HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

SERGEY DRANICHNIKOV APPLICANT

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS RESPONDENT

Dranichnikov v Minister for Immigration and Multicultural Affairs
[2003] HCA 26
8 May 2003
B96/2000

ORDER

Application dismissed.

On appeal from the Federal Court of Australia

Representation:

S Dranichnikov appeared in person

J A Logan SC with R M Derrington for the respondent (instructed by Australian Government Solicitor)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ORS — RESPONDENTS

EX PARTE SERGEY DRANICHNIKOV — APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural Affairs; Ex parte Dranichnikov
8 May 2003
B44/2001

ORDER

1. *Order absolute for a writ of certiorari directed to the fourth respondent quashing the decision of the fourth respondent in matter V97/06976 dated 11 August 1998.*

2. *Order absolute for a writ of prohibition directed to the first respondent prohibiting him from acting upon or giving effect to or proceeding further upon the decision of the first respondent by his delegate the third respondent dated 20 May 1997.*

3. *Order absolute for a writ of mandamus directed to the fourth respondent requiring it to review according to law the decision of the first respondent by his delegate the third respondent dated 20 May 1997.*

4. *First respondent to pay the costs of the prosecutor.*

Representation:

S Dranichnikov appeared in person

J A Logan SC with R M Derrington for the respondents (instructed by Australian Government Solicitor)

CATCHWORDS

Dranichnikov v Minister for Immigration and Multicultural Affairs

Re Minister for Immigration and Multicultural Affairs; Ex parte Dranichnikov

Immigration – Refugees – Protection visa – Fear of persecution for reason of membership of particular social group – Whether Refugee Review Tribunal considered applicant was member of broader class of social group than that claimed – Whether Tribunal misunderstood and failed to address applicant's case – Whether constructive failure by Tribunal to exercise jurisdiction – Whether failure to accord natural justice.

Practice and procedure – High Court – Concurrent applications for special leave to appeal and for constitutional writs – Discretionary considerations in the grant of constitutional relief – Whether availability of appeal a discretionary bar to constitutional relief – Relevance of repeal of applicable legislation to the form of relief provided.

Constitution, s 75(v).
Migration Act 1958 (Cth), s 476.

1 GLEESON CJ. I regret that I am unable to share the conclusion reached by the other members of the Court, not because of any disagreement on a matter of principle, but because I have a different understanding of the reasons of the Refugee Review Tribunal ("the Tribunal"), whose decision is under review. The facts are set out in the other judgments. Since mine is a dissenting view, on a purely factual issue, I will state my reasons briefly.

2 It is contended that, so far, all who have considered Mr Dranichnikov's case – the delegate, the Tribunal, Kiefel J, and the Full Court of the Federal Court – have misunderstood, and therefore failed to address, that case. The particular question to be decided is whether that is true of the Tribunal.

3 The essence of the contention is that the Tribunal wrongly thought that the relevant social group to be considered, for the purpose of deciding whether Mr Dranichnikov had a well-founded fear of persecution by reason of membership of such a group, was businessmen, whereas his case was that he was a member of a more limited group consisting of businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals.

4 The Tribunal, in its reasons, said:

> "The Tribunal was informed of the circumstances surrounding the Applicant's actions in relation to trying to stamp out the attacks on entrepreneurs which had been increasing in the latter part of 1993 and the beginning of 1994. He had joined a number of other business people and had made representations to the Mayor and attended public meetings to highlight the plague of corruption and lawlessness. In order to pursue his objective in the field in which he was employed, he worked for the formation of a committee for the registration of property titles; this was achieved. Both the Applicant and his wife gave a number of examples of police inaction after crimes had been committed and standover tactics employed when citizens were doing the right thing and reporting instances to the police. Indeed the Applicant claims that the police put pressure on him to sign a letter requesting the discontinuation of the investigation into the attempt on his own life. He signed the letter because he felt that request as a threat. That was in late February or early March 1994.
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> ...
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> The Tribunal finds that the harm feared is not motivated by a Convention reason, hence the Tribunal need not proceed to a consideration of whether the fear is well-founded ...
>
> The Applicant's adviser had posited in his submission that the Applicant was a member of a particular social group, namely,

> businessmen in Russia. Even if the Tribunal were to accept this proposition, there is no indication that the persecution is 'for reasons of' membership of this group. Following the attempt on the Applicant's life in 1994 the Applicant does not report anything other than dissatisfaction with the society and the political system as a whole; there have been no further attempts to harm him or his family, nor are there indications of behaviour on the part of the Applicant which would attract the adverse attention of anyone for reasons of being a businessman in Russia. The actions which the Applicant described, which he took with other businessmen, in making representations to the Mayor were those of a concerned citizen and not part of a cognizable unit which could be considered a particular social group under the Convention."

5 The Tribunal's reasons were given on 11 August 1998. The submission to which the Tribunal was referring was contained in a letter of 3 August 1998 to the Tribunal from Mr Dranichnikov's solicitors. The letter said:

> "In recent years businessmen in Russia have been persecuted and murdered purely for belonging to *that specific group of people known as* '*businessmen*'. Mr Dranichnikov by definition of his employment was recognised as a member of the business community who was also actively involved in the pursuit of justice. Mr Dranichnikov by virtue of his businessman status and his stance against crime was considered obstructive and worthy of elimination. The attempt on his life is a very real indication of the graveness of his situation and his justifiable fears of returning to his country of origin." (emphasis added)

6 The solicitors evidently, and for good reason, recognised that there may be a difficulty in persuading the Tribunal to treat people who complained about failure to enforce the law, or people who took a "stance against crime", as a "particular social group". Accordingly, the submission stressed Mr Dranichnikov's status as a "businessman", and argued that businessmen constituted a "specific group of people". Mr Dranichnikov's stance against crime was given as a reason why he was at particular risk, but when it came to identifying the relevant social group, his status as a businessman was put in the forefront of the argument. The reasons of the Tribunal responded to the submission as it was put. The Tribunal considered that the most that could be said was that he was a "concerned citizen and not part of a cognizable unit which could be considered a particular social group". The Tribunal appears to me to have considered the argument advanced by Mr Dranichnikov's solicitors, in the light of the evidence and the Convention.

