HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS APPELLANT

AND

RESPONDENTS S152/2003 RESPONDENTS

Minister for Immigration and Multicultural Affairs v Respondents S152/2003
[2004] HCA 18
21 April 2004
S152/2003

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1, 2 and 3 made by the Full Court of the Federal Court on 23 May 2002 and, in lieu thereof, order that the appeal to the Full Court of the Federal Court be dismissed.*

3. *Appellant to pay the respondents' costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with S B Lloyd for the appellant (instructed by Sparke Helmore)

N J Williams SC with B M Zipser for the respondents (instructed by the respondents)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Respondents S152/2003

Immigration – Refugees – Applications for protection visas by de facto husband and wife nationals of Ukraine – Well-founded fear of persecution – Husband claimed to suffer religious persecution as Jehovah's Witness – Refugee Review Tribunal found that incidents of which husband complained were individual and random incidents and did not amount to persecution, and that the chance that he would suffer persecution in future was remote – Tribunal rejected claim that state encouraged or condoned persecution of Jehovah's Witnesses – Whether Full Court of Federal Court erred in concluding that Tribunal committed jurisdictional error in failing to consider a different claim of whether the husband might suffer future harm from private individuals because of religious belief and whether the government of Ukraine was able in a practical sense to stop such harm occurring – Absence of evidence before Tribunal to support a conclusion that Ukraine did not provide level of protection required.

Immigration – Refugees – Applications for protection visas – Relevance of attitude or capacity of state to whether fear of harm well-founded, to whether there is persecution, to whether a person is outside country of nationality owing to well-founded fear of persecution and to unwillingness of person to seek protection of state – Protection theory and accountability theory – Non-state actor – Harm by non-state actors – Persecution by non-state actors – State complicity in persecution – Persecution tolerated or condoned by state – Failure of state protection – Unwilling or unable to provide protection.

International law – Treaty – Interpretation – Refugees Convention – "Persecution" – Different theories of persecution – Meaning of treaty provisions – Proper approach to meaning – Primacy of text – Approaches of courts in countries of refuge – Protection theory and accountability theory – Whether a third theory applicable.

Words and phrases – "well-founded fear", "persecution", "protection".

Migration Act 1958 (Cth), s 36(2).
Convention relating to the Status of Refugees, Art 1A(2).

1 GLEESON CJ, HAYNE AND HEYDON JJ. The issue in this appeal concerns the application of the definition of "refugee" in the Refugees Convention as amended by the Refugees Protocol ("the Convention") in a case where the feared conduct in a person's country of nationality is that of private individuals, and where neither the government nor its officers encourage, condone or tolerate conduct of the kind in question.

2 The respondents applied for protection visas, relying on s 36(2) of the *Migration Act* 1958 (Cth) ("the Act"), and claiming that they were persons to whom Australia had protection obligations under the Convention. Article 1A(2) of the Convention provides that the term "refugee" shall apply to any person who:

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

3 The respondents are Ukrainian nationals. The first respondent had suffered serious harm from some fellow citizens in Ukraine because he was a Jehovah's Witness. The nature of that harm will be explained below. The first respondent needed to establish that he feared persecution for reasons of religion, that his fear was well-founded, that he was outside Ukraine owing to such fear, and that he was unable or, owing to such fear, unwilling to avail himself of the protection of his country of nationality.

4 The respondents are de facto husband and wife. The second respondent is not a Jehovah's Witness, and it was the position of the first respondent that was the focus of attention. The respondents left Ukraine in December 1998, and arrived in Australia in the same month. In February 1999, they applied for protection visas. On 7 May 1999, their application was refused by a delegate of the Minister. They applied for review of that decision by the Refugee Review Tribunal ("the Tribunal"). In September 2000, the Tribunal affirmed the delegate's decision. The respondents sought judicial review of the Tribunal's decision in the Federal Court of Australia. The matter came before Wilcox J, who found no error of law in the Tribunal's reasons, and who, on 9 April 2001, dismissed the application. The respondents then appealed successfully to the Full Court of the Federal Court (Lee, Moore and Madgwick JJ). Before considering the decision of the Full Court, it is necessary to examine the case that was put to the Tribunal, the findings of the Tribunal, and the Tribunal's reasons for affirming the delegate's decision.

5 The first respondent said that he became interested in the Jehovah's Witnesses religion in about May 1998. He was given some literature by a friend, and started to attend meetings on Sunday evenings. He began to distribute publications to his neighbours, and to engage in other forms of proselytising. Sometimes his activities were received with hostility and insults. On an occasion in June 1998, a group of drunken teenagers set upon him as he was returning to his home unit. They called him "a stinking sectarian", and punched and kicked him. He suffered severe injuries. An ambulance was called. He was given emergency treatment at a hospital, and then spent a week at home in bed. A policeman visited him at home, and asked for his account of what happened. The first respondent, who did not know the identity of his attackers, did not make a formal statement.

6 On an occasion in July 1998, there was an apparent attempt to set fire to the front door of the unit in which the first respondent was living. Written on a nearby wall were the words: "Death to sectarians! Bitch, if you want to live, stop your filthy activities, or else!"

7 In September 1998, on an occasion when the first respondent went into a building to distribute magazines, he was attacked and beaten by four men.

8 The first respondent's religious beliefs and activities also incurred the resentment of his employer. He was dismissed on a ground that he regarded as spurious. He then decided to leave Ukraine.

9 The Tribunal took account of country information from the United States Department of State, the British Home Office, and the Australian Department of Foreign Affairs and Trade. That information was consistent. It contained no suggestion that the Ukrainian government was not in control of the country, or that the police force and the judicial system were not reasonably effective and impartial. It said that the Ukrainian government permitted freedom of religious practice in the case of "traditional religions", which included Jehovah's Witnesses, although "new religions", such as Scientology, were treated differently. It was noted that, as part of the Soviet Union for most of the 20th century, Ukraine was a society in which, for a long time, the public practice of religion had been strongly and officially discouraged, and that sections of the community were still likely to be hostile to religious proselytising. The Tribunal noted that there were more than 100,000 Jehovah's Witnesses in Ukraine, and that the Church itself, in its published material, did not claim to be persecuted there.

10 The Tribunal found "that the [first respondent] was assaulted and that he was assaulted because some individuals were affronted by his religious beliefs.

However, these incidents must be seen as individual and random incidents of harm directed at the [first respondent] and not as persecution for a Convention reason."

11 The first respondent set out to convince the Tribunal that the government of Ukraine, both directly and through the state-controlled media, encouraged persecution of Jehovah's Witnesses. That proposition was rejected. The first respondent also asserted that the police condoned violence towards Jehovah's Witnesses. The Tribunal did not accept that. The Tribunal said:

> "On the basis of the above information, the Tribunal is not satisfied that the authorities can be said to be unwilling or unable to protect their citizens. The fact that the [first respondent] experienced incidents about which he either did not make a statement, or did not persevere in any way if discouraged from making a statement, cannot be taken as evidence that the authorities condoned such incidents. On the occasion on which the police were alerted to an assault by the ambulance officers, they responded appropriately."

12 The Tribunal also said:

> "In short, the Tribunal accepts the independent evidence of the US State Department, the British Home Office and DFAT, but more particularly of the official Jehovah's Witness website itself, that Jehovah's Witnesses in the Ukraine do not face State-sanctioned persecution. It accepts that harm may sometimes befall individual church members, probably more frequently when they go out and proselytise – putting themselves deliberately into an interaction with members of the general public – but that this harm befalls them on a one-off, individual basis.
>
> In the case of the [first respondent], he has suffered two assaults and some property damage that can almost certainly be attributed to adverse reaction to his new-found religious beliefs. However, the Tribunal finds that they were individual attacks with different perpetrators being involved. The Tribunal further rejects his claims that the State is implicated through its manipulation of the media and that it is unwilling or unable to protect its citizens."

13 In the light of what the Full Court later said, it is to be noted that the Tribunal twice expressed the conclusion that it was not satisfied that the Ukrainian authorities were unable or unwilling to protect citizens from violence based on antagonism of the kind here involved.

14 It is also to be noted that the first respondent's case before the Tribunal was that the government of Ukraine actively encouraged persecution of Jehovah's Witnesses. It was not asserted that the judicial system, or the police force, of the country lacked the power to deal effectively with unlawful violence, if they wanted to do so. The allegation was not one of absence of power, or even one of mere absence of will. It was one of positive encouragement of certain forms of unlawful violence. That was the context in which the Tribunal's reasons were expressed. As sometimes happens, by the time the case reached a further level of decision-making, a new point was made. But a fair reading of the Tribunal's reasons requires an understanding of the case it was addressing.

15 The respondents were unrepresented before the Full Court. The reasons of the Full Court record that, during the hearing of the appeal, an issue emerged that had not been raised before Wilcox J. How it emerged does not appear. The issue was said to relate to "the Tribunal's rejection of the [first respondent's] claim that the Ukrainian authorities were either unable or unwilling to provide protection to their citizens". To describe that as the first respondent's claim is perhaps not entirely accurate. His claim was that the authorities were unwilling to provide protection in the sense that they were the instigators of the harm. The Full Court said that the Tribunal was entitled to find that there was no evidence that the Ukrainian authorities encouraged persecution of Jehovah's Witnesses. "However, the Tribunal did not address the question of possible future harm befalling the [respondents] or whether the Ukrainian government was able, in a practical sense, to prevent such harm, given the history of violence towards [the first respondent] on account of his religious beliefs. These matters were relevant in determining whether the [respondents'] fear of persecution was well-founded."

16 The Full Court went on:

> "Counsel for the [Minister] submitted that the Tribunal did make a finding that the State had the ability to protect its citizens ... However, examination of the Tribunal's reasons indicates it only went so far as considering whether the [first respondent] sought and failed to obtain protection from the Ukrainian authorities. There was no specific consideration of the State's ability, in a practical sense, to provide protection. It is not an answer, in our opinion, simply to assert that the harm suffered by the first [respondent] 'must be seen as individual and random incidents of harm and not persecution'."

