HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND CALLINAN JJ

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

DALJIT SINGH RESPONDENT

Minister for Immigration and Multicultural Affairs v Singh
[2002] HCA 7
7 March 2002
A11/2001

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

J Basten QC with S B Lloyd for the appellant (instructed by Australian Government Solicitor)

M W Gerkens for the respondent (instructed by Fernandez Canda Gerkens)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Singh

Immigration – Refugees – Exclusion from Convention protection for commission of "serious non-political crime" – Meaning of "serious non-political crime" – Whether murder can ever be a political crime – Proportionality of crime to political purpose – Relevance of revenge motive – Whether political purpose must be dominant, sole or significant purpose.

Immigration – Refugees – Exclusion from Convention protection – Commission of offence prior to "admission … as a refugee" – Meaning of reference to admission as refugee – Whether refugee status must be determined before consideration of exclusion.

Judicial review – Jurisdiction – Review for errors of law – Interpretation of "serious non-political crime" in Refugees Convention – Decision about whether murder was a political crime – Whether decision reviewable for error of law.

Words and phrases – "serious non-political crime" – "common crimes" – "pure political crimes" – "admission … as a refugee".

Migration Act 1958 (Cth), s 36(2).
Convention Relating to the Status of Refugees 1951, as amended by the Protocol Relating to the Status of Refugees 1967, Art 1F(b).

1 GLEESON CJ. The respondent, a Sikh of Indian nationality, arrived in Australia in 1996, and applied for a protection visa, claiming to be a person to whom Australia had protection obligations under the Refugees Convention ("the Convention")[1]. In support of his application, he said that he had fled India because the Indian police were arresting members of the Khalistan Liberation Force (KLF), to which he belonged. He claimed to have held a senior position in the KLF, as a Commander of Information, and that he feared he would be subjected to torture and imprisonment if he returned to India. The delegate who considered that application questioned the respondent about the activities of the KLF, and the participation of the respondent in those activities. The delegate, without deciding whether the respondent otherwise satisfied the requirements for refugee status, concluded that the respondent was excluded under Art 1F of the Convention, which is part of Australian law by virtue of s 36(2) of the *Migration Act* 1958 (Cth). The respondent appealed to the Administrative Appeals Tribunal. The Tribunal affirmed the delegate's decision, although relying upon Art 1F(b), whereas the delegate had relied upon Art 1F(a). The respondent appealed to the Federal Court. The issue before the Federal Court was whether the Tribunal's decision involved an error of law in the interpretation and application of Art 1F(b). The respondent failed before Mansfield J, but succeeded before the Full Court of the Federal Court (Ryan, Branson and Lehane JJ)[2].

2 Article 1F of the Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
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> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
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> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

3 The Tribunal found that there were serious reasons for considering that the respondent had committed a serious non-political crime in India. The

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1 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.

2 *Singh v Minister for Immigration and Multicultural Affairs* (2000) 102 FCR 51.

jurisdiction of the Federal Court, invoked by the appeal to that Court, was to review the Tribunal's decision for error of law. What the Tribunal regarded as serious reasons for considering that the respondent had committed a serious non-political crime were based substantially upon what the respondent had told the delegate about his activities in the KLF. A finding that the respondent was, on his own account, implicated in serious crimes was open, having regard to what he told the delegate. (Before the Tribunal, he attempted to resile from his most significant admissions, but the Tribunal disbelieved that part of his evidence. That question of fact was not in issue in the Federal Court.) The central issue concerned the Tribunal's characterisation of the crimes as "non-political".

4 A point was raised for the first time in this Court. It concerns the concluding words of Art 1F(b). The respondent left India by stowing away on a ship. When he arrived in Australia, he disembarked secretly and joined some fellow Sikhs. He then applied for a protection visa. The Australian authorities have never made any decision, or taken any step, that could amount to the admission of the respondent to Australia as a refugee. At present, his refugee status remains unresolved. If the decision of the Full Court of the Federal Court is upheld, the matter will go back to the Tribunal for further consideration, according to law, of the application of Art 1F and, depending upon the outcome of that consideration, of any other issues that arise concerning the respondent's status. Neither the delegate, nor the Tribunal, has made a decision as to whether the respondent has a well-founded fear of persecution, upon a Convention ground. The respondent claims to fear torture; but that claim might not be believed. He may simply have a well-founded fear of being prosecuted. Even if his criminal conduct were found to be political, that would not necessarily mean that for the Indian authorities to proceed against him, in accordance with due process of Indian law, would amount to persecution.

5 To give Art 1F(b) a strictly literal interpretation, so that it could only be considered and applied after the Australian authorities had made a decision that the respondent was a person to whom protection was owed under the Convention, would involve an internal inconsistency in the Convention as it applies by force of Australian law. Article 1F is expressed as an exception. If it is satisfied, the provisions of the Convention are said not to apply to the person in question. If the provisions of the Convention do not apply to the person, the person cannot be entitled to protection under the Convention. Whatever the operation of the expression "admission … as a refugee" in other systems of municipal law, in Australia there would be nothing to which the language could apply. It would be necessary to read the words "prior to his admission to that country as a refugee" as meaning no more than "prior to his entry into that country". The preferable solution is to read the reference to "admission … as a refugee" as a reference to putative admission as a refugee. Although the point was not adverted to before the Tribunal or the Full Court, that, in practical effect, was how the case proceeded. It was regarded, on both sides of the record, as convenient, and appropriate, to consider the application of Art 1F before

addressing any other issues that might have arisen concerning the respondent's refugee status. The respondent has been legally represented at all stages, and it has not been suggested that this involves any unfairness to him. There may be cases in which it would be inappropriate to decide an issue arising under Art 1F as a preliminary question, but this is not one. There is no difficulty in assuming, without deciding, that the respondent has a well-founded fear of persecution on Convention grounds if he were returned to India, and deciding whether, on his own account to the delegate of his role in the KLF, there are serious reasons for considering that he has committed a serious non-political crime outside Australia before he entered Australia and applied for a protection visa.

6 The error of law attributed to the Tribunal arose out of the reasoning by which it characterised the crimes of which it suspected the respondent as non-political crimes. I say "suspected" because, as the case was argued and decided in the Federal Court, there was no occasion to examine problems that, in other cases, might arise concerning the requirement that there be serious reasons for considering that a person has committed a crime, or that a crime be serious. Once the Tribunal rejected, as it was entitled to do, the respondent's attempts to resile from his earlier accounts of his activities as a senior officer of the KLF, then his own evidence provided serious reasons for considering that he was an accessory to the killing of a police officer, and that he was knowingly concerned in the movement of weapons and explosives which were used to "hit" people who were "targets" of the KLF. The context in which these admissions were made to the delegate was one in which the respondent was concerned to make the point that he was an important person in the KLF. The delegate had put to the respondent that, on the information available to him, low-level members of an organisation such as the KLF had no reason to fear persecution in India. It was by way of response to that suggestion that the respondent explained his involvement in killing a police officer, and in assisting with movements of weapons and explosives.

7 The respondent, in his evidence, depicted the Sikh population of India as having been, in 1984, victims of violence and persecution "by Hindu mobs encouraged by the Indian Government". He said that, after the destruction of his family's business and property, he joined the KLF, which had as its objectives the liberation of Khalistan (the Punjab), the establishment of an independent Sikh state, and resistance to the oppression of Sikhs. This, he said, was a political group, although the account he gave of its organisation suggested that it operated upon para-military lines.

8 As an example of his work in the KLF, the respondent told the delegate of one of the "targets". A police officer in a certain town had arrested a KLF member and tortured him so badly that he was unable to walk. The respondent, as a Commander of Information, was instructed to gather intelligence about the police officer, his family, and his movements. He collected information which he passed on to his superior. The KLF then killed the police officer. The

respondent said he was not involved in the actual killing, but the inference that his intelligence-gathering was used for the purpose of the killing was clearly open. Indeed, that was part of the point he was seeking to make in support of his claim that he feared torture if he returned to India.

9 The Tribunal made the following findings of fact.

> "1. The applicant knowingly and actively participated in the unlawful killing of the police officer referred to earlier in these reasons. The applicant did so by the provision of information and intelligence pertaining to the whereabouts and movements of the police officer knowingly for the purpose of the killing of him by other members of the KLF.
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> 2. The applicant has on other occasions knowingly participated in the commission of similar acts by the provision of information and intelligence concerning the movement and whereabouts of other persons who were 'targets' for KLF purposes.
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> 3. The applicant also knowingly and actively participated in acts of violence perpetrated by members of the KLF in so far as he assisted in the provision of weapons and explosives to those members full well knowing the purpose for which they were to be used and after these acts of violence were carried out, he arranged from time to time transportation for these members and places for them to hide."

10 The grounds of appeal to the Federal Court did not challenge those findings. The appeal was limited to suggested error of law.

11 The Tribunal based its decision principally on par 1 of the above findings. In its reasoning as to the consequences of that finding, the Tribunal recorded a submission made by counsel for the Minister:

> "Ms Maharaj then submitted that the admissions by the applicant at the interview were clearly sufficient to satisfy the Tribunal that there were serious reasons for considering that he had been an accessory both before and after the fact of murder, namely, the murder of the police officer who was killed by the KLF on the basis of intelligence information collected and supplied by the applicant. Ms Maharaj submitted that murder was clearly a serious crime. In addition, she submitted that the KLF was a terrorist organisation involved in revenge killings of people alleged to have committed acts of violence against the Sikh community of which the murder in question was an example and that, for this reason, the crime committed by the applicant could not be said to be of a political nature. In other words, as the crime was not committed in furtherance of the political objectives of the KLF, it could not be said to be a political crime. It

followed … that as there were serious reasons for considering that the applicant had committed a serious non-political crime he was excluded from protection under the Refugees Convention by virtue of Article 1F(b)."

12 That submission was accepted. The Tribunal's conclusions were expressed as follows:

"40. The question then arises as to whether this serious crime is non-political. Having regard to the accepted evidence, the Tribunal is satisfied on the balance of probabilities that the planned unlawful killing of the police officer took place because he was alleged to have tortured a member of the KLF. Despite the assertions by the applicant that his involvement with the KLF and the activities of the KLF in general were directed solely at achieving the creation of the independent Sikh state of Khalistan and protecting Sikh minorities from oppression by the Indian authorities, in the Tribunal's opinion, the crime in question can only be characterised as an act of revenge or retribution against the particular police officer for the alleged torture of a KLF member. Accordingly, there can be said to be no nexus or proportionality or close or direct causal link between this crime and the alleged political objectives of the KLF. The Tribunal is of the view that this serious crime is very much akin to the subject crime in *Hapugoda* which the Tribunal found to be lacking in any meaningful political character. For these reasons, the Tribunal finds that the unlawful killing of the police officer falls to be considered as a serious non-political crime for the purposes of Article 1F(b) of the Refugees Convention.

41. The obvious reason why the police officer was unlawfully killed, namely to avenge the torture of a KLF member, alleviates the necessity to enquire into the political nature or otherwise of the KLF involving as it would an enquiry as to whether that organisation is in fact a terrorist organisation and whether the applicant is in fact a terrorist. In short, the political nature or otherwise of the KLF (of which the applicant was a member) has no relevant bearing on whether the serious crime was political or not simply because the unlawful killing of the police officer out of retribution cannot, on the facts before the Tribunal, constitute a serious political crime for Article 1F(b) purposes.

42. The Tribunal now turns to the applicant's degree of participation in the unlawful killing of the police officer. The Tribunal is satisfied that the applicant actively participated in the killing of the officer in the sense that he knowingly provided information about the officer's movements for the purpose of and which enabled the

killing of the officer. The Tribunal is satisfied that the applicant's actions at the very least make him an accessory to the murder of the officer and that constitutes for Article 1F(b) purposes a serious non-political crime.

43. The Tribunal's findings with respect to the unlawful killing of the police officer are such that there are serious reasons for considering that the applicant has committed a serious crime outside the country in which he seeks refuge."

13 The matter of *Hapugoda*[3] was a case in which a member of the People's Liberation Front in Sri Lanka had made an armed attack on a police station, resulting in the death of six people. The motive for the attack was retribution for the death of a personal friend of the attacker. There was held to be no connection between the crime and the political objectives of the Front.

14 In due course, it will also be necessary to consider what the Tribunal had to say about the consequences of pars 2 and 3 of the findings quoted above. The main focus of argument in the appeal, however, was the reasoning based upon the finding in relation to the killing of the police officer. Mansfield J, and the Full Court of the Federal Court, found error of law in the Tribunal's reasoning, particularly in par 41, in that it proceeded upon an artificial and unwarranted antithesis between political action and revenge. The appellant in this Court, the Minister, does not seek to support such an antithesis as a matter of legal necessity; rather, he argues that the Tribunal's reasoning merely reflected a view taken of the facts of the particular case; a view that was open and that involved no error of law.

15 The history of Art 1F(b), and of the expression "serious non-political crime", was considered by the House of Lords in *T v Home Secretary*[4]. The task of characterising a crime such as unlawful homicide as either political, or non-political, is difficult to relate to Australian concepts of criminal responsibility[5]. But it has confronted courts in common law jurisdictions for more than a century; originally in the context of the *Extradition Act* 1870 (UK), and more recently in the context of the Convention. As one of the exceptions to an international obligation to afford protection on certain grounds, it recognises a state's interest in declining to receive and shelter those who have demonstrated a propensity to

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3 *Re Hapugoda and Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 659.

4 [1996] AC 742.

5 See *Gil v Canada (Minister of Employment and Immigration)* (1994) 119 DLR (4th) 497 at 498-499 per Hugessen JA.

commit serious crime. The qualification to the exception is that the crime must be non-political. Part of the problem is that the concept of a political crime is not limited to conduct such as treason, sedition, or espionage, which in some cases might readily be recognised as related entirely to the political circumstances of the locality where it occurred, and as unlikely to carry any possible threat to public safety or order in the country of refuge.

16 That unlawful killing can, at least in some circumstances, be political, has long been accepted in extradition cases. It may be doubted that the image of the clinical assassin, with a narrow focus upon an oppressive dictator, taking care to avoid what would now be called collateral damage, ever bore much relation to reality. While homicide is foreign to our experience of political conflict, that is because we have been favoured with a relatively peaceful history. At other times, and in other places, the taking of life has been, and is, an incident of political action. Even so, when courts have endeavoured to state the principles according to which a decision is to be made as to whether a crime which, by hypothesis, has been committed in another country, in circumstances utterly different from those that prevail in the country of refuge, is political, they have taken pains to confine the concept so as to avoid the consequence that all offences committed with a political motivation fall within it. An example is to be found in the definition proposed by Lord Lloyd of Berwick, and agreed in by Lord Keith of Kinkel and Lord Browne-Wilkinson, in *T v Home Secretary*[6]:

> "A crime is a political crime for the purposes of article 1F(b) of the Geneva Convention if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public."

17 Terrorist activities are not political crimes, for the reason given in that passage. This, no doubt, is what the Tribunal had in mind in par 41 of its reasons when it adverted to the possible need to examine whether the KLF was a terrorist organisation. As the Tribunal approached the case, that was an issue it did not need to address.

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6 [1996] AC 742 at 786-787.

18 While the authorities accept the possibility that murder might, in some circumstances, be a political crime, they recognise one further qualification of direct relevance to the Tribunal's reasoning. Even if a killing occurs in the course of a political struggle, it will not be regarded as an incident of the struggle if the sole or dominant motive is the satisfaction of a personal grudge against the victim[7]. But it is only necessary to state the qualification in order to see the danger of over-simplification. People engaged in any kind of prolonged conflict, including military battle, and ordinary democratic politics, will have scores to settle with their adversaries. It is difficult to imagine serious conflict of any kind without the possibility that parties to the conflict will seek retribution for past wrongs, real or imagined. Revenge is not the antithesis of political struggle; it is one of its most common features.