7 I am not persuaded that the Tribunal misunderstood Mr Dranichnikov's case, or failed to address it.

8 I would dismiss the application for special leave to appeal, and the application for constitutional writs, with costs.

9 GUMMOW AND CALLINAN JJ. The applicant, Mr Dranichnikov, seeks special leave to appeal against a decision of the Full Court of the Federal Court, and prerogative relief under s 75(v) of the Constitution. The question which his application under s 75(v) raises is whether, in substance, the Refugee Review Tribunal ("the Tribunal") failed to exercise jurisdiction to review a decision of the delegate of the Minister. If special leave were granted the applicants would urge that the Federal Court erred in dismissing the applicant's application for a review of the Tribunal's decision under s 476 of the *Migration Act* 1958 (Cth) ("the Act").

The facts

10 Mr Dranichnikov arrived in Australia on 8 January 1997 with his wife Olga Dranichnikov and their daughter Maria Dranichnikov. On 20 May 1997, an application that they made on 2 April 1997 for a protection visa under the Act was refused by a delegate of the Minister for Immigration and Multicultural Affairs. They sought a review of the refusal by the Tribunal.

11 On 11 August 1998, the Tribunal decided to affirm the delegate's decision. In doing so it made a number of findings in the applicant's favour.

The findings of the Tribunal

12 Both Mr Dranichnikov and his wife gave credible accounts of their experiences in Vladivostok in Russia. They described, accurately it follows, several instances of police inaction after crimes had been committed and of oppression by police officers.

13 Mr Dranichnikov was the General Manager of a company that provided real estate and legal services in respect of property transactions in the city. The business of the company was not a large one. It had a turnover of about $A15,000 a month and employed only eight people.

14 Before February 1994, Mr Dranichnikov had tried to interest the authorities in ways and means of preventing attacks, including murderous ones, on entrepreneurs. These had been increasing in the latter part of 1993 and in early 1994. His efforts extended to the making of representations to the Mayor of Vladivostok, and attending public meetings to draw attention to endemic corruption and lawlessness in the city. Another of his endeavours, and one which was successful, was the formation of a committee for the registration of titles. His efforts apparently provoked a serious assault upon him in which he was stabbed at his home in Vladivostok in February 1994. He was so severely injured that he had to be admitted to hospital.

15 The Tribunal also accepted Mr Dranichnikov's evidence that there was an inability and unwillingness on the part of the security forces within Russia to deal with crime. In late February or early March 1994, under duress by police officers in Vladivostok, he signed a letter requesting discontinuation of the investigation into the assault upon him.

16 Mr Dranichnikov has a subjective fear of returning to Russia: that fear is of physical harm from criminal activities by unknown persons.

17 But the fear, the Tribunal held, did not relate to a "Convention reason": there was no indication that any persecution that he has suffered was "for reasons of" his membership of a particular social group constituted by businessmen in Russia. Neither Mrs Dranichnikov nor their daughter advanced any separate case for the grant of protection visas.

18 In its reasons the Tribunal stated what it apparently thought to be Mr Dranichnikov's case, that the particular social group to which he claimed to belong was of "businessmen in Russia". He contends however that in fact he submitted to both the Minister's delegate and the Tribunal that the relevant class was a narrower one, of businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime in Vladivostok and to protect Russian businessmen who protested. It is apparent that Mr Dranichnikov placed emphasis in his initial application upon his membership of that narrower group. This appears from a summary of this aspect of his case made on 20 May 1997 by the Minister's delegate in his reasons for dismissing the application:

> "The applicant['s] claim is based on the principle that he belongs to a *particular* social group of 'Entrepreneurs' – as a businessman in Russia, he is at risk from the criminal organisations that operate in Russia and who have links with the authorities. He states that his *profile is raised because he organised anti-crime meetings and spoke out in public against the authorities* [sic] *inability to defeat crime*." (emphasis added)

19 When the delegate came however to decide Mr Dranichnikov's application he overlooked that Mr Dranichnikov had put his case in the way in which he had. The delegate concluded:

> "I do not accept that there is evidence to suggest that there is general persecution of businessmen in Russia."

On 8 September 1998 the Dranichnikovs lodged a further application for review with the Tribunal in respect of the delegate's refusal to grant them a protection visa. The Tribunal refused that application on 21 January 1999 on the basis that

it had no jurisdiction because it had already, by its earlier decision, finally determined a request for review of the delegate's decision.

The proceedings in the Federal Court

20 On 15 February 1999, Mr Dranichnikov applied to the Federal Court for the judicial review of both decisions of the Tribunal. Later, in April 1999, he sought judicial review in the Court of a separate, but not unrelated, refusal of an application, this time for bridging visas. The applications to the Federal Court were heard together by Kiefel J who, on 7 February 2000, dismissed them.

21 Mr Dranichnikov appealed to the Full Court of the Federal Court against her Honour's decisions. Then, as he had before Kiefel J, Mr Dranichnikov sought to press many, mostly hopeless contentions. It seems likely that his best case, that of membership of the smaller identifiable group of protesting businessmen which he maintained there, was lost in the morass of argumentative and illogical propositions that he advanced generally. The appeals were heard by the Full Court (Whitlam, Tamberlin and Sundberg JJ) which on 14 December 2000 unanimously dismissed them. On 28 June 2002 Gaudron and Gummow JJ referred an application for special leave to appeal from those decisions, and an application for constitutional relief pursuant to s 75(v), to this Court.

The proceedings in the High Court

22 Mr Dranichnikov wished to raise a number of different matters, but by reason of earlier rulings of the Court, argument was confined to the following question only:

> "[W]hether the Tribunal erred in law in treating the applicant as a member of the social group of entrepreneurs and/or businessmen and not of a more limited group consisting of entrepreneurs and/or businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals".

23 Mr Dranichnikov contends in this Court that the Tribunal misstated and failed to deal with the case presented to it. We accept this to be so. The passage that we have quoted from the decision of the delegate shows clearly the emphasis that Mr Dranichnikov placed upon his membership of a special group, not just of business people, but of business people in public protest, in effect, about state sanctioned corruption including, on occasions, violence. There is no reason why he would have presented his case any differently before the Tribunal. And in fact he did not. He not only referred to, and relied upon the material which had been presented to the delegate, and which in turn was before the Tribunal, but also included a written submission by his solicitor which reiterated Mr Dranichnikov's membership of a group of legitimate business people "who pose a threat to

organised crime"; and, that he had taken a "stance against crime". It is clear that the Tribunal misunderstood and failed to deal with this important aspect of Mr Dranichnikov's case.