17 It is not completely clear what the Full Court meant by its references to the Ukrainian government's ability "in a practical sense" to prevent harm to the first respondent. It appears, however, that what the Full Court had in mind was that the first respondent had suffered harm in the past (in the manner and on the occasions described above), and that there was no assurance that the same would

not happen to him again in the future. The suggested error of the Tribunal, said by the Full Court to be jurisdictional error, lay in failing "to consider the right question, namely, whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm". Since the Tribunal had found that the three attacks on the first respondent were random and unco-ordinated, that the attackers were different, and that each group was unknown to the others, the "pervasive pattern of harm" must be the hostility, in certain elements of the community, towards "sectarian" religious practice and proselytising, and the propensity of some of those elements to express their hostility in a violent manner. The Full Court said that the practical ability, or lack of ability, to provide protection was relevant in determining whether the first respondent's fear was well-founded. It did not advert expressly to whether it was also relevant to determining whether that which the first respondent feared was persecution, or to whether the first respondent's unwillingness to avail himself in Australia of the protection of the Ukrainian authorities was "owing to" such fear.

18 It was pointed out in *Minister for Immigration and Multicultural Affairs v Khawar*[1] that, although the paradigm case of persecution contemplated by the Convention is persecution by the state or agents of the state, it is accepted in Australia, and in a number of other jurisdictions, that the serious harm involved in what is found to be persecution may be inflicted by persons who are not agents of the state. But not all serious harm inflicted upon a person by his or her fellow-citizens amounts to persecution, even if it is inflicted for one of the reasons stated in the Convention. The word used by Art 1A(2) is "persecuted", not "harmed", or "seriously harmed". Furthermore, it is used in a context which throws light on its meaning.

19 The immediate context is that of a putative refugee, who is outside the country of his nationality and who is unable or, owing to fear of persecution, unwilling to avail himself of the protection of that country. As explained in *Khawar*[2], we accept that the term "protection" there refers to the diplomatic or consular protection extended abroad by a country to its nationals. In the present case, the first respondent must show that he is unable or, owing to his fear of persecution in Ukraine, unwilling to avail himself of the diplomatic or consular protection extended abroad by the state of Ukraine to its nationals. Availing himself of that protection might result in his being returned to Ukraine. Where diplomatic or consular protection is available, a person such as the first

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1 (2002) 210 CLR 1 at 10-11 [22].

2 (2002) 210 CLR 1 at 10 [21] per Gleeson CJ. See also at 21 [61]-[62] per McHugh and Gummow JJ.

respondent must show, not merely that he is unwilling to avail himself of such protection, but that his unwillingness is owing to his fear of persecution. He must justify, not merely assert, his unwillingness. As the Supreme Court of Canada put it in *Canada (Attorney General) v Ward*[3], a claimant's unreasonable refusal to seek the protection of his home authorities would not satisfy the requirements of Art 1A(2). In *Applicant A v Minister for Immigration and Ethnic Affairs*[4], Brennan CJ referred to Art 1C(5), which refers to the possibility that circumstances may change in such a way that a refugee can no longer refuse to avail himself of the protection of the country of his nationality. This indicated, he said, that the definition of "refugee" must be speaking of a fear of "persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality"[5].

20 The wider context is that of an instrument which provides an important, but defined and limited, form of international responsibility towards a person whose fundamental human rights and freedoms have been violated in a certain respect in the person's country of nationality. Because it is the primary responsibility of the country of nationality to safeguard those rights and freedoms, the international responsibility has been described as a form of "surrogate protection"[6]. "Protection" in that sense has a broader meaning than the narrower sense in which the term is used in Art 1A(2) but, so long as the two meanings are not confused, it is a concept that is relevant to the interpretation of Art 1A(2). The wider context was referred to by Dawson J in *Applicant A*[7] when he said that international refugee law was meant to serve as a substitute for national protection where such protection was not provided in certain circumstances, and by Lord Hope of Craighead who said in *Horvath v Secretary of State for the Home Department*[8] that the general purpose of the Convention is to enable a person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the

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3 [1993] 2 SCR 689 at 724.

4 (1997) 190 CLR 225 at 233.

5 (1997) 190 CLR 225 at 233.

6 The term was used in Hathaway, *The Law of Refugee Status* (1991) at 135, and adopted by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 495.

7 (1997) 190 CLR 225 at 248.

8 [2001] 1 AC 489 at 495.

international community. A further part of the context is Art 33 of the Convention, which prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of one of the factors referred to in Art 1A(2).

21 Having regard to both the immediate and the wider context, a majority of the House of Lords in *Horvath* took the view that, in a case of alleged persecution by non-state agents, the willingness and ability of the state to discharge its obligation to protect its citizens may be relevant at three stages of the enquiry raised by Art 1A(2). It may be relevant to whether the fear is well-founded; and to whether the conduct giving rise to the fear is persecution; and to whether a person such as the first respondent in this case is unable, or, owing to fear of persecution, is unwilling, to avail himself of the protection of his home state. Lord Hope of Craighead quoted with approval a passage from the judgment of Hale LJ in the Court of Appeal in *Horvath*[9] where she said, in relation to the sufficiency of state protection against the acts of non-state agents:

> "[I]f it is sufficient, the applicant's fear of persecution by others will not be 'well founded'; if it is insufficient, it may turn the acts of others into persecution for a Convention reason; in particular it may supply the discriminatory element in the persecution meted out by others; again if it is insufficient, it may be the reason why the applicant is unable, or if it amounts to persecution unwilling, to avail himself of the protection of his home state."

22 *Horvath* was a case not unlike the present. A Roma citizen of Slovakia claimed asylum in the United Kingdom, saying that he feared serious harm by skinheads against whom the Slovak police failed to provide adequate protection. It was found that, although the appellant's evidence as to the harm inflicted on him was credible, Slovakia provided citizens with a sufficient level of state protection against violence. On those findings, four members of the House of Lords held that there was no persecution, no well-founded fear, and no inability, or unwillingness owing to such fear, on the part of the appellant to avail himself of the protection of Slovakia. The fifth member, Lord Lloyd of Berwick, agreed in the result, but confined his reasons to the third ground. The outcome of the case may be compared with *Canada (Attorney General) v Ward*[10] where the Supreme Court of Canada upheld a claim that the Convention applied. In that case the issues were narrow. The person making the claim had been sentenced to

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9 [2001] 1 AC 489 at 497.

10 [1993] 2 SCR 689.

death at a court martial by a paramilitary organisation in Ireland. The Attorney General of Canada conceded that the government of Ireland was unable to protect him[11]. She also argued that state complicity is a prerequisite to persecution, but conceded that a state's inability to protect its citizens amounts to complicity if what is involved is otherwise persecution on a Convention ground.

23 Problems of interpretation of instruments may arise because, although a provision was not intended to be confined in its operation to a certain kind of case, such a case was in the forefront of the contemplation of the drafters, and dominated their choice of language. When that occurs, the provision may operate smoothly and coherently in its application to the paradigm case, but in other cases it may give rise, not to impossibility of application, but to difficulty. In a case where the harm feared by a putative refugee is harm inflicted by the state, or agents of the state, in the country of nationality, the significance for the application of Art 1A(2) of the complicity of the state in the harm inflicted is clear. Assuming the harm to be sufficiently serious, and the reason for it to be a Convention reason, the fear of harm will be well-founded (because of its source); it may readily be characterised as persecution, and identified as the reason the person in question is outside the country of nationality; the external protection, which may involve being sent back, is illusory; and the unwillingness to seek such protection may be explained and justified by the fear of persecution. (It is unnecessary in the present case to examine what is involved in the concept of inability to seek external protection. There is a Ukrainian Embassy in Australia, and before that there was a consulate. The first respondent must rely upon unwillingness.) Even where the harm feared is harm not inflicted by the state, or agents of the state, but where the state is complicit in the sense that it encourages, condones or tolerates the harm, the same process of reasoning applies. The attitude of the state is relevant to a decision whether the fear of harm is well-founded; it is consistent with the possibility that there is persecution; it is consistent with the person being outside the country of nationality because of a well-founded fear of persecution; and it supports a conclusion of unwillingness to seek (external) protection based on a fear of persecution because of the state's encouragement, condonation or tolerance of the persecution.

24 What of a case such as the present? The Full Court held that the Tribunal failed to consider Ukraine's ability to provide internal protection, the question being "whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm". In addition to rejecting explicitly a claim that the state encouraged the harm suffered by the first respondent, the Tribunal, on more than one occasion, said that it was not

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11 [1993] 2 SCR 689 at 710.

prepared to find that the Ukrainian authorities were unable or unwilling to protect him. This was in a context where there were two physical attacks on the first respondent and one on his property, the attacks were random and unco-ordinated, the police had interviewed the first respondent about one of them and he had been unable to identify his attackers, he had never made a statement to the police, and the police were found to have "responded appropriately".

25 The first respondent is outside his country of nationality owing to a fear resulting from a violent response of some Ukrainian citizens to his religious proselytising. The Tribunal's conclusion that the violence was random and unco-ordinated was not merely an assertion. It was a finding based on the evidence, and it was directly relevant to the case the first respondent was seeking to make, which was that the violence was orchestrated and state-sponsored. The first respondent did not set out to demonstrate that his country was out of control. On the contrary, he was claiming that the government was in control, and was using its power and influence to harm people like him. The new case, raised for the first time in the Full Court, has to be related to the terms of Art 1A(2). What kind of inability to protect a person such as the first respondent from harm of the kind he has suffered would justify a conclusion that he is a victim of persecution and that it is owing to a well-founded fear of persecution that, being outside his country, he is unwilling to avail himself of his country's protection?

26 No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the Tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.

27 In fact, there was no evidence before the Tribunal that the first respondent sought the protection of the Ukrainian authorities, either before he left the country or after he arrived in Australia. According to the account of events he gave to the Tribunal, he made no formal complaint to the police, and when the police interviewed him after the first attack, he made no statement because he could not identify his attackers. The Tribunal considered the response of the police on that occasion to be appropriate. It is hardly surprising that there was no evidence of the failure of Ukraine to provide a reasonably effective police and justice system. That was not the case that the first respondent was seeking to

make. The country information available to the Tribunal extended beyond the case that was put by the first respondent. Even so, it gave no cause to conclude that there was any failure of state protection in the sense of a failure to meet the standards of protection required by international standards, such as those considered by the European Court of Human Rights in *Osman v United Kingdom*[12].

