Minister for Immigration and Multicultural Affairs v <<Khawar>> [2002] HCA 14 (11 April 2002)

Last Updated: 11 April 2002

HIGH COURT OF AUSTRALIA

GLEESON CJ,

McHUGH, GUMMOW, KIRBY, AND CALLINAN JJ

MINISTER FOR IMMIGRATION AND

MULTICULTURAL AFFAIRS APPELLANT

AND

NAIMA <<KHAWAR>> & ORS RESPONDENTS

Minister for Immigration and Multicultural Affairs v <<Khawar>>

[2002] HCA 14

11 April 2002

S128/2001

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

N J Williams SC with J D Smith and M N Allars for the appellant (instructed by Australian Government Solicitor)

J Basten QC with S E Pritchard for the respondents (instructed by Coelho & Coelho)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v <<Khawar>>

Immigration - Refugees - Application for protection visa - Well-founded fear of persecution - Applicant, a citizen of Pakistan, allegedly victim of domestic violence at the hands of her husband and his family - Whether failure by State to provide effective police protection against domestic violence capable of constituting persecution for a Convention reason where the feared violence is perpetrated by non-State agents for non-Convention reasons - Whether Convention requirement that putative refugee be "unwilling to avail himself of the protection" of the country of nationality refers to protection by the State within the country of origin or to diplomatic or consular protection available to citizens who are outside the country of origin - Whether selective or discriminatory failure by State to enforce the criminal law against non-State actors who assault members of a particular social group capable of constituting persecution under the Convention.

Immigration - Refugees - Application for protection visa - Membership of a particular social group - Applicant, a citizen of Pakistan, allegedly victim of domestic violence at the hands of her husband and his family - Whether "women in Pakistan" a particular social group - Whether applicant may fall within a more narrowly defined social group.

Words and phrases - "persecution", "particular social group".

Migration Act 1958 (Cth), s 36(2).

Convention relating to the Status of Refugees, art 1A(2).

1. GLEESON CJ. This appeal raises two issues concerning the definition of "refugee" incorporated into the Migration Act 1958 (Cth) ("the Act") by s 36(2), which deals with the granting of protection visas, and provides that a criterion for a protection visa is that the applicant is a non-citizen "to whom ... Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."[1] The definition appears in Art 1 of the Convention. Article 1A(2) provides that the term "refugee" shall apply to any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

2. The substantive provisions of the Convention appear in a series of Articles which specify various obligations of a contracting state, being "the country in which he finds himself", to a refugee (Art 2). These include obligations as to the juridical status to be accorded to the refugee (Ch II), as to rights of employment (Ch III), as to welfare (Ch IV), and as to rendering diplomatic and other assistance of the kind that might ordinarily be rendered by the country of nationality (Ch V).

3. Article 33(1) of the Convention provides:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

4. The issues arise in the context of applications for a protection visa by a married woman, Ms <<Khawar, a citizen of Pakistan, and her three children. Ms Khawar's case is that she was a victim of serious and prolonged domestic violence on the part of her husband and members of his family, that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, and that such refusal is part of systematic discrimination against women which is both tolerated and sanctioned by the state[2]. Those allegations are not admitted to be true; and the allegations as to police inaction, and state policy, in Pakistan have not yet been the subject of findings. This Court is concerned only with legal issues that arise from the nature of the case MsKhawar >> seeks to make, and from the way in which her case was dealt with in the Refugee Review Tribunal.

5. The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention.

6. The second issue is whether women (or, for present purposes, women in Pakistan) may constitute a particular social group within the meaning of the Convention.

Facts and proceedings

7. Ms <<Khawar>> and her children arrived in Australia in June 1997, and lodged applications for protection visas in September 1997. In February 1998, a delegate of the appellant refused the applications. The respondents sought review of that decision by the Refugee Review Tribunal ("the Tribunal"). In January 1999, the Tribunal affirmed the delegate's decision.

8. There was anonymous information before the Tribunal that Ms <<Khawar>>'s claim that she was a victim of abuse, and that she had a fear of persecution, was bogus and, by implication, that she and her husband were colluding. The Tribunal did not make findings as to the truth of that information, and dealt with the matter upon the basis that the allegations of abuse were true. Because the Tribunal considered that, even on that basis, the claim to refugee status was fundamentally flawed, for reasons that will appear, it was regarded as unnecessary to make findings on the allegations of fabrication.

9. There are two presently relevant factual issues, or potential issues, as to which the Tribunal received information, but about which it made no findings. The failure to make such findings was related to the legal approach which has given rise to the present appeal.

10. First, Ms <<Khawar>> gave evidence of four occasions on which she approached the police, alone or together with a male relative, to complain of the violence from which she was suffering. On each occasion the police response, she said, was one of indifference and refusal to help. The Tribunal did not decide whether to accept that evidence.

11. Secondly, Ms <<Khawar>>'s solicitor filed a submission that included, under the heading "Country Context", material concerning "the position of women in Pakistani society and culture generally." That included extracts from reports of the United States State Department, the Canadian Immigration and Refugee Board, Amnesty International, and the Australian Department of Foreign Affairs and Trade. Much of the information was to the same effect as the facts that were found, and were ultimately before the House of Lords, in R v Immigration Appeal Tribunal, Ex parte Shah[3]. In that case, Lord Steyn said[4]:

"Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case. On the findings of fact and unchallenged evidence in the present case, the position of women in Pakistan is as follows. Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. Domestic abuse of women and violence towards women is prevalent in Pakistan. That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state."

12. Again, the Tribunal made no findings as to whether that information was true, because it considered that, even if it were true, the claim to refugee status must fail.

13. The Tribunal's decision was given before the House of Lords decided Ex parte Shah. The essence of the Tribunal's reasoning was that, even if Ms <<Khawar's claims as to her treatment by her husband and his family were true, those harming her were not motivated by her membership of any particular social group, but by purely personal considerations related to the circumstances of her marriage, the fact that she brought no dowry to the family, and their dislike of her as an individual. The reasoning proceeded on the assumption that the alleged persecution, if any, consisted solely of the conduct towards Ms Khawar>> of her husband and his relatives. That conduct was not for reasons of race, religion, nationality, political opinion, or membership of a particular social group, even if women constituted such a group. It was for personal reasons. On that approach, the attitude of the Pakistani police, or of the Pakistani state, was incapable of turning the inflicting of harm for reasons having nothing to do with any of the grounds set out in Art 1A(2) into persecution for one of the reasons stated.

14. There was an appeal to the Federal Court of Australia, which came before Branson J, who concluded that the Tribunal had erred in law in its interpretation of the Convention definition of refugee and in its failure to make findings on the two issues of fact earlier mentioned[5]. The matter was referred back to the

Tribunal for further consideration according to law. The Minister appealed to the Full Court of the Federal Court. By majority (Mathews and Lindgren JJ; Hill J dissenting), the appeal was dismissed[6].

15. In this Court, with reference to the first of the two legal issues earlier identified, the appellant's counsel argued, as his "central proposition", that persecution and protection are distinct concepts in the Convention definition of refugee, and that it is impermissible to treat absence of state protection as a factor capable of converting private harm, based upon a motivation other than one of the Convention reasons, into persecution within the Convention definition. It was acknowledged that, if that proposition were wrong, and if the second legal issue were also decided in favour of the respondents, the orders of Branson J must stand, and the matters would need to go back to the Tribunal for further findings of fact.

16. Since the first issue turns largely upon the concepts of state protection and persecution, and upon whether, as the respondents contend, they are interrelated, or whether, as the appellant insists, they must be considered separately, it is necessary to examine those concepts.

Protection

17. There is a broader sense, and a narrower sense, in which the term "protection" is used in the present context.

18. An example of the broader sense is to be found in the following passage in the judgment of Brennan CJ in Applicant A v Minister for Immigration and Ethnic Affairs[7]:

"The feared 'persecution' of which Art 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to 'the country of his nationality' for protection of his fundamental rights and freedoms but, if 'a well-founded fear of being persecuted' makes a person 'unwilling to avail himself of the protection of [the country of his nationality]', that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent."

19. The relationship between persecution as the inflicting of serious harm in violation of fundamental rights and freedoms, and the responsibility of a country of nationality, or state, as the primary protector of fundamental rights and freedoms, has been taken up in the interpretation of the Convention[8]. It is reflected in what was said by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [9]:

"I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word 'persecution' implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme."

20. His Lordship went on to quote Dawson J in Applicant A[10], who said that it was a well-accepted fact that international refugee law was meant to serve as a substitute for national protection where such protection was not provided due to discrimination against persons on grounds of their civil or political status.

21. The narrower sense in which "protection" is used is that of diplomatic or consular protection extended abroad by a country to its nationals. As Professor Kälin has demonstrated[11], the history of the Convention and textual considerations suggest that, in Art 1A(2), in the expression "the protection of that country", the word "protection" is used in this sense. The historical background to the Convention includes the 1946 Constitution of the International Refugee Organisation, which referred to external protection and viewed a refugee as a person having no consul or diplomatic mission to whom to turn. The drafting history

appears to support Professor Kälin's view. And the inability or unwillingness of the refugee referred to in Art 1A(2) to avail himself of the protection of his country, by hypothesis, occurs when he is outside his country. It does not follow, however, that the broader sense of protection is irrelevant to Art 1A(2).

22. It is accepted in Australia, and it is widely accepted in other jurisdictions[12], that the serious harm involved in persecution may be inflicted by persons who are not agents of the government of the country of nationality referred to in Art 1A(2). However, the paradigm case of persecution contemplated by the Convention is persecution by the state itself. Article 1A(2) was primarily, even if not exclusively, aimed at persecution by a state or its agents on one of the grounds to which it refers. Bearing that in mind, there is a paradox in the reference to a refugee's inability or unwillingness to avail himself of the protection of his persecutor. But accepting that, at that point of the Article, the reference is to protection in the narrower sense, an inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection in the wider sense, or may be related to a possibility that seeking such protection could result in return to the place of persecution. During the 1950s, people fled to Australia from communist persecution in Hungary. They did not, upon arrival, ask the way to the Hungarian Embassy.

23. The opening portion of Art 1A(2) postulates that a putative refugee is outside the country of his nationality owing to a fear of persecution. That contemplates a fear of persecution within the country of his nationality. It is "such fear" that makes the person unwilling to avail himself of the protection of his country. It is not a fear of being persecuted by the country's diplomats that causes the unwillingness; although the possibility that if he puts himself in their hands he may be returned to his own country may be a consideration.

24. When a national of another country applies, under the Act, for a "protection visa", claiming that Australia "has protection obligations" under the Convention, and contends that his or her case falls within Art 1A(2), unwillingness to seek the diplomatic protection of the country of nationality may be self-evident. But on the questions whether persecution is a threat, (which usually involves consideration of what has occurred in the past as a basis for looking at the future), and whether such persecution is by reason of one of the Convention grounds, and whether fear of persecution is well-founded, the obligation of a state to protect the fundamental rights and freedoms of those who are entitled to its protection may be of significance. The reasons for this will be considered in dealing with the concept of persecution.

