

HIGH COURT OF AUSTRALIA

CHAN v. MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS [1989]

HCA 62; (1989) 169 CLR 379

F.C. 89/034

Immigration - Administrative Law (Cth)

High Court of Australia

Mason C.J.(1), Dawson(2), Toohey(3), Gaudron(4) and McHugh(5) JJ.

CATCHWORDS

Immigration - Refusal by Minister's delegate of refugee status - Act referring to status under international Convention and Protocol - Well-founded fear of being persecuted - Persecution - Relevant time for determination - Migration Act 1958 (Cth),s. 6A(1)(c).

Administrative Law (Cth) - Judicial review - Decision under an enactment - Conduct engaged in for purpose of making decision - Determination of status of refugee - Applicant not holding temporary entry permit - Administration Decisions (Judicial Review) Act 1977 (Cth),ss. 3, 6, 13(1) - Migration Act 1958 (Cth),s. 6A(1)(c).

HEARING

1989, April 6; December 9. 9:12:1989

APPEAL from the Federal Court of Australia.

DECISION

MASON C.J.:

1. Subject to the comments which follow, I am in agreement with the orders proposed by McHugh J. and with his reasons for judgment.

2. In the Federal Court the Minister conceded that the delegate's decision was a decision “under an enactment” within the meaning of that expression in s.5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (“the ADJR Act”) and that the Federal Court had jurisdiction to entertain an application for judicial review. In this Court, Mr Callaway Q.C., for the Minister, though not attempting to resile from that concession, suggested that because Mr Chan was not the holder of a temporary entry permit there was some doubt whether the decision was made under s.6A(1)(c) of the Migration Act 1958 (Cth) (“the Act”).

3. Minister for Immigration and Ethnic Affairs v. Mayer [1985] HCA 70; (1985) 157 CLR 290 decided that s.6A(1)(c) impliedly confers on the Minister the function of determining whether an applicant under s.6A(1)(c) has refugee status and, accordingly, that the Minister's decision is made “under an enactment” so as to be susceptible of review under the ADJR Act. In Mayer the respondent held a temporary

entry permit and his application was for a determination that he had refugee status. If he obtained such a determination, he would have satisfied the two pre-conditions in s.6A(1)(c) essential to the exercise of the discretion to grant a permanent entry permit.

4. Mr Chan did not hold a temporary entry permit. He applied for such a permit, as well as for a determination of his refugee status, no doubt with a view to obtaining a permanent entry permit under s.6A(1). His applications were dealt with separately, the application for a temporary entry permit being refused by the Minister and the application for refugee status being refused by the Minister's delegate. Keely J. set aside both decisions and in turn the Full Court of the Federal Court set aside his Honour's orders. Mr Chan has not appealed against the Full Court's decision in relation to his application for a temporary entry permit. I doubt that his failure to appeal from that aspect of the Full Court's decision would affect adversely his prospects of obtaining a temporary entry permit and a permanent entry permit, if he succeeds in securing refugee status. In any event I do not see that failure to appeal from that part of the Full Court's decision can affect retrospectively the existence of jurisdiction in the Federal Court at the time when Keely J. heard and determined the application for review of the decisions by the Minister and his delegate.

5. The refusal by the delegate of the application for refugee status was a decision made in the context that Mr Chan was then applying for a temporary entry permit and would apply for a permanent entry permit under s.6A(1) if his application for refugee status succeeded. There is a strong case for saying that in this setting the delegate's decision amounted to a decision under s.6A(1) and, if not, to "conduct engaged in for the purpose of making a decision" to which the ADJR Act applies: see ss.3(5), 6(5) of the ADJR Act. Refusal by the delegate of the application for refugee status was conduct engaged in as part of procedures leading to the ultimate unavailability of a permanent entry permit. It matters not that the antecedent decision was not made by the person who makes the decision to which the Act applies: see *Gunaleela v. Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543, at pp 556-557.

6. In the absence of full argument I would not wish to express a concluded view on the question whether the Federal Court had jurisdiction in the circumstances of this case. Suffice to say that absence of jurisdiction was not manifest; indeed, there is *prima facie* a strong case for holding that the Federal Court had jurisdiction. In this situation, we would not be justified in going behind the Minister's concession that Keely J. had jurisdiction to hear and determine Mr Chan's application for judicial review of the two decisions.

7. For the reasons given by McHugh J., the question whether or not a person has the status of "refugee" within the meaning of Art.1A(2) of the Convention relating to the Status of Refugees ("the Convention") is one for determination upon the facts as they exist when the person concerned seeks recognition as a refugee. Section 6A(1)(c) proceeds upon that view of the Convention. The words "the Minister has determined ... that he has the status of refugee ..." (my emphasis) make this clear. Moreover, it is a view that accords with that expressed by Mason, Deane and Dawson JJ. in *Mayer*, at p 302. In making such a determination under the Convention, a logical starting point in the examination of an application for refugee status would generally be the reasons which the applicant gave for leaving his country of nationality. Those reasons will necessarily relate to an earlier time, since when circumstances may have changed. But

that does not deny the relevance of the facts as they existed at the time of departure to the determination of the question whether an applicant has a “fear of persecution” and whether that fear is “well-founded”.