19 The respondent claimed that the Sikhs in India were victims of oppression and brutality that was sometimes condoned, sometimes instigated, and sometimes engaged in, by government agents, including the police. That claim may not be true. As the submissions of counsel for the Minister before the Tribunal plainly suggested, it may be an outrageous slur upon the Indian authorities. But the Tribunal made no finding about that. The respondent claimed that one of the political objectives of the KLF was to prevent oppression of the Sikhs, its ultimate objective, the establishment of an independent Sikh state, being only the final and most complete form of relief in contemplation. Counsel for the Minister, on the other hand, submitted that the KLF was a terrorist organisation involved in revenge killings against people who were violent towards Sikhs. The Tribunal found it unnecessary "to enquire into the political nature … of the KLF". The Tribunal said that the political objectives of the KLF had no bearing because this particular killing of a government agent was done "out of retribution". I agree with the conclusion of all four judges of the Federal Court. The reasoning of the Tribunal was legally erroneous, and cannot be explained upon the basis suggested by the appellant. It was not merely a finding of fact related to the particular circumstances of the case. There was no evidence to warrant a conclusion that the police officer was killed for reasons of personal animus or private retribution. On the respondent's account, which the Tribunal evidently accepted, the police officer became a "target" because he had tortured a KLF member. That can be described as a form of vengeance or retribution, but, if it were accepted that one of the political objectives of the KLF was to resist oppression of Sikhs, it is not vengeance or retribution of a kind that is necessarily inconsistent with political action in the circumstances which the respondent claimed existed in India. For the Tribunal to say, even by reference to the facts of the case, that such retribution cannot be political, was wrong.

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7 *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556 at 583.

20 The very fact that the Tribunal found it unnecessary to form a view as to the political nature of the KLF, or as to whether it was a terrorist organisation, demonstrates that it was proceeding upon a view that there is a necessary antithesis between violent retribution and political action. That was an error of law.

21 I do not suggest that, on the respondent's account of events and circumstances in India, and of the aims of the KLF, and of the circumstances of the killing of the police officer, it must follow that the crime was political. Once it was accepted that the concept of a political crime was not limited to offences such as treason, sedition, and espionage, and could extend to what would otherwise be "common" crimes, including unlawful homicide, then it became necessary to find means of avoiding the consequence that any crime could be political if one of the motives for which it was committed was directly or indirectly political. There is no bright line between crimes that are political and those that are non-political. But, as the Tribunal rightly recognised in part of the reasoning quoted above, there must be a sufficiently close connection between the criminal act and some objective identifiable as political to warrant its characterisation as a political act. And the achievement of that objective must be the substantial purpose of the act. The UNHCR Handbook[8] states:

> "There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature."

22 To identify homicide as a political act ordinarily requires a close and direct connection between the act and the achievement of an objective such as a change of government, or change of government policy, which might include relief from government sponsored or condoned oppression of a social group. In the present case, upon an evaluation of the circumstances in India at the time of the killing, the relevant policies of the government, the observance of the rule of law by the agencies of government, including the police, and the objectives and methods of the KLF, the Tribunal might well reach the same conclusion as that which it reached in the first place. Even so, the respondent is entitled to have his case considered according to law. The path by which the Tribunal came to its original decision took an impermissible short-cut.

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8 Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for determining Refugee Status*, par 152.

23 The Tribunal also, briefly, considered the significance of its findings 2 and 3, and concluded that they constituted an additional ground for deciding against the respondent under Art 1F(b). It was on this aspect of the case that the Full Court disagreed with Mansfield J, who would have upheld the Tribunal's decision on this ground.

24 The reasoning of the Tribunal was as follows:

> "45. The Tribunal would indicate that there is a paucity of information before it to determine the exact nature and extent of these acts perpetrated by members of the KLF. It is not unreasonable to infer from the record of interview, however, that where the 'target' was a person (as was the case with the police officer) then there were other occasions when purely for retributive purposes a person was killed or injured. It is also not unreasonable to infer that the role played by the applicant was on one or more of those occasions such as to constitute serious reasons for considering that he had committed a serious non-political crime within the meaning of Article 1F(b). It is also not unreasonable to infer in the Tribunal's opinion that the provision by the applicant of weapons and explosives to members of the KLF 'to hit any target' … coupled with the corroborative material contained in the record of interview, resulted on one or more occasions in a serious non-political crime being committed by the applicant. The nature of the actions of the applicant and the KLF in the above regard strongly suggest that these crimes were non-political. There is, in any event, clearly insufficient information before the Tribunal to indicate the necessary nexus or proportionality or close or direct causal link between crimes of this nature and the alleged political objections of the KLF. The Tribunal accordingly finds that there are serious reasons for considering that the applicant has committed serious non-political crimes other than that which involved the unlawful killing of a police officer."

25 Once again, the ultimate conclusion of the Tribunal may have been correct, but, as the Full Court pointed out, the process of reasoning is flawed. First, it is affected by the errors that have already been found to exist in relation to the reasoning on the killing of the police officer; it commences by carrying that reasoning over into this context. Furthermore, there is no apparent consideration of the nature of the "targets" of the weapons and explosives. Whether they were civilians or government agents could be material. Nor was there any examination of the objectives claimed to be political, or their relationship to the criminal acts. The disinclination of the Tribunal to examine the political objectives of the KLF, and to consider the submission on behalf of the Minister that it was a terrorist organisation, might have favoured one side or

the other, but these were matters to be taken into account in order to evaluate the competing contentions.

26 The appeal should be dismissed with costs.

27 GAUDRON J. The Minister for Immigration and Multicultural Affairs ("the Minister") has appealed to this Court from a decision of the Full Court of the Federal Court of Australia. That Court allowed an appeal from Mansfield J, set aside a decision of the Administrative Appeals Tribunal ("the Tribunal") and remitted the matter to the Tribunal for further consideration. The Tribunal had, by its decision, rejected an application by the respondent, Mr Singh, for review of a decision of a delegate of the Minister ("the Delegate") refusing to grant him a protection visa.

28 The Delegate held that Mr Singh was not entitled to a protection visa because he was excluded from the benefit of 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 ("the Convention") by reason of Art 1F of that Convention.

29 Article 1F of the Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The Delegate's decision was based on Art 1F(a) but confirmed by the Tribunal on the basis of Art 1F(b). Neither the Delegate nor the Tribunal found it necessary to consider whether Mr Singh fell within the definition of "refugee" in Art 1A of the Convention.

30 Before turning to the facts, it is convenient to refer to an argument made on behalf of Mr Singh for the first time in this Court. The argument concerns the phrase "outside the country of refuge prior to his admission to that country as a refugee" in Art 1F(b). It was argued on behalf of Mr Singh, by reference to that phrase, "that Article 1F(b) could have [no application to him] in the absence of a finding that he was a 'refugee' in terms of Article 1A."

31 The composite phrase "outside the country of refuge prior to his admission to that country as a refugee" describes both where and when a serious non-political crime must be committed before Art 1F(b) operates to exclude a person from the benefit of the Convention. The crime in question must have been committed outside "the country of refuge", a phrase which is apt to include a

country in which the person concerned seeks refuge. And the crime must have been committed "prior to ... admission to that country as a refugee". The fact that the person has not, at the relevant time been admitted as a refugee is not to the point if the crime in question was committed before he or she could be so admitted. In such circumstances, the crime was necessarily committed "prior to ... admission ... as a refugee".

32 The facts which led the Delegate and, later, the Tribunal to consider Art 1F may be shortly stated. Mr Singh is an Indian citizen of Sikh ethnicity. In 1986, he joined the Khalistan Liberation Force ("the KLF"), an organisation whose objectives include the creation of an independent Sikh state. In a record of interview conducted by the Tribunal, Mr Singh stated that its objectives were also "to protect their own people, to stop the genocide by the Indian government ... to distribute the literature, [and] educate the people [as to] how we can protect our religion [and] how we can protect our innocent people".

33 Mr Singh rose to become a KLF Commander of Information and, as such, his duties were, according to a statutory declaration provided with his application for a protection visa, to "collect ... information ... to arrange the necessary supplies to hit any target ... [to arrange] the transportation for operatives after the target [was] hit and arrange places to hide." As is implicit in those duties, the KLF's methods include or, perhaps, included the use of violence.

34 One of the "targets" that was the object of KLF violence was a police officer at Ludhiana who, according to an earlier record of interview conducted by the Delegate and considered by the Tribunal, had tortured a KLF member and was later killed by the KLF. Mr Singh stated that he was required to collect information with respect to the police officer as to "[h]ow many kids he [has], and what school they go [to], what time he go[es] to work, and which road he takes when he is leaving from [his] house, and what route he takes when he is coming back." Mr Singh denied that he was ever "involved in the action" but said that he was involved in collecting information for such operations "many, many times." He also said that he was required to organise supplies, including weapons, and their transportation.

35 In his evidence before the Tribunal, Mr Singh sought to portray the activities of the KLF as non-violent and denied that he had been involved in the transportation of weapons. He also said that he did not know whether the police officer at Ludhiana had been killed by the KLF or by others. The Tribunal, as it was entitled to do, rejected that evidence and proceeded on the basis of the matters set out in Mr Singh's statutory declaration and record of interview with the Delegate.

36 By reference to that earlier evidence, the Tribunal made the following factual findings:

> "1. [Mr Singh] knowingly and actively participated in the unlawful killing of the police officer [at Ludhiana]. [He] did so by the provision of information and intelligence pertaining to the whereabouts and movements of the police officer knowingly for the purpose of the killing of him by other members of the KLF.
>
> 2. [He] has on other occasions knowingly participated in the commission of similar acts by the provision of information and intelligence concerning the movement and whereabouts of other persons who were 'targets' for KLF purposes.
>
> 3. [He] also knowingly and actively participated in acts of violence perpetrated by members of the KLF in so far as he assisted in the provision of weapons and explosives to those members full well knowing the purpose for which they were to be used and after these acts of violence were carried out, he arranged from time to time transportation for these members and places for them to hide."

37 After recording the findings of fact set out above, the Tribunal passed to "a consideration of whether the actions of [Mr Singh] ... amount[ed] to a crime for Article 1F(b) purposes." In this regard, the Tribunal stated that the killing of the police officer in Ludhiana "can only be characterised as an act of revenge or retribution against [him] for the alleged torture of a KLF member [and, a]ccordingly, there can be said to be no nexus or proportionality or close or direct causal link between [the] crime and the alleged political objectives of the KLF." For that reason, the Tribunal held that the killing of the police officer was a serious non-political crime for the purposes of Art 1F(b) of the Convention. The Tribunal added that because the crime was to avenge the torture of a KLF member it was unnecessary to consider whether the KLF is "a terrorist organisation and whether [Mr Singh] is in fact a terrorist."

38 A preliminary question arises as to whether in characterising the killing of the police officer at Ludhiana solely as an act of revenge, the Tribunal was making a factual finding that it lacked any political objective. A factual finding to that effect would not be open to review in the Federal Court[9] and would necessarily lead to the conclusion that the killing was a serious non-political crime for the purposes of Art 1F(b) of the Convention.

39 The Tribunal's reasons are not entirely clear, but its statement that, given the motive of revenge, there could be "no nexus or proportionality or close or direct causal link between [the] crime and the alleged political objectives of the

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9 By s 44(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) a party to a proceeding before the Tribunal may only "appeal" to the Federal Court of Australia "on a question of law".

KLF" strongly suggests that it was of the view that, as a matter of law, a crime which was motivated by revenge could never be characterised as a political crime. In my view, its reasons should be so understood.

40 The question whether a crime that is motivated by revenge can constitute a political crime requires consideration of the expression "a political crime". Historically, the notion of "a political crime" has not been confined to "pure" political crimes such as treason or sedition, whether for the purposes of extradition or refugee law[10]. Of recent times, however, there has been a tendency, for the purposes of refugee law, to impose limits on the notion by reference to "atrocious" crimes[11], "terrorist" activities[12] or "unacceptable" means[13], as though crimes which answered those descriptions were, on that

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10 An early and authoritative statement to this effect is found in *In re Castioni* [1891] 1 QB 149 in which the murder of a member of the state council of a Swiss canton, in the course of a political insurrection, was considered to be a political crime. See also the discussion in Lord Mustill's speech in *T v Home Secretary* [1996] AC 742 at 761-762; Lord Simon of Glaisdale's observations in *R v Governor of Pentonville Prison; Ex parte Cheng* [1973] AC 931 at 953-954 and García-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law", (1962) 48 *Virginia Law Review* 1226 at 1239-1257.

11 See, for example, *McMullen v Immigration and Naturalization Service* 788 F 2d 591 at 596-598 (9th Cir 1986) per Wallace J; *Immigration and Naturalization Service v Aguirre-Aguirre* 526 US 415 at 429-430 (1999) per Kennedy J delivering the opinion of the Court; United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, rev ed (1992) at 36 [152]; Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 105-106. See also in the context of extradition law, *Carron v McMahon* [1990] 1 IR 239 at 267 per Finlay CJ.

12 See, for example, *T v Home Secretary* [1996] AC 742 at 772 per Lord Mustill. See also in the context of extradition law, *Eain v Wilkes* 641 F 2d 504 at 520-521 (1981) per Wood J; *Ellis v O'Dea* [1991] ILRM 346 at 362 per Hamilton P; affirmed [1991] 1 IR 251; La Forest, *Extradition to and from Canada*, 3rd ed (1991) at 92-95, referring to the decisions of *Re State of Wisconsin and Armstrong* (1973) 32 DLR (3d) 265 and *Re Commonwealth of Puerto Rico and Hernandez (No 2)* (1973) 42 DLR (3d) 541.

13 See, for example, *Gil v Canada (Minister of Employment and Immigration)* (1994) 119 DLR (4th) 497 at 518 per Hugessen JA. Equivalent expressions have included: "barbarous" (Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 106); "brutal, cowardly and callous" (*Shannon v Fanning* [1984] IR 569 at 581 per O'Higgins CJ); and, "disproportionate" (Lord Mustill discusses the

(Footnote continues on next page)

account, incapable of constituting political crimes. And the reasons of the Tribunal might suggest that the same is true of a crime which is motivated either wholly or in part by revenge.

41 The tendency to place limits on the notion of "a political crime" by reference to descriptions such as "atrocities", "terrorist" activities, or, even "crimes of revenge" is readily understandable. However, such descriptions are imprecise and may, on that account, involve over-simplification. Moreover, and more to the point, they find no expression in the text of the Convention itself.

42 One reason why there is a tendency to exclude "terrorist" activities and the like from the notion of "a political crime" is that the latter notion is incapable of definition by reference to the criminal acts involved in such a crime. Such acts necessarily vary from place to place and time to time with changing political circumstances and changing technologies. Thus, it is possible to define "a political crime" only by reference to its object or purpose. A political crime is simply a crime which has a political object or purpose.

43 In *R v Governor of Pentonville Prison; Ex parte Cheng*, an extradition case, Lord Diplock said that an offence was not political:

> "unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there."[14]

44 This statement correctly identifies, in my view, political purpose as the defining feature of a political crime. However, there are two aspects of that statement that require consideration. The first is the requirement that political purpose be the only purpose of the crime in question. In the absence of anything in the text of the Convention to suggest otherwise, there is no reason why the political purpose should be the sole or, even, the dominant purpose of the crime, so long as it is a significant purpose. Further, and as Lord Slynn of Hadley pointed out in *T v Home Secretary*, it is not at all clear that "in order to be a political offence the act has to be directed against the government of the day"[15].

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different ways in which this notion has been applied in relation to the political offence exception in *T v Home Secretary* [1996] AC 742 at 768-770).

14 [1973] AC 931 at 945.

15 [1996] AC 742 at 775.

45 In some, perhaps many countries, power and political influence are exercised by bodies and organisations that are not organs of government. They may exercise power and influence with the tacit consent of the government concerned. On the other hand, they may do so because the government is unable to assert its own authority. And with increasing globalisation, the organisations or bodies in question are not necessarily confined to those that operate solely within national boundaries. Accordingly, I would consider a crime to be political if a significant purpose of the act or acts involved is to alter the practices or policies of those who exercise power or political influence in the country in which the crime is committed.