25. In the present case, Ms <<Khawar>> does not rely upon mere inability of the police and other authorities of Pakistan to protect her against personally motivated violence. She claims that the violence is tolerated and condoned; not merely at a local level by corrupt, or inefficient, or lazy, or under-resourced police, but as an aspect of systematic discrimination against women, involving selective enforcement of the law, which amounts to a failure of the state of Pakistan to discharge its responsibilities to protect women. She may not be able to make good her claim. The Tribunal has not yet found the necessary facts. But, as the case of Ex parte Shah shows, it is possible that she might be able to establish the facts she alleges.

26. As her case is argued, and as a matter of principle, it would not be sufficient for Ms <<Khawar>> to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes. An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.

Persecution

27. Article 1A(2) does not refer to any particular kind of persecutor. It refers to persecution, which is conduct of a certain character. I do not see why persecution may not be a term aptly used to describe the

combined effect of conduct of two or more agents; or why conduct may not, in certain circumstances, include inaction.

28. Whether failure to act amounts to conduct often depends upon whether there is a duty to act. Sometimes, for example, silence, where there is an obligation to speak, might bear a positive as well as a negative aspect. In some circumstances, silence in the face of an accusation can amount to an admission. Or failure to contradict what somebody else says might, in some circumstances, involve a representation that what is said is true. It depends upon the circumstances; and a relevant circumstance might be what would ordinarily be expected, or whether the person who remains silent has a legal or moral duty to speak. Similarly, the legal quality of inaction in the face of violence displayed by one person towards another might depend upon whether there is a duty to intervene. If X sees A assaulting B, then there may be no duty upon X to intervene, and the mere failure to do so might not amount to conduct of any description. But if A and B are schoolchildren, and X is a teacher responsible for their supervision, the failure to intervene will take on a different complexion.

29. If there is a persecutor of a person or a group of people, who is a "non-state agent of persecution", then the failure of the state to intervene to protect the victim may be relevant to whether the victim's fear of continuing persecution is well-founded. That would be so whether the failure resulted from a state policy of tolerance or condonation of the persecution, or whether it resulted from inability to do anything about it. But that does not exhaust the possible relevance of state inaction.

30. The references in the authorities to state agents of persecution and non-state agents of persecution should not be understood as constructing a strict dichotomy. Persecution may also result from the combined effect of the conduct of private individuals and the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm. As was noted earlier, this is not a case in which it is necessary to deal with mere inability to provide protection; this is a case of alleged tolerance and condonation. In Ex parte Shah[13], Lord Hoffmann, in giving the example of the Jewish shopkeeper set upon with impunity by business rivals in Nazi Germany, referred to the failure of the authorities to provide protection, based upon race, as an "element in the persecution"[14]. The same expression was used by Lord Hope of Craighead in the passage from Horvath quoted above.

31. Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state. In relation to the case which Ms <<Khawar seeks to make out, the decision in Ex parte Shah in this respect is directly in point[15]. If her contentions, as to which no findings have yet been made, are correct, then Ms Khawar>> was being abused by her husband and his relatives for personal reasons, but her likely subjection to further abuse without state protection is by reason of her membership of a particular social group, if it be the case that women in Pakistan may be so described.

A particular social group

32. In my view, it would be open to the Tribunal, on the material before it, to conclude that women in Pakistan are a particular social group.

33. The size of the group does not necessarily stand in the way of such a conclusion. There are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur. In some circumstances, the large size of a group might make implausible a suggestion that such a group is a target of persecution, and might suggest that a narrower definition is necessary. But I see nothing inherently implausible in the suggestion that women in a particular country may constitute a persecuted group, especially having regard to some of the information placed before the Tribunal on behalf of Ms <<Khawar>>. 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.

34. In Applicant A[16], McHugh J explained why the persecutory conduct itself cannot define the particular social group in question for the purposes of Art 1A(2), but went on to add that the actions of the persecutors may serve to identify or even cause the creation of such a group[17]. He held that couples in China who want to have more than one child, contrary to the one child policy, were not a particular social group, as there was no social attribute or characteristic which linked them independently of the alleged persecutory conduct.

35. Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely. The alleged persecution does not define the group.

Conclusion

36. The decision of Branson J and the Full Court was correct. The matter must go back to the Tribunal for further findings.

37. The appeal should be dismissed with costs.

38. McHUGH AND GUMMOW JJ. This is another appeal which turns upon the provisions of the Migration Act 1958 (Cth) ("the Act") respecting the issue of protection visas. It is common ground that the appeal is to be determined by reference to the legislation as it stood before the commencement of the Migration Legislation Amendment Act (No 6) 2001 (Cth).

39. Section 29(1) of the Act provides for the granting by the Minister, subject to the Act, of:

"permission, to be known as a visa, to do either or both of the following:

(a) travel to and enter Australia;

(b) remain in Australia".

Section 36(1) states that there is a class of visas to be known as "protection visas". Sub-section (2) of s 36 states:

"A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

40. If, after considering a valid application for a protection visa, the Minister is satisfied that the criteria prescribed by the Act and the other requirements spelled out in par (a) of s 65(1) are met, the Minister is to grant the visa.

The Convention

41. The expression "a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol" picks up the definition of "refugee" in Art 1 of these international instruments ("the Convention"). In particular, attention is focused by the submissions in this appeal upon a particular portion of the lengthy definition in Art 1 of the Convention. This is the first paragraph in sub-s (2) of s A:

"[Any person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his

nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

42. The term "asylum" does not appear in the main body of the text of the Convention; the Convention does not impose an obligation upon Contracting States to grant asylum or a right to settle in those States to refugees arriving at their borders[18]. Nor does the Convention specify what constitutes entry into the territory of a Contracting State so as then to be in a position to have the benefits conferred by the Convention[19]. Rather, the protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States. The obligations include such matters as juridical status (Ch II) including "free access to the courts of law" (Art 16), and gainful employment (Ch III) and welfare (Ch IV). The provisions of Ch III and Ch IV confer rights by reference to various stipulated standards, including "the same treatment as is accorded to" nationals of the Contracting State, "the most favourable treatment accorded to nationals of a foreign country in the same circumstances", and treatment "not less favourable than that accorded to aliens generally in the same circumstances".

43. However, the provisions in Ch V (Arts 25-34) are significant. In particular, Art 31 provides that, even if refugees entered a Contracting State illegally, it is not to impose penalties upon them on account of their illegal entry or presence; Art 32 imposes an obligation not to expel a refugee lawfully in the country of a Contracting State "save on grounds of national security or public order"; and Art 33 contains the non-refoulement provision[20].

44. Although none of the provisions in Ch V gives to refugees a right to enter the territory of a Contracting State, in conjunction they provide some measure of protection. Nevertheless, it remains the case, to repeat one commentator[21]:

"States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum.[22]

Today, the generally accepted position would appear to be as follows: States consistently refuse to accept binding obligations to grant to persons, not their nationals, any rights to asylum in the sense of a permanent right to settle. Apart from any limitations which might be imposed by specific treaties, States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself.[23]"

45. Several further points should be made here. The first is that the Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chs II, III and IV of the Convention. The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system.

46. Secondly, the drawing of the definition of "refugee" into municipal law itself involves the construction of that definition and that in turn may require attention to the text, scope and purpose of the Convention as a whole. In particular, it would be erroneous to construe the passage set out above from sub-s (2) of s A of Art 1 in isolation from the rest of the Convention.

47. Thirdly, the Convention is not to be approached with any preconceptions as to the preference of a "broad" to a "narrow" construction, or vice versa. Observations to like effect made in DP v Commonwealth Central Authority[24] respecting legislation based on the Hague Convention on International Child Abduction are in point here.

48. Fourthly, the scope of the Convention was deliberately confined. In Minister for Immigration and Multicultural Affairs v Haji Ibrahim[25], in the course of reasons for judgment with which Gleeson CJ[26] and Hayne J[27] agreed, Gummow J said[28]:

"The provisions in the Act respecting protection visas have to be construed in the context of the legislation as a whole. This shows that the provisions in question are not the only mechanism for giving effect to the calls of international humanitarianism. Further, the Convention was adopted against a particular background of customary international law concerning the consequences of delinquency in the exercise of State responsibility for the welfare of its own nationals and the acceptance by asylum States of responsibilities under their municipal laws towards those they accepted as refugees. The Convention was not designed to confer any general right of asylum upon classes or groups of persons suffering hardship and was deliberately confined in its scope. Whether there is a need for revision of the Convention and whether this should be promoted by the other branches of government is not a matter that arises for this Court. Its mandate is to construe and apply the Act. The interpretation of the protection visa provisions in the Act should not be strained to meet a judicially perceived mischief in the delayed development of customary or other international law."

The litigation

49. The first respondent, Mrs <<Khawar, is a citizen of Pakistan. She arrived in Australia with her three children, the second, third and fourth respondents, on 17 June 1997. The respondents had been issued Australian visitor visas on 5 June 1997 which permitted a single entry to, and a three-month stay in, Australia. On 16 September 1997, the day prior to the expiry of that three-month period, the first respondent lodged an application for protection visas for herself and her children. On 4 February 1998 a delegate of the Minister refused to grant the protection visas sought. Mrs Khawar>> then applied to the Refugee Review Tribunal ("the Tribunal") for review of that decision. The decision of the Tribunal affirming the decision of the delegate was given on 11 January 1999.

50. The issue before the Tribunal was whether Mrs <<Khawar possessed a well-founded fear of persecution for reasons of membership of a particular social group. Mrs Khawar claimed that in Pakistan she was a target of domestic violence at the hands of her husband and, to a more limited extent, of his family. Mrs Khawar married in 1980. She completed about 11 years schooling, and speaks, reads and writes Urdu, and also reads and writes some English. Her evidence detailed instances of abuse beginning in about 1986 and increasing in severity over a period of years. It is sufficient to note that the abuse included slappings, beatings which led to her hospitalisation, a threat to throw acid on her and a threat to kill her by setting fire to her. On one occasion her husband had doused her with petrol, an activity which had ceased only when a neighbour had arrived in response to the screams of Mrs Khawar>> and her children.

51. The Tribunal referred to two letters, written anonymously, which alleged that Mrs <<Khawar's case was false, and that her husband had followed her to Australia in August 1997 and was on good terms with her. Mrs Khawar denied these allegations but the Tribunal did not express any conclusion on the matter. However, the Tribunal stated that it was "willing to accept that [Mrs Khawar>>'s] claims about the violence she suffered at the hands of her husband [were] true".