8. The delegate concluded that Mr Chan “did not have a well-founded fear of persecution should he be returned to the P.R.C.”. As I read the delegate's statement of reasons, he was asserting that, although Mr Chan had a fear of persecution, it was not a well-founded fear. The delegate's statement that Mr Chan's original preference if made to leave Australia was to return to the P.R.C. was inconsistent with a well-founded fear of persecution in China might suggest that the delegate did not believe that Mr Chan had any fear of persecution in the event of his return to China. However, I would have expected the delegate to make an express finding that Mr Chan had no fear of persecution if that were the case. Accordingly, I regard the statement as another ground for concluding that Mr Chan's fear was not well-founded. In this respect it is significant that a reference to Mr Chan's original preference that he would prefer to be returned directly to China rather than to Hong Kong or Macau follows the delegate's other reasons for concluding that Mr Chan's fear was not well-founded.

9. The delegate acknowledged that Mr Chan “may have been discriminated against to a limited degree due to the apparent perception the local authorities had of his family” but “considered that this did not amount to persecution within the terms of the Convention”. It is not clear whether the delegate found that the matters complained of were not persecution at all or were not persecution within the meaning of the Convention because it was not persecution “for reasons of ... political opinion”. The better interpretation is, I think, that the delegate found that Mr Chan's fear was not “well-founded” on either view. It follows that, in order to succeed in his challenge to the delegate's decision under the ADJR Act, it was necessary for Mr Chan to show that, in finding that his fear was not well-founded on these grounds, the delegate was in error, so that his exercise of power was so unreasonable that no reasonable person could have so exercised it: ss.5(2)(g), 6(2)(g) of the ADJR Act. Although it was not the function of the Federal Court to review the delegate's decision on the merits, the Court was bound to set aside the decision if it was “so unreasonable that no reasonable person could have come to it”: *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* [1986] HCA 40; (1986) 162 CLR 24, at p 41.

10. In deciding that Mr Chan's fear of persecution was not “well-founded”, the delegate did not make a finding that since Mr Chan escaped from China the conditions there had so changed or improved that there was little or no likelihood of persecution on political grounds. The delegate appears to have accepted Mr Chan's account of the measures taken and threatened against him by the authorities and to have regarded as the critical issue the question whether those measures amounted to persecution or persecution for reasons of political opinion or gave rise to a well-founded fear of persecution. Accordingly, the Federal Court was not confronted with the problem of reviewing a finding of the delegate concerning the state of affairs prevailing in China at the time of Mr Chan's application for refugee status.

11. The Convention and the Protocol do not define the words “being persecuted” in Art.1A(2). The delegate was no doubt right in thinking that some forms of selective or discriminatory treatment by a State of its citizens do not amount to persecution. When the Convention makes provision for the recognition of the refugee status of a person

who is, owing to a well-founded fear of being persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns. Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether any deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason.

12. I agree with the conclusion reached by McHugh J. that a fear of persecution is “well-founded” if there is a real chance that the refugee will be persecuted if he returns to his country of nationality. This interpretation accords with the decision of the House of Lords in *Reg. v. Home Secretary; Ex parte Sivakumaran* [1987] UKHL 1; (1988) AC 958. There Lord Keith of Kinkel spoke (at p 994) of the need for an applicant to demonstrate “a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country” and Lord Goff of Chieveley spoke (at p 1000) of “a real and substantial risk of persecution”. Lord Bridge of Harwich, Lord Templeman and Lord Griffiths agreed with Lord Keith and Lord Goff. A similar opinion was expressed by the Supreme Court of the United States in *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2d 434 where Stevens J., with reference to a statutory provision (which reflected the language of Art.1(A)(2) of the Convention), in delivering the majority opinion, and citing *Immigration and Naturalization Service v. Stevic* (1984) 467 US 407, at p 425, observed (at p 453) that the interpretation favoured by the majority would indicate that “it is enough that persecution is a reasonable possibility”. I do not detect any significant difference in the various expressions to which I have referred. But I prefer the expression “a real chance” because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it is an expression which has been explained and applied in Australia: see the discussion in *Bouhey v. The Queen* [1986] HCA 29; (1986) 161 CLR 10, at p 21, per Mason, Wilson and Deane JJ. If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.