46 Once it is accepted, as in my view it must be, that political purpose is the defining feature of a political crime, references to "proportionality", "nexus" or "causal link", as made by the Tribunal, assume legal significance[16]. A crime is unlikely to have a political purpose if it has no relevant connection with the political aims of those involved in its commission. So, too, as has been explained in other legal contexts, "proportionality" is a useful indicator of purpose[17]. The

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16 See also *R v Governor of Pentonville Prison; Ex parte Cheng* [1973] AC 931 at 945 per Lord Diplock; *T v Home Secretary* [1996] AC 742 at 787 per Lord Lloyd of Berwick; *Eain v Wilkes* 641 F 2d 504 at 521 (1981) per Wood J; *McMullen v Immigration and Naturalization Service* 788 F 2d 591 at 595 (9th Cir 1986) per Wallace J; *Gil v Canada (Minister of Employment and Immigration)* (1994) 119 DLR (4th) 497 at 518 per Hugessen JA; United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, rev ed (1992) at 36 [152]; Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 105.

17 See with respect to constitutional powers that may be exercised for a particular purpose, *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 260 per Deane J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312 per Deane J; *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ (with whom Toohey J agreed on this point at 117); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29 per Mason CJ, 89 per Dawson J, 93-94 per Gaudron J, 101 per McHugh J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 296-297 per Mason CJ, 317-323 per Brennan J, 350-357 per Dawson J, 371-378 per Toohey J, 388 per Gaudron J; *Leask v The Commonwealth* (1996) 187 CLR 579 at 593 per Brennan CJ, 605-606 per Dawson J, 614-615 per Toohey J, 616 per Gaudron J, 616-617 per McHugh J, 624 per Gummow J, 634-635 per Kirby J. See with respect to discrimination laws, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 511-512 per Brennan J, 572-574 per Gaudron J; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472-474 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ, 478-479 per Gaudron and McHugh JJ; *Waters v Public Transport*

(Footnote continues on next page)

true purpose of actions which are unnecessary or disproportionate to the end which is said to justify those actions is unlikely to be the achieving of that end but is likely to be the satisfaction of some other and different purpose.

47 Actions which are either unnecessary or disproportionate to the political objectives which are said to justify them are, perhaps, usefully described as "terrorist" activities. But for the purposes of Art 1F(b), that description is not, of itself, determinative. The issue is whether the actions in question were undertaken for a political purpose, in the sense that that purpose was a significant purpose.

48 It follows from what has been said that the Tribunal erred in the present matter by not determining whether, in relation to the killing of the police officer in Ludhiana, Mr Singh had a significant political purpose. Such a purpose was not negatived by the element of revenge. As the Chief Justice has pointed out in his reasons for judgment in this matter, revenge is likely to be an aspect of many political crimes. Moreover, and as the Chief Justice has also pointed out, it was not negatived by looking simply to the main political objective of the KLF, namely, the establishment of an independent state. It was necessary for the Tribunal to consider whether the purpose of the crime was the achieving of one of the other KLF objectives, including, for example, the protection of Sikh people from violence or torture.

49 The same error which has been identified in relation to the killing of the police officer at Ludhiana is to also be found with respect to other crimes which the Tribunal found Mr Singh had committed.

50 The appeal should be dismissed with costs.

Corporation (1991) 173 CLR 349 at 363-364 per Mason CJ and Gaudron J. Note that in some of these cases the expression "appropriate and adapted" is used.

51 McHUGH J. Associated with this case is the important question as to how this Court should define "a serious non-political crime" for the purpose of Art 1F(b) of the Refugees Convention[18]. But given the arguments of the parties and the view that I take of the case, I do not reach that question.

52 The first question in the appeal is whether the reasons of the Administrative Appeals Tribunal show that it held that a murder motivated by revenge could not be a political crime. If it did, it erred in law. If it did not, it made no error, and this appeal must be allowed. In my opinion, the reasons of the Tribunal show no more than that it found as a matter of fact – not of law – that the particular killing had to be characterised as one of revenge and that it had no political character.

53 More than a century ago, the Queen's Bench Division, in *In re Castioni*[19], held that murder could be an offence "of a political character" for the purpose of the *Extradition Act* 1870 (UK). Denman J said[20] that murder could be an offence of a political character if it was done in the furtherance of "a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands". That statement may not be exhaustive as to what constitutes a political crime for the purpose of the Refugees Convention. But it is wide enough for the purposes of this appeal.

54 The Tribunal held that Mr Singh was a party to the murder of a police officer who had tortured a member of the Khalistan Liberation Force, an organisation in which Mr Singh held the position of Commander of Information. The Tribunal went on to hold that there were serious reasons for considering that Mr Singh had committed a serious non-political crime within the meaning of Art 1F(b) of the Convention. The murder of the policeman was a cold-blooded one, and Mr Singh played an important part in its execution. Nevertheless, the Tribunal would not have erred in law if it had found that the murder was done in furtherance of the armed political struggle between the Khalistan Liberation Force and the government of India and was a political crime. When a group, intent on seizing political power or forcing political concessions from the State, believes that it can attain that power or those concessions only through "the barrel of a gun", its members inevitably commit themselves to killing their opponents to attain the group's objectives. To murder State functionaries who

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18 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.

19 [1891] 1 QB 149.

20 *In re Castioni* [1891] 1 QB 149 at 156.

torture or mistreat group members is an almost inevitable consequence of a decision to engage in such an armed struggle. Murdering State functionaries may intensify the extent to which group members are mistreated and tortured. But such revenge killings also strike terror in the minds of those functionaries, weaken their resolve to continue the political struggle and increase the morale of members of the group. Murdering a policeman because he has tortured or killed a member of the group, *qua* membership, cannot be regarded as so remote from furthering the political objectives of the group that the murder is necessarily non-political. But it will be non-political if the only motivation for the murder is personal revenge, divorced from the political struggle[21].

55 Contrary to the view of the judges of the Federal Court, I do not read the Tribunal's reasons as holding as a matter of law that the murder of the policeman was a serious non-political crime because the murderers were actuated by revenge. When the reasons are fairly read, I think that the Tribunal simply held that the Khalistan Liberation Force members who committed this murder did so only because they privately wished to avenge the torture and subsequent death of their fellow member. Upon the evidence, it was open to the Tribunal to hold that the killing was personal, not business, to use the terminology of Michael Corleone. The Tribunal's holding may be erroneous as a matter of fact. But with all respect to those who hold the contrary view, I think it requires an over-zealous reading of the Tribunal's reasons to conclude that the Tribunal erred in law in reaching its decision.

56 This Court has said "that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed"[22]. Unless that instruction is faithfully applied, the promise of judicial restraint in administrative review proceedings will be no more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will"[23].

57 In giving its reasons, the Tribunal said:

"**FINDINGS OF FACT**

…

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21 *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556 at 583.

22 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

23 *Edwards v California* 314 US 160 at 186 (1941) per Jackson J, concurring.

> 40. The question then arises as to whether this serious crime is non-political. Having regard to the accepted evidence, the Tribunal is satisfied on the balance of probabilities that the planned unlawful killing of the police officer took place because he was alleged to have tortured a member of the KLF. Despite the assertions by the applicant that his involvement with the KLF and the activities of the KLF in general were directed solely at achieving the creation of the independent Sikh state of Khalistan and protecting Sikh minorities from oppression by the Indian authorities, in the Tribunal's opinion, the crime in question can only be characterised as an act of revenge or retribution against the particular police officer for the alleged torture of a KLF member. Accordingly, there can be said to be no nexus or proportionality or close or direct causal link between this crime and the alleged political objectives of the KLF. The Tribunal is of the view that this serious crime is very much akin to the subject crime in *Hapugoda*[24] which the Tribunal found to be lacking in any meaningful political character. For these reasons, the Tribunal finds that the unlawful killing of the police officer falls to be considered as a serious non-political crime for the purposes of Article 1F(b) of the Refugees Convention.
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> 41. The obvious reason why the police officer was unlawfully killed, namely to avenge the torture of a KLF member, alleviates the necessity to enquire into the political nature or otherwise of the KLF involving as it would an enquiry as to whether that organisation is in fact a terrorist organisation and whether the applicant is in fact a terrorist. In short, the political nature or otherwise of the KLF (of which the applicant was a member) has no relevant bearing on whether the serious crime was political or not simply because the unlawful killing of the police officer out of retribution cannot, on the facts before the Tribunal, constitute a serious political crime for Article 1F(b) purposes."

58 The statement that "the crime in question can only be characterised as an act of revenge or retribution" occurs in a passage that discusses the evidence and in a section of the reasons that has the heading "FINDINGS OF FACT". Because that is so, the statement of the Tribunal seems more likely to be a finding of fact than a conclusion of law. Moreover, earlier in its reasons – at pars 27 to 34 – the Tribunal had discussed the meaning of and the cases dealing with the phrases "serious reasons for considering that" and "serious non-political crime" in Art 1F(b). Nothing in those paragraphs suggests that the Tribunal thought that a revenge killing could never be a political crime. In par 34, the Tribunal said:

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24 *Re Hapugoda and Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 659.

> "However, consideration of that term is to be found in *Hapugoda*[25]. In that case, the Tribunal affirmed a decision to refuse to grant a protection visa to a member of the People's Liberation Front (JVP) in Sri Lanka. The Tribunal found that the applicant came within the exclusion provision of Article 1F(b) on account of his participation in an armed attack on a police station which resulted in the death of six people. Applying the reasoning of French J in *Dhayakpa*[26] in finding that the attack did constitute a serious crime within the meaning of Article 1F, the Tribunal, after reviewing the relevant authorities, considered whether the acts of the applicant for visa could be said to be of a political nature. In this regard, the Tribunal drew the following conclusion[27]:
>
> > 'The nature and purpose of this attack was clearly to seek retribution for the death of his friend Mahesh. In that sense it was not directed solely for a political purpose or for genuine political motives. There was no sufficiently close or direct causal link between the attack on the Madampe police station and the alleged political purposes of the JVP. There was a lack of nexus between the crime and any realistic political objective. It was for a private purpose involving a personal motive too remote from the political objectives of the JVP.
> >
> > ... It was clearly disproportionate to any political objective sought to be achieved.'"

59 The reference in par 40 to *Re Hapugoda and Minister for Immigration and Multicultural Affairs*[28] is significant. In par 40, the Tribunal said that the murder of the policeman "is very much akin to the subject crime in *Hapugoda* which the Tribunal found to be lacking in any meaningful political character". That suggests that the Tribunal was holding that the policeman's murder was committed "for a private purpose involving a personal motive too remote from the political objectives" of the Khalistan Liberation Force to be a political crime. It also explains the Tribunal's statement in par 41 that the political nature of the Khalistan Liberation Force "has no relevant bearing on whether the serious crime

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25 *Re Hapugoda and Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 659.

26 *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 563.

27 (1997) 46 ALD 659 at 667.

28 (1997) 46 ALD 659.

was political or not simply because the unlawful killing of the police officer out of retribution cannot, *on the facts before the Tribunal*, constitute a serious political crime" (emphasis added). If the Tribunal was intending to assert that an unlawful killing out of revenge could never constitute a serious non-political crime, the italicised words were superfluous.

60 Unless the Tribunal's reasons are scrutinised "in a pernickety way, with an eye vigilant to the discovery of error"[29], no error of law can be found in its reasons.

61 I agree with other members of the Court that the Court should reject Mr Singh's attempt to raise a new ground concerning the concluding words of Art 1F(b). As the Chief Justice points out in his reasons, the "preferable solution is to read the reference to 'admission … as a refugee' as a reference to putative admission as a refugee"[30].

62 The Minister's appeal should be allowed.

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29 *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 175 ALJR 808 at 813 [30]; 178 ALR 497 at 504.

30 Reasons of Gleeson CJ at [5].

63 KIRBY J. This appeal[31] concerns an exclusion from the definition of "refugee", contained in Art 1F(b) of the Convention relating to the Status of Refugees ("the Convention")[32]. That definition and exclusion have been incorporated into Australian law by the *Migration Act* 1958 (Cth) ("the Act")[33]. The meaning of the phrase "a serious non-political crime", appearing in Art 1F(b), is important. Where there are "serious reasons for considering that" a person claiming protection under the Convention has committed such a crime outside the country of refuge, he or she is not entitled to protection.

64 Defining a "serious non-political crime" has been described as a problem that presents "the gravest difficulties"[34]. In an earlier manifestation of the phrase, it was said to present one of the "most acute" dilemmas of extradition law[35]. So far as the Australian law on refugees is concerned, the scope of offences "of a political character" is not fixed[36]. This is the first time that this Court has had to consider Art 1F(b).

65 The difficulties of definition derive, in part, from the absence of any settled international consensus about the expression[37] and the changing views of national courts and tribunals about its meaning[38]. The content of the expression depends on an almost infinite variety of factors[39]. It has been influenced by the changing nature of crimes, of weapons, of the transport of criminals and of the

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31 From the judgment of the Full Court of the Federal Court of Australia: *Singh v Minister for Immigration and Multicultural Affairs* (2000) 102 FCR 51 ("*Singh*").

32 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, ATS 1954 No 5, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, ATS 1973 No 37.

33 The Act, s 36(2).

34 Grahl-Madsen, *The Status of Refugees in International Law* (1966), vol 1 at 290.

35 Clark, Coudert and Mack, *The Nature and Definition of Political Offense in International Extradition*, Proceedings of the American Society of International Law (1909) at 94 cited in García-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law", (1962) 48 *Virginia Law Review* 1226 at 1231 ("García-Mora").

36 *R v Wilson; Ex parte Witness T* (1976) 135 CLR 179 at 191.

37 García-Mora (1962) 48 *Virginia Law Review* 1226 at 1227-1231.

38 *R v Wilson; Ex parte Witness T* (1976) 135 CLR 179 at 191.

39 *In re Castioni* [1891] 1 QB 149 at 155.

global political order, and the increased vulnerability of modern societies to violent forms of political expression[40].

66 Long before the Convention was adopted, Grotius wrote that asylum was accepted by international law as available for those fugitives who suffered undeserved enmity but not for those who had done something injurious to human society[41]. Since that distinction was propounded, first in the field of extradition law and more recently in the Convention, courts have struggled to find a point that will allow decision-makers to differentiate between fugitives accused of a serious political crime[42] and those in respect of whom there are "serious reasons for considering" that they have committed a serious *non*-political crime[43].

67 Given that this kind of differentiation has troubled courts for more than a hundred years, there is wisdom in Viscount Radcliffe's warning[44], that it is now unlikely that the point of distinction will receive a definitive answer accepted by everyone as universally applicable. On the other hand, where important rights and duties turn on the meaning of the expression, being rights and duties that must be considered by judges and other decision-makers, it is reasonable to demand that there should be a measure of clarity about the concept. Even if the best that courts can do is describe the idea, and the appropriate ways to approach it, they should attempt to do so[45]. The alternative is a negation of the rule of law

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40 cf *T v Home Secretary* [1996] AC 742 at 762 per Lord Mustill.

41 Grotius, *De Jure Belli ac Pacis Libri Tres*, Kelsey trans (1925) at 530 cited in García-Mora (1962) 48 *Virginia Law Review* 1226 at 1244.

42 As stated in the *Extradition Act* 1870 (UK), s 3; cf *Extradition Act* 1988 (Cth), s 5, s 7(a). In s 5 of the Australian Act, "political offence" is defined "in relation to a country" as meaning "an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country)". The definition expressly excludes certain offences, including offences against international law, offences declared by bilateral regulations, a range of attacks, threats or attempts upon heads of state or governments and offences constituted by taking or endangering the life of a person committed in circumstances in which "such conduct creates a collective danger, whether direct or indirect, to the lives of other persons" and is declared by regulations not to be a political offence in relation to the country. There is no similar definition of "non-political crimes" for the purposes of the Act and the Convention, Art 1F(b).