52. Nevertheless, the Tribunal found that Mrs <<Khawar's husband "was not motivated to harm her because she was a member of a particular social group". In particular, the Tribunal found that "[s]he was not harmed because she was a member of any of the particular social groups proposed by [Mrs Khawar's] adviser: 'women'; 'married women in Pakistan'; 'married women in Pakistan without the protection of a male relative'; 'married women in Pakistan separated from one's husband and without the protection of a male relative'; 'married women in Pakistan suspected of adultery'; or 'women who have transgressed the mores of Pakistani society'". The Tribunal found that she had been harmed because the family of Mrs Khawar>>'s husband:

"were angry or shamed by the fact that he married her for love when he was already engaged to a relative and because she brought no dowry to the family. She was also seen as being responsible for her husband being estranged from his family for five years."

53. The Tribunal therefore found that Mrs <<Khawar "was not harmed for a Convention reason". It should be noted that the Tribunal appears to have considered that the harm suffered by Mrs Khawar was of

sufficient severity to come within the meaning of the expression "persecution". However, the Tribunal did not indicate whether it accepted material put forward by Mrs Khawar>>'s solicitor which would tend to show a systemic failure by police authorities in Pakistan to investigate or lay charges in respect of complaints by women of domestic violence against them.

54. Mrs <<Khawar applied to the Federal Court for review of the Tribunal's decision on the ground that that decision involved an error of law within the meaning of s 476(1)(e) of the Act[29]. That error of law was said to arise from the failure of the Tribunal to make findings of fact respecting the claims made by Mrs Khawar that she had reported incidents of the domestic violence to the police and that "the police failed to provide any, or any effective protection". Mrs Khawar>> had claimed that she had been to the police to report the incidents of violence on four occasions and that on each occasion the police either had refused to take the complaint or had failed to take the complaint seriously. The notion of failure by State authorities to provide "protection" to their nationals whilst they are within the territory of the State is important for this litigation.

55. The Federal Court (Branson J) set aside the decision of the Tribunal and referred the matter to the Tribunal "for further consideration according to law". In her reasons for judgment[30], her Honour found that the Tribunal had made "no findings of fact concerning [Mrs <<Khawar's] claim that she was unable to obtain police protection in respect of the violence experienced by her". Branson J also found that the Tribunal had failed to determine whether Mrs Khawar>> was a member of a particular social group in Pakistan within the meaning of the Convention and said[31]:

"Had the [T]ribunal made a finding that [Mrs <<Khawar>>] was a member of a social group in Pakistan which was comprised of Pakistani women, or alternatively married Pakistani women, it may well have concluded, as Lord Steyn did on the evidence in [R v Immigration Appeal Tribunal; Ex parte Shah[32]] that:

'Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of their membership of a social group but because of the hostility of their husbands is unrealistic.'"

Branson J expressed her conclusion as follows[33]:

"I conclude that in considering the question of the motivation of [Mrs <<Khawar's] husband in harming her, the [T]ribunal made an error of law involving an incorrect interpretation of the applicable law (ie the phrase 'a well-founded fear of being persecuted for reasons of ... membership of a particular social group'). First, the [T]ribunal failed to construe the phrase as a whole having regard to the purposes of the Convention and s 36 of the Act. Concomitantly, the [T]ribunal reached a conclusion on the question of whether [Mrs Khawar's] fear of persecution was for reason of her membership of a particular social group without first identifying the relevant social group, if any, of which [Mrs Khawar>>] was a member. The matter will be remitted to the [T]ribunal for further consideration according to law."

56. An appeal by the Minister to the Full Court was dismissed, by majority (Mathews and Lindgren JJ; Hill J dissenting)[34].

57. On further appeal to this Court, the Minister challenges what he sees as the basis of the decision of the majority in the Full Court. The Minister seeks orders which would have the effect of setting aside the orders made by Branson J and dismissing the application for review of the decision of the Tribunal.

58. The Minister puts his case by urging a negative answer to what is framed as two issues. The first is whether the failure of the country of nationality of an applicant for a protection visa to provide effective police protection against domestic violence to members of a particular social group is capable itself of constituting persecution for reasons of a ground stated in sub-s (2) of s A of Art 1 of the Convention where the violence feared by the applicant is directed at that person for non-Convention reasons.

59. The second is whether fear of harm directed at the applicant by a non-State agent for non-Convention reasons, together with or in the knowledge of the failure of the State of nationality to provide effective police protection against such harm to members of a particular social group to which the applicant belongs, "is capable of giving rise to protection obligations" to the applicant. It will be apparent that the two issues are interrelated.

The Convention definition

60. The references to "protection" and "protection obligations" invite attention to the construction of s A of Art 1 of the Convention and, in particular, to the passage "[any person who] owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group ... is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

61. This passage presents two cumulative conditions, the satisfaction of both of which is necessary for classification as a refugee. The first condition is that a person be outside the country of nationality "owing to" fear of persecution for reasons of membership of a particular social group, which is well founded both in an objective and a subjective sense[35]. The second condition is met if the person who satisfies the first condition is unable to avail himself or herself "of the protection of" the country of nationality. This includes persons who find themselves outside the country of their nationality and in a country where the country of nationality has no representation to which the refugee may have recourse to obtain protection. The second condition also is satisfied by a person who meets the requirements of the first condition and who, for a particular reason, is unwilling to avail himself or herself of the protection of the country of nationality; that particular reason is that well-founded fear of persecution in the country of nationality which is identified in the first condition.

62. The definition of "refugee" is couched in the present tense and the text indicates that the position of the putative refugee is to be considered on the footing that that person is outside the country of nationality. The reference then made in the text to "protection" is to "external" protection by the country of nationality, for example by the provision of diplomatic or consular protection, and not to the provision of "internal" protection provided inside the country of nationality from which the refugee has departed.

63. Further, it is significant that sub-s (2) of s A of Art 1 of the Convention goes on to deal specifically with the situation of persons who lack a nationality. The requirement is stated as applying to one:

"who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it".

Thus, the Convention does not speak of the protection of stateless persons by their country of habitual residence. Nevertheless, the definition does speak of such persons being unable to return to the country of former habitual residence or being unwilling to do so owing to a well-founded fear of persecution.

64. The immediate origins of these provisions of s A of Art 1 are found[36] in the Constitution of the International Refugee Organization[37]. That Organization was concerned to treat as a refugee[38]:

"a person who has no consul or diplomatic mission to whom to turn, and who does not benefit from reciprocal agreements between countries maintaining friendly relations which protect the nationals of one country living on the territory of another".

65. Writing of the Convention, Grahl-Madsen pointed out that protection referred to the possibility of the refugee to enlist[39]:

"the services of the authorities of his home country in some way or other in order to reap some benefit due to nationals of that country. He may do this by applying for and receiving a national passport ... or a certificate of nationality, for the purpose of regularizing his stay in a foreign country on the basis thereof, in order to be able to invoke a treaty of reciprocity, or to claim other benefits due to persons of his nationality,

or for some similar reason. In more rare cases he may request his national authorities to intervene in his favour with the authorities of another State."

The travaux préparatoires of the Convention strongly supports these views[40].

66. Against the background and text of the Convention, it would be an error to inject the notion of "internal protection" into the first condition mentioned above, namely that the person in question be outside the country of nationality by reason of a fear of persecution which is well founded both in an objective and a subjective sense. Hence the statement by the Senior Legal Adviser to the Office of the United Nations High Commissioner for Refugees[41]:

"[T]he inconsistency of the 'internal protection' theory with the inner coherence of the definition is evident from a tendency to misread or misunderstand the words of the Convention."

67. However, the assumption that the notion of "protection" is to be read back into the first condition underlies the following statement by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department[42]:

"The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community."

68. In our opinion, the reference to "protection" in this passage is apt to mislead and to distort the construction of the first condition. The reference to "protection [by] the international community" is also apt to mislead. The Convention is concerned with the status and civil rights to be afforded to refugees who, relevantly, are outside the country of nationality and within the territory of a State Party to the Convention. The Parties to the Convention are a narrower class than the "international community" and, in any event, the Convention represents a significant but qualified limitation upon the absolute right of the member States to admit those whom they choose[43].

69. Similar statements to that of Lord Hope have been made in the Canadian Federal Court of Appeal[44]. The New Zealand Court of Appeal (Richardson P, Henry, Keith, Tipping and Williams JJ) said in Butler v Attorney-General[45]:

"Central to the definition of 'refugee' is the basic concept of protection - the protection accorded (or not) by the country of nationality or, for those who are stateless, the country of habitual residence. If there is a real chance that those countries will not provide protection, the world community is to provide surrogate protection either through other countries or through international bodies. So both paragraphs of art 1A(2) define refugees in part by reference to their ability or willingness to avail themselves of the protection of their country of nationality or of habitual residence."

70. The source of the construction indicated by these Courts appears to be found in the writings of a Canadian scholar, Professor Hathaway concerning "surrogate" or "substitute" protection. In Horvath, Lord Hope said[46]:

"As Professor James C Hathaway in The Law of Refugee Status[47] has explained, 'persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community'. [H]e refers[[48]] to the protection which the Convention provides as 'surrogate or substitute protection', which is activated only upon the failure of protection by the home state. On this view the failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals." (original emphasis)

71. Lord Hope also referred[49] to what he regarded as the "helpful and instructive" analysis of Art 1 by Lord Lloyd of Berwick in Adan v Secretary of State for the Home Department[50]. His Lordship had there referred to sub-s (2) of s A of Art 1 as including as categories of refugee:

"(1) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country".

That classification which his Lordship said was common ground between the parties in Adan is, with respect, unobjectionable. The difficulty arises from the statement then made by Lord Lloyd that in each of the two categories[51]:

"the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'".

72. The difficulties which are provoked by the reasoning in Adan and Horvath are discussed in a recent publication of the United Nations High Commissioner for Refugees[52]. It is said in pars 35 and 36 of that publication:

"35. The meaning of this element of the definition has recently been much debated. According to one view, it refers to protection by the state apparatus inside the country of origin, and forms an indispensable part of the test for refugee status, on an equal footing with the well-founded fear of persecution test. According to others, this element of the definition refers only to diplomatic or consular protection available to citizens who are outside the country of origin. Textual analysis, considering the placement of this element, at the end of the definition and following directly from and in a sense modifying the phrase 'is outside his country of nationality,' together with the existence of a different test for stateless persons, suggests that the intended meaning at the time of drafting and adoption was indeed external protection. Historical analysis leads to the same conclusion. Unwillingness to avail oneself of this external protection is understood to mean unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur.