28 The first respondent sought to explain and justify his unwillingness to seek the protection of the Ukrainian authorities, either at home or abroad, on the basis that they were the instigators, directly or indirectly, of the attacks on him. That case was rejected by the Tribunal. The Full Court found no fault with that part of the Tribunal's decision. The only other basis upon which the first respondent's unwillingness to seek the protection of the Ukrainian government could be justified, and treated as satisfying that element of Art 1A(2), would be that Ukraine did not provide its citizens with the level of state protection required by international standards. It is not necessary in this case to consider what those standards might require or how they would be ascertained. There was no evidence before the Tribunal to support a conclusion that Ukraine did not provide its citizens with the level of state protection required by such standards. The question of Ukraine's ability to protect the first respondent, in the context of the requirements of Art 1A(2), was not overlooked by the Tribunal. Because of the way in which the first respondent put his claim, it was not a matter that received, or required, lengthy discussion in the Tribunal's reasons. If the Full Court contemplated that the Tribunal, in assessing the justification for unwillingness to seek protection, should have considered, not merely whether the Ukrainian government provided a reasonably effective police force and a reasonably impartial system of justice, but also whether it could guarantee the first respondent's safety to the extent that he need have no fear of further harm, then it was in error. A person living inside or outside his or her country of nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the state.

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12 (1998) 29 EHRR 245.

29 The Tribunal's finding that it was not satisfied that the Ukrainian government was unable to protect the first respondent, and its finding that the first respondent was not a victim of persecution, must be understood in the light of the terms of Art 1A(2), the evidence that was before the Tribunal, and the nature of the case the first respondent sought to make. Once the Tribunal came to the conclusion that the contention that the Ukrainian authorities instigated or encouraged the harm suffered by the first respondent must be rejected, and that the attacks on him or his property were random and unco-ordinated, then its finding about the government's willingness and ability to protect the first respondent must be understood as a finding that the information did not justify a conclusion that the government would not or could not provide citizens in the position of the first respondent with the level of protection which they were entitled to expect according to international standards. That being so, he was not a victim of persecution, and he could not justify his unwillingness to seek the protection of his country of nationality. It was not enough for the first respondent to show that there was a real risk that, if he returned to his country, he might suffer further harm. He had to show that the harm was persecution, and he had to justify his unwillingness to seek the protection of his country of nationality.

30 Wilcox J was correct to conclude that the Tribunal's reasons disclosed no errors of law and no jurisdictional error. The appeal should be allowed. The orders of the Full Court, save as to costs, should be set aside. In place of those orders, it should be ordered that the appeal to the Full Court be dismissed. In accordance with the terms of the grant of special leave to appeal it should be ordered that the appellant pay the respondents' costs of the appeal.

31 McHUGH J. The Full Court of the Federal Court of Australia set aside a decision of the Refugee Review Tribunal ("the Tribunal") that the respondents were not refugees within the meaning of the Refugees Convention[13]. The Full Court held that, in reaching its decision, the Tribunal had fallen into jurisdictional error. The error consisted in failing to consider whether the respondents might suffer future harm from random acts committed by private individuals because of the male respondent's religious belief and whether the government of their country of nationality was able in a practical sense to prevent such harm occurring. The issue in this appeal is whether the Full Court erred in holding that the Tribunal had fallen into jurisdictional error.

32 In my opinion, the Tribunal acted within its jurisdiction in reaching its decision and committed no error of law that required its decision to be set aside. When a person fears persecution for a Convention reason from the random and uncoordinated acts of private individuals, the ability of that person's country to eliminate or reduce the risk of persecution may be relevant in determining whether the person has a well-founded fear of persecution. It is likely to be relevant to that issue when the persecutor is known or readily ascertainable. But determining whether the government of the country of nationality is able to prevent harm from the random and uncoordinated acts of private individuals is not a *necessary* element in determining whether the person's fear of harm from random acts is well-founded. The need for such a determination is a variable factor that may be decisive in some cases but irrelevant in others. Nor is the absence of protection of the person by the State, in the context of a purported duty to protect, an element of persecution.

33 In determining the issue of well-founded fear, the critical question is whether the evidence established a real chance that the asylum seeker will be persecuted for a reason proscribed by the Convention, if returned to the country of nationality. If the evidence shows that the persecutors have targeted the asylum seeker, the ability of the country of nationality to protect that person will be relevant to the issue of well-founded fear. If the evidence shows no more than that private individuals randomly harm the class of persons to which the asylum seeker belongs but fails to show that that person has a real chance of suffering harm, the ability of the country to eliminate those acts is irrelevant. Every year motor car accidents cause the death of or serious injury to thousands of Australians. But that does not mean that every driver who fears death or serious injury from a motor accident has a well-founded fear that he or she will suffer death or serious injury in that way. The inability of Australian governments to

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13 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.

eliminate those deaths and injuries does not determine whether the fear is well-founded.

34 In the present case, the Tribunal found that in the past the male respondent had not suffered acts of persecution for a Convention reason and that there was only a remote chance that he would suffer such acts in the future. That was a factual conclusion open to the Tribunal and was not reviewable in the Federal Court. Having made that finding of fact, the Tribunal was not bound to determine whether the country of nationality had the ability – in a practical sense or otherwise – to eliminate those acts.

Statement of the case

35 The respondents, who are Ukrainian nationals, are de facto husband and wife. The husband is a Jehovah's Witness; the wife is not. They arrived in Australia in December 1998. In February 1999, the husband applied for a protection visa on the ground that he was a refugee who had fled Ukraine to escape religious persecution. The wife also applied for a protection visa. Her claim for asylum was a derivative one based on her husband's claim.

36 Australia has protection obligations under the Refugees Convention to any person who is a refugee. Article 1A(2) 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 ...".

37 A delegate of the Minister for Immigration and Multicultural Affairs refused the respondents' applications. The Tribunal affirmed the delegate's decision. The Tribunal found that the husband had been assaulted on two occasions and that a fire had been lit outside his property on another occasion "because some individuals were affronted by his religious beliefs". It was the husband's case before the Tribunal that the government of Ukraine encourages the persecution of Jehovah's Witnesses and that members of its police force condone violence towards Jehovah's Witnesses. He claimed that the harm that he suffered was the result of the policies of the Ukrainian government. In evidence before the Tribunal, the husband said that Ukraine was "a country where they whip up hatred against the JWs". He also said "the authorities do not want young people (like the [husband]) being active in the church as they may be more successful in spreading the word". The husband said that the arson attack "confirmed what dreadful conditions there were for members of the JW faith in the Ukraine". However, the Tribunal rejected the husband's claim that "the government in the Ukraine and ... its tame press ... actively encourages persecution of Jehovah's Witnesses".

38 The Tribunal found that the incidents of which the husband complained were individual and random incidents and did not constitute persecution. It rejected the claim that the Ukrainian government encouraged or condoned attacks on Jehovah's Witnesses. The Tribunal found that, although a police officer came to the husband's apartment after the first assault, he took the matter no further when the husband "for some reason" did not make a statement. However, the husband claimed that he went to the police station after the second assault and that the police officers would not take his or another person's statement. The Tribunal found that, even if this was so, there were at least two police stations where the husband could have complained. One of them was the station that had sent the officer who had investigated the first assault. In addition, said the Tribunal, the husband could have gone to the office of the Procurator-General. He also had the option of complaining to his Church.

39 In concluding that the Ukrainian government did not encourage or condone attacks on the Witnesses, the Tribunal took into account a "recent Country Information report" of the Department of Foreign Affairs and Trade. That report stated that Jehovah's Witnesses were considered to be one of the traditional religions in Ukraine which "are respected almost as native traditional religions". The Tribunal said that the official website of "the Jehovah's Witnesses, a sophisticated and well-resourced organisation", showed that its membership in Ukraine was increasing and that it had "823 congregations across the country". It said that these matters indicated "that the organisation is not being suppressed by the authorities; nor are Ukrainians terrified to join or frightened to continue their membership of the church".

40 The Tribunal said:

> "On the basis of the above information, the Tribunal is not satisfied that the authorities can be said to be *unwilling or unable to protect* their citizens." (emphasis added)

41 Later, the Tribunal said:

> "In short, the Tribunal accepts the independent evidence of the US State Department, the British Home Office and DFAT, but more particularly of the official Jehovah's Witness website itself, that Jehovah's Witnesses in the Ukraine do not face State-sanctioned persecution. It accepts that harm may sometimes befall individual church members, probably more frequently when they go out and proselytise – putting themselves deliberately into an interaction with members of the general public – but that this harm befalls them on a one-off, individual basis."

42 The respondents applied to the Federal Court of Australia for judicial review of the Tribunal's decision. Wilcox J, who heard the application, found no

error in the Tribunal's reasons and dismissed the application. However, the Full Court of the Federal Court allowed an appeal against his Honour's decision. After stating that "the Tribunal concluded that there was no evidence of general condonation or active participation in persecution to support the claim that the government was unable or unwilling to protect its citizens", the Full Court said:

> "However, the Tribunal did not address the question of possible future harm befalling the [respondents] or whether the Ukrainian government was able, in a practical sense, to prevent such harm, given the history of violence towards [the husband] on account of his religious beliefs. These matters were relevant in determining whether the [respondents'] fear of persecution was well-founded.
>
> The evidence, as accepted by the Tribunal, was that the [husband], over a period of months had been assaulted on two occasions, suffered property damage which may have led to personal harm, and had been dismissed from his employment because of his religious beliefs. These findings clearly raised an issue about whether there was a risk of harm for a Convention reason that the authorities could not provide protection against."

43 The Full Court went on to say:

> "The Tribunal accepted that the harm inflicted on the [husband] was carried out by Ukrainian citizens for reasons of religion, namely, 'his new-found religious beliefs'. The acts of harm were such that they could have been accepted, severally or in combination, as acts of persecution ... Therefore, the harm suffered could have been regarded by the Tribunal as past acts of persecution inflicted for a Convention reason, and highly relevant to the issue before the Tribunal, namely, was there a real chance ... that the [husband] may suffer acts of persecution in the future, thereby making his fear of such persecution a well-founded fear."

44 The Full Court then summarised what it saw as the husband's case before the Tribunal. It said:

> "The [husband's] case was that he feared the continuation of acts of harm for reasons of religion committed by Ukrainian citizens from time to time. That is, such acts reflected an attitude within the Ukrainian populace that a person such as the [husband] should be so treated because of profession of adherence to the Jehovah's Witness religion. The [husband] feared such assaults would continue because of the degree of hostility in the community to his religion and the apparent belief that proselytisers for the Jehovah's Witness' religion should be so dealt with. Contrary to the statement of the Tribunal, such events as suffered, or

> feared, by the [husband] did not fail to constitute persecution if they were 'individual attacks with different perpetrators'."

45 However, it is difficult to accept that this is an accurate statement of the husband's case before the Tribunal. The Full Court's summary leaves out the fact that the husband's case before the Tribunal was that the Ukrainian government encouraged attacks on Jehovah's Witnesses. Before the Tribunal, the husband's case was that the State was responsible for the persecution that he feared. It does not seem to have been any part of his case before the Tribunal that he feared persecution by private citizens and that he was a refugee because the Ukrainian government was unable to prevent harm to him.