43 As stated in the Convention, Art 1F(b).

44 *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556 at 589.

45 *T v Home Secretary* [1996] AC 742 at 787.

and the surrender of such questions to idiosyncratic opinions that may have little or nothing to do with the context of the case at hand.

The facts

68 The respondent[46] is by nationality a citizen of India, by language and culture a Punjabi and by religion a Sikh. After the murder of his family in communal violence in Delhi in 1984, he joined the Khalistan Liberation Force ("KLF"). The basic object of the KLF is to create an independent Sikh State of Khalistan, centred on the Punjab. According to an Australian Government document dated 1997, included in the respondent's bundle before the Administrative Appeals Tribunal, the KLF is not a registered political party in India. The Indian Government regards it as a terrorist organisation. Perhaps it is worth mentioning that the same Australian document in 1997, described Fretilin, the movement that pressed for an independent State of East Timor, as a body that the Indonesian Government regarded as a "rebel organisation". As has often been remarked, those who demand self-determination of peoples and the rewriting of national boundaries are often described as terrorists or rebels unless they secure their political objectives[47].

69 It was common ground that the respondent had been an active member of the KLF within India. He claims that when he was ordered to leave India he did so, and subsequently arrived in Australia, evading immigration clearance. In January 1997, he applied for a protection visa on the ground that he was a refugee.

The history of the proceedings

70 In accordance with the Act[48], the application was first heard by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister"). The delegate accepted that the respondent was a senior member of the KLF and had been actively engaged in its activities. These activities reportedly included suicide bombing; attempted use of remote controlled bombs; kidnappings of business people or their children for ransom; and use of a car bomb in New Delhi.

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46 The respondent was identified by name before the Tribunal, in the Federal Court and in this Court. No application was made to substitute an identifier. See now the Act, s 501K.

47 *T v Home Secretary* [1996] AC 742 at 755 per Lord Mustill. See also Kirby, "Australian Law – After 11 September 2001", (2001) 21 *Australian Bar Review* 253, where examples are given of earlier "terrorist actions".

48 The Act, s 496.

71 The delegate appears to have proceeded on the assumption that the respondent would qualify for refugee status, subject to the operation of any exclusions in Art 1F of the Convention. He addressed those exclusions directly. He concluded that the KLF had been responsible for "crimes against peace", one of the crimes mentioned in Art 1F(a). Without determining other issues, he therefore held that the respondent was excluded under Art 1F of the Convention and was thus not a person to whom Australia had protection obligations.

72 The respondent appealed to the Administrative Appeals Tribunal ("the Tribunal")[49]. There he gave oral evidence and submitted documents that included the foregoing description of the KLF[50]. In the course of its reasons for decision[51], the Tribunal, like the delegate, proceeded directly to consider whether the respondent fell within an exclusion recognised by the Convention. Unlike the delegate, the Tribunal found that the respondent was disqualified by the commission of a "serious non-political crime" under Art 1F(b)[52]. The Tribunal made the three findings of fact that became the focus of the hearings in the Federal Court and in this Court. As those findings are set out in the reasons of Gleeson CJ[53], Gaudron J[54] and Callinan J[55], I will not repeat them.

73 Correctly, the Tribunal addressed its attention (as the delegate had not) to the involvement of the respondent personally (as distinct from the involvement only of the KLF) in the disqualifying conduct which would take him outside an entitlement to protection. It held that the killing of the police officer was a "serious non-political crime". It made the other findings set out in the reasons of

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49 Appeals in respect of decisions concerning Art 1F of the Convention lie to the Tribunal and not to the Refugee Review Tribunal ("RRT"). See the Act, s 500(1)(c). The distinction between appeals to and from the Tribunal and the RRT was noted by the Federal Court: *Singh* (2000) 102 FCR 51 at 58 [19].

50 Extracts from the record of interview in the Tribunal are contained in the reasons of Callinan J at [146]-[147].

51 Constituted by Burns DP.

52 Reasons of the Tribunal at 13.

53 Reasons of Gleeson CJ at [9].

54 Reasons of Gaudron J at [36].

55 Reasons of Callinan J at [148].

the other members of this Court[56]. In effect, the Tribunal classified the crimes of the respondent as "only … an act of revenge or retribution" and for that reason "non-political".

74 The respondent then "appealed" to the Federal Court of Australia. The "appeal" was limited to one on a question of law[57]. The primary judge in that Court (Mansfield J) concluded that an act of revenge "in an immediate sense" could still have the purpose of "endeavouring to dissuade the authorities from engaging in the conduct to which the political objection is taken" and thus be a "political crime", not excluded by Art 1F(b) of the Convention[58]. On this footing he found a legal error in the reasons of the Tribunal. However, he held that the Tribunal's third finding (regarding other "acts of violence") had not been vitiated by error of law. He therefore concluded that it had been open to the Tribunal to find that the respondent's involvement in those crimes amounted to serious "non-political" crimes.

75 The Full Court[59] upheld the first part of the decision of the primary judge. In relation to the other finding, the Full Court held that the Tribunal had failed to explain the basis on which it had come to its conclusion that the respondent had been guilty of serious "non-political" crimes[60]. It therefore found errors of approach in each of the three findings upon which the Tribunal had based its decision. It upheld the respondent's complaint of error of law. It ordered that the matter be remitted to the Tribunal for further consideration.

76 It is from the judgment that included that order that the Minister ("the appellant"), by special leave, has appealed to this Court.

The three issues

77 Three issues were argued in the appeal:

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56 Reasons of the Tribunal at 19. These are set out in the reasons of Gleeson CJ at [12], McHugh J at [57] and Callinan J at [148].

57 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44. The decision is not excluded from the jurisdiction of the Federal Court: the Act, s 485(2) (as it previously stood). The Full Federal Court noted that the decision of the Tribunal might also have been the subject of judicial review: *Singh* (2000) 102 FCR 51 at 53 [4].

58 *Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1599 at 13.

59 Ryan, Branson and Lehane JJ.

60 *Singh* (2000) 102 FCR 51 at 62 [31].

(1) *Refugee status*: Whether the Tribunal and the Federal Court had erred in law in considering the application of Art 1F(b) of the Convention, given that the respondent had not been admitted to Australia as a refugee;

(2) "*Serious non-political crime*": Whether the Federal Court had erred in its approach to the meaning of Art 1F(b) of the Convention; and

(3) *Question of law*: Whether the Federal Court had erred in setting aside the decision of the Tribunal on the ground of error of law, having regard to the Tribunal's findings of fact, the applicable law and the proper approach of the Federal Court to reviewing such decisions.

78 It is possible to dispose quite briefly of the first and third issues. The second issue, which requires elucidation of the meaning of the contested phrase in Art 1F(b), presents greater difficulty.

The refugee status point

79 *The respondent's contention*: The terms of Art 1F(b) of the Convention are set out in other reasons[61]. The delegate, the Tribunal and the Federal Court were unanimous in accepting the submissions of the appellant on the first issue. He submitted that there was no occasion to consider whether the respondent was a "refugee" within the meaning of the Convention[62] once it was decided that the respondent fell within the exclusion in Art 1F(b). In this Court, although not previously, the respondent contended that this approach was wrong in law. He submitted that the failure of the Tribunal first to make a finding that he was a refugee was fatal to the appeal.

80 As the respondent put it, the only foundation for the invocation of the exclusion, in terms of that paragraph, was that he had already been admitted to this country as a refugee. In the absence of such an "admission", the exclusionary provisions of Art 1F(b) were not engaged. The respondent argued that he had never been admitted to Australia "as a refugee". In fact, he had entered Australia illegally as a ship's deserter.

81 *Raising a new point*: The legal process before this Court is an appeal, as contemplated by the Constitution[63]. Appeals to the High Court have been held to

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61 Reasons of Gleeson CJ at [2]; reasons of Gaudron J at [29]; reasons of Callinan J at [161].

62 The Convention, Art 1A.

63 The Constitution, s 73.

be "strict" appeals for the correction of error in the court below[64]. The point belatedly raised by the respondent is a point of law.

82 This Court has held that a failure to raise a point of law in earlier proceedings is not necessarily fatal to its later determination by the Court, if the point can be decided without recourse to new evidence and without procedural unfairness to any party[65]. The appellant made it clear that he raised no objection to the enlargement of the issues in the appeal to have the respondent's contention determined. It is sensible to determine the contention.

83 *Arguments of the parties*: The respondent rested his submissions on what he said was the plain language of Art 1F(b). The position of that article in the scheme of the Convention must also be considered. Article 1F(b) represents an exemption to the definition of "refugee" contained in Art 1A. According to the respondent, unless the applicant for a protection visa qualifies as one to whom protection obligations are owed, logically, no question of exclusion is presented. By divorcing the exclusion from the entitlement to protection, there was, he submitted, a risk of characterising the "serious non-political crime" in an artificial light, divorced from the consequences that would follow for the applicant from such a characterisation.

84 The appellant argued that the introduction of this argument was not sustained by the way in which the case had been presented before the delegate and in the Tribunal. He submitted that there were obvious reasons of convenience for separating, and dealing first with, the issue presented by Art 1F(b) of the Convention. In a process that is already time-consuming, vexing and expensive, convenience suggested that it should be open for the delegate and the Tribunal to take the course adopted in this case where that course was otherwise appropriate.

85 *Conclusion – no legal error*: In my view the respondent has not demonstrated that the appeal must be dismissed for want of proof of an element in the exclusionary provision of Art 1F(b). I leave aside the consequences that would have followed for the respondent from the success of his contention. I will confine myself to dealing with it as it was presented.

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64 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 298; *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17], 54 [164], 62-63 [189].

65 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 150-151 [129]-[130]; *Crampton v The Queen* (2000) 75 ALJR 133 at 143 [52], 155-156 [121]; 176 ALR 369 at 382, 399-400.

86 There was nothing in the procedure followed in these proceedings to prevent the respondent making the points now advanced as reasons for approaching Art 1F(b) as an exception to duties falling upon States bound by the Convention in respect of persons who otherwise qualified within the definition of "refugee". Sometimes it could be convenient for both parties to have the suggested applicability of Art 1F(b) decided as preliminary to all other issues. Given that the respondent had been associated with the KLF and that such association was relevant both to his claim to refugee status and his potential exclusion for commission of "serious non-political crimes", it can readily be understood why a decision was taken to deal first with the exclusion.

87 In any case, the definition of "refugee" in Art 1A and the exclusions from it in Art 1F are not necessarily intended to be applied sequentially. Ordinarily, they will be decided, as necessary, in the one proceeding. However, there is nothing in the Convention or the Act that forbids the decision-maker saying to the applicant, as the delegate and the Tribunal said, in effect, to the respondent: "For the moment we will assume that you would be admitted as a refugee. We will approach your case on that footing, without finally deciding it. But we want first to determine whether you have 'committed a serious non-political crime outside' Australia." The Convention is expected to operate in the real world of speedy, economical and efficient decision-making. Where there is a choice between a construction of the Convention that would further decision-making of that character and one that would frustrate those objectives, the former construction should be preferred.

88 This conclusion has the merit of upholding proper procedures for raising objections before the decision-makers and courts below. It rejects an objection that rings hollow in the mouth of the respondent. It confirms a procedure before the delegate and the Tribunal that will, in given cases (of which this was one), be sensible. Moreover, as Lord Slynn of Hadley pointed out in *T v Home Secretary*[66], an adverse decision, to the effect that Art 1F(b) of the Convention applies, does not necessarily mean that the applicant for protection must return to the State where he or she has committed a serious crime. It remains open to the Minister, if another State can be found willing to accept that person, to permit the applicant to go there.

89 The first issue should therefore be determined against the respondent.

The serious non-political crime point

90 *The context of international law*: I reach the substantive and difficult question in this appeal. It concerns the meaning of the phrase "serious non-

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66 [1996] AC 742 at 776.

political crime" in Art 1F(b) of the Convention and whether, as the Full Court found, the Tribunal erred in the meaning it gave to that phrase.

91 The first point to make is that the expression, although incorporated into Australian law[67], is one that appears in an international treaty. It must therefore be given a meaning appropriate to its provenance[68]. This fact obliges a court to approach its meaning in the way laid down by the rules of municipal and international law governing the interpretation of treaties[69]. In the light of conflicting authority from many jurisdictions, it can hardly be doubted that the phrase is ambiguous. Accordingly, it is permissible in elucidating its meaning to have regard to the state of international law before the Convention was adopted; its apparent purposes; the travaux préparatoires; and the opinions of scholars of international law[70].

92 *The context of the Convention*: The context in which par (b) appears in Art 1F of the Convention is obviously relevant. Article 1F(b) is found between two other exclusions, each of them applicable to highly reprehensible conduct, namely the commission of serious international crimes (par (a)) and acts contrary to the principles of the United Nations (par (c)). To some extent, the context gives emphasis to what the word "serious", appearing in par (b), already signifies. It is assumed for the purposes of par (b) that the applicant for protection has committed a "serious" crime. The applicant does not for this reason alone lose his or her rights as a "refugee". The entitlement to protection under Art 1A of the Convention is only lost if the crime in question is classified as "non-political".

93 In examining the words of the Convention, it is essential to remember that the phrase appears in an international treaty. Otherwise, municipal courts may fall into the error of introducing into the elaboration of its meaning peculiarities of domestic law that have no place in an international context. Lord Mustill recognised this potential cause of error when considering the way in which some English courts had attempted to introduce into Art 1F(b) concepts such as remoteness, "derived from the specialist English law of damages"[71].

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67 The Act, s 36(2).

68 *R v Wilson; Ex parte Witness T* (1976) 135 CLR 179 at 191.

69 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256, 294-295.

70 *T v Home Secretary* [1996] AC 742 at 763 per Lord Mustill.

71 *T v Home Secretary* [1996] AC 742 at 768.

94 *The Convention as a compromise*: The way in which the Convention was developed, as revealed in the travaux, is also relevant to the meaning of Art 1F(b). The Convention is a compromise between the interests of the contracting States[72]. On the one hand, the Convention imposes heavy burdens on "countries of refuge"[73], in order to secure its humanitarian objectives. Often the burden falls on immediately contiguous States parties. They may be ill-equipped to provide long-term refuge in tolerable conditions. Out of these considerations, pressure may be imposed on distant countries, having little or no connection with the persons who claim refugee status and knowing little, if anything, about the political conditions of their respective countries. In such cases, decision-makers in the country of refuge will often be substantially dependent on the applicant for information concerning his or her claim.

95 On the other hand, countries of refuge are usually entitled to ensure the integrity of their own communities. In the case of serious crimes, such countries are normally entitled to exclude persons convicted of, or suspected of complicity in, such crimes. This is because such involvement may indicate, to some degree at least, the possibility of future risk to the community of the country of refuge[74]. Without such entitlement in defined extreme cases, there would be a risk that the protective objectives of the Convention might be undermined by strong popular and political resentment. Upon this theory, it is beyond the purposes of the Convention to oblige countries of refuge to receive, and provide safe haven for, persons in respect of whom there are serious reasons for considering that they have committed, relevantly, "a serious non-political crime".

96 Thus, the exclusions in Art 1F of the Convention are to be construed as constituting part of the compromise under which "countries of refuge" will hold themselves bound by international law (and municipal law giving it effect) to afford protection to refugees, but not in cases where such an obligation would be intolerable.

97 By inference, then, this exception from "refugee" status reflects the recognition of an obligation to receive and protect at least some serious criminals if their crimes were "political" in character. That obligation is doubtless

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72 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 274 per Gummow J.

73 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 per Dawson J.

74 Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 104; *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 at 564-565.

explained, in turn, by the context in which the Convention was written in the mid-twentieth century. That was a time, in many countries (including India itself), where some persons seeking refuge did so after committing serious crimes of a political character, but for objectives that they viewed as justified and even noble. Such objectives included the claims of subject and colonial peoples to self-determination[75]. In many, perhaps most, such cases those persons might not be welcomed with "open arms"[76] by local officials and their communities.