36. Despite this apparent clarity, there now exists jurisprudence that has attributed considerable importance in refugee status determination to the availability of state protection inside the country of origin, in line with the first view described above. This somewhat extended meaning may be, and has been, seen as an additional - though not necessary - argument in favour of the applicability of the Convention to those threatened by non-state agents of persecution." (footnotes omitted) (emphasis added)

73. The "internal" protection and "surrogacy" protection theories as a foundation for the construction of the Convention add a layer of complexity to that construction which is an unnecessary distraction. The preferable position is that indicated in the above publication of the United Nations High Commissioner for Refugees in the passage[53]:

"As pointed out in the final paragraphs of [Fortin[54]], it may surely be legitimate for a person who fears non-state agents not to accept diplomatic protection outside the country as this would provide the country of origin with the possibility of lawfully returning him or her to that country. This would expose the refugee to the feared harm and therefore would make his or her unwillingness to avail of such external protection both reasonable and 'owing to such fear' of persecution."

74. In opposition to the "protection" theory, there is what is called the "accountability" theory of interpretation of the Convention. In R v Secretary of State for the Home Department, Ex parte Adan, the English Court of Appeal said of the latter theory[55]:

"Put shortly the 'accountability' theory limits the classes of case in which a claimant might obtain refugee status under the [Convention] to situations where the persecution alleged can be attributed to the

state. German law requires an asylum seeker to show that he fears persecution (on a Convention ground) by the state, or by a quasi-state authority. If he relies on persecution by non-state agents, it must be shown to be tolerated or encouraged by the state, or at least that the state is unwilling to offer protection against it."

75. In Minister for Immigration and Multicultural Affairs v Haji Ibrahim, Callinan J[56] and Gummow J[57] left open the question whether the "accountability" theory should be accepted. The submissions by the Minister in this case, to which reference already has been made, to a degree seek an acceptance of that theory. However, it is again unnecessary to determine whether the theory should be accepted. The reasons why that is so and the path to be taken for the resolution of the present dispute when it is returned to the Tribunal now follow.

Persecution and discrimination

76. In Chan v Minister for Immigration and Ethnic Affairs[58], Mason CJ pointed out that (i) the Convention necessarily contemplates in the definition of "refugee" that there is a real chance that the person in question will suffer "some serious punishment or penalty or some significant detriment or disadvantage" if that person returns to the country of nationality; (ii) some forms of selective or discriminatory treatment by a State of its citizens will not amount to persecution; (iii) harm or threat of harm "as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason"; and (iv) such harm or threat of harm may be constituted by the "denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned". In Haji Ibrahim[59], McHugh J again made the point that, whilst persecution involves discrimination that results in harm to an individual, not all discrimination will amount to persecution.

77. In a number of previous cases in this Court, in particular Chan, Applicant A v Minister for Immigration and Ethnic Affairs[60] and Chen Shi Hai v Minister for Immigration and Multicultural Affairs[61], the issues have turned significantly upon the application to the persons claiming refugee status of certain laws of the country of their nationality and the existence of well-founded fears as to the enforcement against them of those laws. Here, the situation is rather different. The laws of Pakistan which are involved have not specifically been identified but may be taken to be criminal laws of a general application respecting serious assault by one individual upon another. Mrs <<Khawar>> complains not of her harassment by the selective enforcement against her of those laws but, to the contrary, of the significant detriment or disadvantage she suffers from the alleged failure by the Pakistani police authorities to enforce the criminal law against those who break those laws, in particular against those who inflict domestic violence upon her. In that sense, she complains of discrimination which amounts to persecution.

78. The selective enforcement of a law of general application may result in discrimination between complainants which produces, in the legal sense, discrimination against one group of complainants. In Street v Queensland Bar Association, when dealing with the phrase "disability or discrimination" in s 117 of the Constitution, Gaudron J said[62]:

"Although in its primary sense 'discrimination' refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is 'discrimination between'; the legal sense is 'discrimination against'."

79. The substance of Mrs <<Khawar>>'s complaint is that (a) she was unable to obtain police protection in respect of the domestic violence she suffered; (b) that state of affairs represented a denial of fundamental rights otherwise enjoyed by nationals in Pakistan; and (c) it was a form of selective or discriminatory treatment which amounted to persecution by the State authorities.

80. As legal propositions, these elements in Mrs <<Khawar's case may be accepted. The difficulty is, as Branson J pointed out, the Tribunal made no findings of fact upon Mrs Khawar's allegation that she could not obtain police protection in respect of the domestic violence she suffered. The Tribunal did not make a

finding upon material put forward on behalf of Mrs Khawar>> which would tend to show a systemic failure by Pakistani police authorities to investigate or to lay charges in respect of complaints by women of domestic violence against them.

Particular social group

81. The harm amounting to persecution which has been identified above must be suffered for a Convention reason. The case put here is that Mrs <<Khawar was a member of a particular social group in Pakistan. Again, the Tribunal failed to make the necessary finding. It failed to determine whether Mrs Khawar>> was a member of such a group. It was open to the Tribunal on the material before it to determine that there was a social group in Pakistan comprising, at its narrowest, 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. Other formulations have been referred to earlier in these reasons and nothing said here is intended to foreclose a finding that a group so defined existed. This is a matter for the Tribunal on reconsideration of the case.

82. It may be that the members of a group under any of the above formulations are very numerous. However, the inclusion of race, religion and nationality in the Convention definition shows that that of itself can be no objection to the definition of such a class. Applicant A establishes that disagreement with a law of general application and fear of the consequences of the failure to abide by that law does not, on that account, constitute the persons in question a social group within the meaning of the Convention definition[63]. That has no bearing upon the present case. Nor does the proposition, which also is to be derived from Applicant A[64], that ordinarily the enforcement of a generally applicable criminal law will not constitute persecution of a social group constituted by those against whom that law is enforced.

83. Applicant A indicates that the particular social group cannot be defined solely by the fact that its members face a particular form of persecution so that the finding of membership of the group is dictated by the finding of persecution. Those considerations do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.

Persecution

84. It should, in our view, be accepted that, whilst malign intention on the part of State agents is not required[65], it must be possible to say in a given case that the reason for the persecution is to be found in the singling out of one or more of the five attributes expressed in the Convention definition, namely race, religion, nationality, the holding of a political opinion or membership of a particular social group. If the reason for the systemic failure of enforcement of the criminal law lay in the shortage of resources by law enforcement authorities, that, if it can be shown with sufficient cogency, would be a different matter to the selective and discriminatory treatment relied upon here.

85. That selective and discriminatory treatment, if shown on facts found by the Tribunal, would appear to answer Mason CJ's criterion mentioned in Chan of harm amounting to persecution by denial of a fundamental right otherwise enjoyed by Pakistani nationals, namely access to law enforcement authorities to secure a measure of protection against violence to the person.

86. Whilst the Tribunal appears to have treated the violence of non-State actors of which Mrs <<Khawar>> complained as sufficiently severe to amount to "persecution", that classification is not determinative for several reasons. First, in any event, there would be the further requirement of a Convention reason; victims of domestic violence would meet the Convention definition only by showing more than the harm of which they complain.

87. Secondly, and this is crucial for the basis propounded above, the persecution in question lies in the discriminatory inactivity of State authorities in not responding to the violence of non-State actors. Thus, the harm is related to, but not constituted by, the violence. It is for this reason that it has been unnecessary to consider whether the "accountability" theory mentioned in Haji Ibrahim and reflected in the Minister's submissions on this appeal should be accepted.

Conclusions

88. The propositions of law indicated above with respect to persecution and membership of a social group provide the framework for the reconsideration of the matter by the Tribunal. It will be for the Tribunal to reconsider the matter and make the necessary findings upon the materials then before it. Those materials may be supplemented and are not confined to the material initially before the Tribunal.

89. It also should be emphasised that nothing said here forecloses the Tribunal from making a finding upon what, in a sense, is a threshold issue. This is the question whether Mrs <<Khawar>>'s case has been fabricated and whether she is on good terms with her husband who is alleged also to be in Australia.

90. The appeal should be dismissed with costs.

91. KIRBY J. This appeal[66] concerns refugee law. It arises out of an unsuccessful application for a protection visa[67] by a Pakistani woman who failed to convince the delegate of the Minister and the Refugee Review Tribunal ("the Tribunal") that she was a "non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[68].

92. The decision of the Tribunal was reviewed by the Federal Court of Australia[69] and set aside by a judge of that Court (Branson J)[70]. Her Honour's order was made on the ground that the Tribunal had erred in law in failing to make findings of fact necessary for the proper application of the law to the facts presented to the Tribunal and essential for a correct decision[71]. By majority, the primary judge's decision, and order remitting the matter to the Tribunal for further consideration, were confirmed by the Full Court of the Federal Court[72]. By special leave, an appeal has now been brought to this Court by the Minister for Immigration and Multicultural Affairs ("the Minister").

The facts, legislation and issues

93. Most of the facts relevant to my reasons are contained in the reasons of Gleeson CJ[73] and of McHugh and Gummow JJ[74]. So is the applicable legislation[75], details of the course of the proceedings below[76] and a statement of the issues argued before this Court[77]. I will avoid unnecessary repetition.

94. In order to appreciate the significance of the omission in fact-finding committed by the Tribunal in approaching the application made by Mrs Naima <<Khawar>> ("the respondent"), it is important to appreciate that the Tribunal, for the purposes of its decision, was willing to accept as true her claims about the violence that she had suffered at the hands of her husband and members of his family. It is also relevant to note the Tribunal's express findings in relation to the failure of the Pakistani governmental authorities (principally the police) to provide protection to the respondent. The respondent stated that she had gone to the police on four occasions to report the incidents of violence of which she complained[78]:

* The first time was before May 1995. According to the respondent, the police refused to accept and act upon her complaint, telling her that such incidents were occurring throughout the country and that they could do nothing about them.

* The respondent stated that she went a second time in November 1996, after her husband threatened to burn her alive. Because she had heard reports about such burning incidents and because her situation had become critical, she had started to take the threats seriously. She was accompanied on the second occasion by her sister's husband, saying that she hoped that she would be taken more seriously because accompanied by a man. Although the police officer took a report, the respondent stated that he did not write down her story accurately. According to the respondent he did not seem to take her complaint seriously. When the

respondent's husband returned home that evening, he allegedly told her that he knew of the police report and warned her that the police could do nothing.

* In January 1997, the day after her husband beat her after she had questioned him about his seeing another woman, the respondent stated that she had again gone to the police with her brother-in-law. Again what was written by the police officer who took the report was grossly inaccurate.

* After an incident in March 1997 in which her husband and his brother poured petrol on her, the respondent stated that she had again gone to the local police station. The officer told her that women always tried to blame their husbands for problems for which they themselves were the real cause, and that she should sort out her "own work".

The neglected material before the Tribunal

95. In addition to this personal account of the respondent's experiences of neglect, indifference and inaction concerning her attempts to invoke the protection of the law in the form of the police to whom the respondent had made her reports, her case before the Tribunal included substantial, and apparently authentic and reliable, material concerning the negative attitude of the Pakistani authorities to complaints by women in a position similar to the respondent.