46 It is unnecessary to determine whether the appeal should be allowed on the ground that there was no jurisdictional error as found by the Full Court because the ability of the Ukrainian government to protect the husband was never an issue before the Tribunal. As will appear, even if that issue had been raised, the findings of the Tribunal did not require it to be decided.

47 After finding that the Tribunal had only considered whether the husband sought and failed to obtain protection from the Ukrainian authorities, the Full Court said that "[t]here was no specific consideration of the State's ability, in a practical sense, to provide protection". The Full Court then said:

> "The Tribunal failed to consider the right question, namely, whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm. That question related directly to whether the [husband and wife's] fear of persecution was well-founded and ultimately relevant to their application for a protection visa."

48 The Full Court set aside the decision of the Tribunal and remitted the matter to it for further hearing.

49 Subsequently, this Court granted the Minister special leave to appeal against the Full Court's order.

The issues

50 It is not clear what the Full Court had in mind when it referred to a "pervasive pattern of harm". In its context, it must mean that harm to Jehovah's Witnesses in Ukraine is widespread and follows a pattern. However, the Tribunal made no such finding. It had found that three incidents concerning the husband had occurred, that his attackers were different on each occasion, and that each group was unknown to the other groups. The Tribunal also accepted:

"that harm may sometimes befall individual church members, probably more frequently when they go out and proselytise ... but that this harm befalls them on a one-off, individual basis".

51 Three incidents do not constitute a "pervasive pattern". Nor do those incidents in combination with the finding that harm "may sometimes befall" Jehovah's Witnesses. A finding that there was a pervasive pattern of harm is a factual finding that the Tribunal did not make and the phrase "pervasive pattern of harm" is not synonymous with what it did find. Indeed, the Tribunal's findings negate the idea that in Ukraine there is a widespread pattern of harmful acts against Jehovah's Witnesses. In a refugee appeal, the Full Court has no jurisdiction or power to make factual findings. The issues for determination in the appeal must be considered on the facts that the Tribunal did or did not find.

52 The question then is whether the Tribunal fell into jurisdictional error in failing to determine whether "in a practical sense" the State was able to protect the husband, as a member of the Jehovah's Witness Church, from one-off, individual harmful incidents that from time to time befall those members. The Full Court thought that determining this issue was a necessary element in determining whether the husband and wife had a well-founded fear of persecution. Thus, this question raises issues concerning:

- a well-founded fear of persecution;
- a State's obligation to protect its citizens from Convention-related attacks by non-State agents; and
- a Convention signatory's obligation to give asylum to persons who are persecuted by private citizens in circumstances where the home State is unable to protect those persons against such persecution.

The purpose of the Convention

53 The chief object of the Convention is to impose obligations on the signatories to the Convention to provide protection and equality of treatment for the nationals of countries who cannot obtain protection from their own countries[14]. That follows from the obligation of the signatories to protect a person who is outside his or her country, has a well-founded fear of persecution for a Convention reason and "is unable or, owing to such fear, is unwilling to

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14 Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v Secretary of State for the Home Department*", (2001) 13 *International Journal of Refugee Law* 16 at 18, 20; Hathaway, *The Law of Refugee Status*, (1991) at 105; cf *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 11 [24] per Gleeson CJ.

avail himself of the protection of that country". However, views differ as to the extent of a signatory's obligation where non-State agents carry out the persecution[15].

The accountability theory

54 The "accountability" theory reflects one of these views of the Convention. Under the accountability theory, a signatory State is required to extend protection only when the government of the country of nationality is responsible for the persecution of a person for a Convention reason either by inflicting, condoning or tolerating the persecution[16]. Under this theory, a signatory State owes no obligation in respect of persecution caused by non-State agents that the government of the country of nationality does not condone or tolerate[17]. Thus, no Convention obligation is owed where the government of the country of nationality has reacted effectively to prevent the persecution or the persecution is beyond its resources or capacity to prevent[18]. That is because, on the accountability theory, the country of nationality cannot be held responsible for the acts of non-State agents that it has not condoned or tolerated[19]. The accountability theory of the Convention prevails in Germany[20]. The German Federal Administrative Court, following principles laid down by the Federal Constitutional Court, has held that, if the country of nationality "is generally unable to provide protection including when it attempts to do so, refugee status

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15 Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 72-74.

16 Wilsher, "Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?", (2003) 15 *International Journal of Refugee Law* 68 at 71.

17 Wilsher, "Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?", (2003) 15 *International Journal of Refugee Law* 68 at 71; Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (1966) at 189.

18 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 6-7.

19 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 6.

20 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 7.

will be denied"[21]. France[22], Italy[23] and Switzerland[24] are other countries that have applied the accountability theory of the Convention although these countries now "appear to have broken away, if not in doctrine, in practice, though in a discretionary and informal way"[25]. In *Minister for Immigration and Multicultural Affairs v Khawar*[26], Gummow J and I said that there was no need to determine, for the purpose of that case, whether the accountability theory was part of Australian law.

The protection theory

55 Many countries that reject the accountability theory – and they constitute the majority of signatories – favour the "protection" theory of the Convention[27]. That theory proceeds from the widely accepted premise that the object of the Convention is to provide "substitute protection" and "fair treatment" where such treatment is lacking in the country of nationality[28]. Professor James Hathaway, a

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21 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 7.

22 Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 72-73; European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 14.

23 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 14.

24 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 14.

25 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 14.

26 (2002) 210 CLR 1 at 25-26 [73]-[75]. In *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 53-55 [151]-[155], 80-81 [228], Gummow and Callinan JJ also left the question open.

27 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 496C.

28 *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958 at 992-993; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 495, 509; Lambert, "The Conceptualisation of 'Persecution' by

(Footnote continues on next page)

leading exponent of the protection theory, has argued that "refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming"[29]. He has referred to this class of protection as "surrogate or substitute protection"[30].

56 Influenced by Professor Hathaway's writings, the House of Lords[31] and the New Zealand Court of Appeal[32] have determined a signatory State's Convention obligations by reference to the protection theory. In *Horvath v Secretary of State for the Home Department*[33], Lord Hope of Craighead said:

> "If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection against persecution of its own nationals." (emphasis in original)

57 The protection theory imposes greater obligations on signatory States than the accountability theory imposes. It can require a signatory State to provide protection in cases where a person is likely to be persecuted for a Convention reason as the result of the inability of the country of nationality to provide protection. State complicity – whether by perpetration, condonation or approbation – is not a requirement of the protection theory of the Convention because it is based on the premise that the purpose of the Convention is to help those who are in need of international protection[34]. According to that theory, however, not all those who are persecuted for a Convention reason require international protection. Proponents of the theory also contend that "[t]he purpose of refugee law is to offer surrogate protection when [the country of

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the House of Lords: *Horvath v Secretary of State for the Home Department*", (2001) 13 *International Journal of Refugee Law* 16 at 18, 20.

29 Hathaway, *The Law of Refugee Status*, (1991) at 124.

30 Hathaway, *The Law of Refugee Status*, (1991) at 135.

31 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

32 *Butler v Attorney-General* [1999] NZAR 205.

33 [2001] 1 AC 489 at 495H.

34 Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 *Georgetown Immigration Law Journal* 415 at 423.

nationality] fails in its duty"[35] to protect its citizens. Consequently, there is no obligation on a signatory State to give refugee protection *merely* because, upon return to the home country, non-State agents might breach a person's rights, even if the breach will be committed for a Convention reason. Thus, according to proponents of the protection theory, persecution by non-State actors occurs only when there is a violation of a right and the State has a duty to prevent that violation[36]. And, as interpreted by the House of Lords in *Horvath*, a person may not be a refugee although that person has a well-founded fear of persecution by non-State agents. In *Horvath*, Lord Hope of Craighead said[37]:

> "A person may satisfy the fear test because he has a well-founded fear of being persecuted, but yet may not be a 'refugee' within the meaning of the article because he is unable to satisfy the protection test."

58 Lord Hope went on to say[38]:

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

<u>The protection theory should be rejected</u>

59 This construction of the Convention, however, leads to the implausible result that what is "persecution" for the purpose of the Convention when carried

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35 Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v Secretary of State for the Home Department*", (2001) 13 *International Journal of Refugee Law* 16 at 20.

36 Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v Secretary of State for the Home Department*", (2001) 13 *International Journal of Refugee Law* 16 at 20.

37 [2001] 1 AC 489 at 497F.

38 [2001] 1 AC 489 at 497G-498A.

out by the State is not persecution when carried out by non-State agents. The construction was developed from the analysis of Art 1A(2) by Lord Lloyd of Berwick in *Adan v Secretary of State for the Home Department*[39] who said that "the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'". In *Horvath*[40], Lord Hope of Craighead, basing himself on this statement, held that persecution required an absence of State protection. Lord Lloyd, who also delivered a speech in *Horvath*, adhered to the two separate tests, although his Lordship came to the same result[41]. Thus, when the State or its agents persecute, the protection test is automatically satisfied. Yet the same acts carried out by non-State agents do not constitute persecution within the meaning of the Convention. The applicant must show both persecutory acts by the non-State agents and that the State has breached its duty to protect the applicant.

60 The decision in *Horvath*[42] illustrates the point. In *Horvath*, the House unanimously held that a person was not a refugee, within the meaning of Art 1A(2), even though the person had a well-founded fear of violence from "skinheads"[43] against whom the police of the home State had failed to provide protection. Lord Hope said[44]:

> "I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of a refugee."

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39 [1999] 1 AC 293 at 304E.

40 [2001] 1 AC 489 at 497F.

41 [2001] 1 AC 489 at 503A-G.

42 [2001] 1 AC 489.

43 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 493H.

44 [2001] 1 AC 489 at 499G-500A.

61 Lord Clyde thought that it was not possible to give a complete or comprehensive formulation of what constituted the relevant level of protection. His Lordship said[45]:

> "The use of words like 'sufficiency' or 'effectiveness', both of which may be seen as relative, does not provide a precise solution. Certainly no one would be entitled to an absolutely guaranteed immunity. That would be beyond any realistic practical expectation. Moreover it is relevant to note that in *Osman v United Kingdom* (1998) 29 EHRR 245 the European Court of Human Rights recognised that account should be taken of the operational responsibilities and the constraints on the provision of police protection and accordingly the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities ... There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case."