98 Most national communities would probably not want serious criminals of any kind – political, common or somewhere in between. However, the compromise struck by the Convention requires that those who qualify as refugees shall be accorded legal rights to protection. Their rights have to be respected whilst the law remains as it is. It is the duty of the Minister, his delegate, the Tribunal, the Federal Court and this Court to give effect to those rights. We must do so although the result might not be palatable in the particular case.

99 The foregoing compromise between humanitarian objectives and States' self-protection is reflected in the choice of wording in the Convention. Originally, the draft of Art 1F(b) omitted the adjective "serious", apparently on the footing that the French word for "crime" already imported a notion akin to a felony. When "serious" was added, it indicated the way in which the "conflicting impulse" was to be resolved between the hospitality to be accorded for humanitarian purposes to refugees, and the entitlement of "countries of refuge" to exclude persons in respect of whom there were serious reasons for considering that they had committed common crimes[77].

100 Unfortunately, no words were added (assuming that to be possible) to delineate serious crimes of a non-political character, from those committed in the course of, or for the purposes of, or in some way connected with, political activities. Instead, the delineation is left to a function of characterisation performed by reference to words of a phrase that is extremely general in language and rather vague in meaning.

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75 International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23, Art 1; International Covenant on Economic, Social and Cultural Rights done at New York on 19 December 1966, ATS 1976 No 5, Art 1.

76 *Gil v Canada (Minister of Employment and Immigration)* (1994) 119 DLR (4th) 497 at 503 ("*Gil*").

77 *T v Home Secretary* [1996] AC 742 at 761.

101 The opacity of the language may have been intentional. It might represent the outcome of international negotiations where different State parties were seeking to expand, or restrict, the humanitarian obligations of the Convention. The resulting uncertainty allows for the adaptation of the language of the Convention to the constantly changing conditions in which it is invoked. Earlier municipal attempts to define "political crimes" more precisely for the purposes of extradition law demonstrated that this sometimes results in a serious frustration of legitimate humanitarian objectives[78].

102 *Extradition law as a qualified guide*: Most of the judicial decisions cited in cases concerned with the meaning of Art 1F(b) of the Convention have involved the meaning of the phrase "political crimes". An analogous expression long appeared in treaties and municipal laws concerned with extradition[79]. It is in this context, in England, that a number of decisions grapple with the meaning, in the context of extradition, of "a political offence" or "an offence of a political character"[80].

103 In the course of these decisions, and in decisions in other jurisdictions, distinctions are made between so-called "common crimes", "purely political crimes" and "relatively political crimes". The last are common crimes with some political "overlay"[81]. Crimes designated as "purely political" would involve such offences as high treason, capital treason, activities contrary to the external security of the State and so on[82]. In such cases, depending on the facts, no matter how unwelcome the offender might be, the exemption from extradition would apply to protect him or her from forced repatriation.

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78 García-Mora (1962) 48 *Virginia Law Review* 1226 at 1229-1230: a reference to the definition in the German Extradition Law of 1929 which included reference to "good relations with foreign States" and led to unhappy experiences during the Nazi regime.

79 Shearer, *Extradition in International Law* (1971), Ch 7, "Political Offences". The *Extradition Act* 1870 (UK), s 3 spoke simply of an "offence of a political character".

80 The cases include *In re Castioni* [1891] 1 QB 149; *In re Meunier* [1894] 2 QB 415; *R v Governor of Brixton Prison; Ex parte Kolczynski* [1955] 1 QB 540; *R v Governor of Brixton Prison; Ex parte Schtraks* [1964] AC 556; and *R v Governor of Pentonville Prison; Ex parte Cheng* [1973] AC 931.

81 *T v Home Secretary* [1996] AC 742 at 761.

82 García-Mora (1962) 48 *Virginia Law Review* 1226 at 1235. Treason has been held to be an offence of a political character: *R v Governor of Brixton Prison; Ex parte Kolczynski* [1955] 1 QB 540 at 549.

104 When the Convention came into force, it was natural that lawyers, familiar with this body of jurisprudence, should turn to it to give meaning to Art 1F(b). There was a recognition of the overlap between the exemption from extradition and the exception from refugee status. Each was concerned with serious crimes. Each was motivated by the (usually unexpressed) fear that the accused might not receive a fair trial if returned to the place where the crimes had allegedly been committed, or might be in mortal danger if so returned. The need for congruence between extradition law and the law of the Convention was therefore emphasised[83]. The latter was described as containing an "echo" of the former[84].

105 However, in using judicial opinion expressed in the context of extradition cases, it is important to remember the significant differences that exist between the operation of the law of extradition and the grant of asylum to refugees[85]. One obvious difference is the way in which the exceptions are expressed. Another is that extradition, relevantly, involves an application by a foreign State for the return to its system of justice, of a person who claims exemption by reason of the political character of the alleged offence. Refugee status, on the other hand, is a right conferred on a person by the law of the country of refuge, pursuant to the Convention. Extradition law is, in a sense, a derogation from one State's sovereignty in favour of another upon conditions to which the two States concerned have specifically agreed. Refugee law involves the imposition upon a State, for humanitarian reasons, of an obligation created by international law, but on conditions that recognise legitimate exceptions.

106 *The proper approach*: The Convention, including Art 1F(b), should not be read with an eye focussed solely on the experience of the political processes of Australia or like countries. The Convention was intended to operate in a wider world. It was adopted to address the realities of "political crimes" in societies quite different from our own. What is a "political crime" must be judged, not in the context of the institutions of the typical "country of refuge" but, on the contrary, in the circumstances of the typical country from which applicants for refugee status derive.

107 This reminder also emphasises the care that must be applied by municipal judges in construing the phrase "serious non-political crime" solely by reference

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83 *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 743 per La Forest J; cf Hathaway, *The Law of Refugee Status* (1991) at 221 cited in *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 180.

84 *T v Home Secretary* [1996] AC 742 at 764.

85 *T v Home Secretary* [1996] AC 742 at 764.

to their own experience. As Lord Mustill pointed out, in most developed countries (including, one might say, Australia), the assassination of political leaders, police officers and other public officials is regarded as an anathema[86]. However, with every respect to Callinan J's reasons in this case[87], it is too late, and would be mistaken, to place outside the definition of "political crimes", the murder of such personnel in societies having a different history, constitutional organisation, political arrangements and internal tensions.

108 That such conduct may fall within the description of an "offence of a political character" for extradition purposes was made plain long ago by Denman J in *In re Castioni*[88]. This point has been maintained[89]. It would reverse more than a century of law to say that a person in respect of whom there are serious reasons for considering that he or she has committed murder is always, or almost always, shown to have committed a "serious non-political crime".

109 *Atrocious and terrorist acts*: These words of caution also apply to the trend in some modern decisions concerning Art 1F(b), to regard certain acts of violence, even if "political" in a broad sense of that word, as beyond the pale so that they will not be condoned, as they could appear to be if one country were obliged to offer sanctuary to the perpetrator[90].

110 The history of this reasoning can probably be traced to *In re Meunier*[91], a case involving an anarchist. However, in the century since that decision was written, with the development of new weapons, the greater vulnerability of society and more intensive media coverage of acts of violence, courts have paid closer attention to the acceptable paradigm of "political" action which, although criminal, even seriously so, will not put the offender beyond the protection of the Convention and hence of domestic law giving it effect.

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86 *T v Home Secretary* [1996] AC 742 at 770.

87 Reasons of Callinan J at [160]. See also definition of "political offence" in *Extradition Act* 1988 (Cth), s 5 noted above at [66] fn 42, where some murders are clearly contemplated as coming within the definition of a "political offence" for the purposes of that Act.

88 [1891] 1 QB 149 at 156.

89 See *T v Home Secretary* [1996] AC 742 at 770.

90 *T v Home Secretary* [1996] AC 742 at 755.

91 [1894] 2 QB 415.

111 Various attempts have been made to define with greater exactitude the conduct that will take an applicant for refugee status outside the Convention even if, in some general way, the crimes in which that person was involved might have been linked in the offender's mind with some vague political purpose. Thus, if the crime concerned involved an "atrocious act, grossly out of proportion to any genuine political objective", such that it could not reasonably be seen to be advancing a political objective[92], it might be classified as "non-political". Likewise, the infliction of indiscriminate violence[93]; the "open manifestation of anarchy"[94]; the perpetration of "acts of odious barbarism and vandalism"[95]; the involvement in a "rampage" of crime[96] or sheer acts of terrorism[97], have all been excluded from the category of "political crime". Judges have vied with each other to invent new epithets for conduct that will take its perpetrator outside the Convention's protection. The debate about the subject has continued. It is not concluded[98].

112 The differences are well illustrated in contrasting opinions of United States courts. In *Eain v Wilkes*[99], the case involved an attempt to extradite to Israel a person alleged to have detonated a bomb in a "teeming market area" of an Israeli city, killing two young boys and maiming many others. The application was resisted on the basis that what was alleged was a "political offence", outside the requirement of extradition. The United States Court of Appeals for the Seventh Circuit set its face against permitting "[t]errorists who have committed barbarous acts elsewhere" to remain in the United States[100].

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92 *T v Home Secretary* [1996] AC 742 at 758 per Lord Mustill.

93 *Ellis v O'Dea* [1991] ILRM 346 cited in *Gil* (1994) 119 DLR (4th) 497 at 513.

94 García-Mora (1962) 48 *Virginia Law Review* 1226 at 1230.

95 Shearer, *Extradition in International Law* (1971) at 186.

96 *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301 at 311.

97 *T v Home Secretary* [1996] AC 742 at 772.

98 *Matter of Extradition of Atta* 706 F Supp 1032 at 1039 (1989).

99 641 F 2d 504 (1981); cert den 454 US 894 (1981).

100 641 F 2d 504 at 520 (1981). At 521, the Court applied *In re Meunier* [1894] 2 QB 415 at 419 concerning the exclusion from the category of "political offences" of anarchists who were terrorising an entire population in order to subvert government through social disorder.

113 The contrary viewpoint was expressed five years later in *Quinn v Robinson*[101]. That was a case where the United Kingdom sought extradition to try a suspect, who was a member of the Irish Republican Army, for murder and conspiring to cause explosions in London ten years earlier. Reinhardt J took to task what he saw as the impermissible attempt by United States courts to narrow the application of the exception for "political crimes". In his view, this approach appeared "to be moving beyond the role of an impartial judiciary by determining tacitly that particular political objectives are not 'legitimate'"[102]. Whilst accepting that "Americans are offended by the tactics used by many of those seeking to change their governments" and that such tactics often departed from the "cultural and social values or mores" of the United States, particularly with respect to the value of individual human life, his Honour went on[103]:

> "[I]t is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty."

114 In a later decision, *Matter of Extradition of Atta*[104], Korman J criticised the foregoing opinion in *Quinn*. *Atta* was another application for extradition to Israel, this time for an attack on a bus carrying civilian passengers. Korman J resolved the objection to extradition adversely to the prisoner and criticised Reinhardt J's expressed "neutrality"[105]. He held[106]: "Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense." His justification was that, otherwise, the perpetrators of the horrors in Dachau, Auschwitz, My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre and other atrocities would be immune from criminal accountability[107].

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101 783 F 2d 776 (1986).

102 783 F 2d 776 at 804 (1986).

103 783 F 2d 776 at 804 (1986).

104 706 F Supp 1032 (1989).

105 706 F Supp 1032 at 1040, fn 8 (1989).

106 706 F Supp 1032 at 1042 (1989) citing *Matter of Doherty* 599 F Supp 270 at 274 (1984) per Sprizzo J.

107 706 F Supp 1032 at 1042 (1989) citing *Matter of Doherty* 599 F Supp 270 at 274 (1984) per Sprizzo J.

115 The reasoning in the foregoing, and other relevant cases, demonstrates the high emotion that can intrude into the resolution of such questions. The opinion of Korman J must, with respect, be read with caution, at least in the context of applications under the Convention. The events which he cited would, on the face of things, fall within the exclusions in Arts 1F(a) or (c). In *T v Home Secretary*[108], Lord Mustill disagreed with Korman J's reasoning.

116 In part, this ongoing debate can be explained because judges are forced to recognise that neither wars nor revolutions are conducted in as "mannerly a fashion as they once were"[109]. Furthermore, judges recognise that the language of the Convention obliges them to classify the crime, concededly "serious", by reference to its character and not, as such, the motives for or occasion of the crime[110], or the consequences that the crime might produce[111]. These were the considerations that led Lord Mustill to prefer the disqualifying features of particular crimes in terms of whether they represented acts of "terrorism" rather than by reference to their "atrocious" consequences[112]. To the extent that this description focusses attention on the character or nature of the crime, rather than its outcomes (which might be accidental or unintended), I agree with Lord Mustill. However, the adoption of the word "terrorism" merely introduces new problems about which there is, as yet, no agreement in international law.

117 Precisely because cases such as the present are likely to engender high controversy occasioning strong feelings, it is essential for courts to increase their efforts to find, and apply, neutral legal principles.

118 *Purpose as a means of differentiation*: One suggested means of differentiating "political" from "non-political" crimes has been the exploration of the purposes for which the putative "refugee" committed the crimes in question. This has led, in turn, to an attempt to differentiate serious crimes committed out of genuine political motives and those committed merely for personal reasons or

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108 [1996] AC 742 at 770.

109 *Quinn v Robinson* 783 F 2d 776 at 804 (1986).

110 *Matter of Extradition of Suarez-Mason* 694 F Supp 676 at 707 (1988); *Gil* (1994) 119 DLR (4th) 497 at 512.

111 *T v Home Secretary* [1996] AC 742 at 769-770.

112 *T v Home Secretary* [1996] AC 742 at 772; cf *McMullen v Immigration and Naturalization Service* 788 F 2d 591 at 599 (1986).

gain[113]. This line of thinking has insisted upon a "close and direct link" between the crime in question and the alleged political purpose, such that where the nexus is "remote", the crime in question can be classified as having been committed for extraneous objectives and thus be "non-political" in character.

119 This reasoning also derives from legal authorities on the subject of extradition. In common law countries the "political" character of offences was usually determined by reference to whether such offences were "incidental" to the pursuit of defined political objectives. However, the civil law frequently differentiated "political" from "non-political" offences by reference to the aims or motives of the author of the crime and, specifically, whether the motive was to injure a political regime or to pursue some collateral personal objective. Some support for this suggested discrimen in terms of the "political object" or "political motive" of the offender was given in this Court, in the context of extradition, in *R v Wilson; Ex parte Witness T*[114], adopting the words of Viscount Radcliffe of the House of Lords in *R v Governor of Brixton Prison; Ex parte Schtraks*[115]. In order to differentiate those offences which would be characterised as "political" from those by inference "non-political" there crept into the case law a supposed distinction between crimes whose sole or predominant motivation was classed as "political" and those which were not[116].

120 Various ways were found to express this link between the subjective motivation of the offender and the mental element of the offence. However, as Lord Mustill pointed out in *T v Home Secretary*[117], the gravity of the offence in question is already hypothesised by the requirement that the offence must be "serious". Its character cannot depend on the consequences that may follow, nor, as such, upon those that the offender intended. Whilst the object of the offender may therefore be relevant to the character of the particular offence, political motivation on the part of the offender does not convert every offence committed for such motives into a "political" crime[118]. Neither will some degree of personal

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113 Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) at 36 [152] quoted in *Gil* (1994) 119 DLR (4th) 497 at 513.

114 (1976) 135 CLR 179 at 183-184.

115 [1964] AC 556 at 591-592.

116 *Ex parte Cheng* [1973] AC 931 at 944-945; *T v Home Secretary* [1996] AC 742 at 775.

117 [1996] AC 742 at 769.

118 *Ahmad v Wigen* 910 F 2d 1063 at 1066 (1990) cited in *Gil* (1994) 119 DLR (4th) 497 at 511.

motivation on the part of the offender necessarily exclude the offence from being a political one. A stable discrimen will not be provided by reference to whether the decision-maker approves or disapproves of the objectives of the offender. No doubt, in the 1930s and 1940s, the objects of many of the champions of Indian independence would have been thoroughly disapproved of by courts and populations of some countries of refuge. That fact teaches the care that must be observed by an impartial judiciary in determining entitlements to refugee status by reference to judicial evaluation of the merits of the putative refugee's motives or purposes.