24 To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice. A failure to accord natural justice did not provide a statutory basis for a review of a decision of the Tribunal. This followed from the language of s 476(2)(a) of the Act (as it was when the applications were made[1]) which provided as follows:

> "(2) The following are not grounds upon which an application may be made under subsection (1):
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> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision".

25 The question remains however whether what occurred, either characterised as a failure to accord natural justice or as that, and more, which we consider it to be, including a constructive failure to exercise jurisdiction, entitles Mr Dranichnikov to relief under s 75(v) of the Constitution. It is to that question that we will now turn.

26 At the outset it should be pointed out that the task of the Tribunal involves a number of steps. First the Tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention[2]. That determination in part at least involves a question of law. If that question is answered affirmatively, the next

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1 Section 476 was repealed and substituted by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) and subsequently amended by the *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act* 2001 (Cth).

2 Article 1A(2) 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 defines a refugee as a person who:

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

question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well founded, and if it is, whether it is for a Convention reason.

27 The Tribunal failed to decide the first question. It decided another question, whether Mr Dranichnikov's membership of a social group, namely, of "businessmen in Russia" was a reason for his persecution and relevantly nothing more. The Tribunal should have decided the matter which was put to it, whether Mr Dranichnikov was a member of a social group consisting of entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals.

28 It seems to us that had that question been addressed it would in all likelihood have permitted of one only answer, an affirmative one. This is so because the Tribunal accepted Mr Dranichnikov as a witness of credit, and therefore the correctness of his account of his activities, and their climax, the violent assault which he suffered.

29 In *Minister for Immigration and Multicultural Affairs v Khawar* Gleeson CJ said[3]:

> "As her case is argued, and as a matter of principle, it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes."

30 The Dranichnikovs' case as presented to the Tribunal has in common with Ms Khawar's case, an apparent deliberate abstention by the authorities from the affording of protection to a member of an identified group. Indeed in Mr Dranichnikov's case, it appears that the authorities may have facilitated criminal conduct by forcing him to withdraw his complaint. The group to which he belongs is one which is smaller than the group in *Khawar* and accordingly is easier to identify and define.

31 The reasoning of McHugh and Gummow JJ in the same case is to a similar effect to that of Gleeson CJ. Their Honours said[4]:

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3 (2002) 76 ALJR 667 at 671 [26]; 187 ALR 574 at 581.

4 (2002) 76 ALJR 667 at 681 [84]; 187 ALR 574 at 594.

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

32 The failure of the Tribunal to exercise jurisdiction is also analogous to the situation in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[5]. In that case the Tribunal effectively denied Mr Bhardwaj a hearing of his application for an adjournment, and, as a result, a hearing of his substantive case of the kind to which he was entitled. The Tribunal's decision to affirm the Minister's decision to cancel Mr Bhardwaj's student visa was therefore made not just in breach of the rules of natural justice, but without affording him a hearing of the kind the Act required he be given. The Tribunal failed to give Mr Bhardwaj a hearing of his application for an adjournment as if it had never been made. It accordingly did not exercise jurisdiction in respect of a live application validly made to it.

33 Relief under s 75(v) of the Constitution is, like prerogative relief generally, discretionary. One often compelling discretionary bar is the availability of other relief. Whilst it may be arguable that Mr Dranichnikov might have been entitled to relief under s 476(1)(e)[6] of the Act, the uncertainty of

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5 (2002) 76 ALJR 598; 187 ALR 117.

6 At the relevant time, s 476(1)(e) provided:

> "(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:
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> ...
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> (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision".

such an outcome, the repeal of s 476 as it then was, and the fact that before he could in any event pursue his arguments in respect of the decision of the Full Court of the Federal Court he would need special leave, mean that there is no relevant discretionary bar to constitutional relief here.

34 The applicant has made out his entitlement to relief under s 75(v) of the Constitution. Writs of certiorari to quash the Tribunal's decision, and of mandamus to compel it to review the delegate's decision according to law, together with prohibition to prohibit any implementation of the delegate's decision should issue. The application for special leave to appeal should be dismissed. The first respondent should pay the applicant's costs of the application under s 75(v) of the Constitution.

35 KIRBY J. These proceedings involve another challenge to a decision to refuse an applicant a protection visa as a refugee. The circumstances in which a person is entitled to protection in accordance with obligations that Australia has assumed under the Refugees Convention 1951[7] are incorporated in the *Migration Act* 1958 (Cth) ("the Act")[8]. These proceedings concern a suggested error made by the Refugee Review Tribunal established by the Act[9] ("the Tribunal") in identifying the category upon which it was claimed a protection visa should issue. This mistake, so it is said, led to an error on the part of the Tribunal in reaching its conclusion which was adverse to the applicant.

36 Having failed in a challenge to the Tribunal's decision in the Federal Court of Australia, the applicant applied to this Court for special leave to appeal. That application was referred to the Court as now constituted to be heard as on the return of an appeal. Concurrently with those proceedings, and in case the complaints fell outside the relief available under the Act as it then stood[10], an application was brought in the original jurisdiction of this Court for relief by way of mandamus and prohibition and for certiorari to make such relief complete.

The facts

37 Mr Sergey Dranichnikov ("the applicant") arrived in Australia in January 1997 with his wife and daughter. In April 1997, application for a protection visa was made to the Minister for Immigration and Multicultural Affairs ("the Minister") on behalf of the Dranichnikovs on the ground that they were refugees. All of them are nationals of the Russian Federation. In accordance with the Act, a form was lodged setting out the application. To this form was annexed a "submission" that contained the basis of the applicant's claim for refugee status.

38 The applicant stated that he had been appointed in late 1993 as general manager of a company in Vladivostok, which is on the Pacific Ocean coast of the Russian Federation. The company was a small enterprise, employing eight persons, including the applicant's wife. It had a turnover of approximately $A15,000 a month. According to the applicant:

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7 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, Art 1A, 1954 *Australia Treaty Series* 5. See also the Protocol relating to the Status of Refugees done at New York on 31 January 1967, 1973 *Australia Treaty Series* 37.