62 Both the House of Lords in *Horvath* and Lord Lloyd of Berwick in *Adan* concluded that the words "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" required the construction they placed on Art 1A(2). As the United Nations High Commissioner for Refugees has pointed out[46], on this view of the concluding words, "protection by the state apparatus inside the country of origin ... forms an indispensable part of the test for refugee status, on an equal footing with the well-founded fear of persecution test".

63 In *Khawar*, Gummow J and I rejected this construction of Art 1A(2)[47]. We held that the concluding words of Art 1A(2) referred to external protection and not internal protection. We rejected the "internal protection" theory accepted by the House of Lords in *Horvath*. We concluded that the reference to the unwillingness of the applicant to avail him or herself of protection meant unwillingness to be returned to the country of nationality where the feared persecution could occur. It was not directed to protection within the country of nationality but to seeking diplomatic or consular protection available to citizens

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45 [2001] 1 AC 489 at 510F.

46 "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", (2001) 20 *Refugee Survey Quarterly* 77 at 87.

47 (2002) 210 CLR 1 at 24-25 [72]-[73].

who are outside that country. We adopted[48] the statement of the United Nations High Commissioner for Refugees:

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

64 For the reasons that Gummow J and I gave in *Khawar*, the protection theory of the Convention, as expounded by the House of Lords in *Horvath*, does not represent the law of Australia. The judgment of Gleeson CJ in *Khawar* also rejects the view that "protection" in Art 1A(2) refers to internal protection[49].

65 If conduct constitutes persecution for a Convention reason when carried out by the State or its agents, it is persecution for a Convention reason when carried out by non-State agents. In neither its ordinary nor its Convention meaning does the term "persecution" require proof that the State has breached a duty that it owed to the applicant for refugee status. Where the State is involved in persecution, it will certainly be in breach of its duty to protect its citizens from persecution. But that is beside the point. State culpability is not an element of persecution. The attitude of the State may be relevant, however, to whether a person has a well-founded fear of persecution, a point recognised by Gleeson CJ in *Khawar*[50].

The accountability theory should also be rejected

66 Rejection of the protection theory of the Convention is not necessarily inconsistent with the accountability theory of the Convention. But once it is accepted that State culpability is not an element of "persecution", it is difficult to accept the accountability theory. It could only be accepted if the Convention was exclusively concerned with State persecution of persons or if international refugee law in 1951 was concerned only with the creation of rules applicable to the relationship between States and their citizens. German courts have adopted both these rationales to justify the accountability theory of the Convention[51].

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48 (2002) 210 CLR 1 at 25 [73].

49 (2002) 210 CLR 1 at 10 [21].

50 (2002) 210 CLR 1 at 11 [24].

51 European Council on Refugees and Exiles, *Non-State Agents of Persecution and the Inability of the State to Protect – the German Interpretation*, London, September 2000 at 4-6.

67 No doubt the widespread State persecution of refugees was the catalyst for enacting the Convention. But the Convention's reference to persecution is general; it does not refer to persecution by a State or its agents. To read down the general words of the Convention to give effect to the catalyst for the Convention would be contrary to the principles for interpreting treaties as laid down in Art 31 of the Vienna Convention on the Law of Treaties. Under those principles, primacy is given to the text although context, object and purpose must also be considered[52].

68 Furthermore, nothing in the Convention supports the view of the German courts that the Convention was concerned with the creation of rules applicable to the internal relations between States and their citizenry. On the contrary, the terms of the Convention show that it was concerned with imposing obligations on the signatories to the Convention. It was not directed to persecuting States; it was directed to the signatories to the Convention. It specified the criteria for determining who was a refugee and what obligations each signatory country owed to refugees who sought asylum in that country.

69 Moreover, as Professor Goodwin-Gill has pointed out, "there is no basis in the 1951 Convention, or in general international law, for requiring the existence of effective, operating institutions of government as a pre-condition to a successful claim to refugee status"[53]. Hence, to read a requirement of State conduct into the Convention's definition of "refugee" is to add a further element to the definition[54].

70 In my view, the accountability theory has no part to play in interpreting Art 1A(2) of the Convention.

Well-founded fear of persecution

71 The findings of the Tribunal show that the individual assaults and the other conduct of which the husband complained were not part of a pattern. Nor did they involve *sustained* discriminatory conduct. The Tribunal regarded them as individual acts by different perpetrators. However, the Full Court said that "[t]hese findings clearly raised an issue about whether there was a risk of harm

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52 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231, 240, 251-256, 277.

53 Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 73-74.

54 Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 *Georgetown Immigration Law Journal* 415 at 418.

for a Convention reason that the authorities could not provide protection against". And, as I have said, the Full Court held that the Tribunal had fallen into jurisdictional error by not considering whether, in a practical sense, the State was able to provide protection against individual acts by different perpetrators. Hence, as I have indicated, the Full Court must have considered that that question was a necessary element in determining whether the husband and wife had a well-founded fear of persecution.

72 In its ordinary meaning, persecution involves selective harassment or oppression of any kind. The terms "harassment" and "oppression", particularly the former, imply repetitive, or the threat of repetitive, conduct. In its ordinary meaning, persecution always involves discrimination of some kind although discrimination is not necessarily persecution[55]. The harassment or oppression will ordinarily be motivated by enmity or by the desire to achieve an objective. It frequently involves the infliction of systematic harm over a period directed against those who hold particular beliefs or who refuse to comply with the persecutor's wishes.

73 In the Convention, however, the notion of persecution is not at large. Either expressly or by necessary implication or inference, the Convention controls and narrows the meaning of persecution for its purposes. Thus, the selectivity and motivation of the harassment or oppression is defined by reference to five matters: reasons of race, religion, nationality, political opinion and membership of a particular social group[56]. Further, not every kind of harassment or oppression constitutes persecution for the purpose of the Convention. The Convention is concerned with persons who are outside their country of nationality and are unable or unwilling to seek the protection of that country because of a well-founded fear of what will happen to them if they return to that country. This factor, together with the imposition of obligations on the country where asylum is sought, indicates that the feared harm must be of a serious nature that goes beyond simple discrimination and requires the country of asylum to protect the refugee. It is not to be supposed that the Convention required signatory States to give asylum to persons who were persecuted for a Convention reason but who were unlikely to suffer serious infringement of their rights as human beings. Thus, for the purpose of the Convention, the feared harm will constitute persecution only if it is so oppressive that the individual

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55 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 18-19 [55]; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 26 [76]-[77].

56 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 284 per Gummow J.

cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person[57]. Implicit in that statement is the further proposition that there is a real chance that the feared conduct will be repeated or, if it has not already occurred, will occur, if the asylum seeker returns to the country of nationality.

74 Most forms of persecution involve sustained discriminatory conduct or a pattern of discriminatory conduct against an individual or a group of individuals[58]. But a well-founded fear of persecution may be established for the purpose of the Convention although it does not derive from conduct that is part of a pattern or involve sustained discriminatory conduct. The fear may arise from an announcement as to a future course of conduct or from a single act[59] that was directed at the asylum seeker or at others. It is not necessary that the asylum seeker should have been persecuted in the past[60]. The Convention looks to the future. What has occurred in the past does not determine whether a person is a refugee for the purpose of the Convention. In determining whether that person has a well-founded fear that he or she will be persecuted if returned to the country of nationality, the past is a guide – a very important guide – as to what may happen[61]. But that is all.

75 The Convention does not refer to persecutors. It refers to persecution, not persecutors. The persecution to which the Convention refers may be carried out by the State or its agents or by one or more private citizens[62]. From the victim's point of view, the result is the same. In determining whether a person has a *well-founded* fear of persecution, however, it may matter a great deal whether the State or its agents or a private individual or individuals will inflict the persecution.

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57 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 20-21 [61]-[65], 32 [99].

58 cf *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 7 [18] per Gaudron J.

59 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 32 [99].

60 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 7 [16] per Gaudron J.

61 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574-575.

62 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 7 [17] per Gaudron J.

76 Where fear of persecution springs from the conduct of the State and there is a real chance that the conduct will continue and affect the asylum seeker, a finding that the fear is well-founded will be virtually inevitable. Similarly, where the persecutory conduct of State agents is widespread, a finding that the fear is well-founded will be virtually inevitable. On those hypotheses, refusal to return to the country of nationality is the only practical means of avoiding the real chance of persecution. More difficult issues arise where the persecution is the work of private individuals, particularly where there are many of them and their conduct is uncoordinated, or where the persecution is perpetrated by isolated State agents. As Gaudron J pointed out in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*[63], "a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion". If the threat of persecution arises from an individual or a small group of individuals and the State is prepared to act against the individual or group, in most cases the threat is likely to be eliminated or greatly reduced. In such a case, the proper conclusion may well be that the fear is not well-founded because there is no real chance that the persecutory conduct will occur. If the State refuses to act or tolerates the conduct of the individual or group, the State itself will be complicit. On that hypothesis, unless there is only a remote chance that the asylum seeker will be persecuted, ordinarily the proper conclusion is that the fear is well-founded. Both the State and the individual or group will be guilty of persecution.

77 The case that presents most difficulty is one where harm to individuals for a Convention reason may come from any one or more of a widely dispersed group of individuals and the State is willing but is unable to prevent much of that harm from occurring. In societies divided by strongly held ethnic or religious views, it commonly happens that members of one group have a real chance of suffering harm – often violent harm – because of the pervasive but random acts of members of another group. Such harm occurs although the State makes every effort to prevent it. In such cases, it would be a misuse of language to say that the fear of persecution is not well-founded because the State has "a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected"[64]. In *Horvath*, relying on the protection theory, the House of Lords limited the scope of the definition of "refugee" by requiring that a State be unwilling or unable to eliminate persecutory conduct by private individuals. Nothing in the Convention, however, supports this limitation. It should not be read into the Convention.

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63 (2000) 204 CLR 1 at 7 [16].

64 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 510H.

78 If there is a real chance that the asylum seeker will be persecuted for a Convention reason, the fear of persecution is well-founded[65] irrespective of whether law enforcement systems do or do not operate within the State. In *Haji Ibrahim*, all members of this Court recognised[66] that persons may be persecuted for a Convention reason although the State is unable to protect them because a civil war is raging in the country. No different view should be taken where in peace-time a State is unable to protect its citizens from harm inflicted for a Convention reason. As Gleeson CJ pointed out in *Haji Ibrahim*[67], "[p]ersecution and disorder are not mutually exclusive". In the same case, Gaudron J said that persecution may exist for the purpose of the Convention "whether or not the conduct occurs in the course of a civil war, during general civil unrest or ... [where] it may not be possible to identify any particular person or group of persons responsible for the conduct said to constitute persecution"[68].