Serious non-political crime – the discrimen

121 *Approach to characterisation*: Decision-makers are entitled to guidance from this Court on how they should approach the task of characterisation of criminal conduct presented by a case such as the present. In my view, this much can be said. A person who is otherwise entitled to protection as a "refugee" has, on the face of things, a high claim to that status. It is one written in Australia's own law. It also reflects obligations of international law, which Australia has accepted and by which it is bound. Even the existence of serious grounds for believing that he or she has committed a "serious" crime will not disqualify a person from protection, if a proper view of the crime in question, looked at as a whole, is that it is "political" rather than "non-political" in character.

122 The motives for the crime are not conclusive as to its character. But because crime in most societies, including our own, ordinarily involves a mental element, the perpetrator's intention may well be relevant to the character of the crime. It may, for example, constitute a reason for classifying a crime, performed by a person who happens to be a member of a political movement, as "non-political", if its purpose was mainly for extraneous, personal or selfish reasons. On the other hand, the mere fact that the crime has been committed by a person involved in a political movement, or during disorder associated with that movement, is not enough to warrant its classification as "political" rather than "non-political". Neither does the existence of some degree of personal motivation necessarily warrant the classification of the offence as non-political. The sometimes complex array of motivations for any offence must be considered before a characterisation of the offence for the purposes of the Convention is determined.

123 Nor are the consequences of the crime in question, known or implied, determinative of its character. The history of liberation movements, and rebellion against autocratic, colonial and tyrannical governments, has witnessed too many instances of serious crimes, involving innocent victims, to permit a hard and fast exclusion of otherwise "political" crimes because they had terrible

outcomes. It is not possible, conformably with long established case law, to exclude, as such, the crime of murder[119].

124 If the target of the crime is an armed adversary[120] or armed agent of the State (such as a police officer or other public official)[121], it is more likely that the crime should be classified as "political", than if the target comprises innocent civilians[122], or if there is no particular target and just the indiscriminate use of violence against other human beings[123]. In such cases it is open to the decision-maker, in the context of "non-political crimes" in Art 1F(b) of the Convention, to conclude that the crimes are "serious" but outside the scope of the protection for serious "political" crimes.

125 In the context of a phrase used in an international treaty it would be inappropriate to apply to its elucidation, doctrines developed peculiarly by the common law, either to exclude classification as "political" by reference to notions of remoteness, or to inculpate persons on the basis of their indirect involvement in a joint criminal enterprise with others. On the other hand, where the achievement of "political" objectives may be viewed as "remote" from the conduct in question, this may just be another way of saying that the true character of the serious crime is "non-political" rather than "political". The mere fact that the person did not actually "pull the trigger" does not necessarily exculpate him or her from involvement in a "serious crime" of the disqualifying kind[124]. Each case must be classified by reference to its own facts.

126 Given that what is posited is a "serious crime" and that, ordinarily, the "country of refuge" would be fully entitled to exclude a person suspected of such "criminal conduct" from its community, a duty of protection to refugees that exists under the Convention and municipal law giving it effect, must be one that arises in circumstances where the political element can be seen to outweigh the character of the offence as an ordinary crime[125]. If the humanitarian purpose of

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119 *In re Castioni* [1891] 1 AC 149; *Ex parte Cheng* [1973] AC 931 at 945.

120 *Gil* (1994) 119 DLR (4th) 497 at 516.

121 García-Mora (1962) 48 *Virginia Law Review* 1226 at 1239.

122 *Matter of Extradition of Atta* 706 F Supp 1032 at 1047 (1989).

123 *Ellis v O'Dea* [1991] ILRM 346 cited in *Gil* (1994) 119 DLR (4th) 497 at 513.

124 *McMullen v Immigration and Naturalization Service* 788 F 2d 591 at 599 (1986).

125 *T v Home Secretary* [1996] AC 742 at 784 citing Goodwin-Gill, *The Refugee in International Law* (1983) at 60-61.

the Convention is kept in mind and the decisions are made by people who have some knowledge of the history of the political movements of the world in recent times, the application of the foregoing criteria will be unlikely to involve error of law.

127 Decision-makers in Australia, judicial and otherwise, will ordinarily have little exposure to the circumstances that, in other countries, have given rise to political struggles that sometimes involve resort to serious crimes, including of violence, where other peaceful means of securing longed-for freedom fail. It is not only for a refugee from a European regime akin to that of Nazi Germany that the protection of the Convention is afforded. There are other political circumstances, later in time and closer geographically to Australia, that have notoriously involved serious criminal conduct that history has eventually viewed as justified. It is such cases which decision-makers, tribunals and courts have to determine without the wisdom of political hindsight, by reference to the exemption in Art 1F(b) of the Convention.

128 *Conclusion*: Adopting the foregoing approach, I agree with the analysis of the Full Court. The Tribunal, with respect, applied an over-simplistic view of the characterisation of the crimes which were before it. It failed to characterise the crimes in question as the law required. On its first two findings, it did so, as all judges in the Federal Court held, by incorrectly regarding the classification of the motives of the respondent as wholly determinative of the characterisation of the crime as "political" or "non-political". As to the third factual finding, it too was flawed because the Tribunal failed to consider, and to demonstrate that it had considered, whether the "targets" of the weapons, in the transport of which the respondent was involved, were purely political targets or indiscriminate targets necessarily involving innocent civilians.

129 It follows, as a matter of law, that the characterisation required by the Act and the Convention was not properly performed. The Full Court was correct to require that the respondent's application be reconsidered by the Tribunal in accordance with the law that it clarified. The second issue should be determined against the appellant.

The error of law point

130 It is inherent in the foregoing conclusion that I would also reject the appellant's argument on the third issue. However, as the point was fully argued and as it is determinative for McHugh J[126], I will add some comments about it.

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126 Reasons of McHugh J at [55]-[62].

131 The appellant challenged the approach that the Federal Court had taken to the review of the decision of the Tribunal. He submitted that the Full Court, like the primary judge in respect of the first two findings of the Tribunal, had failed to apply correctly the principles controlling judicial review of an administrative decision for error of law. He argued that a court, limited to correction of error of law on the part of an administrative decision-maker, should be slow to intervene, absent a real argument that the decision-maker lacked jurisdiction. A court should not intervene simply because it disagreed with the decision-maker's findings of fact. On the contrary, it should defer to the approach of the decision-maker, both in the assessment of the factual material and in the criteria adopted[127].

132 The appellant noted two indications in the applicable law that reinforce the appropriateness of such "deference" in a case such as the present. The first was that the primary decision involved the satisfaction of the Minister (or his delegate). The second was that the terms of the Convention did not oblige the establishment of the existence of a "serious non-political crime" beyond reasonable doubt or even on the balance of probabilities. It was enough that there should be "serious reasons for considering" that such a crime had been committed by the applicant for a protection visa[128]. The applicable terms of the Convention could therefore be contrasted with other provisions, such as those requiring proof that a person has been "convicted" of an offence[129]. Courts in a number of jurisdictions have commented on the lower standard of proof of relevant facts that is inherent in the phrase employed in Art 1F(b)[130].

133 Where a repository of statutory power has been designated by the Parliament as the decision-maker, required to determine whether critical facts do or do not exist, courts, without clear authority to go further, should restrict their intervention to cases that fall within the categories that have been identified as evidencing legal error[131]. In the United States, such restraint upon appellate

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127 cf *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391.

128 That being the term in Art 1F(b) of the Convention; cf *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 179.

129 The Convention, Art 33(2); cf *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 178, 179.

130 cf *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301 at 306; *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173 at 175-176; *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 179.

131 *R v Hillingdon London Borough Council: Ex parte Puhlhofer* [1986] AC 484 at 518.

intervention is often described in terms of the "deference" owed by courts of law to administrators entrusted with primary decision-making in that country. This principle is especially applicable in the context of immigration decisions. In this Court there are suggestions of a similar approach in the repeated expressions of caution against over-zealous scrutiny of administrative reasons, nominally for error of law, that finds such error in infelicitously expressed or otherwise imperfect reasons[132].

134 The task that confronted the delegate, the Tribunal and the Federal Court in the present matter was to apply to certain facts as found, words or phrases of an international treaty, incorporated into Australian municipal law. Allowing fully for the elusiveness of an all-encompassing definition of what amounts to a question of law, there could be no doubt that a demonstrated error in an approach by a decision-maker to the meaning and operation of a critical statutory phrase would be an error of law[133]. It will often be difficult to discern error of law in a finding of primary facts. However, where the decision-maker has given reasons that indicate that the finding was arrived at by a misunderstanding of the applicable legal test, or where the finding resulted from a failure to apply correctly the language of that phrase to the facts as found, a court reviewing for error of law is entitled to intervene. It does so not to impose on the decision-maker any view that the court may have of the facts, but to ensure that the correct legal criteria are applied when the administrative decision-maker reaches the conclusion on the facts.

135 It was comparatively easy for a decision-maker to misunderstand the legal test applicable in this case. This was so because there have been many contradictory judicial dicta upon it.

136 Whatever other enlightenment may be thrown upon the meaning of the phrase "serious non-political crime" appearing in Art 1F(b) of the Convention, it is clear that both the primary judge and the Full Court were correct in deciding that the Tribunal's approach to its first two findings of fact was legally flawed. By accepting an erroneous dichotomy between crimes of revenge and "political crimes", the Tribunal misunderstood the legal criterion which it was obliged to apply. The misunderstanding was highly material to the respondent's case because it excluded from consideration, erroneously, acts which might be *both* political *and* motivated by an element of vengeance. Being the misapplication of

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132 eg *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 291.

133 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 394-395 citing Fullagar J in *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51.

the applicable phrase in the Convention, equivalent to one of statute, it constituted an error of law.

137 The same can be said in relation to the Full Court's conclusion that an error of law had been shown in the approach of the Tribunal to the third finding of fact. The only difference between the Full Court and the primary judge in this respect was that the latter considered that the reasons given were sufficient, whereas the former considered that they demonstrated the same serious flaw, or inadequacy in reasoning, which suggested the absence of a lawful basis for the conclusion that the evidence involved the respondent in conduct taking him outside the pursuit of political goals[134]. I agree with the Full Court.

138 The fact that the Tribunal called its conclusion one of fact, placed its reasoning under a heading "Findings of fact" or even thought it was making a finding of that character cannot be determinative of the point when challenged in a court as exhibiting an error of law[135]. If a fact-finding body reaches its conclusion by applying an incorrect understanding of the law, its conclusion will be flawed for error of law. A court with power of correction must then say so. There were strong indications that the incorrect classification influenced the Tribunal's conclusion. The facts adduced before the Tribunal did not disclose that the murdered policeman was involved in any personal attack on the respondent or his family. The KLF operative he had allegedly tortured was simply "one of our people". There was no real suggestion of private purposes or of a personal motivation on the part of the respondent. His task was solely to supply information. He did so allegedly under KLF orders.

139 In such circumstances the conclusion of the Tribunal that his participation in the murder was "an act of revenge or retribution" and for that reason was outside the classification of "political" is demonstrative of legal error. It treated the presence of a motivation of "revenge or retribution" as incompatible with a crime of a political character. This involved a misunderstanding of what "political" and hence "non-political" meant in the context. If an incorrect understanding of the Convention phrase is applied to the facts found it is unsurprising that it should lead to a legally incorrect result. To exhibit deference to such legal error would not be consonant with the jurisdiction and power of judicial review (called "appeal") conferred by the Parliament on the Federal Court. It would, moreover, be inconsistent with our constitutional notions about the rule of law.

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134 cf *Singh* (2000) 102 FCR 51 at 62 [31].

135 cf reasons of McHugh J at [58].

140 The approach of the Full Court to its limited jurisdiction and power was therefore correct. The third issue should therefore be decided in favour of the respondent.

Conclusions and orders

141 In my view the principles that emerge from this appeal include the following:

(1) A decision-maker does not err in law in considering as a preliminary issue whether an applicant for refugee status falls within an exception in Art 1F of the Convention. As a matter of law, it is not necessary first to decide the applicant's entitlement to refugee status. In appropriate cases this may be assumed whilst the application of the exception is being determined.

(2) Whilst courts empowered to intervene for error of law will not subject the reasons of administrative decision-makers (such as the delegate or the Tribunal) to over-zealous scrutiny, a misconstruction of a key phrase of the applicable law (here the meaning of "non-political" in the Convention, as incorporated by the Act) involves an error of law which the court is obliged to correct. An applicant for refugee status is entitled to have the Convention correctly applied to his or her case, freed from such an error.

(3) A decision-maker makes an error of law by assuming that the fact that an act was one of "revenge or retribution" necessarily makes it "non-political". There is no such dichotomy.

(4) The precise meaning of serious "non-political" crimes in Art 1F(b) of the Convention is not conclusively elaborated, for all possible cases, by the Convention itself, municipal law or judicial authority. However, some guidance can be offered:

    (a) To characterise the crime as "political" or "non-political", it is necessary to consider all of the facts of the case in the context, and for the purposes, of the Convention. There is no bright line for distinguishing "non-political" from "political" crimes;

    (b) "Political" crimes are not confined to crimes that fall within the purely political offences such as treason, sedition and the like. "Non-political crimes" take their meaning accordingly;

    (c) Depending on the circumstances, murder may be a "political crime" if it is otherwise so characterised;

    (d) The ascertainment of the object or purpose of the crime is relevant to deciding whether it is "political" or "non-political" in character.

To be "political" it must, in some appropriately close way, be linked with the purpose of changing the political environment, commonly the government, by the commission of the crime;

(e) Whilst purely personal grudges or motivations for a crime may sometimes demand that the crime be classified as personal (and "non-political" for that reason), revenge and personal hatred are not, as such, inconsistent with political action. On the contrary, they may be its expression in a particular case;

(f) In deciding whether a crime is "political" or "non-political" it will sometimes be relevant to consider the weapons and means used; whether the "target" of the crime is a public official or a government agent as distinct from unarmed civilians chosen indiscriminately; and whether the crime is proportionate to the political end propounded. If it is excessive and disproportionate, it will be easier to infer that its true character is "non-political", that is, done for the satisfaction of some other and different, possibly entirely personal ("non-political") purpose. It will usually be necessary to examine the alleged objectives of any organisation involved and the applicant's connection, if any, with that organisation; and

(g) It will also be appropriate to read the exception for "serious non-political crimes" in the context of the burden that is placed by the Convention upon countries of refuge and the exceptions that are provided in the specified cases, including by Art 1F, where, in the particular case, that burden would be intolerable. The serious crimes mentioned in the exclusions in Art 1F are such that their extreme character is accepted as exempting the country of refuge from the protection obligations stated in the Convention, however much otherwise the applicant qualifies for recognition as a "refugee".

142 Other relevant principles must await later cases, doubtless with the advantage of further international elaboration. In this case, the appeal from the Full Court's decision should be dismissed with costs.

CALLINAN J.

The facts

143 The respondent in this case is a Sikh whose family and house were annihilated in Delhi following the assassination of the Prime Minister of India, Mrs Indira Gandhi, in October 1984. Subsequently, the respondent joined the Khalistan Liberation Force ("the KLF") to work, as he put it, "to liberate our country" Khalistan (the Punjab). By January 1991, he was promoted by the "General" of the KLF to the position of "Commander of Information". In or about 1996, the respondent was ordered to leave India and to travel to Australia by his commanding general in order to "save [his] life". No particular circumstances of danger to the respondent were identified by him. By December 1996, the respondent had travelled by ship to Melbourne where he disembarked and entered Australia illegally by evading any scrutiny by customs and immigration officials. The respondent wished to remain in Australia and lodged an application for a protection visa, under s 36 of the *Migration Act* 1958 (Cth)[136], in January 1997.