96. It can be assumed that the foregoing material had been tendered to the Tribunal to meet a contention for the Minister that the respondent's reason for leaving Pakistan (and consequent reluctance to return there) was a purely private affair concerning domestic disagreements between her husband, his family and herself. Such a reason would not qualify for consideration as entitling the respondent to a protection visa on the ground of refugee status. The respondent did not submit otherwise. Instead, it was her contention that what had happened to her was but an instance of the general withdrawal from women in her position in Pakistan of the protection of the law that would, by implication, have been available to a man threatened with comparable acts of violence and personal affront.

97. The material tendered to the Tribunal was substantial. The respondent relied upon it to establish that the neglect by police in her case derived from a policy or general practice of withdrawing police protection from women like her and not for some other reason (such as lack of police resources, default of individual police officers, influence of the husband's family, financial corruption and so forth). The material included extracts from:

* a report of the Canadian Immigration and Refugee Board, Human Rights Briefs: Women in Pakistan, reviewing the many changes to the law of Pakistan introduced after 1977 during the military regime of General Zia ul-Haq, including to the Law of Evidence (Qanun-e Shahadat) devaluing the testimony of female as against male witnesses and alteration of the criminal law with respect to retribution (Qisas-e Divat) extending the area of legal discrimination against women in cases of murder, bodily injury and abortion and reducing by half the compensation payable where the victim of such crimes was female;

* a 1994 cable from the Australian Department of Foreign Affairs and Trade concerning oven burns leading sometimes to death of wives, especially in rural districts of Pakistan and often related to disputes over dowry payments by the wives' families. In this cable, the police response and protection was described as "minimal";

* a 1995 report from Amnesty International, Women in Pakistan - Disadvantaged and Denied Their Rights;

* a 1997 United States State Department report on the general practice of Pakistani police to return battered wives to abusive husbands;

* a 1998 report from the United States State Department on the general status of women in Pakistan. The report included information on the limitations on the admission and weight given to the testimony of women in court; the non-reporting by hospitals of so-called "stove deaths" involving women and, where

such reports were made, the reluctance of police to investigate them or to lay charges or even to arrange for post mortem examinations to be conducted; and the killing and mutilation by male relatives of women accused or suspected of adultery, rarely with police intervention or effective court action or legal redress.

98. The phenomenon of burning of women in the position of the respondent is also described in academic literature in the Indian subcontinent[79] and is sometimes linked historically to the same sources of female submission and subjugation evidenced in the practice of sati which was abolished during British rule[80].

The defect in the Tribunal's approach

99. The Tribunal concluded that the respondent was not harmed because she was a member of a "particular social group" but because of her husband's family's anger about the shame that she had caused her husband by getting him to marry her instead of a bride chosen by the family and because she brought no dowry with her to the marriage. On that basis, the Tribunal found that, even if the harm which it accepted for the purpose of its decision were otherwise "persecution" within the Convention definition, it was not "for reasons of" the respondent's membership of a "particular social group". It was on that basis that the Tribunal confirmed the delegate's rejection of the respondent's application.

100. Taken in isolation such a finding might seem to be one of fact - assigning the harm that was accepted to have been proved to a cause based on a particular family's domestic disputes. If that were all, the decision would have to be affirmed by the courts, confined as they are in this respect to correcting errors of law on the part of administrative decision-makers. But when the significant factual material tendered by the respondent is taken into account, the material before the Tribunal arguably takes on a different character. It is then possible, indeed essential, to consider the family dispute concerning the respondent in the light of the material about the serious legal, social and practical disadvantages suffered by the respondent and women in her position which she presented to the Tribunal. The Tribunal might still conclude that the respondent did not fall within the Convention definition. But it could scarcely do so lawfully without considering, and making essential findings of fact about, the case that the respondent had propounded to bring herself within the Convention definition. In short, it was open to the Tribunal to reject the respondent's application. But in light of the substantial, apparently reliable and consistent material that she had produced concerning the situation in Pakistan affecting her and persons like herself, it was not open to the Tribunal to ignore the respondent's claim that her case was a paradigm instance of the discrimination of Pakistani law and official practice against women in her position, which amounted to persecution, justifying her fear about returning to Pakistan.

101. It follows that I agree with the primary judge and the majority in the Full Court of the Federal Court that the Tribunal committed an error of law in failing to make findings of fact on the respondent's allegation that she was unable to secure protection of the law and its agencies in Pakistan against the serious harm perpetrated against her and that she was a member of a "particular social group" of at least one of the kinds propounded before the Tribunal.

102. Until such factual findings were made it was impossible for the Tribunal to apply accurately to the facts, the Convention definition which the respondent had invoked. I agree with Callinan J[81] that it is sometimes possible to divide issues in a case and to deal only with a particular issue that amounts to a winning point that provides a completely legal answer to a claim. Such a case is illustrated by the recent decision of this Court in Minister for Immigration and Multicultural Affairs v Singh[82]. But where, as here, the Tribunal failed to address itself to the essential features of the case which the respondent had presented to establish persecution and to identify herself with a "particular social group" in Pakistan, this did not amount to by-passing unnecessary complications in the case. It represents an impermissible attempt to oversimplify the matter by ignoring essential factual determinations which, if decided in particular ways, would have brought the respondent within the Convention definition of "refugee" entitling her, by law, to the protection of Australia. This the Tribunal could not do. The Federal Court was correct to send the matter back to the Tribunal for reconsideration.

Persecution: dictionary and contextual meanings

103. The key components of the definition of "refugee" applicable to the respondent's case are:

"owing to well-founded fear of being persecuted for reasons of ... membership of a particular social group ... [she] is outside the country of [her] nationality and ... owing to such fear, is unwilling to avail [herself] of the protection of that country".

104. The essential concepts in the definition that arise for consideration in the context of this appeal are those of persecution, membership of a particular social group and whether the necessary causal relationships are established. Those causal relationships are indicated by the repeated references to "owing to" and the single reference to "for reasons of". Unless the character of the persecution alleged is properly identified, it is comparatively easy to misapply the causal criteria, as the Tribunal did in this case. When that occurs the Convention definition has not been applied to all of the facts propounded but only to some of them.

105. Some facts were clear, or accepted by the Tribunal for the purposes of the respondent's case. These were that she had a relevant "fear", that she was outside the country of her nationality and that she was unwilling to avail herself of the protection of that country. So the question for the Tribunal, in applying the Convention definition, was whether the remaining elements in the definition were made good by the respondent's case. The starting point for answering that question was to have a clear idea of the meaning of "persecuted".

106. To assign meaning to "persecuted" in this context, courts, including this Court, have had resort to dictionaries[83]. This is a natural enough course to adopt, common in elucidating the meaning of statutes and other written instruments expressed in words. I have myself followed the same course in this context[84]. According to such dictionary meanings "persecute" means "to pursue with harassing or oppressive treatment; harass persistently" and "to oppress with injury or punishment for adherence to principles"[85].

107. The application of these and similar definitions to the facts of the present case presents two questions. The first is whether it is permissible, and relevant, to have regard to the harmful conduct towards the respondent of non-state agents (such as her husband and his family) or whether only the conduct of the state and its agents is relevant in this context. The second is whether, if it is relevant to look at the conduct of non-state agents in this case, their conduct, as described by the material adduced before the Tribunal by the respondent, could qualify as "persecution". If the answer to each of these questions were in the negative, it would be pointless to remit this matter to the Tribunal because, whatever additional findings of fact it made, they would not rise to the level of persecution for the purposes of the Convention definition.

108. I am now inclined to see more clearly than before the dangers in the use of dictionary definitions of the word "persecuted" in the Convention definition. At least, I see such dangers unless there is an acceptance of the need for adjustments appropriate to the context. First, the word "persecuted" appears here in an international treaty which is not as susceptible to exposition by reference to Australian or even English standard dictionaries as is a word appearing in a local legal instrument. It is by use of dictionaries that concepts such as enmity and malignity have been imported to the notion of persecution which are neither mentioned in the text of the Convention, nor necessary to the context. Such a feature of the definition now seems to have been abandoned in Australia[86], it being recognised that some persecution is performed by people who think that they are doing their victims a favour. Dictionary definitions can thus incorrectly direct the mind of the decision-maker to the intention of the persecutor instead of to the effect on the persecuted. It is the latter that is important if the "fear" (twice referred to in the Convention definition) is to be understood and the complex motivations and causes of the flight and the claim of the applicant to protection are to be analysed correctly[87].

109. Secondly, this Court has repeatedly emphasised that, even in giving meaning to words used in a local legal instrument, it is essential to have regard to a context beyond the word itself. Normally, the sentence, not the word, is the medium by which an idea is constructed and communicated[88]. If this is the correct approach to elucidating meaning in a municipal legal document, it applies with even greater force to

ascertaining the meaning of a document of considerable opacity, such as the Refugees Convention. In Applicant A[89], McHugh J said, correctly in my view:

"[I]nternational treaties often fail to exhibit the precision of domestic legislation. This is the sometimes necessary price paid for multinational political comity. The lack of precision in treaties confirms the need to adopt interpretative principles, like those pronounced by Judge Zekia, which are founded on the view that treaties 'cannot be expected to be applied with taut logical precision'.

...

The phrase 'a well-founded fear of being persecuted for reasons of ... membership of a particular social group' is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole."

110. Considerations such as these have led decision-makers in several other jurisdictions to approach the meaning of the word "persecuted" by reference to the purpose for which, and context in which, it appears rather than strictly by reference to local dictionaries. The latter may give some verbal equivalents and synonyms and offer general guidance about the meaning of a word. But it is the purpose and content of the Convention that will illuminate the boundaries of the idea of persecution in the Convention. That purpose and content can, in turn, only be understood by reference to the history and broad humanitarian object of the Convention[90]. It, and the municipal law giving it effect, were designed to ensure that the unredressed affronts to humanity that occurred in the middle of the twentieth century and before would not be repeated[91].

111. It is true that the Convention is not open-ended or unlimited in the scope of its protection. It must be applied - like any other legal instrument - according to its terms. But its meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress "violation[s] of basic human rights demonstrative of a failure of state protection"[92]. It is the recognition of the failure of state protection, so often repeated in the history of the past hundred years, that led to the exceptional involvement of international law in matters concerning individual human rights. In that context, the International Covenant on Civil and Political Rights[93] and the Convention on the Elimination of All Forms of Discrimination against Women[94] (to both of which Australia is a party) are obviously important in expressing the concept of women's equality before the law and the unacceptability of the state and its agencies discriminating unjustly against women solely by reason of their sex.