13. Viewed in this light the decision of the delegate was so unreasonable that no reasonable person could have reached it. It seems that the delegate and, for that matter, the DORS Committee, misconceived the concept of persecution under the Convention. So much is evident in the concession that Mr Chan may have been discriminated against to a limited degree due to the apparent perceptions the local authorities had of his family and the assertion that this did not amount to persecution within the terms of the Convention. Just why discrimination of this kind did not amount to persecution was not explained by the delegate. Discrimination which involves interrogation, detention or exile to a place remote from one's place of

residence under penalty of imprisonment for escape or for return to one's place of residence amounts prima facie to persecution unless the actions are so explained that they bear another character.

14. The delegate may have considered that these actions did not amount to persecution for reasons of political opinion because the actions were taken on account of Mr Chan's membership of an anti-revolutionary family. Even if these actions were solely motivated by reason of the authorities regarding Mr Chan as a member of an anti-revolutionary family, they must be classified as persecution for reasons of political opinion. The essence of the matter was that Mr Chan was subjected to discrimination because unacceptable political opinions were ascribed to the family of which he was a member. So much is necessarily implicit in the delegate's finding.

15. In any event the delegate was in error in treating Mr Chan's political activities and opinions in isolation. Although the delegate professed not to be persuaded that his internal exile and detention were related to political activities on his part, it stands to reason that the authorities would be inclined to regard with suspicion and distrust a member of an anti-revolutionary family who was associated with a faction opposed to the government, even if his political opinions were not clearly defined or so clearly defined as to throw up an identifiable conflict with the political philosophy of the government. The authorities' treatment of Mr Chan was eloquent testimony to their belief that he was viewed unfavourably because he was identified with anti-revolutionary political opinions.

16. This fact undermines the Full Court of the Federal Court's conclusions (a) that Mr Chan had failed to articulate any political issue upon which he differed from the authorities "now in power" in China and (b) that the imposition of that punishment would now be unlikely, given the length of time since the conduct occurred and the substantial changes in the political situation in China since Mr Chan left. There was simply no material before the Federal Court which entitled it to conclude or assume that the regime in China was different from that in power when Mr Chan escaped in 1974 or that the regime would not be likely to take adverse action against him. It was the same regime as was in power when Mr Chan was subjected to interrogation, exile, detention and imprisonment.

17. The Full Court placed insufficient weight upon the circumstances as they existed at the time of departure which grounded Mr Chan's fear of persecution. In the absence of compelling evidence to the contrary the Full Court should not have inferred that the grounds for such fear had dissipated. While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure. Those changes are a matter which, if they were to be relied upon, needed to be established and stated by the delegate in reasons. As I have said, the required justification was not established. However, I should not be taken as saying that the delegate failed to meet his

obligations under s.13 of the Act. As I see it, his error was one of acting upon impermissible reasons and then reaching unreasonable conclusions.

18. The delegate concluded that Mr Chan did not possess a well-founded fear of persecution. This was based partly on Mr Chan's original statement that he would prefer to return directly to China rather than to Hong Kong or Macau. But that preference is not inconsistent with a fear of persecution in China, since Mr Chan appears to have assumed that the authorities in Hong Kong and Macau would compel his return to China in any event. The evidence that the authorities were inquiring as to his whereabouts would have sustained a finding that there would be a real chance of adverse discrimination occurring if he were returned to China. This is reinforced by the authorities' threat that he would be imprisoned for two years should he escape once more. In the face of these facts I would regard the delegate's decision that Mr Chan's fear of persecution was not well-founded as so unreasonable that no reasonable person could have reached it, even if I regarded the delegate as having formed a correct view as to the meaning of "persecution".

19. I have already mentioned that there was no material which justified the Full Court's reference to "substantial changes" having taken place in China. In exercising its function of judicial review under the ADJR Act, the Full Court was not entitled to go beyond the material before the delegate. By introducing its own view of the state of affairs in China the Full Court seems to have trespassed into the forbidden field of review on the merits: *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.*, at pp 40-42. This was impermissible for another reason in that the Court acted on its own opinion as to the state of affairs in a foreign country, a matter on which it should ordinarily take account of the view of the Executive before reaching a conclusion.

20. I note in conclusion that I have not found the Handbook on Procedures and Criteria for Determining Refugee Status, (1979), ("the Handbook") published by the Office of the United Nations High Commissioner for Refugees especially useful in the interpretation of the definition of "refugee". Without wishing to deny the usefulness or the admissibility of extrinsic materials of this kind in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties (see, for example, *Fothergill v. Monarch Airlines* [1980] UKHL 6; (1981) AC 251, at pp 274, 279, 290-291, 294-296; O'Connell, *International Law*, 2nd ed. (1970), vol.1, pp 261-262), I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention.

21. Each appeal must be allowed and the decision of the delegate set aside.

DAWSON J.:

1. The appellant in the first of these three matters is the de facto husband of the appellant in the second matter. The appellant in the third matter is the son of the first and second appellants. The outcome of the first appeal will determine the fate of the other two matters, so that it is convenient to deal with it and to refer to the first appellant simply as the appellant.

