refugee review tribunal

LEGAL BULLETIN

Issue No.93 *22 December 2003*

MODIFYING CONDUCT AND PERSECUTION

The Implications of *Appellant S395/2002 v MIMA* *Appellant S396/2002 v MIMA* [2003] HCA 71

SYNOPSIS©

In *Appellant S395/2002 v MIMA; Appellant S396/2002 v MIMA*[1] (*Appellant S395/2002*), the High Court considered the significance of an applicant's "discreet" behaviour to the question of whether the applicant has a well-founded fear of persecution. By a 4-3 majority,[2] the Court allowed an appeal from two men who claimed to have a well-founded fear of persecution because of their homosexuality. The majority held the Tribunal had failed to consider whether the appellants had acted discreetly only because they feared persecution if they did not, and disqualified itself from properly considering whether they had a well-founded fear of persecution if they were returned to Bangladesh.

1 [2003] HCA 71 (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, & Heydon JJ, 9 December 2003).
2 *ibid*, per McHugh, Kirby, Gummow & Hayne JJ (Gleeson CJ, Callinan and Heydon JJ dissenting).

IMPLICATIONS FOR THE TRIBUNAL

Generally speaking, *Appellant S395/2002* reinforces existing principles relating to the assessment of claims involving the expression and suppression of opinions, beliefs and identity. The majority judgments make it clear that the Tribunal has no jurisdiction or power to require an applicant for protection to take steps to avoid persecution. Thus, it would be wrong to reject a claim based on homosexuality on the basis that the applicant could reasonably avoid persecution by being discreet. The decision-maker should not be distracted from the fundamental question, namely, whether the applicant has a well-founded fear of being persecuted.

Like other recent cases, *Appellant S395/2002* also demonstrates that there can be differences of opinion as to the scope of an applicant's claims as well as the extent to which the Tribunal is required to consider a case not put to it. While the law on the latter question remains somewhat unsettled, the judgment of McHugh and Kirby JJ is consistent with the position as stated by a number of Full Federal Court cases, that the Tribunal should not limit itself to the case articulated by an applicant where the facts found by it, or not negated by its findings, might support an argument that the applicant is entitled to the protection of the Convention.

FACTS AND BACKGROUND

The appellants applied for protection visas on the basis that they feared persecution in Bangladesh for reasons of their homosexuality.

In affirming the delegate's decision, the Tribunal found that the appellants were homosexuals and that homosexual men in Bangladesh were a particular social group under the Convention. Referring to evidence on the position of homosexuals in Bangladesh generally, it found that "homosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serous forms of harm, for example the possibility of being bashed by the police." The Tribunal also found that Bangladeshi men could have homosexual affairs or relationships if they were discreet. It found that "Bangladeshis generally prefer to deny the existence of homosexuality in their society, and, if possible, will ignore rather than confront it".

The Tribunal accepted that the appellants had lived together since 1994 and that they were shunned by their families because of their homosexuality and may have been the subject of gossip and taunts from neighbours who suspected they were homosexuals. However, it rejected their claims of serious harm, including that they were attacked, had lost their jobs because of their sexuality, and had a fatwa issued against them. The Tribunal concluded that the appellants had lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families and that "they clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now".

The appellants' argued that the Tribunal erred in law in holding that the appellants did not have a well-founded fear of persecution. They argued that the Tribunal had, in effect, required that they act discreetly in order to avoid what otherwise would be persecution.

At first instance Lindgren J dismissed the appellants' applications for review. The Full Court of the Federal Court dismissed their appeals from that decision.

THE HIGH COURT'S DECISION

By majority (McHugh, Kirby, Gummow and Hayne JJ, with Gleeson CJ, Callinan and Heydon JJ dissenting) the Court allowed the appeal. The Court unanimously found that the Tribunal had not required the appellants "to be 'discreet' about their membership of a group", but had merely found that the appellants would live discreetly in the future, as they had done in the past, because "there is no reason to suppose that they would not continue to do so if they returned home now."[3] The majority nevertheless found that the Tribunal had misunderstood or misapplied the relevant law.