79 In order to establish that fear is well-founded in cases of private persecution, an asylum seeker will no doubt have to show more than that persons holding the same beliefs, opinions or membership of races, nationality or particular social groups are being persecuted. The asylum seeker will have to show that there is a real chance that he or she will be one of the victims of that persecution. That person will have to show some fact or circumstance that indicates that there is a real chance that he or she will be among the victims. Thus, it may be enough to show that, by reason of the conduct of the asylum seeker, he or she stands a greater chance of harm than other persons who hold the same beliefs or opinions, or membership of the particular group. Or it may be enough to show that a very high percentage of such persons are persecuted for a Convention reason and the circumstances of the applicant are similar to those who have been persecuted.

80 In many – perhaps most – cases, however, more will be needed than proof that a percentage of members holding beliefs, opinions or membership similar to the asylum seeker have been harmed for a Convention reason. Statistical percentages based on experience of past events are usually an accurate guide to the chance of similar events occurring in the future. Insurance companies and financial institutions, for example, bet heavily on such statistical percentages

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65 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389, 398, 407, 429.

66 (2000) 204 CLR 1 at 5 [7], 7 [18], 24 [73], 51-53 [145]-[150], 65-66 [185]-[188], 73-74 [205]-[208], 80 [227].

67 (2000) 204 CLR 1 at 5 [7].

68 (2000) 204 CLR 1 at 7 [18].

when estimating the chance of future events occurring. But a percentage chance based on the results of a number of events, by itself, seldom throws light on whether a future event is likely to affect any particular person, place or property. To make the percentage useful for predicting the occurrence of an individual event, the predictor has to know a good deal about the inputs that form the basis of the statistical calculation. The predictor must know, for example, the source and nature of the inputs, the period and the area over which they were collected and their significance for the subject of the prediction.

81 Each year, a significant percentage of Australians, aged between 50 and 60, suffer heart attacks. But that says little about the chance of any individual in that age bracket suffering a heart attack. The statistical chance of such a person having a heart attack has predictive value only when other factors concerning the individual are known – weight, levels of cholesterol or blood pressure, smoking, diet, exercise and genetic predisposition, for example. When they are known, their correlation with the risk of heart attack may convert an insignificant percentage concerning the age group as a whole into a high risk for the individual.

82 Hence, in determining whether an asylum seeker has a well-founded fear of persecution, usually the decision-maker has to know a good deal more than that other persons holding similar beliefs, opinions or membership have been persecuted. It will ordinarily be necessary to know whether the circumstances of those persons were similar in all material respects to those that the asylum seeker will likely face. Only then will the experience of other members of the relevant category throw light on whether there is a real chance that the asylum seeker will be persecuted.

83 However, once the asylum seeker is able to show that there is a real chance that he or she will be persecuted, refugee status cannot be denied merely because the State and its agencies have taken all reasonable steps to eliminate the risk. Nothing in the Convention supports such a conclusion.

The Tribunal did not err

84 It follows that the ability of the Ukrainian government to protect the husband from harm because of his religious beliefs was potentially relevant to whether his fear of persecution was well-founded. But it was relevant only if there was otherwise a real chance that private individuals would persecute the husband in the future. If the Tribunal found that there was *no real chance* of private individuals persecuting him, the ability or inability of Ukraine to protect him from harm did not arise. And the reasons of the Tribunal show that it found as a fact that the husband had not been persecuted in the past and there was only a remote chance that he would be persecuted in the future. The Tribunal said:

> "The Tribunal is satisfied that the [husband] has not suffered harm amounting to persecution for a Convention reason in the past and that the chance that he would so suffer in the reasonably foreseeable future is remote. It follows that the Tribunal is not satisfied that [he] has a well founded fear of persecution for a Convention reason. He is not a refugee."

85 After examining the evidence concerning the activities of Jehovah's Witnesses in Ukraine, the Tribunal had earlier said:

> "This independent evidence does not negate the fact that the [husband] was assaulted and that he was assaulted because some individuals were affronted by his religious beliefs. However, these incidents must be seen as individual and random incidents of harm directed at the [husband] and not as persecution for a Convention reason."

86 In its reasons, the Full Court said that the Tribunal had "erred in law if it understood that harm inflicted for a Convention reason could not constitute persecution within the meaning of the Convention unless inflicted regularly in a coordinated pattern". However, the Full Court made no finding that the Tribunal had so erred, and there is no reason to think that the Tribunal fell into this error. As I indicated above, the matter for the Tribunal's determination was not whether the husband's previous suffering amounted to persecution, although that was a relevant consideration, but whether he had a well-founded fear of future persecution. The reasons of the Tribunal show that it thought that the incidents that had befallen the husband were random events by different individuals. There was thus no reason for concluding that the husband would suffer harm in the future from these individuals. Hence, to make out a case of future harm, the husband could only rely on the finding that:

> "harm may *sometimes* befall individual church members, probably more frequently when they go out and proselytise – putting themselves deliberately into an interaction with members of the general public – but that this harm befalls them on a one-off, individual basis". (emphasis added)

87 In finding that "the chance that [the husband] would so suffer in the reasonably foreseeable future is remote", the Tribunal probably concluded from all the evidence that attacks on Jehovah's Witnesses did not occur frequently enough to conclude that there was a real chance that *he* would suffer harm. There was no evidence that suggested that the husband was the target of attacks or that he stood a greater chance than other Jehovah's Witnesses of being harmed. Nor was there any evidence that the circumstances that he would face as a Jehovah's Witness were not materially dissimilar from the circumstances faced by those who had been harmed in the past. Not only was there no evidence as to the frequency or the percentage of Jehovah's Witnesses who "sometimes" suffered harm but there was no evidence as to the times or places of such

occurrences. It was open to the Tribunal to conclude, therefore, that, despite the husband's earlier experiences, and those of other Jehovah's Witnesses, the statistical chance of his being harmed was too small to classify that chance as a real one.

88 Whether the Tribunal's finding on future persecution was correct in fact is beside the point. It was a finding of fact that was not reviewable in the Federal Court. Having found that the husband and, through him, his wife did not have a well-founded fear of persecution, the Tribunal was not required to determine whether Ukraine had the ability in a practical sense or otherwise to eliminate acts that harmed Jehovah's Witnesses. The Full Court erred, therefore, in finding that the Tribunal had fallen into jurisdictional error.

Order

89 The appeal must be allowed.

90 KIRBY J. This is another appeal concerning refugee law. The Full Court of the Federal Court of Australia unanimously[69] upheld an appeal from the primary judge (Wilcox J)[70]. It reversed his Honour's order adverse to the present respondents, who were applicants for protection visas ("the applicants") before the Refugee Review Tribunal ("the Tribunal"). In effect, by its judgment, the Full Court required that the Tribunal reconsider the applicants' claim. By special leave, the Minister for Immigration and Multicultural Affairs ("the Minister") appeals to this Court. She seeks restoration of the orders of the primary judge. If successful, that would close the applicants' legal right to the reconsideration of their application by the Tribunal.

The background facts

91 The applicants are male and female domestic partners whose country of nationality is Ukraine. Effectively, the matter was determined in light of events that had primarily concerned the male applicant. No point of distinction was made concerning the female applicant. It was accepted by the Tribunal that the male applicant had suffered harm in the course of two beatings and in an attack in or near his apartment[71]. It was clear that these attacks were related to the fact that the male applicant had become interested in the teachings of the Jehovah's Witnesses, a denomination of the Christian religion. The male applicant had promoted that religious denomination, including by handing out relevant literature. It appears that these activities occasioned animosity on the part of the male applicant's assailants. Whether his assailants followed the more traditional religions of Ukraine, whether they were adherents to the former secularist beliefs of that country, promoted during the long period that Ukraine was part of the Soviet Union, or otherwise, is undisclosed.

92 The Tribunal accepted that the violence directed towards the male applicant was an "adverse reaction to his religion" and that he had suffered because of his religion[72]. Such violence preceded the departure of the applicants from Ukraine for Australia, their arrival in this country and their claim for protection visas on the ground of refugee status[73], which was promptly made.

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69 [2002] FCAFC 145 per Lee, Moore and Madgwick JJ.

70 [2001] FCA 652.

71 [2002] FCAFC 145 at [3]. Background facts are stated in the reasons of Gleeson CJ, Hayne and Heydon JJ at [2]-[16].

72 [2002] FCAFC 145 at [3].

73 Under the *Migration Act* 1958 (Cth), s 36(2).

93 The existence of "fear", in a subjective sense, as claimed by the male applicant, appears to have been accepted. The next question thus became whether that fear was "well-founded", whether it involved a fear of "being persecuted for reasons of … religion" and whether it otherwise attracted the requirements contained in Art 1A(2) of the Refugees Convention as amended by the Refugees Protocol ("the Convention")[74], incorporated into Australian law by the *Migration Act* 1958 (Cth) ("the Act").

Rejection of state complicity in the harm to the male applicant

94 Before the Tribunal, the applicants' claim to fall within the Convention definition of "refugee" substantially relied upon the basis that Ukraine, and in that sense its state apparatus, agencies and officials, was complicit in the attacks suffered by the male applicant. It was submitted that Ukraine had encouraged the violence directed at the male applicant through the media and otherwise. This was the essential evidentiary case presented, upon the basis of which the applicants sought protection visas in Australia. Obviously, if such a case could be made good, the applicants would have enjoyed good prospects of success. Persecution of members of the Jehovah's Witness religion by the official apparatus of nation states is not unknown in history, including recent history. Discrimination against Jehovah's Witnesses has been claimed in Australian history and considered by this Court[75].

95 However, upon this case of complicity and involvement by Ukraine in the harm suffered by the male applicant, the applicants failed before the Tribunal. They did so on the evidentiary merits. The reasons given for their loss in this respect are compelling. They were grounded in country information from reliable governmental and other sources to the effect that state authorities in Ukraine generally accept traditional religions (of which Jehovah's Witnesses are treated as one). The reasons were also supported by the references to the website of the international organisation of the Jehovah's Witnesses Church naming certain countries as unfriendly and worse to members of their denomination. Some of the neighbours of Ukraine are amongst those countries so named. However, Ukraine itself is not mentioned. On the contrary, the website indicates that there are more than 100,000 members of the Jehovah's Witnesses in Ukraine and that there are 823 congregations.

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74 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37.

75 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116.