2. The appellant contends that a decision, made by a delegate of the Minister, that he, the appellant, did not have the status of a refugee, involved an improper exercise of power within the meaning of s.5(1)(e) or s.6(1)(e) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (“the ADJR Act”). The basis for this contention is that the decision was so unreasonable that it lay outside any proper exercise of the power relied upon to support it. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1947] EWCA Civ 1; (1948) 1 KB 223; *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* [1986] HCA 40; (1986) 162 CLR 24, at pp 40-41.

3. These proceedings commenced by way of an application by the appellant for an order to review the decision in question under the ADJR Act. That Act applied only if that decision was a decision of an administrative character made under an enactment or amounted to conduct for the purpose of making such a decision. For the purposes of this case, “enactment” may be taken to mean an Act of the Commonwealth Parliament. The respondent did not contend in the courts below or, indeed, before us, that the decision of the delegate was not a decision to which the ADJR Act applies, but failure to take the point does nothing to confer jurisdiction, and it cannot be disregarded.

4. The decision of the delegate was made in the context of an application by the appellant, who is a non-citizen, to be granted an entry permit under s.6A(1)(c) of the Migration Act 1958 (Cth). That provision, which is negative in form, requires that an entry permit (which is to be distinguished from a temporary entry permit) not be granted to a non-citizen after his entry into Australia unless “he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967”. Since the appellant could not be granted an entry permit unless he was the holder of a temporary entry permit, he applied, or was treated as having applied, for a temporary entry permit in addition to his application for a determination of refugee status. The respondent refused to grant a temporary entry permit and it follows that he was bound to refuse to grant, and did refuse to grant, an entry permit.

5. Any argument that the decision regarding the appellant's refugee status is not a decision to which the ADJR Act applies must be based upon the fact that the appellant at the time he made his applications was not the holder of a temporary entry permit which was in force. That is necessarily so because in *Minister for Immigration and Ethnic Affairs v. Mayer* [1985] HCA 70; (1985) 157 CLR 290 it was held that, where an application was made for refugee status (apparently as a preliminary to the grant of an entry permit) and the applicant was the holder of a temporary entry permit, a determination of the Minister denying refugee status was made “under an enactment” within the meaning of s.3 of the ADJR Act. An argument was rejected that s.6A(1)(c) of the Migration Act conferred no authority to determine refugee status; that it merely required the existence of such a determination as an objective fact. It was held that s.6A(1)(c) should be construed as impliedly conferring on the Minister the statutory function of making the determination.

6. In *Gunaleela v. Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543 a Full Court of the Federal Court held that where application was made for refugee status by persons who were deemed not to have entered Australia, a determination refusing refugee status was not made under s.6A(1)(c) of the Migration Act and was not, therefore, made “under an enactment”. But that was because the applicants in that case, unlike the appellant in this case, were deemed not to have entered Australia and the opening words of s.6A(1) make it plain that an applicant must satisfy the threshold test of having entered Australia before a decision can be made under any of its provisions. The appellants in *Gunaleela* were deemed not to have entered Australia because they arrived at a proclaimed airport and left it only for the purpose of being kept in custody: Migration Act, ss.5(2), 36A(8).

7. It is true that an entry permit shall not be granted under s.6A(1)(c) unless the applicant is the holder of a temporary entry permit and the applicants in *Gunaleela* did not hold temporary entry permits. But that was not the basis of any decision in that case. The appellant in this case was not the holder of a temporary entry permit at the time he applied for refugee status but, because he had entered Australia, was able to apply for one at the same time as part of his application for an entry permit which would give him permanent residence status.

8. The application for a temporary entry permit was before the Minister at the same time and in the same context as the appellant's application for refugee status. It was possible, and no doubt likely, that had the Minister determined that the appellant was entitled to refugee status, he would have granted him a temporary entry permit, thus clearing the way for the issue of an entry permit upon a permanent basis. It is, I think, impossible in these circumstances to distinguish the situation in this case from that in *Minister for Immigration and Ethnic Affairs v. Mayer*. Consideration of both the issue of a temporary entry permit and the determination of refugee status were before the Minister as part of the process for seeking an entry permit under s.6A(1) of the Migration Act and par.(c) of that sub-section should be construed as conferring on the Minister the statutory function of making a determination of the appellant's refugee status no less than was the case in *Minister for Immigration and Ethnic Affairs v. Mayer*. Accordingly, it is my view that the decision of the Minister, made through his delegate, was of an administrative character made under an enactment and was therefore a decision to which the ADJR Act applied. It is for that reason that s.5(1)(e) of the ADJR Act, which deals with a decision which is an improper exercise of power, is the relevant provision rather than s.6(1)(e), which deals with conduct for the purpose of making a decision.

9. The decision of the delegate, which was made in accordance with a recommendation of the Determination of Refugee Status Committee, was that the appellant did not have a well-founded fear of persecution should he be returned to the People's Republic of China and that accordingly he was not a refugee within the meaning of the Convention and Protocol. Article 1A(2) of the Convention, as amended by the Protocol, provides that the term “refugee” applies 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."