144 The respondent was, in accordance with the appellant's policy, interviewed by an official of the appellant's Ministry, Mr McHugh. It is relevant to set out some of the exchanges which took place in that interview:

> "MR McHUGH Did you undergo any period of training with the KLF, when you first joined?
>
> MR SINGH What kind of training?
>
> MR McHUGH Don't know. Well, what was your first – what did you first do for the KLF? What was your first involvement with them?
>
> MR SINGH I was just trying to move the stuff, the collection and the transportation.
>
> MR McHUGH So what were you doing, sorry?

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136 "Protection visas

> (1) There is a class of visas to be known as protection visas.
>
> (2) 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."

MR SINGH *I was moving all the material, they wanted to move it from one place to another place, because I have the connection in the transportation business.*

MR McHUGH So did you drive the truck, do you mean?

MR SINGH No.

MR McHUGH What did you do?

MR SINGH Like, when they wanted to move one shipment to the other area, and they wanted to deal with the trucking transportation, I have the connection. *I tell them, 'There's a couple of boxes you want to move from certain places to certain places,' like that.*

MR McHUGH So you made the arrangements?

MR SINGH Yes, making the arrangements.

MR McHUGH And what are we talking about? Boxes of what?

MR SINGH *Sometimes they have weapons also in the boxes, too.*

MR McHUGH *Sometimes weapons, sometimes what else?*

MR SINGH I was told by my superior, 'We want to transport this box,' that's all I know.

MR McHUGH Where did you meet other members? Did you meet at a house, or what?

MR SINGH All different places.

MR McHUGH Were they supporters' houses, generally, or out in the middle of the fields, or where?

MR SINGH Some – a couple of people I met in the restaurant, at a hotel, something like that.

MR McHUGH *How long did you do that sort of work? Make those arrangements for materials to be transhipped?*

MR SINGH *Until I came here, in December last year. Collecting the information, passing the information.*

MR McHUGH Well, why would that – I can see that sort of activity would have made you of interest to the authorities when the Khalistan movement was at its height, but why would they be interested in you now?

MR SINGH Because at the moment it's still going on.

MR McHUGH No, but at a greatly reduced level.

MR SINGH Only for those people, they are not active. It's still going on.

MR McHUGH I mean the information that I have, and that I read is, except for the top members, police won't show the interest in you that they would have shown at the height of the campaign.

MR SINGH Would you repeat that?

MR McHUGH Well, the information that I read is, except for the people that were the leaders of the organisations, the Khalistan organisations, except for those people, the police won't show any great interest in other people that were just members.

MR SINGH *I was not just a member, I got a lot of information.*

MR McHUGH Well, you've told me, so far, that you just arranged for goods to go in trucks.

MR SINGH *I was on third level, collecting all the information.*

MR McHUGH Well, you had better explain it to me, because you haven't told me anything about that, yet. You've told me, so far, that you put goods on trucks. Now, did you do anything more than that?

MR SINGH *I was collecting all the information.*

MR McHUGH I don't understand what that means, collecting all what information?

MR SINGH *If they wanted any target.*

MR McHUGH What information, though?

MR SINGH *For example, say whoever the police officer was torturing other persons, and where he lives, what he does, what time he go to work, stuff like that.*

MR McHUGH Anything else? Any other information that you would collect, in this particular example you are talking about?

MR SINGH It was all different kind of information. It depends what area, where and when there's need to be done. Whatever was signed up by my chief, and making arrangement for the people, they come in

from a different area, they want to meet the chief, or they want to stay there.

MR McHUGH They wanted you to what?

MR SINGH Collect from different area, the people, the chief want to see them. We have to make ---

MR McHUGH 'Chief,' did you say?

MR SINGH 'Chief,' yes.

MR McHUGH So you would call people in from different areas?

MR SINGH Yes.

MR McHUGH How did you do that?

MR SINGH We send the message, 'We want to see you,' so and so. We have some kind of criteria, we've got to meet, like once a month.

MR McHUGH How would you call them? Would you call them on the phone?

MR SINGH It depends what area, or where they are. Sometimes we send a personal message, sometimes we ---

MR McHUGH *Did you ever take part in any of these hits of targets yourself?*

MR SINGH *No.*

MR McHUGH Why wouldn't you have done that? Wasn't there any call on you to do that? Wouldn't everyone be expected to do that sort of work?

MR SINGH Can you make it more clear?

MR McHUGH I'm saying I would have thought that everyone in the organisation, at some stage, may have been called on to do that sort of work, hitting targets, as you termed it.

MR SINGH That was ordered by the chief.

MR McHUGH Yes, but what I'm saying, I think you are missing the point. I would have thought any organisation like that, there would have been times when everyone would have had to involve themselves in striking targets?

MR SINGH No, everybody has their different jobs.

MR McHUGH Were you given weapons training, yourself?

MR SINGH No.

MR McHUGH Was that unusual, that you weren't given weapons training?

MR SINGH Not really, because there are a lot of people that are trained for that, that they don't use the weapon and they have a different type of job to do.

MR McHUGH What's the strength of the KLF now? How many members would they have now?

MR SINGH Are you talking about from top level to low level?

MR McHUGH Yes.

MR SINGH Exactly, I don't know exactly how many members.

MR McHUGH Where is the leadership living at the moment?

MR SINGH Are you talking about the chief?

MR McHUGH Mm, the chief and chief's advisers, I guess.

MR SINGH He's in Pakistan.

MR McHUGH Did you travel around with him frequently, or at times?

MR SINGH Quite a few times.

MR McHUGH What caused you to leave India, at this point in time?

MR SINGH Could you make it more clear please?

MR McHUGH Why did you leave India now? Why didn't you leave two years ago, when perhaps a lot of the other high ranking Khalistan leaders left? Three years ago a lot of them left them [sic], why didn't you leave then? Why have you left now?

MR SINGH Because I just got the order from the chief.

MR McHUGH Are you the only one to get such an order from the chief?

MR SINGH Would you repeat that again?

MR McHUGH Are you the only one to get an order like that, to leave the country?

MR SINGH No.

MR McHUGH Who did the chief give the order to?

MR SINGH Whoever he wanted to.

MR McHUGH Why now? What's happened?

MR SINGH Because it's too dangerous to live there.

MR McHUGH But it's been more dangerous in the past.

MR SINGH The people that are active, there is the same danger was three years ago or four years ago, the same danger as now. For them there's no difference.

MR McHUGH You talk about, in your application, about being just a member, at one stage, and then being promoted to Commander of Information, later on.

MR SINGH Mm.

MR McHUGH When did you get that promotion?

MR SINGH I think that was '91.

MR McHUGH How did duties change then, before that promotion, after that promotion? What was the difference in your duties?

MR SINGH Can you be more specific?

MR McHUGH Before 1991, what were your duties? What were your responsibilities? You've talked about putting goods on trucks, and what else?

MR SINGH Distributing the literature, stuff like that.

MR McHUGH So how did all those duties change after you got promoted?

MR SINGH *In '91 I was introduced to the chief, and he was impressed with my work, my hard work and my honesty, and the loyalty to the – that's why he promoted me to collect, do some more specific kind of work, they can trust me more than another person.*

MR McHUGH And the work you did after that point, that was the information that you told me about before, was it? See, I'm looking at your duties, I'm trying to look at what you did previously, before the promotion. I'm trying to look at what you did after the promotion. So I'm saying, after promotion you did a lot of that information gathering that you told me about before, is that right?

MR SINGH Yes.

MR McHUGH What else did you do?

MR SINGH If you want to send a message to some area commander or this commander, stuff like that, whatever the information they needed, we pass it to them. Whatever the message he want to send to the person, sometimes too dangerous to use the phone.

MR McHUGH And you talk about using codes. Could you explain the codes you used to me?

MR SINGH Code that you talk about to use phone line.

MR McHUGH Sorry?

MR SINGH The code that you talk about when you use the phone line.

MR McHUGH I guess that's what – you talked about, you made a reference to using codes, did you?

MR SINGH Yes, different codes, like say, call on the phone, say, 'How's your family?' If he said, 'Okay,' that means boxes are already there, something like that.

MR McHUGH So they weren't so much strict codes, they were just ways, phrases you'd devise for using them.

MR SINGH Because we don't know if the phone is going to be recorded or not, you know, stuff like that, you know. That's why we just do the family things, you know, to – 'How's your family?' If he say, 'The family is okay,' that means the box, he already received the box. For example, I can say that.

MR McHUGH Did you used to speak in Punjabi?

MR SINGH Punjabi and Hindi.

MR McHUGH *Can you give me an example of one of the targets that you were – give me an example of one of the targets that you were involved in? Tell me one of the incidents.*

MR SINGH To collecting the information, or what can involve me?

MR McHUGH I want to know about what you called, 'a target.' I want to know the details of a target that you helped to arrange. Details of an operation that you helped carry out, I want to know the details. Just as an example, you tell me, give me an example.

MR SINGH *There was one police officer, he was* ---

MR McHUGH *What town?*

MR SINGH *At Ludhiana.*

MR McHUGH *Ludhiana.*

MR SINGH *Mm.*

MR McHUGH *How do you spell that?*

MR SINGH *L-u-d-h-i-a-n-a.*

MR McHUGH *A police officer, yes.*

MR SINGH *He was after, with the KLF people, and one of our persons was – get caught, and he tortured him so badly he was not able to walk, and they kept him in the cell, or police station, you can call that, 17 days. They torture him so badly, then after that we try to save his life, we try to get something up, we talk, we say that political approach, or something like that.*

MR McHUGH *Political?*

MR SINGH *Yes.*

MR McHUGH *Political what?*

MR SINGH Like some conduct – people go and he was a student like say, he was a professor. He tried to approach him to protect him, 'He's okay, he's not this type of person,' or something like that. Or there was one guy, he was an ex MLA.

MR McHUGH *So you got a politician to approach what, the police?*

MR SINGH Yes. Sometimes they listen to them, you know. It depends on officer, if he want to listen or not, because they have some authority.

MR McHUGH All right, but you are telling me about this case. All right, you've got a police officer who is torturing one of your men, you've got someone to approach him. What happened?

MR SINGH *Then he didn't release him, then I as ordered, from my boss, and find out all the detail about his family. How many kids he got, and what school they go, what time he go to work, and which road he takes when he is leaving from house, and what route he takes when he is coming back. So I work on that case, and collect all the information, and pass it to my chief.*

MR McHUGH *What happened to that policeman?*

MR SINGH *They get rid of him.*

MR McHUGH *So they killed him?*

MR SINGH *Yes, because before they did it the KLF killed, right, the policeman kill him, and then they wait until they kill him too.*

MR McHUGH How many operations like that would you have passed information on about?

MR SINGH To hitting the target?

MR McHUGH *Mm, how many operations, how many actions like that would you have been involved in?*

MR SINGH *I was not involved in the action.*

MR McHUGH *In collecting the information for the action?*

MR SINGH *I don't know exactly what number, many, many times.*

MR McHUGH Now, you've given me a chart of the Khalistan Liberation Force. Could you write in the names of these high rank people for me, as it is when you left? Thank you. Now, you talk about arranging the necessary supplies to hit any target. What sort of supplies are we talking about? What sort of guns, or whatever?

MR SINGH Like the transportation, whatever they needed.

MR McHUGH *What sort of things were needed? What would go into a typical operation, that's what I'm asking. What sort of supplies would you move?*

MR SINGH *What do you mean, 'supplies'? Are you talking about the weapons, are you talking about ---*

MR McHUGH *Well, I don't know, you've called them supplies in your application. I'm asking you.*

MR SINGH *It depends what they needed.*

MR McHUGH *What could they need?*

MR SINGH *Well, if they want to hit the target they need the weapon, that could be arranged by the chief.*

MR McHUGH *What sort of weapons?*

MR SINGH *Whatever they needed, what's best for the target.*

MR McHUGH *Well, give me an example.*

MR SINGH *They need, say like a revolver or a gun.*

MR McHUGH *A walawa, what's that?*

MR SINGH *I'm talking about a pistol or something like that.*

MR McHUGH *A pistol, is it? Revolver?*

MR SINGH *A revolver, yes.*

MR McHUGH *What other weapons?*

MR SINGH *AK47.*

MR McHUGH *Was that the main strike weapon, an AK47?*

MR SINGH *Most of the time.*

MR McHUGH *Did you know where these things were – did you have them or did you just give instructions? Were they hidden in hideaways, or what?*

MR SINGH *Yes.*

MR McHUGH *And you just gave instructions about getting so many for the particular operation?*

MR SINGH *No, I got the instruction from the chief of where there are and how many they needed, and when the operation is done they'll collect them back.*" (emphasis added)

145 The delegate of the appellant refused the respondent a protection visa. The respondent sought a review of that refusal by the Administrative Appeals Tribunal ("the Tribunal"). In those proceedings, in which the respondent was represented by a migration agent, he effectively sought to repudiate the substance of some of his statements to the interviewing officer, Mr McHugh. Two examples of his efforts in this regard are as follows.

146 During his examination-in-chief, the respondent was asked by the person representing him, Mr Glazbrook, a question about superior orders:

"MR GLAZBROOK Were you always acting under orders from your superior officers in the KLF to gain information, or were you just gathering information as you went around and then passed that information on? Were you the instigator of the information?

MR SINGH We were collecting the information not only because we were ordered by the organisation, we were collecting the information because where there's a happen, we just go there, send over people, collect the information – what's happened, how many genocide – by the Indian government; not only because of the organisation and we pass that information to the political parties and all those human rights groups. Whatever they do after the information, we don't know.

MR GLAZBROOK Did you pass the information onto other groups besides the KLF?

MR SINGH Yes, sir – just like political parties, you know, we tried to approach them, the political people and all the religious people you know, we give them the information because that information does not come because all the media's controlled by the Indian government.

MR GLAZBROOK Did you believe, or have any conscience feelings about what you were doing with information, as being against humanity, generally?

MR SINGH We tried to protect the humanity, not to genocide the humanity.

MR GLAZBROOK But you, yourself – did you have feelings that you were committing any offence yourself?

MR SINGH No."

147 Later he gave evidence at odds with his earlier statement that he had "tracked" one particular police officer (and his family) who was a "target" of the KLF and was, according to the respondent, later killed by a member of that organisation:

> "MR GLAZBROOK Did the KLF go beyond offering protection? Did the KLF institute actions against the police, of their own accord?
>
> MR SINGH If they did, I have no knowledge.
>
> MR GLAZBROOK Did you believe that the information you were giving to your leaders was a part of the process of taking action against certain police, or certain security forces?
>
> MR SINGH That's not in my knowledge. That's their decision, whatever they did to the information.
>
> MR GLAZBROOK So you believe that the information that you were gathering and passing on, was information to assist the KLF in carrying out some of its functions?
>
> MR SINGH No. Because I'm not the only one who was collecting the information, there were a lot of other people they were doing the information."

148 The Tribunal was unimpressed by the respondent as a witness: the Tribunal found that he had made a calculated attempt to avoid the consequences of his disclosure to the appellant's interviewing officer, which, in the Tribunal's opinion, generally represented an accurate account of the relevant events. Accordingly, the following findings were made by the Tribunal:

> "1 The applicant knowingly and actively participated in the unlawful killing of the police officer referred to earlier in these reasons. The applicant did so by the provision of information and intelligence pertaining to the whereabouts and movements of the police officer knowingly for the purpose of the killing of him by other members of the KLF.
>
> 2 The applicant has on other occasions knowingly participated in the commission of similar acts by the provision of information and intelligence concerning the movement and whereabouts of other persons who were 'targets' for KLF purposes.
>
> 3 The applicant also knowingly and actively participated in acts of violence perpetrated by members of the KLF in so far as he assisted in the provision of weapons and explosives to those members full well knowing the purpose for which they were to be used and after

> these acts of violence were carried out, he arranged from time to time transportation for these members and places for them to hide."