8 See especially the Act, s 36(2).

9 The Act, s 457.

10 The Act was amended by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).

> "At the end of 1993 and the beginning of 1994 there were number of murders and attempted murders of entrepreneurs. Number of such crimes was increasing, and it was covered by the press, TV and radio. Most of these crimes were unsolved and criminals were never found. As someone who belongs to the social group of entrepreneurs, it worried me extremely, as could see myself as a target. I openly criticised the work of the law authorities at meetings and organised protest gatherings. I could not stay uninvolved, when people were killed, and no one was punished for it."

39 The applicant stated that, in February 1994, an attempt was made to kill him. He alleged that he was struck on the back in the hallway of his home by an assailant using a knife. The police were called but "they were indifferent to what has happened, neither were they interested in catching the criminal". According to the applicant, the police did not even take the knife of the assailant that had been dropped in the attack.

40 The applicant said that before and after this attack he had been making demands for action by the authorities against the lawlessness and corruption that were pervasive in Vladivostok. The applicant stated in his submission:

> "My only possible 'crime' was that I spoke openly and directly against unlawfulness of security authorities."

41 After the attack the applicant claimed to have been "under constant stress and fear". Because both he and his wife had a "strong sense of justice" they "very often spoke against the lawlessness". According to the applicant, "it became clear for me that the attempt on my life was due to this fact. In Russia, at the moment, murder is one way of dealing with people who are unwanted".

42 The Minister assigned the applicant's application to his delegate, an officer of his department. The delegate's decision recorded his understanding of the applicant's claim. The delegate summarised the claim as being based on the fact that the applicant was a "businessman" who had "organised protest gatherings and meetings where he criticised the work of the security authorities". He recorded the stabbing attack on the applicant, the lack of interest of the authorities and the applicant's feeling that the attack was caused by his speaking out against the authorities. It was his speaking out that the applicant felt had raised his profile.

43 The delegate considered the applicant's case within the Convention category of "membership of a particular social group"[11]. The delegate identified

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11 The Convention, Art 1A says, relevantly: "For the purposes of the present Convention, the term 'refugee' shall apply to any person who: … (2) owing to

(Footnote continues on next page)

the "social group" in question as "entrepreneurs" and went on to elaborate this class further as "[businessmen] in Russia … at risk from the criminal organisations … who have links with the authorities". The delegate recorded the applicant's belief that his profile had been raised because "he organised anti-crime meetings and spoke out in public against the authorities [sic] inability to defeat crime"[12]. However, when it came to expressing his decision, the delegate confined the applicant's stated fear to the fact "that he will face differential harm *as a businessman*"[13]. Approaching the application in this way the delegate concluded[14]:

> "I do not accept that there is evidence to suggest that there is general persecution of *businessmen* in Russia."

44 On that footing, the delegate rejected the applicant's claim that he had been targeted "because of a membership of a particular social group". What the applicant had suffered was no more than "criminal actions directed by the perception that the applicant as an individual is a worthy target for intimidation by the criminal elements of society"[15]. The applicant did not therefore suffer fear of persecution for a Convention reason if he returned to Russia.

45 Following this rejection of his application, the applicant sought a review of the delegate's decision[16] by the Tribunal. In support of this application, he caused his migration agent, a solicitor, to write to the registrar of the Tribunal clarifying his claim for protection. In this letter, the agent emphasised the importance of attributing weight to the applicant's protest activities which raised his profile "within the community [in Vladivostok] and [to] the threats against himself and his family [that] can in part be attributed to his involvement in these activities". The agent stated:

> well-founded fear of being persecuted for reasons of … membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

12 Decision of the delegate, par 3.3.1.

13 Decision of the delegate, par 3.3.3 (emphasis added).

14 Decision of the delegate, par 3.3.5 (emphasis added).

15 Decision of the delegate, par 3.3.5.

16 The Act, s 412. The powers of the Tribunal are set out in s 415.

> "Our understanding of the situation would indicate that Mr Dranichnikov would not be a potential target if he was not affiliated to that group of legitimate business people who pose a threat to organised crime.
>
> In recent years businessmen in Russia have been persecuted and murdered purely for belonging to that specific group of people known as 'businessmen'. Mr Dranichnikov by definition of his employment was recognised as a member of the business community who was also actively involved in the pursuit of justice. … [B]y virtue of his businessman status and his stance against crime [he] was considered obstructive and worthy of elimination. The attempt on his life is a very real indication of the graveness of his situation and his justifiable fears of returning to his country of origin."

46 It is clear from this letter that the case that the applicant was propounding before the Tribunal was something more than fear of return to Russia by reason of his membership of the particular social group of businessmen or entrepreneurs in that country. The added elements were that the applicant claimed to be a businessman who could not accept the increasing levels of corruption and violence in Russia, denounced the suggested complicity of the authorities in it and took a public stance against such developments.

47 In his evidence before the Tribunal, the applicant reasserted and elaborated these aspects of his claim. He described how he had joined in an "attempt to actually do something about [the] problem" of attacks on businessmen, instanced by the attack on him. Thus, he said that he had joined in a round table meeting held at the City Council office in Vladivostok. Together with other entrepreneurs he took "part in the discussions about our operation". He went on:

> "We wanted to involve the government, the police and other government agencies in that campaign of fighting crime, fighting corruption in order to protect citizens, in order to maintain order in the country and to maintain order in the way of the businesses operating. We asked the law enforcement agency to provide us with some information".

48 According to the applicant, the results of his efforts were inconclusive. Experience had taught that people were being killed either for big money or because they became "unwanted for their activity". It was within weeks of the meeting at the City Council that the applicant was attacked at his home. The applicant ascribed the attack to the fact that he was "unwanted" because of his activities in seeking to "right things" and "help people". After the attack, the police returned to speak to the applicant. According to his statement, the police officer sat in the police car and warned him that pursuit of his assailant would be fruitless and, if successful, would lead to revenge. In accordance with the advice

he received, the applicant signed a paper to the effect that he withdrew his complaint.