Persecution and harm by non-state agents

112. Against this background it might be supposed that the Refugees Convention is concerned solely with activities of agents of the state as constituting the kind of "persecution" with which the Convention is concerned. Certainly, the most usual forms of persecution that give rise to claims to refugee status under the Convention are by state agents. However, neither in the language of the Convention nor in the decisions of municipal courts and tribunals has such a narrow meaning been adopted. Thus the Convention does not say (as it might have done) "fear of being persecuted by the country of nationality". Non-state agents of persecution may fall within the definition. So much was expressly recognised by the Supreme Court of Canada in Canada (Attorney General) v Ward[95]:

"The persecution alleged by the appellant emanates from non-state actors, the INLA; the Government of Ireland is in no way involved in it. This case, then, raises the question whether state involvement is a prerequisite to 'persecution' under the definition of 'Convention refugee' in the Act. The precise issues are phrased differently by the parties, but can be summarized in the following fashion. First, is there a requirement that 'persecution' emanate from the state?"

113. To the question stated in the foregoing passage, the Supreme Court of Canada gave the following answer[96] with which I agree:

"The international community was meant to be a forum of second resort for the persecuted, a 'surrogate', approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution. The former is, of course, comprised in the latter, but the drafters of the Convention had the latter, wider purpose in mind. The state's inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection.

I, therefore, conclude that persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens."

114. This conclusion, which was not really contested in the present appeal, has led to a classification of the cases in terms of the involvement of state agents in the persecution complained of[97]:

"(a) Persecution committed by the state concerned.

(b) Persecution condoned by the state concerned.

(c) Persecution tolerated by the state concerned.

(d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection."

115. The respondent presented a case that (she said) fell at least into category (d) and possibly (c) or even (b). The suggestion, derived in part from dictionary definitions of "persecution" taken in isolation from the context, that persecution requires affirmative harassment by state agents fired by enmity and malignity, must be firmly rejected. It is sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person concerned. As a practical matter in most cases, save those involving a complete breakdown of the agencies of the state, decision-makers are entitled to assume (unless the contrary is proved) that the state is capable within its jurisdiction of protecting an applicant[98]. Certainly, that assumption will be made where, as in the present case, the affront to the person concerned is objectively very serious and would appear to involve discrimination by state agents based on an inadmissible ground, namely the respondent's sex. In the context of the many reports of "stove deaths" in Pakistan and earlier threats to burn her alive, the incident in March 1997 in which the respondent was doused with petrol by her husband and his brother was objectively only capable of being treated as gravely criminal. It is impossible to believe that a similar act directed to the husband or another male victim would have been treated by police in Pakistan in such a dismissive fashion.

116. The response of the state agents in the present case could therefore only be fully understood and characterised after the Tribunal had proceeded to view it in the context of the materials which the respondent had placed before the Tribunal, relevant to the legal and other disadvantages faced by women in her situation in Pakistan. It follows that there was point in the Tribunal's proceeding to make factual findings on the materials provided by the respondent and to reach conclusions about whether the serious risk of harm together with the failure of state protection amounted to "persecution" as she alleged.

117. Without identifying the relevant acts claimed to be persecution it was impossible to consider their causative effects. Thus, if the serious harm were merely intra-family cruelty to the respondent that, of itself, would not attract the Convention definition so as to give rise to the relevant "fear" and to justify classification of the harm as "persecution" for a Convention ground. But if the serious harm were found to exist together with state inaction or inability to offer adequate protection, a completely different characterisation of the events would be open to the Tribunal. In such circumstances, the Tribunal could indeed conclude that the "fear" of the respondent of being "persecuted" was not simply her husband and his

family's wrongs to her but that she was in a hopeless and intolerable situation where she had no-one to look to for effective protection, even of her life. Such a situation, if the other elements of the Convention definition were satisfied, would arguably fulfil the final step of the definition and explain why, in the circumstances, the respondent was unwilling to avail herself of the protection of her country of nationality.

118. At a risk of some oversimplification, with Lord Hoffmann in Shah[99] and Lord Clyde in Horvath v Secretary of State for the Home Department[100], I would express the foregoing analysis in the concise formula:

"Persecution = Serious Harm + The Failure of State Protection."[101]

Persecution "for reasons of" a Convention ground

119. When this concise formula is kept in mind it becomes easier to approach with legal accuracy the "nexus issue" presented by the Convention definition's requirement that the persecution be (relevantly) "for reasons of ... membership of a particular social group". It is insufficient that the claimant for refugee status be a member of a particular social group and also have a well-founded fear of persecution. That fear of persecution must be for reasons of the claimant's membership or perceived membership of such group[102].

120. In my opinion the New Zealand Refugee Status Appeals Authority explained the position accurately[103]:

"Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided either by the serious harm limb or by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (eg husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because 'persecution' is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is 'for reason of' a Convention ground, the summative construct is itself for reason of a Convention ground[104]."

121. Thus, even if the Tribunal in the present matter were of the opinion that one ingredient in the Convention definition of persecution, namely the family threats and violence against the respondent by non-state actors, was not (as it concluded) committed for reasons of the respondent's actual or perceived membership of a particular social group, that would not be an end of the matter. If the respondent could show that her well-founded fear of being persecuted was "for reasons of" her being a member of a particular social group because state protection was unavailable to her, that would be enough to meet the Convention requirement.

122. This analysis demonstrates why the failure of the Tribunal in the present case to address, and make factual findings on, that question constituted an error that effectively meant that it had not fulfilled its legal responsibilities. It was not, with respect, a failure to address an unnecessary element in the respondent's claim for relief. Rather, it was a failure to address one of two grounds where the respondent was entitled to succeed if she made either of them good[105]. On its own, the failure of state protection is not capable of amounting to persecution. There must also be a threat or the actuality of serious harm, including from non-state agents. This is because "persecution" is constituted by the two elements described in the concise definition. But if either is "for reasons of" the claimant's membership of a particular social group, that is sufficient. The definition and the causal nexus will then be satisfied. To that extent, the claimant will have fulfilled the requirements of the Convention definition.

123. In the instant case, it may be accepted for the purposes of argument that the respondent's fear of serious harm at the hands of her husband and his family had no causal nexus to her membership of a

particular social group - whether as a woman, a married woman in conflict with her husband, or a married woman without male support seen as having broken the customs and mores of Pakistani society or otherwise. The Tribunal so found. There seems no reason on legal grounds to question its finding in this respect. However, the causal relationship of the failure of state protection - by police and other agencies of the Pakistani state - is in a different category. There, arguably, on the materials placed by the respondent before the Tribunal, the reason for the failure of state protection is the fact that the respondent is a woman in conflict with her husband. At least, the Tribunal could, on the materials placed before it, so find. If it did, that would be sufficient. The causal nexus required by the Convention definition between the persecution propounded and the respondent's membership of the particular social group, as suggested by her, would be established.

124. The foregoing is a further reason why the Tribunal must complete the task imposed upon it by law. By making the relevant factual findings, it must address the alternative way that the respondent advanced her case. It was a case compatible with the language of the Convention and the manner in which it has been understood and applied in a number of jurisdictions, overseas[106] as well as in Australia[107].

125. In my respectful view, the approach urged in this appeal by the Minister departs from the foregoing substantial body of international practice. No basis for such departure was suggested except that it was said to be mandated by what the majority of this Court held in Applicant A[108]. I dissented in that case. I would accept that there are certain arguable discordances between the approach of the majority in that case and what this Court later held in Chen[109], another application for refugee status arising out of the one-child policy of the People's Republic of China. However, at least when Applicant A is read with Chen, I do not see any necessary inconsistency between the approach adopted by the House of Lords in Shah and the approach of this Court to the meaning of the Convention definition of "refugee". In Chen[110], I was party to the orders of the Court. I specifically invoked a number of passages from what had been said in the House of Lords in Shah[111].

The arguable application of a "particular social group"

126. These conclusions leave only the Minister's final suggestion that no relevant "particular social group" could exist with application to a person such as the respondent. There is force in the submission that, whilst attention is focussed on women in Pakistan in domestic conflict with their husbands, the causal nexus necessary to the Convention definition of "refugee" is missing because of the very great width of the "social group" postulated. But once the focus shifts to the failure of state protection, that suggested problem recedes in importance. The "group" is capable of being properly defined in a principled manner, specifically by reference to the ground upon which the state concerned has withdrawn the protection of the law and its agencies.

127. In some overseas jurisdictions it has been held[112], or postulated[113], that women in a particular country may, as such, constitute a "particular social group" for the purposes of the Convention definition. The possibility appears consistent with some of the documentation emerging from the agencies of the United Nations[114]. The Minister conceded in argument that the number of persons potentially involved in a "particular social group" would not of itself put an applicant otherwise within that group outside the Convention definition. This must be correct. After all, there were six million Jews who were incontestably persecuted in countries under Nazi rule. The mere fact that they were many would not have cast doubt on their individual claims to protection had only there been an international treaty such as the Refugees Convention in force in the 1930s and 1940s.

128. Nevertheless, the sheer number of persons potentially involved in a group such as "women in Pakistan" or even "married women in Pakistan" is such that some commentators have expressed doubt that this is the kind of "particular social group" that the Convention was referring to[115]. The Minister contested that such wide categories could in law ever amount to a "particular social group" within the Convention.

129. However that may be, the "particular social group" propounded by the respondent in the present case was capable of being expressed in terms that were considerably narrower and more specific. The materials

presented by the respondent to the Tribunal suggest that there may be a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands' families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law. In the present case, because of the approach which it took, the Tribunal did not embark upon a consideration of whether there was a specific, and thus identifiable, "social group" of such a "particular" character and, if so, whether the respondent was a member of it.

130. Many countries (including, at least until quite recently, Australia) have afforded imperfect protection to women who suffer domestic violence. It does not follow that it is impossible to distinguish those countries that, however imperfectly, provide agencies of the law and non-discriminatory legal rules to address the problem from those countries that, for supposed religious, cultural, political or other reasons, consciously withdraw the protection of the law from a particularly vulnerable group within their society.

131. The Refugees Convention has nothing to say to persons who, being in Australia, are unwilling to avail themselves of the protection of their country of nationality where that country falls in the former category. However, depending upon the evidence in the case and the facts found by the administrative decision-maker, the Convention may well be available to persons from the latter category of country. That is what the respondent asserted was her case. As a matter of law she was entitled to have that assertion considered, the necessary facts found and her claim lawfully decided by the Tribunal. The orders of the Federal Court require that to happen. Those orders should be confirmed.

Orders

132. The appeal should be dismissed with costs.

133. CALLINAN J. The first respondent is a citizen of Pakistan and the other respondents are her children. In these reasons it is necessary to refer specifically to the first respondent only.

134. The statutory framework, the facts, and the course of proceedings below are relevantly fully stated by McHugh and Gummow JJ and need not be repeated, but some of the findings of the Refugee Review Tribunal should be. Before doing so, however, it is well to point out that the first respondent's case before the Tribunal was put in a number of alternative ways with respect to her membership of a particular social group: women; married women in Pakistan; married women in Pakistan without the protection of male relatives; married women in Pakistan separated from their husbands and without the protection of male relatives; married women in Pakistan suspected of adultery; or, women who have transgressed the mores of Pakistani society. For reasons which will appear, the Tribunal found it unnecessary to decide whether the first respondent was a member of any of the groups, and if she were, whether it was a particular social group within the meaning of Art 1A(2) of the Convention[116].

