

**APPELLANT S395/2002 v MIMIA**

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[2003] HCA 71

High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ,  
S395 of 2002, S396 of 2002, 9 December 2003

N99/28382

[N99/28381](#),

[Judgment Text](#)

This was an appeal from a judgment of the Full Court of the Federal Court that dismissed an application for judicial review of a decision of the Tribunal that the appellants, Bangladeshi nationals, were not persons to whom Australia had protection obligations.

The Tribunal accepted that the appellants were homosexual and that homosexuals constituted a particular social group in Bangladesh. However, it did not accept a number of the appellants' claims, including that they were attacked, had lost their jobs because of their sexuality, and had a *fatwa* issued against them. It found their evidence in respect of those claims to be inconsistent and unconvincing. Relevantly, the Tribunal stated:

*"[H]omosexuality 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 serious forms of harm, for example the possibility of being bashed by the police. However, Bangladeshi men can have homosexual affairs or relationships, provided they are discreet. Bangladeshis generally prefer to deny the existence of homosexuality in their society and, if possible, will ignore rather than confront it*

*"[The appellants] did not experience serious harm or discrimination prior to their departure from Bangladesh and I do not believe that there is a real chance that they will be persecuted because of their sexuality if they return. As discussed above, while homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The appellants] lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. 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 contended that the Tribunal erroneously imposed a requirement upon them to act "discreetly" in respect of their sexuality on return. The Federal Court dismissed the application, and that decision was affirmed on appeal by the Full Court.

**Held: *per McHugh, Gummow, Kirby, Hayne JJ (Gleeson CJ, Callinan, Heydon JJ dissenting)* appeals allowed; RRT decision set aside and remitted for reconsideration**

- (i) The Tribunal misunderstood or misapplied the relevant law such that the ground of review in s.476(1)(e) [*"error of law"*] of the Migration Act 1958 was made out.
- (ii) The Tribunal erred by impliedly dividing homosexual men into two particular social groups – discreet and non-discreet homosexual men. In doing so it diverted itself from examining and answering the factual questions that were central to the persecution issues. Whether or not a Bangladeshi male homosexual applying for a protection visa has a well-founded fear of persecution cannot be determined by assigning him to the discreet or non-discreet group of homosexual males and determining the probability of a member of that group suffering persecution. 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.

- (iii) The Tribunal erred by failing to consider whether the need to act discreetly to avoid the threat of serious harm constituted persecution. The Tribunal did not ask *why* the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution.

***per McHugh, Gummow, Kirby, Hayne JJ***

- (iv) To say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by 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 for protection. If the Tribunal makes such a requirement, it fails to address the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question. In the present case, the Tribunal did not impose an obligation to be discreet.

***per McHugh and Kirby JJ (Gleeson CJ, Callinan, Heydon JJ dissenting)***

- (i) The Tribunal erred by failing to consider whether the appellants might suffer serious harm if members of the Bangladesh community discovered that they were homosexuals. It did not consider whether, if the appellants wished to display, or inadvertently disclosed, their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution.
- (ii) Whatever the arguments or evidence of an applicant, the Tribunal is entitled, but not bound, to look at the issue generally. Given that the appellants claimed that Bangladesh was "not a safe place for [them] at all" and that they had "a real fear of persecution", the Tribunal was entitled to go beyond examining whether the appellants faced persecution because of their personal history. In the present case, for example, although the appellants did not raise any issue of modifying their behaviour because they feared persecution, it seems highly likely that they acted discreetly in the past because they feared they would suffer harm unless they did.
- (iii) If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters. If the first of these questions is answered: Yes, and the second: No, the claim of refugee status must be upheld even if the applicant has conducted him or herself in a way that is likely to attract prosecution

***per Gummow and Hayne JJ:***

- (i) 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

***per Gleeson CJ, Callinan and Heydon JJ (dissenting):***

- (i) The appellants did not claim that their that they wanted to behave less discreetly about their sexual relationship, or that their inability to do so involved persecution.

***per Gleeson CJ (dissenting):***

- (i) The Tribunal did not assume or conclude that persecution does not exist if a person, by concealing opinions or behaviour likely to attract retribution and serious harm, can avoid such retribution.