49 The Tribunal described the applicant as a "credible witness who provided clear answers to the questions" asked of him. It said that "his wife also presented evidence which the Tribunal finds credible"[17]. It accepted that the applicant had a "subjective fear of returning to Russia because of the events which he described"[18]. It therefore approached the issue before it as one of determining "whether the harm feared is grounded in the Convention".

50 Unfortunately, in answering that question, the Tribunal also mis-stated the "social group" that was relied on by the applicant. It said[19]:

> "The Applicant's adviser had posited in his submission that the Applicant was a member of a particular social group, namely, *businessmen in Russia*. Even if the Tribunal were to accept this proposition, there is no indication that the persecution is 'for reasons of' membership of *this group*. Following the attempt on the Applicant's life in 1994 the Applicant does not report anything other than dissatisfaction with the society and the political system as a whole; there have been no further attempts to harm him or his family, nor are there indications of behaviour on the part of the Applicant which would attract the adverse attention of anyone *for reasons of being a businessman in Russia*."

51 It was on this basis that the Tribunal affirmed the delegate's decision not to grant the applicant a protection visa.

The decisions of the Federal Court

52 The applications for judicial review of the Tribunal's decision were heard in the Federal Court first by the primary judge (Kiefel J) and subsequently by a Full Court. At both levels, the applicant failed. Most of the issues addressed by the primary judge are no longer in contention. Perhaps because the applicant represented himself, he did not focus on the point that was ultimately argued in this Court. Instead, he raised sundry points of marginal or no significance, all of which failed.

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17 Application of Serguei Dranichnikov, Decision and reasons for decision of the Refugee Review Tribunal, 11 August 1998 ("Decision of the Tribunal") at 5.

18 Decision of the Tribunal at 6.

19 Decision of the Tribunal at 6 (emphasis added).

53 From the reasons of the judges of the Federal Court, it appears that the applicant contested the factual conclusions of the Tribunal relating to the cause of the fear of harm described by him in his application. Unsurprisingly, advanced in this way, the primary judge[20] and the Full Court dismissed the complaint as an impermissible attempt on the part of the applicant to impeach the Tribunal's decision for an error of fact – a ground not amenable to review under s 476(1) of the Act. Presumably because the applicant failed to raise the point submitted in this Court, there was no consideration of whether an error of law, cognisable in the Federal Court within s 476(1), had been made out warranting the setting aside of the decision of the Tribunal. At first instance, that decision was treated as no more than a decision on its own facts, open to the Tribunal on the evidence disclosed in the record.

54 Like the primary judge, the Full Court appears to have been distracted by a multitude of untenable points argued by the applicant. One of these was described, fairly, as a "quite ridiculous quibble"[21]. Others were rejected as "slight" and "of no significance"[22]. Unfortunately, this is what commonly happens when litigants, unfamiliar with the intricacies of the law, are obliged (or choose) to present their cases without legal representation. The risk is that the compounded effect of so many irrelevancies and false grounds will divert the court and obscure a viable ground that passes unnoticed.

55 In the Full Court, presumably in response to a complaint raised by the applicant, the judges considered whether the Tribunal had erred in failing to address whether the applicant's "involvement in protest meetings about corruption and illegality" was a "manifestation of political opinion"[23]. Their Honours determined that "such involvement was not central to [the applicant's] case"[24] which was put in "the context of his exposure to risk of harm as an 'entrepreneur'"[25], thereby invoking the Convention ground of "particular social group" rather than political opinion.

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20 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2000) 60 ALD 482 at 490-491 [34].

21 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2000] FCA 1801 at [40].

22 [2000] FCA 1801 at [47].

23 [2000] FCA 1801 at [49].

24 [2000] FCA 1801 at [49].

25 [2000] FCA 1801 at [49].

56 Whilst the Full Court was prepared to accept that "[a]n asylum claimant does not have to pick the correct Convention 'label' to describe his or her plight", it stated that "the Tribunal can only deal with the claims actually made"[26]. On that footing, the Full Court rejected what it saw as the attempt to expand the applicant's "claim" to one based on "political opinion" stemming from his involvement in protests against corruption and illegality, his advocacy of human rights and his suggested role as a "whistle-blower".

57 Once this foundation for relief was put to one side, the Full Court found no error in the primary judge's decision that warranted its intervention. The appeal was therefore dismissed.

The issues

58 By the time the proceedings reached this Court, enlarged by the application for constitutional writs, the focus of argument had changed somewhat. The ground upon which special leave to appeal from the judgment of the Full Court was sought (and relief claimed in the form of mandamus, prohibition and certiorari) was that the Tribunal (and the Federal Court) had misunderstood and mis-stated the applicant's case grounded in the Convention. Leaving aside the issue of fear of persecution "for reasons of … political opinion" and assuming that ground to be excluded by the way the application had been presented to the Tribunal, the applicant complained that the "particular social group" upon which he had relied had been expressed too broadly. He submitted that the mis-statement was critical to the Tribunal's rejection of his claim that the "fear" that he had successfully established was "for reasons of … membership of [the] particular social group" specified.

59 The issues arising are therefore:

(1) Did the Tribunal mis-state the "particular social group" upon which the applicant relied?

(2) If so, did that mis-statement affect the decision of the Tribunal?

(3) If so, in the application for special leave to appeal to this Court, did the Tribunal's error warrant relief in an appeal on the basis that, on the record, the Full Court should have allowed the appeal before it, set aside the decision of the Tribunal and ordered a rehearing upon the grounds for review then provided in s 476 of the Act?

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26 [2000] FCA 1801 at [49].

(4) If not (or in any event if it is appropriate to consider the application for constitutional writs), should such writs be granted to quash the decision of the Tribunal, to prohibit action upon it and to require a rehearing on the basis (as propounded) of a constructive failure of the Tribunal to exercise the jurisdiction and the powers which the applicant had invoked?

(5) If so, are there any discretionary reasons for declining constitutional relief?

The Tribunal mis-stated the class relied upon

60 When regard is had to the history of the applicant's endeavours to express the basis of his entitlement to a protection visa under the Act[27], by reference to the definition of "refugee" appearing in the Convention, it seems clear that the applicant's case was not based, relevantly, on "political opinion" but on his "membership of a particular social group". It seems equally clear that the "particular social group" that the applicant was propounding was not one limited to "entrepreneurs" or "businessmen in Russia". There were added ingredients that refined the "group" relied upon and that sharpened the focus of the claim. The principal ingredients involved the participation by the entrepreneurs or business people concerned in the making of representations to the authorities in Vladivostok; in attending public meetings to "highlight the plague of corruption and lawlessness"[28]; and in appealing to the authorities for protection which the authorities were either unwilling or unable to provide.