10. The circumstances in which the appellant fled the People's Republic of China, the country of his nationality, and the reasons given by the delegate for his decision are set out fully by McHugh J. and it is sufficient for my purposes if I refer merely to those matters which seem to me to be critical.

11. The appellant's father was an opponent of the revolution in China and had fled to Hong Kong in 1950. The rest of the family, who remained in China, were regarded as anti-revolutionary. The appellant himself, after a period with the Red Guard, was listed in public as against the policies or ideas of the State. He was detained and subsequently exiled by a people's committee to another locality a great distance away from his home following an assessment that he was "anti-revolutionary". He attempted to escape on three occasions between 1972 and 1973, being detained for varying periods from three to seven months when caught. He was threatened with two years detention in another area of China if he attempted to escape again. He did escape again, this time successfully to Macau from where he went to Hong Kong. After some years in Hong Kong he was deported back to Macau. Subsequently he returned to Hong Kong and from there he illegally entered Australia.

12. A letter sent by the appellant to his family in China in 1983 was returned showing that it had been opened by the authorities, so he ceased corresponding with China. His sister in China was questioned about the appellant's whereabouts in 1983. He now corresponds only through his relatives in Hong Kong.

13. The appellant had said that, if he were to be deported, he preferred to be deported to China rather than to Hong Kong. Subsequently he explained this preference by saying that whether he was sent to Macau or Hong Kong, he would eventually be deported from either place to China and, that being so, he would prefer being sent to China directly.

14. The delegate in his reasons accepted that the appellant "may have been discriminated against to a limited degree due to the apparent perception the local authorities had of his family" but considered that "this did not amount to persecution within the terms of the Convention". He accepted that, while the appellant "may be the subject of some attention having escaped from the area where he was assigned in the P.R.C. People's Republic of China, any such attention would not constitute a basis for a well-founded fear of persecution". He thought that the appellant's preference to be returned directly to China was inconsistent with "a well-founded fear of persecution in that country".

15. The test which is posited by the Convention is that of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". These reasons are commonly referred to compendiously as "Convention reasons". There is no room for doubt that if the appellant did fear persecution, it was for a Convention reason being because of either membership of a particular social group or political opinion. Perhaps both reasons were present because, upon the findings of the delegate, such treatment as was

suffered by the appellant was because his family was perceived to be anti-revolutionary and because the appellant was perceived to be of the same persuasion. But it would have been sufficient to constitute a Convention reason that the appellant was a member of a particular social group, namely, his family, irrespective of his personal political opinions.

16. The phrase “well-founded fear of being persecuted” has occasioned some difference of opinion in the interpretation of the relevant Article of the Convention. Upon any view, the phrase contains both a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear. The differences which have arisen have largely stemmed from a desire to place a greater emphasis upon either the subjective or the objective element of the phrase. Paragraph 42 of the Handbook on Procedures and Criteria for Determining Refugee Status issued by the Office of the United Nations High Commissioner for Refugees in 1979 states that:

“In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”

Perhaps the emphasis upon the subjective element in this view of the test was prompted by recognition of the fact that some member States of the Convention are reluctant to find an actual danger of persecution in another country for fear of damaging relations with that other country: see *Reg. v. Home Secretary; Ex parte Sivakumaran* [1987] UKHL 1; (1988) AC 958, at p 998. But “well-founded” must mean something more than plausible, for an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him, to have no foundation. It is clear enough that the object of the Convention is not to relieve fears which are all in the mind, however understandable, but to facilitate refuge for those who are in need of it. Only limited recognition of this is given in the further observation in par.204 of the Handbook that an applicant's statements must be “coherent and plausible, and must not run counter to generally known facts”.

17. On the other hand, it is also clear enough that a fear can be well-founded without any certainty, or even probability, that it will be realized. So much was recognized by the United States Supreme Court in *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2d 434 where it was held that a statutory provision reflecting the relevant phrase in the Convention did not require the probability of persecution. As was said by Stevens J., delivering the opinion of the Court, at p 447:

“That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a 'more likely than not' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”

18. Quoting from *Immigration and Naturalization Service v. Stevic* (1984) 467 US 407, at pp 424-425, Stevens J. (at p 453) concluded that a “moderate interpretation” of

the “well-founded fear” standard was that it was enough that “persecution is a reasonable possibility”. At the same time he recognized (at p 458) “some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication” and referred (at p 453, fn 24) to other formulae suggested by various writers: “a real chance”, “reasonable chance”, “substantial grounds for thinking”, “serious possibility”.