96 In these circumstances, the finding by the Tribunal against the applicants, on the case that they propounded, was scarcely surprising. Certainly, it was supported by the evidence. There is no indication of jurisdictional or other legal error in that determination. No one now suggests otherwise.

The case of harm by non-state actors

97 The applicants appeared before the Tribunal (and in the Federal Court) without legal representation. This made it appropriate for the Tribunal and that Court to adopt an approach of special vigilance. This is because of the duty imposed on the Tribunal by the Act to approach its own functions in a generally inquisitorial and not strictly an adversarial manner[76]. Furthermore, the Federal Court would be aware of the importance of refugee decisions under the Act and that unrepresented applicants could not be expected to know about all the many nuances of that law. Trained lawyers often find it difficult to distinguish jurisdictional from non-jurisdictional error. I have confessed to difficulty myself. In such circumstances, it was proper for the Federal Court to engage in its own scrutiny of the approach adopted by the Tribunal and by the primary judge to see if a relevant undisclosed error appeared warranting a rehearing before the Tribunal. This is what the Full Court did.

98 The Full Court's consideration of the alternative case which it felt was open to the applicants and unconsidered by the Tribunal and the primary judge, was probably enlivened by the then recent publication of this Court's decision in *Minister for Immigration and Multicultural Affairs v Khawar*[77]. That decision was announced on 11 April 2002. That was after the primary judge had delivered his judgment, after the hearing in the Full Court and little more than a month before the publication of the Full Court's reasons. It can be assumed, as the Full Court indicated, that the decision was therefore at the forefront of its thinking[78].

99 In *Khawar*, as in this case, the applicant for refugee status was unable to succeed on the case common in persecution claims, namely persecutory activity by the apparatus of the state, its agencies and officials, in the country of nationality of the applicant for refugee status. In *Khawar* the complaint, by a female citizen of Pakistan, was that she was the victim of repeated violence by

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76 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 146 [52].

77 (2002) 210 CLR 1.

78 [2002] FCAFC 145 at [15].

non-state actors (her husband and his family) which state agencies (namely the police) had failed to investigate or follow up by laying charges in respect of complaints by women, including Mrs Khawar, who alleged domestic violence against them by their husbands and by members of their husbands' families.

100 In *Khawar*, this Court by majority[79] held that "persecution" within the Convention definition of "refugee" could exist as a matter of law although the relevant harm was inflicted on the applicant by non-state actors. Such non-state actors could include private citizens. "Persecution" could arise where the relevant conduct was tolerated or condoned by the state in a discriminatory manner[80]. The principle endorsed by the Court rejected the notion that "persecution" as used in the Convention's criteria for "refugee" status inherently implied a necessity of intolerable conduct by agents of the state in inflicting, condoning or tolerating the persecution ("the accountability theory")[81]. I considered that it was sufficient if the "persecution" involved serious harm and the failure of state protection. In my reasons, at some admitted risk of oversimplification, I adopted the concise formula which Lord Hoffmann had propounded in *R v Immigration Appeal Tribunal; Ex parte Shah*[82] and

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79 Gleeson CJ, McHugh and Gummow JJ and myself. Callinan J did not decide the point but dissented from the orders of the Court.

80 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 12-13 [29]-[31] per Gleeson CJ, 26-27 [76]-[80] per McHugh and Gummow JJ, 37-40 [112]-[118] of my own reasons.

81 For discussion of the accountability theory see the reasons of McHugh J at [54]. Also see Moore, "Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection", (2001) 13 *International Journal of Refugee Law* 32; Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 *Georgetown Immigration Law Journal* 415 at 417-423; Marx, "The Notion of Persecution by Non-State Agents in German Jurisprudence", (2001) 15 *Georgetown Immigration Law Journal* 447; Phuong, "Persecution by Third Parties and European Harmonization of Asylum Policies", (2001) 16 *Georgetown Immigration Law Journal* 81 at 82-83; Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents", (1999) 31 *Columbia Human Rights Law Review* 81 at 106-108. See further *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 53-54 [151]-[154] per Gummow J; *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477 at 522-523 per Lord Hutton; *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920 at 935-936 [39]-[42] per Lord Hope of Craighead, 944-945 [65] per Lord Hutton.

82 [1999] 2 AC 629 at 653.

Lord Clyde had endorsed in *Horvath v Secretary of State for the Home Department*[83]:

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

This represents the alternative theory of "persecution" accepted by most contemporary elaborations of the Convention ("the protection theory")[84].

101 The most obvious failure of state protection will arise when the state and its agencies and officials are the actual perpetrators of serious harm to a person who subsequently claims protection on the ground of refugee status. However, another class that will enliven the Convention is a case like *Khawar*, where the agencies of the state are unable or unwilling to provide protection to their nationals[85]. Where the evidence establishes that this is the case it will potentially lend support to claims of "fear". It may sustain such claims of fear as "well-founded". This is because, to the extent that state agencies or officials engage in the harmful conduct or neglect or omit to provide protection or redress, they render subjective fears substantial and "well-founded". They are "well-founded" because of the protective role ordinarily to be attributed to a state and its

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83 [2001] 1 AC 489 at 515-516.

84 For discussion of the protection theory, see the reasons of McHugh J at [55]-[58]. It is also sometimes referred to as the "persecution theory": *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477 at 518 per Lord Steyn, 522 per Lord Hutton. See further Randall, "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution", (2002) 25 *Harvard Women's Law Journal* 281; Lambert, "The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v Secretary of State for the Home Department*", (2001) 13 *International Journal of Refugee Law* 16; Anker, "Refugee Status and Violence Against Women in the 'Domestic' Sphere: The Non-State Actor Question", (2001) 15 *Georgetown Immigration Law Journal* 391; Moore, "Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection", (2001) 13 *International Journal of Refugee Law* 32 at 33-35; Kälin, "Non-State Agents of Persecution and the Inability of the State to Protect", (2001) 15 *Georgetown Immigration Law Journal* 415 at 424; Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents", (1999) 31 *Columbia Human Rights Law Review* 81 at 102, 119; Adjin-Tettey, "Failure of State Protection within the Context of the Convention Refugee Regime with Particular Reference to Gender-Related Persecution", (1997) 3 *Journal of International Legal Studies* 53 at 54-55.

85 Hathaway, *The Law of Refugee Status*, (1991) at 125-128.

functionaries, the resources that the state normally has to carry out its functions and the scope for sustained oppression where the state is actively or passively involved in the conduct amounting to "persecution".

102 When these qualifications are met, the relevant acts and omissions will arguably fall within the notion of "persecution" as used in this context. They will help establish the necessary link between the "well-founded fear" and the propounded ground, in this case "for reasons of … religion". In the case of an applicant for refugee status who is outside the country of nationality, they will potentially explain why he or she is "owing to such fear … unwilling to avail himself [or herself] of the protection of [the] country [of nationality]"[86].

Consideration of the issues by primary judge

103 Although the primary judge did not have *Khawar* available to him, he did not overlook the possibility that the Tribunal had committed an error warranting intervention of the Federal Court on the basis of the *inability*, as well as the *unwillingness*, of the Ukrainian authorities to protect their citizens from persecution on religious grounds[87]. His Honour expressly referred to, and considered, an argument of the applicants that "the government [of Ukraine] condoned such mistreatment, or was unwilling to do anything about it in a proper case". On the basis of the Tribunal's conclusions, and the evidence before it, the primary judge detected no error requiring intervention by the Federal Court on this footing. He said[88]:

> "[T]here was nothing in this case to indicate any general attitude of condonation [of mistreatment] or unwillingness [of police to do anything about it in a proper case]."

104 The primary judge went on[89]:

> "[I]t seems a large jump to infer, from the reaction of one officer in one police station [about which the male applicant complained], that the

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86 Applying the criteria for "refugee" status in the Convention. See the reasons of Gleeson CJ, Hayne and Heydon JJ at [2]. As to the last criterion, see Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 *International Journal of Refugee Law* 548.

87 [2001] FCA 652 at [24] where the "ability" of the national authorities is specifically referred to.

88 [2001] FCA 652 at [26].

89 [2001] FCA 652 at [29] (emphasis added).

> government of the Ukraine, considering that entity as a whole, was *unable* or unwilling to protect Ukrainian citizens against assault arising out of their religious beliefs … I can understand the Tribunal's unwillingness to make a finding that the Ukrainian government was unwilling or *unable* to protect its citizens in the absence of evidence of … other options having been tried [by the male applicant] and proved unsuccessful."

105 The primary judge pointed out that the issues belatedly raised by the applicants were ones of fact and merits for the Tribunal[90], and that the Federal Court's powers of judicial review were strictly limited[91]. His approach appears orthodox, careful and correct. Clearly enough, it was expressed in terms of the protection theory hitherto generally adopted as the international approach to the Convention definition. The primary judge did not adopt the narrower accountability theory of persecution that would limit "persecution" to the acts of a state or its agencies or those acts of non-state actors impliedly condoned or tolerated by the state. The accountability theory has not been accepted in this country. In advance of *Khawar*, correctly, the primary judge appears to have turned his attention to, and considered, the issue of practical neglect and inability on the part of the authorities in Ukraine to protect the male applicant from serious wrongdoing by non-state actors. As his Honour pointed out, partly because of the way the applicants had presented their case before the Tribunal, the evidence did not sustain a case of unwillingness or inability of Ukraine to protect its nationals. On the face of things, this made the case an unpromising one for judicial review within the limited grounds available for the Federal Court to disturb a decision of the Tribunal.

The competing theories of "persecution"

106 In his reasons in this appeal, McHugh J has suggested that the protection theory of "persecution" is as flawed as the accountability theory[92]. He points to the primary duty of a national court to give effect to the Refugees Convention according to its language[93]. According to McHugh J, the notion of "persecution" itself contains no foothold for importing a necessity of some state involvement (by conduct or relevant omission), and this Court should now reject that approach and accept a new theory of its own ("the third theory"). The new theory of "persecution" would confine the consideration of responses, if any, of state

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90 [2001] FCA 652 at [30].

91 The Act, Pt 8, especially s 476. See [2001] FCA 652 at [31]-[34].

92 Reasons of McHugh J at [32], [59]-[65], [75]-[79].

93 Reasons of McHugh J at [67]. Also see Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969, [1974] *Australian Treaty Series* No 2, Art 31(1).

agencies and officials to the question whether the "fear" is "well-founded". The consideration would not be relevant to whether the impugned conduct was "persecution".

107 I accept the power of the arguments of text and policy that McHugh J has deployed in support of his approach. On the other hand, there are some contrary indications in the Refugees Convention, its history, nature, language and purpose, that suggest that the protection theory of persecution may not be incorrect.