61 No doubt the Tribunal was aware of these added considerations. They were mentioned in the well-focussed submission of the applicant's agent; in the applicant's testimony before the Tribunal; and indeed in the history which the Tribunal itself recorded, adding the observation that the applicant was "credible" and had convinced the Tribunal of the presence of subjective fear.

62 The Tribunal's reasons were delivered within a short time of the agent's letter and the applicant's testimony which the Tribunal accepted. Notwithstanding this, when the Tribunal came to define the "particular social group" for the purposes of the Convention, it described it as "businessmen in Russia"[29]. It then proceeded to assume that this "social group" was the one by which the other considerations in the Convention definition had to be measured in the applicant's case.

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27 [2000] FCA 1801 at [49].

28 Decision of the Tribunal at 5.

29 Decision of the Tribunal at 6.

63 With respect, it is not correct to say, as the Full Court did, that prior to the Tribunal's decision, the applicant did not refine the "particular social group" upon which he was relying. Whilst various formulations were used by him, it is sufficiently clear that the applicant was explaining his subjective "fear" by reference to the peculiar circumstances that had impinged on his life in Vladivostok. These included his involvement with a group of businessmen who had felt sufficiently concerned to participate in discussions at the City Council; who had expressed concern about the lack of effective action by the authorities; whose members had suffered dangers of death and injury (as the applicant in February 1994 was to do) and who had sought intervention by the authorities, only to be disappointed.

64 The applicant's case was therefore much more precise than a claim of fear for "being a businessman in Russia"[30] – a huge class, inferentially including many persons who would have no fear and no foundation for protection as refugees. By expressing the applicant's claim as it did, the Tribunal mis-stated the case before it.

The mis-stated class affected the Tribunal's decision

65 The decision of the Tribunal indicates that the claim by the applicant was rejected on the basis of causation[31]. The Tribunal did not accept that the persecution was "'*for reasons of*' membership of [a particular social] group"[32]. The claim was held to "have no nexus with the Convention"[33]. The Tribunal's mis-statement of the class of social group was central to these conclusions.

66 This is not an occasion to review the explanation, given by this Court in earlier cases[34], of the origins, purpose and meaning of the residual category of "particular social group" expressed in the Convention. It is sufficient to say that this residual category was proposed by the Swedish delegation during negotiation of the Convention. The Swedish representative, Mr Petren, stated[35]:

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30 Decision of the Tribunal at 6.

31 See these reasons at [50].

32 Decision of the Tribunal at 6 (emphasis added).

33 Decision of the Tribunal at 6.

34 eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

35 UN Doc A/Conf.2/SR.3 at 14 cited in Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar – *Sanchez-Trujillo v INS*, 801 F 2d 1571 (9th Cir 1986)", (1987) 62 *Washington Law Review* 913 at 925.

> "[E]xperience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should be accordingly included."

So it was. It was adopted to ensure that "the Convention would protect persecuted groups of people outside of the bounds of ethnic, religious, or political identity"[36]. The Swedish delegates, in their argument, adverted to well-known examples of social group persecution that had occurred in Eastern Europe following the rise of Communist regimes[37]. Cases in the courts of European nations, parties to the Convention, recognised as falling within the "social group" category quite large classes, many of whose members had resorted to countries of Western Europe in flight from countries of Eastern Europe. Thus, members of the "capitalist class", "independent businessmen" and their families were treated as valid "social groups" for the grant of refugee status to persons fleeing from Eastern Europe[38]. Such categories appear to be precisely what the originators of the "particular social group" category had in mind, although, in later years, the class has developed and been applied more broadly.

67 Illustrations of the potential breadth of the class invoked in this case can be found in recent decisions of this Court, such as *Applicant A v Minister for Immigration and Ethnic Affairs*[39]; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*[40]; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*[41]; and *Minister for Immigration and Multicultural Affairs v Khawar*[42].

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36 Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar – *Sanchez-Trujillo v INS*, 801 F 2d 1571 (9th Cir 1986)", (1987) 62 *Washington Law Review* 913 at 926.

37 Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (1966) at 185-186 cited in Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar – *Sanchez-Trujillo v INS*, 801 F 2d 1571 (9th Cir 1986)", (1987) 62 *Washington Law Review* 913 at 925-926.

38 Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar – *Sanchez-Trujillo v INS*, 801 F 2d 1571 (9th Cir 1986)", (1987) 62 *Washington Law Review* 913 at 927-928.

39 (1997) 190 CLR 225.

40 (2000) 201 CLR 293.

41 (2000) 204 CLR 1.

42 (2002) 76 ALJR 667; 187 ALR 574.

The class has received a wide reading in other countries with legal systems similar to our own[43] and in countries with quite different legal traditions[44].

68 Specifying with precision the "social group" that an applicant propounds as the one applicable to his or her case is important for at least two reasons. First, it ensures that the decision-maker addresses accurately the case that is put in respect of which the relevant jurisdiction and powers are invoked. But there is a second, practical reason for precision in this regard. It is one relevant to the present application.

69 As the submissions for the Minister in this Court correctly pointed out (invoking the influential opinion of McHugh J in *Applicant A*[45]), an applicant faces a paradox in identifying the "particular social group" that he or she relies on in cases of this kind. Defining the group widely increases the ease of establishing membership of that group and, to that extent, of fulfilling a requirement of the Convention definition. However, the wider the definition of the "group" propounded, the more difficult it may be for the applicant to show that the suggested fear is one of "persecution" which is "well-founded" and exists "for reasons of" membership of that social group. If the category is defined too narrowly, the decision-maker might be justified in considering that the "particular social group" claimed is not a "social group" at all when that phrase is read as an element of an international treaty intended to have operation at the level of the obligations imposed upon nation states.