19. In *Reg. v. Home Secretary; Ex parte Sivakumaran* the House of Lords (at p 1000) in considering the Convention concluded that for an applicant's fear to be well-founded “there has to be demonstrated a reasonable degree of likelihood of his persecution for a Convention reason”. That would seem to be a more restrictive test than that suggested, although hardly dogmatically, by Stevens J. in *Cardoza-Fonseca*. Whilst alternative verbal formulations of the correct test may be useful in identifying shades of meaning, none can ever offer complete precision. Nevertheless, for the sake of uniformity of approach I should express my preference for a test which requires there to be a real chance of persecution before fear of persecution can be well-founded. It is sufficient to justify that choice to point to the fact, as does the Chief Justice in his reasons for judgment, that it is a test which has been recently expanded by this Court in another context in *Bouhey v. The Queen* [1986] HCA 29; (1986) 161 CLR 10, at p 21, in a manner which is helpful in the present context. A real chance is one that is not remote, regardless of whether it is less or more than fifty per cent.

20. The other question which arises in the interpretation of the Convention is whether the relevant Article requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination. The Handbook in par.28 suggests that the former is the correct interpretation, as does Grahl-Madsen, *The Status of Refugees in International Law*, (1966), vol.1, p 157. However, all else points to the latter conclusion. Article 1C(5) of the Convention provides that the Convention shall cease to apply to a person if he “can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality”. Similarly Art.1C speaks of the circumstances in connexion with which he has been recognized as a refugee having ceased to exist, suggesting that refugee status under the Convention may come and go according to changed conditions in a person's country of nationality and is to be determined according to existing circumstances whenever a determination is required. This view, which appears to me to be correct, was adopted by the majority in *Minister for Immigration and Ethnic Affairs v. Mayer*, at p 302, where it is said that the reference in s.6A(1) of the Migration Act to a determination that an applicant for an entry permit “has” the status of a refugee “is a reference to a contemporaneous determination rather than to some past determination that the applicant had the ‘status of refugee’ at the time when that past determination was made”. See also *Reg. v. Home Secretary; Ex parte Sivakumaran*, at p 992.

21. Of course, the circumstances in which an applicant for recognition of refugee status fled his country of nationality will ordinarily be the starting point in ascertaining his present status and, if at that time he satisfied the test laid down, the

absence of any substantial change in circumstances in the meantime will point to a continuation of his original status. That must be so in the present case where the delegate in his reasons did not seek to point to any significant change in attitude towards the appellant on the part of the authorities in the People's Republic of China. Rather the delegate based his conclusion upon a finding that what had occurred to the appellant before he fled was discrimination against him "to a limited degree due to the apparent perception the local authorities had of his family" but "did not amount to persecution within the terms of the Convention".

22. The delegate thought it was inconsistent with a well-founded fear of persecution that the appellant had expressed a preference that, if he were to be deported, he should be returned directly to China. But that preference, in the absence of the explanation which the appellant subsequently gave, was inconsistent with practically all that the appellant otherwise said. As explained by him, there was no inconsistency and there is no reason why the explanation should not have been accepted.

23. "Persecution" is not defined in the Convention, although Arts 31 and 33 refer to those whose life or freedom may be threatened. Indeed, there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution: see Grahl-Madsen, *op.cit.*, p 193; Goodwin-Gill, *The Refugee in International Law*, (1983), p 38. Some would confine persecution to a threat to life or freedom, whereas others would extend it to other measures in disregard of human dignity. The Handbook in par.51 expresses the view that it may be inferred from the Convention that a threat to life or freedom for a Convention reason is always persecution, although other serious violations of human rights for the same reasons would also constitute persecution. It is unnecessary for present purposes to enter the controversy whether any and, if so, what actions other than a threat to life or freedom would amount to persecution. The delegate, in finding that the appellant was discriminated against "due to the apparent perception the local authorities had of his family", must have found that he suffered a deprivation of liberty for a Convention reason in that the appellant was exiled to an area away from his home village and in that he was detained on successive occasions after he had attempted to escape. There was no evidence of any other form of discrimination and discrimination in that form necessarily amounted to persecution. Nor is there any basis upon which the delegate could have found that the "attention" to which the appellant may be subjected were he to be returned to China would amount to something less than a threat to his liberty. The past experience of the appellant points to the contrary. Having regard to that experience and to the absence of any evidence of any substantial changes in circumstances in the appellant's country of nationality, the conclusion was inevitable that the appellant was unwilling to avail himself of the protection of that country owing to a well-founded fear of being persecuted for a Convention reason. It follows in my view that the conclusion reached by the delegate on the basis of the findings made by him was so unreasonable as to amount to an improper exercise of the power to determine refugee status conferred upon him by s.6A(1)(c) of the Migration Act. It was, in the words of Mason J. in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.*, at p 41, "so unreasonable that no reasonable person could have come to it".

24. I would allow each of the appeals and set aside the decision of the delegate.

TOOHEY J.:

1. The question posed by the three notices of appeal is whether it was “manifestly unreasonable” for the delegate of the respondent Minister to conclude that Chan Yee Kin, one of the appellants, “did not have a well-founded fear of persecution should he (Chan) be returned to the People's Republic of China”.

