights context of the Refugees Convention and other treaties. This is contrary to the principle of 'good faith' interpretation of international obligations as required by Article 31 of the Vienna Convention. It is leading to interpretations which are contrary to the Refugees Convention and which put asylum seekers at risk of *refoulement*. Sadly, Australian jurisprudence on the refugee definition will soon fall out of line with international jurisprudence if this trend continues. In my view s91R and s91S which were passed in haste should be repealed immediately.

Section 91R rather than clarifying the Convention has led to increased challenges on judicial review. As a result of *S157 \ 2002 v Commonwealth* there is increased scope to argue jurisdictional error on both substantive and procedural grounds. The privative clause has thus had the reverse effect and should likewise be repealed.

On the other side however, the decision in *Khawar* has opened up the 'social group' ground to domestic and other abuses and allowed for persecution by non-state agents. It also rejects a prescriptive approach to the nexus issue which potentially collides with

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105 [2003] FCA 548 (5 June 2003).

106 A survey of recent decision in the RRT Bulletin indicates a number of similar claims. Eg V03/1574 (1 August 2003).

107 [2003] FMCA 304 (25 July 2003).

108 See also *QAAD of 2002 v Minister for Immigration* [2002] FCA 1038 (30 September 2002).

109 *SFQB v Minister for Immigration* [2003] FCA 1189 (Lander J, 28 October 2003).

s91R. There are indications that this is leading to confusion and inconsistency. This is an additional reason for the repeal of s91R.

The decisions in *Khawar* and *S157 \ 2002 v Commonwealth* demonstrate the courts acting as guardians of human rights in this context. The analysis of s91R and s91S decisions demonstrates that when the legislature steps in, the waters become very muddied. In my view the legislative measures should be repealed, and the application of the refugee definition should be left to the courts to apply under the Refugees Convention.

However, in terms of raw score it seems that the game has not changed markedly. I note that of 21 challenges I surveyed brought post *S157 \ 2002 v Commonwealth* involving the refugee definition, only three succeeded and these were the cases about religion discussed above. In this game it is those whose human rights need protection who are being tossed back and forth. It should be left to the courts to decide when those human rights need protection, as in *Khawar*, without legislative intervention.

Appendix 1

Section 91R of the Migration Act reads as follows:

s91R Persecution

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

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
(b) the persecution involves serious harm to the person; and
(c) the persecution involves systematic and discriminatory conduct.

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

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

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; disregard any conduct engaged in by the person in Australia unless:
(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.