70 A good illustration of the latter point may be seen in a recent English decision where it was submitted that a family could be a "particular social group" for the purposes of the Convention definition. The claim was made upon the basis that, as a male in a family which was involved in a blood feud in Albania, the applicant in that case had a well-founded fear of persecution if he returned to Albania. The English Court of Appeal accepted that particular social groups could be very large or very small, depending on the circumstances. It acknowledged that, in particular cases, the phrase could even comprise a clan or

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43 eg *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629; *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *Sanchez-Trujillo v Immigration and Naturalization Service* 801 F 2d 1571 (9th Cir 1986).

44 eg cases cited in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 260-263, 280-283, 299-308. See also cases collected in Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar – *Sanchez-Trujillo v INS*, 801 F 2d 1571 (9th Cir 1986)", (1987) 62 *Washington Law Review* 913 at 927-928.

45 (1997) 190 CLR 225 at 256-257.

a family[46]. To decide whether, in the individual case, this was so, it would be necessary to consider whether the propounded "group of people" was recognised by society as a distinct "group" with particular characteristics[47].

71 In that case, the English Court did not accept that the applicant's family could be regarded "as a distinct group by Albanian society any more than, no doubt, most other families in the country"[48]. In a sense, the narrow category claimed for the applicant destroyed his argument that a "particular social group" within the meaning of the Convention existed.

72 Such considerations may, on occasion, be determinative of an applicant's entitlement to protection under the Convention. So it was here. To the extent that the "social group" was defined broadly as "entrepreneurs" or "business people" in Russia, it became easier for the applicant to satisfy the element of membership in the definition. But it became commensurately more difficult for the applicant to satisfy the other elements of the Convention, most especially proof of a "well-founded fear"; proof that such "fear" was of being "persecuted"; and proof that the "fear" was "for reasons of … membership of a particular social group" as so defined.

73 Before the Tribunal in the present case, the applicant failed on the last of these considerations (that is, the reason for the fear which he proved). It was therefore unnecessary, in the event, for the Tribunal to consider the other two remaining elements of the definition. But to the extent that the "social group" in question was defined over-broadly, the applicant faced severe difficulties in establishing his case. It became more likely that his "fear" would be ascribed to personal considerations relating to criminal activities directed against him and his family than to "persecution" within the Convention, which arose "for reasons of … membership of a particular social group".

74 The mistake of the Tribunal in expressing the "social group" as it did was therefore critical for the foundation upon which it rejected the applicant's claim. It cannot be dismissed as an immaterial error.

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46 *Skenderaj v Secretary of State for the Home Department* [2002] 4 All ER 555 at 561 [18], 565 [29].

47 *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 657-658.

48 *Skenderaj v Secretary of State for the Home Department* [2002] 4 All ER 555 at 566 [30].

The appeal: relief under the Act, s 476

75 Having concluded as I would that the Tribunal misdirected itself in such a fundamental way, the issue is whether the applicant was entitled to relief in the Federal Court in his application for review under s 476(1) of the Act, as that sub-section then stood.

76 The primary process before this Court is an application for special leave to appeal, referred into a Full Court. There are two possible impediments, of the procedural kind, to the grant of special leave.

77 The first is that, in his proceedings in the Federal Court, the applicant did not clearly propound the ground of appeal that he has now advanced before this Court. This failure does not amount to a constitutional barrier to this Court's permitting that ground to be raised for the first time in this Court. Although the proceedings would be by way of an "appeal", as contemplated by the Constitution[49], and although such an "appeal" has been held to be a strict appeal[50], this Court has made it clear that, subject to the exercise of discretion particular to the case, it can permit fresh grounds to be raised in an appeal without altering the character of the proceeding as an "appeal"[51].

78 The second relates to the function of the Tribunal and of the Federal Court. The Full Court correctly noted the degree of latitude that would be shown to a person such as the applicant representing himself without legal assistance. It recognised that he did not have to pick the correct Convention "label" to describe his plight[52]. The Tribunal acts in a generally inquisitorial way[53]. This does not mean that a party before it can simply present the facts and leave it to the Tribunal to search out, and find, any available basis which theoretically the Act provides for relief. This Court has rejected that approach to the Tribunal's duties[54]. The function of the Tribunal, as of the delegate, is to respond to the case

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49 Constitution, s 73.

50 *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [16]-[17], 24 [68], 35 [111]-[112]; cf at 81-82 [248]-[249], 123 [370].

51 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 151-153 [130]-[133]; cf at 125-127 [56]-[61].

52 [2000] FCA 1801 at [49].

53 *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 1010 [263]; 190 ALR 601 at 661.

54 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 77 ALJR 437 at 442-443 [31]; 195 ALR 1 at 8.

that the applicant advances. *A fortiori* this is the function of the Federal Court in determining any application to it for judicial review of a decision of the Tribunal.

79 I do not consider that these procedural impediments bar any entitlement that the applicant has in this Court to a remedy under the Act. At least by the time the proceedings reached the Full Court, it is clear enough, from the reasons of that Court, that the applicant was making the point that he was not relying only on the risk of harm to himself as an "entrepreneur"[55]. The identification of the correct category applicable to the case is also fundamental to the proper performance by the Federal Court of its function of review, as of the Tribunal in its function to reconsider the decision of the Minister's delegate.

80 However, in cases of this kind, the grounds upon which the Federal Court may provide judicial review are limited, relevantly by the terms of s 476(1) of the Act as it then stood. Those grounds are narrower than the grounds that exist for review at common law, under the provisions of the *Judiciary Act* 1903 (Cth)[56] or the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[57].

81 No express provision appeared in s 476(1) of the Act to afford a ground for judicial review on the footing of a failure of a person, purporting to make a decision, to exercise that person's jurisdiction and power as the Act provided. In a case such as the present, to afford relief, it would be necessary to construe broadly the grounds that appeared in s 476(1) of the Act, perhaps beyond their apparent purpose.

82 Counsel for the Minister conceded, fairly, that it was arguable that par (e) of s 476(1) was applicable to the case if this Court accepted the applicant's basic argument. At the time, that paragraph provided for review on the ground:

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

83 In the event, it is unnecessary to explore the question of whether that ground, or any others in s 476(1), apply and survive the restrictions on those grounds stated in s 476(2) and (3) of the Act. This is because the commencement of the proceedings for constitutional relief affords this Court a more direct and

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55 [2000] FCA 1801 at [49].

56 s 39B.