2. Put that way, there is not revealed all the issues which these appeals raise. To begin with, the question assumes that there was a decision susceptible of review under s.5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (“the A.D.(J.R.) Act”), alternatively that there was conduct related to the making of a decision within s.6 of that Act. It also assumes that the expression “manifestly unreasonable” has particular significance in the context of the applications made by the appellants, though it is not the language of the A.D.(J.R.) Act. And, although the respondent does not dispute that each of the appellants is a person aggrieved under the Act, the question tends to assume that a favourable answer will resolve the position of the appellants to their satisfaction. It will be necessary to test the validity of these assumptions in the course of these reasons.

3. Although there are three appellants, it is convenient to refer to Chan Yee Kin as “the appellant”. It is he with whom the proceedings are primarily concerned. Soo Cheng Lee lives with the appellant and Kelly Kar Chun Chan is their child, born in Australia.

4. The appellant is a citizen of the People's Republic of China; he entered Australia in August 1980 as a stowaway. Section 6A of the Migration Act 1958 (Cth) reads:

“(1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say -

...

(c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967;

...

(8) In this section, a reference to an entry permit shall be read as a reference to an entry permit other than a temporary entry permit.”

5. The story of the appellant's attempts to gain refugee status may be summarized in this way. He first applied on 29 November 1982 and was interviewed by an officer of the Department of Immigration and Ethnic Affairs on 15 December, a fortnight later. His claim was considered by the Determination of Refugee Status (“DORS”) Committee on 22 July 1983; the Committee, which is a body established by the Commonwealth Government to advise in such matters but has no statutory foundation, recommended that the appellant be not recognized as a refugee. The then delegate of the respondent accepted the recommendation and by letter dated 28 November 1983 told the appellant that his application for refugee status had been rejected. The appellant sought reasons for the rejection. The matter was reconsidered

but, on 16 September 1985, the application was again rejected. There followed a review within the Department, resulting in a decision that the appellant's claim should be again reconsidered. There was a further interview with a departmental officer, a further examination by the DORS Committee, a further recommendation by the Committee that the appellant not be recognized as a refugee, again an acceptance of that recommendation by the Minister's delegate and, on 21 August 1986, a determination by the delegate giving effect to that acceptance.

6. The appellant also sought an entry permit in reliance upon s.6A(1)(c) of the Migration Act. To qualify for the grant of that permit, it was necessary for the appellant to hold a temporary entry permit as well as being the object of a ministerial determination that he had the status of refugee. Having failed to obtain either qualification, he brought proceedings under the A.D.(J.R.) Act. On 4 December 1987 Keely J., in the Federal Court, made the following orders:

- “1. The decision of Dennis J. Richardson, dated 21 August 1986, that the firstnamed Applicant not be granted refugee status be set aside.*
- 2. The application by the firstnamed Applicant for refugee status be referred to the Respondent for further consideration in the light of the reasons for judgment.”*

His Honour declined to grant declaratory relief sought by the appellant, including a declaration that the appellant was entitled to a temporary entry permit. However, in other proceedings, Keely J. set aside the refusal of the respondent to grant “further temporary entry permits and permanent resident entry permits” to the appellant and Soo Cheng Lee.

7. The respondent appealed against both sets of orders made by Keely J. On 18 July 1988 the Full Court of the Federal Court upheld both appeals and dismissed all applications made under the A.D.(J.R.) Act. The three appeals now before this Court relate only to the refusal to grant the appellant refugee status. If the appeals or any of them succeed, the implications will have to be considered.

8. The jurisdiction of the Federal Court to entertain the applications under the A.D.(J.R.) Act depended, under s.5, upon the existence of a decision or decisions “of an administrative character made ... under an enactment” (see definition of “decision to which this Act applies” in s.3(1) of the A.D.(J.R.) Act), alternatively, under s.6, upon the existence of conduct in which “a person has engaged, is engaging, or proposes to engage, ... for the purpose of making a decision to which this Act applies”.

9. In the Federal Court the respondent conceded that there had been a decision of an administrative character made under an enactment to which the A.D.(J.R.) Act applied. Before us counsel for the respondent did not seek to resile from this conclusion. Nevertheless, counsel raised with the Court the fact that the appellant was not the holder of a temporary entry permit and that therefore a determination relating to the appellant's refugee status might not be a decision under an enactment since, in terms of s.6A(1)(c) of the Migration Act, no entry permit could in any event be granted.