135. The findings that were made by the Tribunal and that were adverse to the first respondent were these.

136. The first respondent's husband was not motivated to harm her because she was a member of a particular social group.

137. Secondly, there was no nexus between the harm which the first respondent claimed to have suffered at the hands of her husband and the Convention ground of membership of a particular social group.

138. Thirdly, the Tribunal expressly found that the first respondent was not harmed because of her membership of any of the groups which she sought to define, and to which I have referred.

139. Furthermore, the Tribunal held that the first respondent was not persecuted because of her membership of a particular family.

140. Fifthly, it was held that the reason for the infliction of harm upon her by her husband was her husband's family's anger, or shame, that he should marry the first respondent for love, when the first respondent brought no dowry to the family and he was already engaged to be married to a relative.

141. A sixth finding was that the disharmony between the first respondent and her husband and his family was not influenced by her failure to carry out any role expected of women in Pakistani society: that the first respondent's problems related solely to the fact of her marriage against the wishes of his family, and to the fact that her husband's family disliked her personally.

142. The Tribunal also expressly held that some matters which the first respondent herself stressed, her inability to produce a son, the absence of a dowry, the first respondent's moral character, her non-compliance with her husband's family's wishes, and her status as her husband's property were the motivators for the abuse which she suffered.

143. An eighth finding of the Tribunal was that "women suspected of committing adultery" or "women suspected of kidnapping their children" were not a sufficiently cognisable group within Pakistani society to constitute a particular social group.

144. The next finding to which I need refer is that the first respondent's claim that she would be at risk of persecution while in custody in Pakistan was purely speculative and far fetched.

145. In the result, the Tribunal concluded that the first respondent's difficulties with her husband were of a private and personal nature, and were not related to the Convention ground of membership of a particular social group or to any other Convention ground.

The appeal to this Court

146. Once again this Court is called upon to construe and apply Art 1A(2) of the Convention which defines a refugee as a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

147. Although the definition must be read as a whole, each of its elements must be present: the existence of a well-founded fear; of being persecuted; for reasons of race, religion, nationality, membership of a particular social group, or political opinion; and, the inability, or, because of the existence of the requisite well-founded fear, an unwillingness to avail herself of the protection of the country of her nationality.

148. In this case the "reason" advanced for the persecution is, and could only be, if anything, "membership of a particular social group". There is no suggestion that the first respondent would be unwilling to avail herself of the protection of Pakistan if it were available. Her principal contention in this Court, of discrimination, amounting to persecution, by police officers to whom she has complained of her husband's conduct in Pakistan, is not the matter upon which she placed most weight in the Tribunal. There, her emphasis was upon her claim that she feared assault in custody by police officers after arrest if she returned to Pakistan, and prosecution for removing her children from Pakistan by kidnapping them. I did not understand the first respondent to put her case in this Court exclusively upon any narrow basis. Her contention as to persecution was put in more than one way: as her husband's maltreatment of her; or, that, together with a deliberate abstention by police officers from taking steps available to them, to prevent or mitigate her husband's abuse of her; or, simply the latter alone.

149. Some aspects of the situation in Pakistan may not, regrettably, be unique to that country. As Hill J (dissenting) in the Full Court of the Federal Court in this case said[117]:

"It would, in my mind, be an incorrect use of the word 'persecution' to apply it to a failure or lack of interest by the police to come to the aid of a person who has been beaten at least where the law provides, if enforced, adequate protection and there is no government policy that police ignore calls for help. There is, and it is not a matter of which we can be proud, a lack of enthusiasm in the authorities in Australia to come to the aid of women who are victims of domestic violence, but it would not be suggested that the State is, or for that matter the police are, persecuting those women in Australia. Persecution involves the doing of a deliberate act, rather than inaction."

150. Because I am of the same opinion as Hill J as to his conclusion and much of his reasoning, it is convenient to refer further to what his Honour said. I agree with his Honour's construction of the relevant Article and with his analysis of Chen Shi Hai v Minister for Immigration and Multicultural Affairs[118], that that case did involve positive action, that is to say, a deliberate abstention by or on behalf of the State, from the provision of necessities which were routinely provided to others.

151. In my opinion it was appropriate to decide this case on the basis that it was decided by the Tribunal; namely, that it had not been established that the first respondent feared persecution (however it is to be defined) for reason of membership of a particular social group. In arguing that there were several alternative groupings which might apply to the first respondent, she (and the person representing her before the Tribunal) cast her net as widely as she could. It is understandable that she would seek to do so. The Tribunal was, however, relieved of the necessity to classify her as a member of any one of those groups, assuming them to be particular social groups, as she was not in fact harmed, because, or for the reason that she was a woman in Pakistan, a married woman in Pakistan, a married woman in Pakistan without male relatives as protectors, a separated married woman in Pakistan without male relatives as protectors, or a woman who had, in some way, transgressed the accepted social customs of Pakistani society. And the finding, as to the true reason for the suffering of harm (that is the alleged persecution), related to each of the alternative ways in which she claimed to have been persecuted. In my opinion, it was therefore not correct for the primary judge, Branson J, to criticise the Tribunal for failing to make a finding as to which, or any particular, social group the first respondent belonged. The finding of the Tribunal simply amounted to a finding that the necessary relationship between a relevant reason and the requisite consequences did not exist.

152. Rather, in my opinion, and as both the Tribunal and Hill J also held, the situation in which the first respondent found herself was a situation which arose from the personal characteristics of her relationship with her husband and his family, albeit that her vulnerability as a woman in an abusive relationship may have contributed to the reluctance of the police to assist her[119].

153. Before discussing the reasoning of the majority (Lindgren J, Mathews J agreeing) in the Full Court of the Federal Court in this matter, there are some observations which I would make as to the meaning of the phrase "particular social group". In this case the appellant, for the purposes of the case, made a concession of a far reaching kind, the correctness of which I would at least question if the matter were otherwise a live issue. The concession was that all of the women of Pakistan, presumably of whatever age and in whatever circumstances, might be capable of constituting a particular social group within the meaning of the Article. To regard half of the humankind of a country, classified by their sex, as a particular social group strikes me as a somewhat unlikely proposition. A group must be part of something less than a whole. The bigger the group the more exceptions there will need to be made to it. And the bigger it is, the more general, and the fewer its defining characteristics will be. The use of the term "particular" reinforces the notion of a specific, readily definable body or group of people forming part of a larger whole. It is not possible, and it would be unwise to attempt, to catalogue all of the criteria for the identification and definition of a particular social group within the meaning of the relevant Article. But some features need, in my opinion, to be present. Membership of a particular social group cannot be confined to voluntary membership. One may be born into, or may become gathered up involuntarily into, a social group or groups. But there needs to be a clear linkage or common thread between the people said to constitute the particular social group. Again, as was pointed out by Hill J in the Full Court of the Federal Court here, conflicting international authority does not resolve the problem, although the reasons for judgment of McHugh J in Applicant A v Minister for Immigration and Ethnic Affairs[120] very much help to do so. The fact of persecution of a number of people does not of itself mean that those people constitute a particular social group. The group must exist

independently of, and not be defined by, the persecution, although the conduct of the persecutors may serve to identify or even create a particular social group. As McHugh J further pointed out in Applicant A[121], it must be possible, in order that the group may be regarded as a particular social group within the meaning of the Article, that it be identifiable as a social unit. There must be at least one characteristic, attribute, activity, belief, interest or goal that unites the members of it.

154. I would doubt whether there is any such characteristic, attribute, activity, belief, interest or goal here[122]. What there is here is what sadly occurs from time to time everywhere, as any experienced lawyer knows: violent family discord of which the unfortunate first respondent is the victim and in respect of which the police are reluctant interveners. Nor would I be confident that any of the other suggested categories could meet the criteria for membership of a social group in Pakistan. Some measure of precision must exist as to the criteria. I would doubt very much whether "all married women in that country" does so. And as to women married to abusive husbands, or women without the protection of male relatives, there will always be questions as to the efficacy and availability of local measures to prevent the abuse.

155. The first basis upon which the appeal succeeds is that there is no finding of fact by the Tribunal that the government of Pakistan was complicit in violence to women in abusive relationships. The evidence fell short of that: inactivity or inertia of itself does not constitute persecution. It is very difficult, indeed probably impossible, for an Australian court to assess according to our own standards or the standards of other countries the policing priorities of those countries. There needs to be, for persecution to have occurred, elements of deliberation and intention on the part of the State, which involve, at the very least, a decision not to intervene or act.

156. The majority in the Full Court (as with Branson J) were of the opinion that it was necessary for the Tribunal, in effect, as a starting point, to decide whether the first respondent was a member of a particular social group, and that had the Tribunal held that there was such a group, comprised, for example, of Pakistani women, or, alternatively, married Pakistani women, the Tribunal might well have concluded as Lord Steyn did in R v Immigration Appeal Tribunal; Ex parte Shah[123], that it was unrealistic to say that the persecution stemmed from her husband's hostility rather than membership of a social group. I cannot regard it as erroneous for the Tribunal, and indeed Hill J, to approach the case upon the basis that, however the social group might be defined, another cause was identified, and in my opinion correctly identified, as the reason for the abuse. What the Tribunal did was to identify the actual cause of the violence. Once it had done so, it was apparent that it was a different cause, or, that it occurred for a different reason, from any Convention reason. And that cause, coupled with reluctance, rather than deliberate abstention, by the police, still could not amount to a Convention reason. It was not erroneous for the Tribunal to approach the matter in the way that it did. Courts frequently proceed upon the basis that because one element of a cause of action, for example, causation, cannot be made out, whatever may have been the detriment to the plaintiff or the conduct of the alleged wrongdoer, the case cannot succeed because the necessary relationship between them has not been established[124]. The Tribunal conducted an exercise of exactly that kind in this case, and did not do so improperly. This is another basis upon which the appeal succeeds.

157. I would accordingly allow the appeal.

[1] The Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, is referred to in these reasons as "the Convention".

[2] cf R v Immigration Appeal Tribunal, Ex parte Shah [1999] 2 AC 629 at 635 per Lord Steyn.

[3] [1999] 2 AC 629.

[4] [1999] 2 AC 629 at 635.

[5] <<Khawar>> v Minister for Immigration and Multicultural Affairs (1999) 168 ALR 190.

[6] Minister for Immigration and Multicultural Affairs v <<Khawar>> (2000) 101 FCR 501.

[7] (1997) 190 CLR 225 at 233.

[8] See, for example, R v Secretary of State for the Home Department, Ex parte Adan [2001] 2 AC 477 at 491-492, and the cases there cited.