57 ss 5, 6.

readily applicable foundation for the correction of the error that the applicant has demonstrated.

84 Normally, where the Court has before it concurrently an appellate process and an invocation in the original jurisdiction of the constitutional writs and related relief, it will first decide whether the party succeeds in the appeal. If the party so succeeds, it will, depending on the circumstances, normally be possible to dispose of the constitutional application on the basis of the Court's discretion to refuse such relief because, in the circumstances, it is redundant[58].

85 In the present case, because of the repeal of s 476 of the Act in relation to future cases, and the limited operation of that section, there are strong reasons of convenience, another remedial process being available, for this Court to proceed directly to consider the claim for constitutional writs. The applicant has made out a clear case for relief of that character.

The constitutional writs: a constructive failure to exercise jurisdiction

86 The applicant submitted that he was entitled to the issue of constitutional writs under s 75(v) on the basis that the Tribunal had constructively failed to exercise its jurisdiction in the manner contemplated by the Act[59]. This principle of relief has been applied in recent times, including in immigration decisions, where it is shown that the decision-maker "failed to consider the substance of [the application] and could only have failed to do so because he misunderstood what is involved in the Convention definition of 'refugee'"[60].

87 This Court has repeatedly held that, for the issue of prohibition or mandamus under s 75(v) of the Constitution, it is necessary to demonstrate jurisdictional error on the part of the proposed subject of such relief[61]. Thus, it is essential to establish something more than an error of law within jurisdiction. Difficult as it may sometimes be to differentiate jurisdictional and non-

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58 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 641 [103].

59 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268; cf *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 422.

60 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 82 [81].

61 *Plaintiff S157/2002 v The Commonwealth* (2003) 77 ALJR 454 at 471 [83]; 195 ALR 24 at 47.

jurisdictional error with exactitude[62], in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction. It will be treated as a constructive failure of the decision-maker to exercise the jurisdiction and powers given to it.

88 Obviously, it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction. But where, as here, the mistake is essentially definitional, and amounts to a basic misunderstanding of the case brought by an applicant, the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way.

89 The applicant has established a constructive failure on the part of the Tribunal to exercise its jurisdiction and power in reviewing the decision of the delegate. Prima facie, he is therefore entitled to the issue of the constitutional writs that he seeks and the associated relief of certiorari to make such writs effective.

No discretionary reasons to withhold relief

90 Once this point is reached, it was conceded for the Minister, properly, that there was no discretionary ground for refusing constitutional relief to the applicant. It was also accepted that the applicant had acted correctly in first availing himself of his "appellate" entitlements in the Federal Court. The existence of orders in the Federal Court, undisturbed on appeal, does not bar the way to the provision of constitutional relief[63]. It was accepted that no other ground for refusing relief would arise from the short extension of time that the applicant requires for the issue of the writs as he has sought.

91 I do not consider that the lack of focus, confusion, poor judgment about arguable issues and failure earlier to specify the basis on which he now succeeds constitute reasons, on discretionary grounds, for refusing the applicant constitutional relief[64]. Accordingly, a writ of prohibition in the first instance

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62 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 227-228 [82]-[83]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 136-137 [147]-[149]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 76 ALJR 694 at 727 [175]; 188 ALR 1 at 46.

63 cf *Abebe v The Commonwealth* (1999) 197 CLR 510.

64 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 101-108 [43]-[55], 136-137 [145]-[150], 144 [172]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 103 [150]-[152]; cf *Re*

(Footnote continues on next page)

should issue out of this Court addressed to the Minister (the first respondent) to prohibit him from acting on the purported decision of the Tribunal concerning the applicant and his family. A writ of certiorari should issue to quash the decision of the Tribunal. A writ of mandamus should issue to oblige the Tribunal to consider the applicant's application for review of the decision of the delegate and to determine that application according to law.

92 This outcome does not ensure that the applicant will ultimately succeed in his claim for protection for himself and his family as refugees. There remain the questions of whether he can establish that the subjective fear that has been found to exist in his case is "well-founded", relates to "persecution" and exists "for reasons of" his membership of a particular social group. However, the starting point for the correct consideration of these inter-related questions is the correct identification of the "particular social group" that the applicant propounded. In this case, this was the group of businessmen or entrepreneurs in Vladivostok in the Russian Federation who grouped together in response to serious civic lawlessness and to the failure of the authorities to uphold the law and to address the grave violence to which the members of the group, including the applicant, were subjected.

93 The decision on the merits will be one for the Tribunal. But if the correct "social group" is identified, it cannot be said that the return of the matter to the Tribunal is futile.

Orders

94 The Court should issue the writs of prohibition, certiorari and mandamus sought by the applicant. The Minister should pay the costs of the applicant's application for constitutional relief and certiorari in this Court. The applicant's application for special leave to appeal should be dismissed as unnecessary, with no order as to costs in this Court.

McBain; Ex parte Australian Catholic Bishops Conference (2002) 76 ALJR 694 at 712-713 [95], 736 [229]; 188 ALR 1 at 25-26, 59.

95 HAYNE J. I agree that, for the reasons given by Gummow and Callinan JJ, the Refugee Review Tribunal failed to exercise its jurisdiction, and did not give the applicant natural justice in conducting its review, because it did not consider the claim which the applicant was then making, and had earlier made, for protection. I also agree that certiorari, mandamus and prohibition should issue and that the first respondent should pay the applicant's costs of that application.

96 It must be taken to follow from *Abebe v The Commonwealth*[65] that there is no necessary disconformity between making those orders and not disturbing the orders of the Federal Court dismissing both his application for review by that Court of the Tribunal's decision and his appeal against that dismissal. Yet not to disturb those orders will leave, undisturbed, orders requiring the applicant to pay the respondent's costs of the proceedings in that Court, both at first instance and on appeal.

97 In the circumstances of this matter, in which it is not clear whether the complaint made by the applicant was properly a ground for review under the then applicable, but now repealed, provisions of the *Migration Act* 1958 (Cth), but it is clear that it does ground the relief earlier mentioned, the application for special leave to appeal from the orders of the Full Court of the Federal Court should be dismissed. Neither the interests of justice in the particular case, nor more generally, warrant a grant of special leave. There should be no order as to the costs of that application for special leave.

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65 (1999) 197 CLR 510.