108 Historically, the Refugees Convention arose out of the egregious history of Europe before, during and immediately after the Second World War, where huge numbers of refugees were displaced and forced to seek asylum because of state organised, condoned and tolerated conduct persecutory of such persons. The Convention is an international treaty. It is made by nation states, between nation states, imposing serious obligations upon nation states that cut across the normal duties and rights of nationality. In such circumstances, the reading of "persecution" in the Convention definition, to imply at least some passive involvement of the state of nationality, its agents and officials, would be unsurprising.

109 The Refugees Convention is not, at first blush, a treaty addressed as such to the conduct of private individuals and corporations having no connection with the state of nationality. The language of the Convention definition of refugee seems to support the connection, at least to some extent. The "fear" will not ordinarily be "well-founded" at all if the asylum seeker can properly look to the state of nationality, its agencies and officials, to sanction the conduct of private individuals who are acting oppressively. The limited categories of "reasons" for relevant persecution nominated in the Convention (race, religion etc) are commonly of a kind of interest to governmental agencies and officials, both positively and negatively. By definition, the claim for protection is made outside the country of nationality. It is so serious as to warrant the conclusion that the claimant is "unable" or "unwilling" to avail himself or herself of the protection of the country of nationality. A desire not to return to that country is insufficient. To impose obligations on the country of refuge, something more, in the form of a failure of protection of the country of nationality, is required. One can accept that "protection" in the Convention definition means external, not internal, protection. But treaties, like local texts, must be read as a whole, not word by isolated word[94]. The reason for the inability or unwillingness of the claimant to

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94 See *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (1950) ICJ 221 at 235; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (1991) ICJ 53 at 136.

avail himself or herself of the protection of the country of nationality casts light upon the "persecution" that has contributed to, or caused, that reaction.

110 The ultimate purpose of the Convention is to shift a very important obligation of external protection from the country of nationality to the international community. On the face of things, this may suggest that there is some good reason for doing so – either the active participation or collusion of that country, its agencies and officials in the persecutory acts, or the failure of that country to afford protection where ordinarily, by international standards, that could be expected.

111 I do not decide finally, in this appeal, whether the third theory suggested by McHugh J should now be accepted by this Court. It is not necessary to do so in order to reach a conclusion. On the outcome of this appeal, we are unanimous. The points of difference are not determinative. Nor was a third theory fully argued at the hearing and supported by reference to legal writings and relevant materials. A further reason for hesitation before embracing it at this stage is that, to date, no other final court has adopted the third theory. Whilst this is not a reason for inaction where this Court concludes that error is clearly shown, it is desirable, so far as possible, to observe common approaches to the interpretation and application of an international treaty. This is particularly so in a treaty of major practical significance in the principal countries of refuge which have hitherto generally followed the protection theory, including Australia and the United Kingdom.

112 Whilst reserving the issue for another day, it is therefore appropriate for me to continue to approach the alleged conduct of non-state actors in accordance with the protection theory that I have previously accepted as applicable to claims of "persecution" under the Convention, at least where there is a functioning state apparatus as in Ukraine[95].

The Full Court's finding of oversight of a material issue

113 The Full Court concluded that the Tribunal had erred and, by inference, that the primary judge had failed to detect and require correction of that error. It accepted the uncontroversial principle that a foundation for the Federal Court's intervention would arise if the Tribunal "identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such

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95 See *Khawar* (2002) 210 CLR 1 at 39-40 [118]. See also *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 66 [188], 70-71 [198]-[199].

a way as to affect the exercise of its powers"[96]. But how, in the light of the foregoing analysis, could it be said that the Tribunal and the primary judge had erred by reference to these considerations?

114 The Full Court expressed the error that it detected in various ways. At one stage it said that the Tribunal had failed to ask itself the right question, namely "whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm"[97]. Elsewhere, the default was explained as the omission to consider "whether the Ukrainian government was able, in a practical sense, to prevent such harm, given the history of violence towards [the male applicant]"[98] and "whether there was a risk of harm for a Convention reason that the authorities could not provide protection against"[99].

115 With respect to the Full Court, I consider these findings of errors of omission and neglect on the part of the Tribunal, and of the primary judge, to be strained and unconvincing. There is no absolute obligation on the part of a state to "provide protection" to its nationals, whatever the circumstances. Nor, within the protection theory, can it reasonably be expected that a state will prevent every harm perpetrated against a national by antisocial elements in that person's society. No reasonable reader of the Convention could expect the text to effectively oblige the fulfilment of such standards. They are not the standards against which the obligations to provide protection were written in the Convention. They are not the standards that were accepted in *Khawar*. There it was demonstrated that a systematic and discriminatory denial of legal protection by agencies and officials of the state existed on a Convention ground. Such was not the evidence before the Tribunal in the present case. Certainly, it was not the evidence that the Tribunal accepted.

116 Every case turns on its own facts. Cases will doubtless exist where the evidence shows neglect or indifference on the part of the state to the action of private parties, or turning a blind eye to it, that will enliven the criteria for protection of a person as a refugee, either because the harm involved is so serious or the conduct so repeated and intolerable. *Khawar* was such a case. However,

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96 [2002] FCAFC 145 at [22], citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351-352 [82]-[84]. Also see *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 180 at 190 [54], 195 [88]-[89]; 203 ALR 112 at 126, 133; Germov and Motta, *Refugee Law in Australia*, (2003) at 653-655.

97 [2002] FCAFC 145 at [22].

98 [2002] FCAFC 145 at [16].

99 [2002] FCAFC 145 at [17].

in this case the evidence of harm directed at the male applicant, and of the official response to it, fell far short of the circumstances that would attract the Convention to the case. Certainly, it was open to the Tribunal to so conclude on the evidence before it. As it did.

117 The Convention does not require or imply the elimination of all risks of harm. As Lord Hope of Craighead said in *Horvath*[100], the Convention adopts a "practical standard, which takes proper account of the duty which the state owes to all its nationals". It posits a reasonable level of protection, not a perfect one[101]. It must apply to the variety of nations in the world with their differing resources, traditions and institutional attitudes. It is not geared to the fears of the supersensitive. By the same token, it is not indifferent to conditions which reasonable human beings should not have to accept and are entitled to escape from and in respect of which they are entitled to seek protection from the international community[102] because they feel that invocation outside their country of nationality of protection from that country will only lead to their being returned to conditions of risk of harm that they ought not to have to tolerate[103].

Conclusion: there was no such oversight

118 The Tribunal did not fail to consider such matters in the applicants' case. It specifically rejected any suggestion that "the authorities [of Ukraine could] be said to be unwilling or unable to protect their citizens". It concluded that:

> "The fact that the [male] applicant experienced incidents about which he either did not make a statement, or did not persevere in any way if discouraged from making a statement, cannot be taken as evidence that the authorities condoned such incidents. On the occasion on which the police were alerted to an assault [of the male applicant] by the ambulance officers, they responded appropriately."

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100 [2001] 1 AC 489 at 500.

101 See Williams, "The Correlation of Allegiance and Protection", (1950) 10 *Cambridge Law Journal* 54.

102 *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231-232 per Brennan CJ, 247 per Dawson J; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 307-308 [45]-[47].

103 Fortin, "The Meaning of 'Protection' in the Refugee Definition", (2001) 12 *International Journal of Refugee Law* 548.

119 It was therefore unsurprising that the Tribunal, having rejected the propounded case of systemic or institutional neglect or indifference to protecting the male applicant and having earlier rejected the claim of state complicity in the acts directed against him, rejected the suggestion that what had happened to him was "persecution" within the Convention. The Tribunal, instead, classified that harm as nothing more than "individual and random incidents of harm … and not as persecution". That was clearly a view of the facts open to the Tribunal on the evidence.

120 In accordance with the protection theory, such incidents would not amount to "persecution" without some indication of complicity or condonation and approbation of discrimination and violence against the male applicant on the part of Ukrainian state authorities and agencies. This was an inference which the Tribunal rejected. Such rejection was clearly open to the Tribunal on the evidence. It was not amenable to criticism, or correction, by the Full Court.

121 Contrary to the Full Court, I do not read the Tribunal's reasons as suggesting that harm inflicted on the male applicant for his religious beliefs could only amount to persecution if it were shown to have followed a coordinated *pattern*[104]. This is not what the Tribunal concluded. All that the Tribunal said was that the incidents were random. For that reason, they did not demonstrate any state complicity. Nor did they evidence serious neglect and discriminatory indifference on the part of state authorities and agencies to providing a level of protection proper to nationals in a civilised community. In such circumstances both the affirmative and negative aspects of "persecution" were duly considered by the Tribunal. There was no failure on the Tribunal's part to consider and decide any issue inherent in the case.

122 In a similar way, the primary judge gave proper consideration to both aspects of "persecution". There was thus no failure to address the relevant legal issue, nor did the Tribunal or the primary judge ask themselves the wrong question, ignore relevant material or rely on irrelevant material.

123 In the end, this is yet another case where persons who failed before the Tribunal on the merits, sought to re-canvass factual findings in an impermissible way and to argue their claim for judicial review in a manner significantly different from the argument advanced before the Tribunal[105]. The Federal Court must be attentive to the risk of oversight of relevant legal issues by vulnerable and unrepresented applicants for protection as refugees. The seriousness of the

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104 [2002] FCAFC 145 at [19].

105 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1920-1921 [69]; 201 ALR 437 at 452-453.

issues involved for those making such applications requires rigorous examination of suggested, or otherwise demonstrated, jurisdictional and legal errors[106]. By the same token, the Federal Court must also be careful not to read the Tribunal's reasons in an overzealous or overcritical way or to allow unsuccessful applicants to turn an application for judicial review into an attempted reconsideration of the factual merits[107]. Essentially, that is what the applicants tried to achieve. Their attempt fails.

124 As I approach this appeal it thus involves no new principle and no important proposition of law. It concerns nothing more than the application of the hitherto established law on refugees and the clear law governing the functions of judicial review of primary administrative decisions. To enliven a larger debate about the meaning of the Refugees Convention and the competing theories of "persecution" propounded in relation to it, another case will be necessary in which those theories have been thoroughly canvassed below and where deciding amongst them is important for the outcome. That is not the position here.

Orders

125 The Minister undertook on the grant of special leave to pay the reasonable costs of the applicants of the appeal. The appeal should be allowed. The other orders proposed by Gleeson CJ, Hayne and Heydon JJ should be made.

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106 *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514 at 531.

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