149 The Tribunal held that the killing of the police officer by the KLF was a serious non-political crime:

> "The question then arises as to whether this serious crime is non-political. Having regard to the accepted evidence, the Tribunal is satisfied on the balance of probabilities that the planned unlawful killing of the police officer took place because he was alleged to have tortured a member of the KLF. Despite the assertions by the applicant that his involvement with the KLF and the activities of the KLF in general were directed solely at achieving the creation of the independent Sikh state of Khalistan and protecting Sikh minorities from oppression by the Indian authorities, in the Tribunal's opinion, the crime in question can only be characterised as an act of revenge or retribution against the particular police officer for the alleged torture of a KLF member. Accordingly, there can be said to be no nexus or proportionality or close or direct causal link between this crime and the alleged political objectives of the KLF. The Tribunal is of the view that this serious crime is very much akin to the subject crime in *Hapugoda*[137] which the Tribunal found to be lacking in any meaningful political character. For these reasons, the Tribunal finds that the unlawful killing of the police officer falls to be considered as a serious non-political crime for the purposes of Article 1F(b) of the Refugees Convention."

Appeals to the Federal Court of Australia

150 The respondent subsequently appealed against the decision of the Tribunal to the Federal Court of Australia (Mansfield J). His Honour, after reviewing a number of authorities, concluded that in one respect the Tribunal did fall into error, that is, in treating the respondent's crime as non-political because it was in part at least motivated by a desire for revenge. His Honour held, however, that there was another basis upon which the respondent's appeal should be rejected. It was that the third of the findings (which I have earlier set out) justified the conclusion that the respondent had committed a serious non-political crime. His Honour therefore dismissed the appeal.

151 The respondent then successfully appealed against the decision of Mansfield J to the Full Court of the Federal Court (Ryan, Branson and Lehane JJ). There the appellant failed to persuade the Court that Mansfield J had

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137 *Re Hapugoda and Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 659.

erred in holding the Tribunal to have been in error in deciding that the respondent's participation in the murder of the police officer amounted to the commission of a serious non-political crime. Their Honours said:

> "If there is a political struggle in which agents of the government, including police, have a policy of torturing and killing those who oppose the government, we see no reason why crimes directed at those agents, or police officers, may not be regarded as political (that is, as satisfying the 'incidence' test) even though they may be characterised as crimes of revenge. It is, of course, necessary to look at the circumstances of the particular crime in order to decide (on the basis of what may be very limited information) whether there are serious reasons to believe that it cannot be characterised as political. It is necessary also, of course, to consider whether the crime has characteristics which, notwithstanding 'incidence', require it to be regarded as non-political. Those are the steps which, in our view, the Tribunal did not take. Accordingly, for reasons which are substantially similar to those given by his Honour, in our view the primary judge was correct in relation to the murder of the police officer."

152 They also took a different view of the respondent's other activities in India from the views of the Tribunal and Mansfield J:

> "All that that evidence showed was that there were 'targets' which were 'hit' and that firearms and explosives were supplied in order that they might be 'hit'. There is no indication that any consideration was given to the question whether, on the material before the Tribunal, there was anything to show whether the targets included uninvolved civilians or political targets only or, indeed, whether the crimes were (or were not) directed towards the attainment of the political goals of the KLF. Those were, in our view, matters which, in accordance with the authorities, the Tribunal should have considered. It might be supposed that, to some extent at least, answers might be found in information from reliable governmental or non-governmental sources about the activities of the KLF and, generally, about the nature of its targets and the way in which it attacked them. There was some information of that kind – perhaps not very much – in the documents before the Tribunal. The fact that the Tribunal made no reference to such material suggests that the Tribunal found it unnecessary to do so; but for the reasons we have given, it was necessary, in our view, for the Tribunal to make a finding, on the whole of the material before it, as to the nature of the crimes in which the weapons and other materials, in the supply of which the appellant was involved, were likely to have been used."

The appeal to this Court

153 The appellant appeals to this Court on the following grounds:

"1 The Full Court erred in holding that the Tribunal was required to look at the circumstances of the crime so as to determine whether it is an incident of a political struggle before considering whether there are other characteristics of the crime which make it a 'non-political crime' within Article 1F of the Refugee Convention and Protocol notwithstanding the existence of any political struggle. The Full Court should have held that it is not an error of law for the Tribunal to find that a particular crime is of a kind that is so atrocious that it can bear no sufficient proportionality to political objectives for it to be capable of characterisation as a 'political crime' irrespective of the existence of a political struggle.

2 The Full Court erred in failing to find that:

(a) of its nature, the object of revenge could not be an 'object of overthrowing or subverting or changing the government of a state or inducing it to change its policies' and, therefore, could not itself be characterised as 'political';

(b) when a serious crime is done for revenge *and* for the purpose of overthrowing or subverting or changing the government of a state or inducing it to change its policies, the crime is done with mixed political and non-political motives;

(c) when a serious crime involves a non-political motive it may be characterised as a non-political crime for the purposes of Article 1F(b); and

(d) therefore, once the Tribunal had found that the murder of the police officer was affected by a revenge motive it was open to it to characterise the crime as a 'non-political crime' and to affirm the decision under review."

154 There are some observations that I should make at the outset with respect to matters that I think are of relevance and importance, and which have influenced me in deciding this appeal.

155 We live in a world in which, in many countries, seemingly endless cycles of violence occur. Across the continent of Africa, in countries too numerous to mention, clans, tribes and factions repeatedly kill and maim one another. In Northern Ireland, in the Balkans, in parts of the former Soviet empire, today in parts of Indonesia, less than a generation ago in Indo-China, in parts of South and

Central America, and on the Sub-Continent ever since partition in 1947, peoples execute and assassinate members of rival groups, and, in some cases, adherents to different religious faiths. It is often impossible to know, especially from a distance, and whilst living in a country of longstanding, stable, democratic political institutions, who in those places has right on their side, assuming that blame can be allocated. Equally, it is impossible to know who is or was the initiator and what is an act of revenge, or an act in furtherance of a political objective. It would be a mistake to assume that all of today's terrorists will turn out to be tomorrow's freedom fighters.

156 The rightness of a just cause or the monstrousness of an evil regime is often difficult to discern at the time. From 1917 to 1989, even in the democratic world, opinion was far from unanimous as to the true nature of the Soviet regime. Evidence of the horrors of the police state and the Gulag, the absence of freedom of expression and conscience, mass deaths in slave labour camps, the suppression of all dissent and other atrocities emerged only slowly and fitfully. The same might have been said of the awareness of the activities of the Nazis in the 1930s, during which the gullible, as well as appeasers and sympathisers with malign motives, were disposed to take a benign view of Hitler's totalitarian regime, the full horrors of which only became fully revealed after the Second World War. In both cases, those whom Lenin would describe as "useful idiots" could be found to act as apologists for some of the worst, or the worst crimes in human history. There may be some regimes so brutal and some circumstances so intolerable that no one should be obliged to submit to them: that practically any response is justified.

157 The underlying, inescapable, moral question which the Convention does not answer is, however, do the ends of a political cause justify any means, including murder and assassination?

158 In a sense, violence, especially in its final and worst manifestation, killing, is the antithesis of political activity. Politics is the art or science of government. Murder can hardly be fairly characterisable as an activity in furtherance of, or part of the practice of, an art or science.

159 I would also point out that in this case there was no evidence whether, as in Australia, the death penalty has been abolished in India. If it has, then, the respondent by being an accessory as I think it must be concluded he at least was, or by significantly contributing[138] to the killing of the policeman, inflicted a penalty upon him beyond the power of the polity of India to impose on the respondent.

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138 See *Royall v The Queen* (1991) 172 CLR 378 at 441-451 per McHugh J; *Osland v The Queen* (1998) 197 CLR 316 at 399-404 [204]-[225] per Callinan J.

160 Civilised democratic societies abhor violence. They are averse to unlawful self-help. Their commitment is to open government and fair processes for all citizens. Bearing all of the matters to which I have referred in the last five paragraphs in mind, I will state that I find myself obliged to approach the case with a disposition, with respect to my understanding of what is a political act, against unlawful self-help and violence, especially premeditated murder.

The Convention

161 Clause 1F of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees provides as follows:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

162 Contrary to a submission made in this Court for the first time by the respondent, I am of the opinion that the words "prior to his admission to that country as a refugee" should be understood to mean, "prior to his entry into the country in which he seeks or claims the status of a refugee". Otherwise the purpose of the Convention would be subverted in that the nature of an applicant's prior criminal conduct could only be explored after he had been accorded refugee status.

163 In finding the meaning to be given to the expression "non-political" in cl 1F(b), I should immediately record my debt to Lord Lloyd of Berwick for his review of the authorities in the United Kingdom, the United States and Canada in *T v Home Secretary*[139], although, with respect, I would express my conclusion somewhat differently from the way his Lordship (with whom Lord Keith of Kinkel and Lord Browne-Wilkinson agreed) did. Lord Lloyd said this[140]:

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139 [1996] AC 742.

140 [1996] AC 742 at 786-787.

> "A crime is a political crime for the purposes of article 1F(b) of the Geneva Convention if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public."

164 In my opinion, murder, especially premeditated murder, or its planning or furtherance, will practically never be a political crime. I say "practically never" because, as I have already intimated, it is impossible to predict precisely what circumstances and cases of desperation, and justification, may come before the courts.

165 A crime, in my opinion, will be a political crime if, first, it is done genuinely and honestly for political purposes, that is in order to change or influence an oppressive government or its policies, and, secondly, the means employed, although of a criminal nature according to the law of the country in which they are employed, are reasonably, in all of the circumstances, adapted to that purpose. Circumstances which will be relevant to the question of reasonableness or otherwise are the nature and extent of the persecution, discrimination or oppression suffered by an applicant or a group to which he or she belongs before the commission of the crime; the availability and efficacy of measures to redress or punish such persecution, discrimination or oppression; the extent to which the applicant sought first to invoke or use such measures before embarking on the crime; the means available to the applicant or group to avoid persecution, discrimination or oppression; the nature of the government or its policies that the applicant wishes to influence or change; the process by which that government achieved power; the aims of, and means employed by any organisation to which the applicant belonged in furtherance of which the applicant claimed to be acting; the existence or otherwise of a free press in the applicant's country; the history, so far as it can be reliably ascertained, of dissension in the applicant's country; the way in which both the polity from which the applicant has departed and the polity of the country in which the applicant has sought refuge regard and punish the crime of the applicant, and any crime of his or her "targets" said to justify the former's crime; the respective roles of the government and the group of which the applicant is a member in the perpetuation of cycles of violence; and, the risk of indiscriminate harm to members of the public. No one of these need necessarily be decisive, except perhaps the last in some cases. As to that, its absence does not mean that the

crime will necessarily be a political crime, although when it is present it will almost always be decisive as a ground of exclusion.

166 On the application of these principles, the Tribunal would, once it had found that the respondent's version contained in the official interview was to be preferred, inevitably, in my opinion, have reached the conclusion adverse to the respondent that it did, and on the bases of the two crimes or sets of them for which the appellant contends.

167 I deal first with the murder of the police officer. It was the most violent of crimes. On the respondent's own account (given to the interviewing officer) he was, at the least, and applying the *Briginshaw*[141] test which I think appropriate, an accessory to the crime of murder, or a conspirator in a plan to murder, and, on one view, a significant contributor[142] to, and therefore a principal in, the crime of murder. The crime was committed out of a strong, if not exclusively retributive motivation. Like the Full Court, I would not necessarily hold a crime to be a non-political crime simply because it was or may have been motivated in part by a desire for revenge, but that it has been so motivated cannot be disregarded in evaluating its true character[143]. The punishment by due process of oppressors, or, if those means are not available, activity, perhaps even violent activity, to dislodge them, or to prevent further oppression by them may be justified. But violence, out of revenge is not, any more than revenge can of itself be regarded as a legitimate political activity. It seems to me to be improbable that the killing of this police officer, or indeed a multiplicity of police officers, would produce any changes of the kind which the respondent and the KLF would wish to achieve. There was evidence that there was freedom of movement of Sikhs in India and that oppression could be avoided without departure from the country. I do not overlook that, on the respondent's version, the police officer who was the "target" of the KLF may have committed a dreadful crime or crimes but, as I have already indicated, the perpetuation of cycles of violence is itself likely to be futile. Nor do I overlook that political intervention to save the tortured prisoner of the police officer failed. These are matters which have to be weighed in the balance but they do not, in my opinion, tilt it in favour of the respondent.

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141 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

142 See *Royall v The Queen* (1991) 172 CLR 378 at 441-451 per McHugh J; *Osland v The Queen* (1998) 197 CLR 316 at 399-404 [204]-[225] per Callinan J.

143 Francis Bacon wrote in "Of Revenge", in *The Essays* (1601):

> "Revenge is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong, putteth the law out of office."

168 There was no suggestion that India lacked a free press. It has a democratically elected government. It also has an established hierarchy of courts. It has to be remembered that its political boundaries, although to a large extent they may have been imposed upon the peoples, and perhaps with insufficient care and consultation[144], were ones which it would have been difficult for anyone to draw in such a way as to give satisfaction to all. Having regard to that history, and the differing views, religions and traditions of the peoples of the Sub-Continent, 54 years would not appear to many to be a long period within which to mould and refine a democracy for more than a billion people.

169 The torturing by the police officer cannot be in any way condoned. But the respondent's account throws no light upon the question whether the torture was committed because the victim was a member of the KLF or whether the latter was guilty himself of a criminal act, whether of violence, terrorism, intimidation or otherwise. It is undesirable that a country give comfort to participants in crimes of violence on either side and I see no reason why considerations of these kinds should not influence the interpretation of such an imprecise expression as "non-political", particularly when there is so much room for difference as to an understanding of what is and what is not a political act.

170 It follows, in my opinion, that the Tribunal was correct and both the Federal Court and the Full Court erred in not concluding that the respondent's participation in the activities that led to the killing of the police officer, although a retributive element may have been involved, did not necessarily mean in this case that the respondent had committed a serious non-political crime. The purpose of the obtaining and passing of intelligence about the police officer's movements, the respondent well knowing that the police officer was, in the respondent's words, a "target", could only have been with a view to reprisals against him and to his elimination. The respondent said that he had been aware of other targets on other occasions, and accordingly he could have been under no misapprehension as to the likely fate of the police officer and his role in its

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144 Sir Cyril Radcliffe (later Lord Radcliffe), who was responsible for fixing the boundaries including that of the Punjab as part of the nation of India was given by the last viceroy, Lord Mountbatten (supported by the government of the United Kingdom) after approximately 200 years of British control, a total of 73 days for that purpose, so that his responsibilities would end on the second anniversary of the end of the war against Japan, 15 August 1947. The difficulties of settling disputed boundaries have so far proved intractable. An attempt by Sir Owen Dixon, acting as the special representative of the United Nations Security Council, to resolve the outstanding boundary disputes in respect of the nearby state of Kashmir in 1950 was unsuccessful.

realisation. Because I think this conclusion inevitable, there is no need for the matter to be sent back for reconsideration by the Tribunal.

171 I am also of the opinion that Mansfield J was correct in concluding that there was another basis upon which it could properly be held that the respondent had committed a non-political crime or crimes. People do not move weapons around, including Kalashnikov rifles and explosives, in secret, in order that they may be merely looked at and admired. Their movement could only have been for the purpose of their concealment and use. Something in addition should be said in relation to explosives. The possibility of indiscriminate wounding and killing must always be present when explosives are used unless a completely unoccupied and remote site is the target. Accordingly, there was, in the respondent's involvement in the transportation and concealment of explosives a very real prospect of the wounding or death of, as it has been put euphemistically on other occasions, innocent "collateral casualties".

172 In view of the conclusion that I have stated it is unnecessary for me to deal with the other matters argued by the appellant and referred to in the reasons of Kirby J.

Orders

173 In my opinion, the orders of the Full Court of the Federal Court should be set aside, the appeal allowed and the decision of the Tribunal restored. The respondent must pay the appellant's costs in the Federal Court and the Full Court of the Federal Court.