McHugh and Kirby JJ held that the Tribunal failed to determine whether the appellants had acted discreetly only because it was not possible to live openly in the same way as heterosexual people in Bangladesh[4] and disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh[5]. If the Tribunal had found that a fear of harm had caused them to be discreet in the past, it would have been necessary for the Tribunal to consider whether their fear of harm was well-founded and amounted to persecution. This would have required it to further consider what might happen to the appellants if they lived openly as a homosexual couple in Bangladesh[6]. It followed that the Tribunal had constructively failed to exercise its jurisdiction[7].

Their Honours also held that the Tribunal failed to consider the issue of persecution in relation to the correct "particular social group". By declaring that there was no reason to suppose that the appellants would not continue to act discreetly in the future, it effectively broke the genus of "homosexual males in Bangladesh" into two groups – discreet and non-discreet homosexual men in Bangladesh - and by doing so it fell into jurisdictional error[8].

Similarly, Gummow and Hayne JJ held that the Tribunal erred because it did not ask *why* the appellants would live discreetly; whether it was only because that was how they avoided persecution. The Tribunal found that it was not possible to "live openly as a homosexual in Bangladesh" and that to attempt to live openly "would mean to face problems", but it did not relate those two findings to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well-founded[9]. Their Honours also concurred with McHugh and Kirby JJ that the Tribunal fell into error by dividing homosexual males in Bangladesh into two groups[10].

In their dissenting judgments, Gleeson CJ and Callinan and Heydon JJ held that the appellants did not advance any claims beyond those connected with the factual accounts advanced by them to the Tribunal and in large measure rejected.

---

3 *ibid* at [10], [11], [14], [34], [84] & [107].
4 *ibid* at [51.
5 i*bid* at [53].
6 i*bid* at [53].
7 *ibid* at [54].
8 *ibid* at [60].
9 *ibid* at [88].
10 *ibid* at [90].

According to Gleeson CJ, a Tribunal decision must be considered in light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant at some later stage in the process[11]. The appellants had not claimed that they wanted to behave less discreetly about their sexual relationship and that their inability to do so involved persecution[12].

Justices Callinan and Heydon similarly reasoned that the appellants did not claim that they wished to express their homosexuality in other than a discreet way[13], or that their decision to live discreetly was influenced by a fear of harm if they did not, or that they were at risk of persecution if they wished to display, or inadvertently disclosed, their sexuality or relationship[14]. The Tribunal accordingly did not err in not dealing with claims of that kind.[15]

DISCUSSION

Appellant S395/2002 essentially concerned the proper approach to claims that involved sexual identity and discretion. In dealing with that question, the two majority judgments considered the question of discretion and persecution and secondly, the extent to which the Tribunal must address claims arising on its findings of fact. The Court also discussed issues relating to membership of a particular social group, homosexuality as a particular social group, and laws relating to homosexuality.

Discretion and Persecution

Much of the appellants' argument was directed to the claim that the Tribunal had required them "to be 'discreet' about their membership of a group"[16]. Although the Court unanimously accepted that the Tribunal had not imposed that requirement,[17] the majority made it clear that the Tribunal has no jurisdiction or power to require an applicant for protection to take steps to avoid persecution.[18] McHugh and Kirby JJ explained that persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. It was not a condition of Australia's protection obligations that the person affected must take steps, reasonable or otherwise, to avoid offending his or her persecutors.[19] Their Honours held that in so far as decisions of the Tribunal or Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid harm, they are wrong in principle and should not be followed.[20]

Gummow and Hayne JJ observed that saying that an applicant would live discreetly in the country of nationality may be an accurate description of the way that person would go about his or her daily life, and to say that a decision-maker expects that person will live discreetly, if read as a statement of what is thought likely to happen, may also be accurate[21]. But to say