[9] [2001] 1 AC 489 at 497-498.

[10] (1997) 190 CLR 225 at 248.

[11] Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 426. See also Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548.

[12] Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 415-416.

[13] [1999] 2 AC 629.

[14] [1999] 2 AC 629 at 654.

[15] [1999] 2 AC 629 at 646 per Lord Steyn.

[16] (1997) 190 CLR 225 at 263.

[17] (1997) 190 CLR 225 at 264.

[18] Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum", (1986) 60 Australian Law Journal 148 at 152-154.

[19] Blay and Piotrowicz, "The case of MV Tampa: state and refugee rights collide at sea", (2002) 76 Australian Law Journal 12 at 15.

[20] Article 33(1) states:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[21]

Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum", (1986) 60 Australian Law Journal 148 at 153.

[22] For a comprehensive description of the attempts to reach agreement on a Convention on Territorial Asylum, see A Grahl-Madsen, Territorial Asylum, (1980), and for a note on the abortive Geneva Conference of 1977 on Territorial Asylum, see (1977) 51 Australian Law Journal 330.

[23] S Prakash Sinha, Asylum and International Law, (1971) at 108. However, it should be noted that on the municipal plane States have been willing to assume obligations which they have so far been loath to undertake on the international level. A Grahl-Madsen, Territorial Asylum, (1980) at 24.

[24] (2001) 75 ALJR 1257 at 1266 [41]-[45]; 180 ALR 402 at 414-415.

[25] (2000) 204 CLR 1.

[26] (2000) 204 CLR 1 at 4 [1].

[27] (2000) 204 CLR 1 at 72 [203].

[28] (2000) 204 CLR 1 at 50 [143].

[29] Section 476(1)(e) provided that an application might be made for review by the Federal Court of a judicially reviewable decision on any one or more of the following grounds:

"that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision".

The decision of the Tribunal was a judicially reviewable decision within the meaning of s 475(1)(b) of the Act.

[30] <<Khawar>> v Minister for Immigration and Multicultural Affairs (1999) 168 ALR 190 at 192.

[31] (1999) 168 ALR 190 at 197.

[32] [1999] 2 AC 629 at 646.

[33] (1999) 168 ALR 190 at 197.

[34] Minister for Immigration and Multicultural Affairs v <<Khawar>> (2000) 101 FCR 501.

[35] Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379.

[36] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 279-280.

[37] Australian Treaty Series 1948, No 16, signed by Australia on 13 May 1947 with effect from 20 August 1948.

[38] Holborn, The International Refugee Organization, A Specialized Agency of the United Nations, Its History and Work 1946-1952, (1956) at 311.

[39] The Status of Refugees in International Law, vol 1, (1966) at 255; see also at 261.

[40] Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 Georgetown Immigration Law Journal 415 at 426; Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548 at 558-563.

[41] Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548 at 564.

[42] [2001] 1 AC 489 at 495.

[43] Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 at 45-46 [137].

[44] Zalzali v Canada (Minister of Employment and Immigration) [1991] 3 FC 605 at 609-610.

[45] [1999] NZAR 205 at 216-217.

[46] [2001] 1 AC 489 at 495.

[47] (1991) at 112.

[48] The Law of Refugee Status, (1991) at 135.

[49] [2001] 1 AC 489 at 497.

[50] [1999] 1 AC 293 at 304.

[51] [1999] 1 AC 293 at 304.

[52] Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, (April 2001).

[53] Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, (April 2001), fn 81.

[54] "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 International Journal of Refugee Law 548.

[55] [2001] 2 AC 477 at 491.

[56] (2000) 204 CLR 1 at 80-81 [228].

[57] (2000) 204 CLR 1 at 53-55 [151]-[155].

[58] (1989) 169 CLR 379 at 388.

[59] (2000) 204 CLR 1 at 18-19 [55].

[60] (1997) 190 CLR 225.

[61] (2000) 201 CLR 293.

[62] (1989) 168 CLR 461 at 570-571. See also Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 478; I W v City of Perth (1997) 191 CLR 1 at 36-37, 58.

[63] See Chen Shi Hai v Minister for Immigration and Ethnic Affairs (2000) 201 CLR 293 at 301 [21].

[64] (1997) 190 CLR 225 at 258.

[65] Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 304 [33].

[66] From a judgment of the Full Court of the Federal Court of Australia: Minister for Immigration and Multicultural Affairs v <<Khawar>> (2000) 101 FCR 501.

[67] Migration Act 1958 (Cth), s 36(1) ("the Act"). The legislative provisions are explained in the reasons of McHugh and Gummow JJ at [39]-[40].

[68] The Act, s 36(2) referring to the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, Australia Treaty Series (1954) No 5 together with the Protocol relating to the Status of Refugees done at New York on 31 January 1967, Australia Treaty Series (1973) No 37.

[69] The Act, s 476(1)(e).

[70] <<Khawar>> v Minister for Immigration and Multicultural Affairs (1999) 168 ALR 190.

[71] The terms of s 476(1)(e) are set out in the reasons of McHugh and Gummow JJ at [54], fn 29.

[72] Lindgren J (Matthews J concurring), Hill J dissenting.

[73] At [4]-[16].

[74] At [49]-[50].

[75] Reasons of Gleeson CJ at [1]-[3]; reasons of McHugh and Gummow JJ at [39]-[43].

[76] Reasons of Gleeson CJ at [7]-[14]; reasons of McHugh and Gummow JJ at [49]-[56].

[77] Reasons of Gleeson CJ at [15]; reasons of McHugh and Gummow JJ at [56]-[59].

[78] <<Khawar>> (2000) 101 FCR 501 at 526-527 [97]-[102].

[79] eg Sen, Death by Fire - Sati, Dowry Death and Female Infanticide in Modern India, (2001). See also Dandu Lakshmi Reddy v State of A P [1999] AIR(SC) 3255 at 3257 [6]; Arvind Singh v State of Bihar [2001] 3 SCR 218 at 222.

[80] Described in Sen, Death by Fire - Dowry Death and Female Infanticide in Modern India, (2001) at 24-26; Dhagamwar, Law, Power and Justice - the protection of personal rights in the Indian Penal Code, 2nd ed (1992) at 288-302. See also Indian Penal Code, s 304B and Dowry Prohibition Act 1961 (Ind).

[81] Reasons of Callinan J at [156].

[82] [2002] HCA 7 at [4]-[5], [31], [86]-[87], [162].

[83] Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 284.

[84] Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 312 [62].

[85] The Macquarie Dictionary, 3rd ed (1997) at 1601. See also The Macquarie Dictionary Federation Edition, (2001), vol 2 at 1423.

[86] Chen (2000) 201 CLR 293 at 312-313 [63].

[87] Anker, Law of Asylum in the United States, 3rd ed (1999) at 268-290.

[88] Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389 at 396-397.

[89] (1997) 190 CLR 225 at 255-256 (footnotes omitted).

[90] R v Immigration Appeal Tribunal; Ex parte Shah [1997] Imm AR 145 at 153 per Sedley J approved R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 at 646 per Lord Steyn, 649 per Lord Hoffmann; cf Chen (2000) 201 CLR 293 at 307 [46].

[91] Chen (2000) 201 CLR 293 at 307-308 [47].

[92] Hathaway, The Law of Refugee Status, (1991) at 105 (footnote omitted).

[93] Australia Treaty Series (1980) No 23.

[94] Australia Treaty Series (1983) No 9.

[95] [1993] 2 SCR 689 at 709.

[96] [1993] 2 SCR 689 at 716-717 per La Forest J.

[97] Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [60] (decision of R P G Haines QC and L Tremewan). I have derived much assistance from the analysis contained in this decision.

[98] Ward [1993] 2 SCR 689 at 724-726.

[99] [1999] 2 AC 629 at 653.

[100] [2001] 1 AC 489 at 515-516. The same formula has been adopted and applied in New Zealand: Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [67], [73].

[101] Lord Hoffmann in Shah [1999] 2 AC 629 at 653 attributed the source of the formula to the Gender Guidelines for the Determination of Asylum Cases in the UK (published by the Refugee Women's Legal Group in July 1998) at 5.

[102] cf Applicant A (1997) 190 CLR 225 at 240 per Dawson J referred to and applied in Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [111].

[103] Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [112].

[104] See Shah [1999] 2 AC 629 at 646, 648, 653, 654.

[105] cf reasons of Callinan J at [156].

[106] eg Mayers v Canada (Minister of Employment and Immigration) (1992) 97 DLR (4th) 729; Shah [1999] 2 AC 629; Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000.

[107] Between July 1993 and December 1996, 19 of the 76 refugee cases in which domestic violence was an issue resulted in a grant of refugee status, 12 on the basis of spousal violence against which the state was found to have provided no effective protection: Crock, Immigration and Refugee Law in Australia, (1998) at 149.

[108] (1997) 190 CLR 225; see <<Khawar>> (2000) 101 FCR 501 at 518 [60] per Hill J.

[109] (2000) 201 CLR 293.

[110] (2000) 201 CLR 293 at 307 [46], 315 [69], 317 [73], 320 [81].

[111] cf Bacon and Booth, "The Intersection of Refugee Law and Gender: Private Harm and Public Responsibility", (2000) 23(3) University of New South Wales Law Journal 135 at 153.

[112] Shah [1999] 2 AC 629; Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [104]-[106].

[113] Ward [1993] 2 SCR 689 at 739; Fatin v Immigration and Naturalization Service 12 F 3d 1233 at 1240 (3rd Cir 1993) citing In re Acosta 19 I&N Dec 211 at 233 (BIA 1985).

[114] UNHCR Programme Executive Committee, Conclusion on Refugee Women and International Protection 36th Sess, No 39(k) (1985); "Report of the UNHCR Symposium on Gender-Based Persecution", (1997) International Journal of Refugee Law Special Issue 13; United Nations, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, UN Doc E/CN.4/1998/54 (1998); UNHCR Position Paper: Gender-Related Persecution (January 2000).

[115] Ward [1993] 2 SCR 689 at 716-717; Applicant A (1997) 190 CLR 225 at 232-233, 257; Shah [1999] 2 AC 629 at 639, 651, 656, 658; Refugee Appeal No 71427/99 unreported, New Zealand Refugee Status Appeals Authority, 16 August 2000 at [96]; Hathaway, The Law of Refugee Status, (1991) at 135-141; Anker, Law of Asylum in the United States, 3rd ed (1999) at 377.

[116] Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

[117] (2000) 101 FCR 501 at 504 [10].

[118] (2000) 201 CLR 293.

[119] (2000) 101 FCR 501 at 516 [53].

[120] (1997) 190 CLR 225.

[121] (1997) 190 CLR 225 at 264.

[122] See also R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 at 662-663 per Lord Millett.

[123] [1999] 2 AC 629 at 646.

[124] Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 76 ALJR 163; 185 ALR 280 is the most recent case to be resolved at all levels, including this Court, on the issue of causation alone.