---

11 *ibid* at [1], referring to *Re MIMIA; Ex parte Applicants S134/2002v MIMIA* (2003) 195 ALR 1 at 8.
12 *ibid* at [14].
13 *ibid* at [107].
14 *ibid* at [113].
15 *ibid* at [113].
16 *ibid* at [34].
17 *ibid* at [10], [11], [14], [34], [84] & [107].
18 *ibid* at [50], [82].
19 *ibid* at [40].
20 *ibid* at [50], referring to *Khalili Vahed v MIMA* [2001] FCA 1404, *SAAF v MIMA* [2002] FCA 343, *Nezhadian v MIMA* [2001] FCA 1415, *WABR v MIMA* (2002) 121 FCR 196, and RRT decisions *V96/05496, N97/14489, N98/21362, N98/24718*.
21 *ibid* at [82].

that an applicant is expected to live discreetly is wrong and irrelevant to the task of the Tribunal if it is intended as a statement of what the applicant *must* do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant.

Importantly, the majority also made it clear in that context that if the Tribunal finds that an applicant has lived or would live discreetly it will be necessary to consider *why*.

According to McHugh and Kirby JJ, the notion that it is reasonable for a person to take action that will avoid persecution will inevitably lead to a failure to consider properly whether there is a real chance of persecution, particularly where the actions of the persecutors have caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinion, racial origins, country of nationality or membership of a particular social group.[22]

Their Honours explained that where an applicant has acted in the way he or she did only because of the *threat* of harm, the well-founded fear of persecution held by the applicant is the fear that unless he or she acts to avoid harmful conduct, he or she will suffer harm. In these cases, it is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance in such a case without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly[23]. If the Tribunal in the present case had found that fear had caused the appellants to be discreet in the past, it would have been be necessary then to consider whether their fear of harm was well-founded and amounted to persecution. This would have required consideration of what might happen to them if they lived openly as a homosexual couple.[24]

It is implicit in the majority judgments that if the Tribunal finds that "discreet" behaviour in the past was *not* the result of fear of what would happen if the applicant were not discreet, then the question whether fear of harm is well-founded and amounts to persecution will not arise in the same way.

Tribunal Procedure – Claims which Arise on the Facts

The Minister argued, relying on what Gummow and Hayne JJ had said in *Abebe v Commonwealth*[25] and on a passage in the joint judgment in *Re MIMIA; Ex parte Applicants S134/2002*[26], that the appellants could not raise matters before the Court not claimed before the Tribunal. In *Abebe*, Gummow and Hayne JJ had stated, in a passage with which Gaudron and Kirby JJ agreed:

> It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out.[27]

The dissenting judges in the present matter clearly accepted this argument. The reasoning of Gummow and Hayne JJ also appears to be consistent with what they had said in *Abebe*. Their

---

22 *ibid* at [43].
23 *ibid* at [43].
24 *ibid* at [53]. The judgment of Gummow & Hayne JJ, eg at [86], [88] is to similar effect.
25 (1999) 197 CLR 510.
26 (2003) 195 ALR 1 at 8.
27 (1999) 197 CLR 510 at [187]. See also *Re MIMIA; Ex parte Applicants S134/2002* (2003) 195 ALR 1 per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ at [31] to similar effect.

Honours evidently took a broader view than did the dissenting judges of what the appellants had claimed[28].

However McHugh and Kirby JJ took a somewhat different approach. Their Honours stated that reliance on *Abebe* and *S134/2002* might have been persuasive if the Tribunal had rejected the appellants' claims simply because their evidence lacked credibility. They reasoned however, that having examined the general issue of homosexuality and persecution in Bangladesh more generally, and having found on the basis of independent information that "it is not possible to live openly as a homosexual in Bangladesh" and "to attempt to do so would mean to face problems", the Tribunal should have then gone on to address the claims that naturally arose for the appellants upon those facts.[29]

After stating uncontroversially that the proceedings before the Tribunal were of an inquisitorial nature, their Honours commented that whatever the arguments or evidence of the applicant, the Tribunal is entitled, but not bound, to look into the issue generally but if it elects to do so, it must do so in accordance with law. Thus, in the present case, given that the appellants claimed that Bangladesh was "not a safe place for [them] at all", the Tribunal was entitled to go beyond whether they faced persecution because of their personal history, and examine whether their more general fear of persecution was well-founded.

As in other recent decisions of the High Court[30], *Appellant S395/2002* demonstrates the difficulties that may arise in properly identifying the scope of an applicant's claims as well as the extent to which the Tribunal is required to consider a case not put to it. While the law on the latter question remains somewhat unsettled, the judgment of McHugh and Kirby JJ is consistent with the position as stated by a number of Full Federal Court cases, that the Tribunal should not limit itself to the case articulated by an applicant where the facts found by it, or not negated by its findings, might support an argument that the applicant is entitled to the protection of the Convention.[31]

Other Matters

Particular Social Group

In their discussion of the Tribunal's approach to the relevant "particular social group", McHugh and Kirby JJ reaffirmed the importance of properly considering the applicant's particular circumstances. Their Honours emphasised that it is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant will or will not be persecuted. The central question is whether the individual applicant has a well-founded fear of being persecuted for reasons of membership of a particular social group. An applicant claiming refugee status is asserting an individual right and is entitled to have his or her claim considered as an individual, not as the undifferentiated member of a group.[32]

---

28 *Appellant S395/2002* [2003] HCA 71 at [81].
29 *ibid* at [38].
30 See eg *Dranichnikov v MIMIA* (2003) 197 ALR 389.
31 See eg *MIMIA v VFAY* [2003] FCAFC 191 (French, Sackville & Hely JJ, 22 August 2003) at [97] referring to *MIMA v Applicant S* (2002) 70 ALD 354, *Paramananthan v MIMA* (1998) 94 FCR 28, *Saliba v MIEA* (1998) 89 FCR 38.
32 *Appellant S395/2002* [2003] HCA 71 at [58], [59]. See also the discussion of Gummow and Hayne JJ at [72]-[77].

Homosexuals as a particular social group

McHugh and Kirby JJ held unsurprisingly that as a matter of law it was open to the Tribunal to find that homosexual men in Bangladesh constituted a "particular social group" for the purposes of the Convention. They added that if the Tribunal had held otherwise its decision would arguably have been perverse.[33]

Gummow and Hayne JJ commented that sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private may say nothing about how those individuals would choose to live other aspects of their lives that are related to or informed by their sexuality.[34] Their Honours stated that the use of language of "discretion" may reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity.[35]

Laws relating to homosexuality

McHugh and Kirby JJ held that where an applicant has claimed that the law of the country of his or her nationality penalises homosexual conduct two questions arise: 1) Is there a real chance that the applicant will be prosecuted if returned to the country of nationality? and 2) Are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country? In determining the second question, international human rights standards as well as the laws and culture of the country are relevant matters. If the first question is answered "yes" and the second "no", the claim of refugee status must be upheld, even if the applicant's conduct is likely to attract prosecution.[36] This statement is a reflection of what McHugh J had stated in *Applicant A v MIEA*.[37]

Contact Officers:
Rey Hyland
Sue Burton
Legal Services Section, Sydney

[33] *ibid* at [55].
[34] *ibid* at [81].
[35] *ibid* at [82].
[36] *ibid* per McHugh & Kirby JJ at [45]. There was evidence before the Tribunal that s377 of the Penal Code of Bangladesh made homosexual intercourse illegal but that prosecutions under the provision were extremely rare. The appellants did not suggest that the existence of the law and its potential application to them constituted persecution for a Convention reason. See Gleeson CJ at [12]-[13], McHugh & Kirby JJ at [46], Gummow & Hayne JJ at [68], Callinan & Heydon JJ at [94], [109].
[37] (1997) 190 CLR 225 at 258. See also Chen Shi Hai (2000) 201 CLR 293.