10. Since the point goes to the jurisdiction of the Federal Court to entertain the applications, it cannot be ignored. At the same time this Court has not had the benefit of full argument. Where a non-citizen is the holder of a temporary entry permit which is in force, a determination by the Minister that the person does not have the status of refugee is a decision made under an enactment for the purposes of the A.D.(J.R.) Act: Minister for Immigration and Ethnic Affairs v. Mayer [1985] HCA 70; (1985) 157 CLR 290. In Gunaleela v. Minister for Immigration and Ethnic Affairs (1987) 15 FC.R. 543 the Full Court of the Federal Court held that where non-citizens arrived in Australia without temporary entry permits, but had not entered Australia in terms of the Migration Act, decisions made that they did not have refugee status were not decisions made under the Migration Act. The Full Court found it unnecessary to decide whether decisions of the DORS Committee and the Minister's delegate amounted to "conduct engaged in for the purpose of the making of decisions" and were therefore reviewable under s.6 of the A.D. (J.R.) Act.

11. In Akers v. Minister for Immigration and Ethnic Affairs (unreported decision of Federal Court, 22 December 1988) Lee J. referred, at p 16, to "the practice of the Minister or his authorized officer to consider the merits of any application which relies upon para.6A(1)(e), notwithstanding that the applicant may not then be the holder of a temporary entry permit". That paragraph reads:

"(e)he is the holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him."

His Honour considered that a determination under s.6A(1)(e) that there were no "strong compassionate or humanitarian grounds" constituted a decision under the Migration Act even though the applicant was not the holder of a temporary entry permit. Lee J. adopted alternative approaches in reaching this conclusion. It is necessary to refer to one approach only, namely, that "where the Minister or his authorized officer has received an application for the grant of an entry permit and has proceeded to consider and determine that application on its merits and does not decline to consider the application on the basis that the applicant is not the holder of a temporary entry permit, a decision will have been made under the Act in respect of that application ..." (at p 18).

12. In the present proceedings no mention was made of any ministerial practice in regard to applications for entry permits based on s.6A(1)(c) of the Migration Act. Nevertheless, it is apparent from the procedure followed in the present case (as summarized earlier in these reasons) that the appellant's application for refugee status was considered in detail by the DORS Committee and by the Minister's delegate. There was no refusal to consider the application on the ground that the appellant was not the holder of a temporary entry permit. While in the end no entry permit can be issued under par.(c) until a temporary entry permit is in force, the existence of the latter is not a prerequisite to making a determination of refugee status. And, as it happened, it was the Minister who refused the application for a temporary permit while it was his delegate who determined the application for refugee status.

13. On 16 December 1986 the Department wrote to the appellant:

“The Minister's delegate has endorsed the (DORS) Committee's recommendation and has agreed that your application for refugee status in Australia must be refused.”

The letter referred to the determination made on 21 August 1986 that the appellant did not have refugee status. While the matter was not fully argued, I am sufficiently persuaded that the determination was a decision made under the Migration Act; the Act was the source of the consideration given by the Minister's delegate and of the determination ultimately made.

14. Alternatively, the Minister was engaged in conduct for the purpose of making a decision under s.6A(1)(c); there was no other purpose to be served by the inquiry he conducted since he might easily have said that, in the absence of a temporary entry permit, there was nothing to be gained by referring the matter to the DORS Committee or to his delegate. It follows that the Federal Court was properly seized of the applications.

15. The question posed at the outset of these reasons arises because of the terms of Art.1A(2) of the Convention relating to the Status of Refugees which applies the term “refugee” to any person who:

“(2)As a result of events occurring before 1 January 1951 and 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 ...”

The limitation on the time at which events occurred was effectively removed by the Protocol that was done at New York on 31 January 1967.

16. It is on the meaning and operation of these words, in particular “well-founded fear of being persecuted for reasons of ... political opinion”, that these appeals turn. Clearly enough an assessment for the purposes of Art.1A(2) must look at the applicant's history and background. Those matters and the way in which the delegate dealt with them in the present case are set out in the judgment of McHugh J. I do not wish to add to what is said by his Honour in that respect.

17. The expression “well-founded fear” is not a precise one; in particular, it invites debate as to the extent to which the fear depends upon objective facts and the extent to which it reflects the subjective state of the person concerned. And, within the framework of the Convention, there is a question whether the status of refugee turns upon the facts existing when a person seeks recognition or whether it may derive from some earlier point in time.

18. As to the second of these questions, the appellant submitted that his status as a refugee must be determined in the light of facts existing when he left China. In effect the appellant was saying: “Once a refugee, always a refugee”, subject to the cessation provisions in Art.1C of the Convention.

19. There is support for the appellant's submission in the literature: see, for example, the handbook issued by the Office of the United Nations High Commissioner for Refugees under the title Handbook on Procedures and Criteria for Determining Refugee Status, (1979), par.28; Grahl-Madsen, *The Status of Refugees In International Law*, (1966), vol.1, p 157. But the language of the Convention itself tells against such a construction. In particular, the cessation provisions in Art.1C(5) and (6) mention that “the circumstances in connexion with which he has been recognised as a refugee have ceased to exist”. The emphasis is on recognition as a refugee and that, in context, means recognition by the State party which has accorded protection as a refugee. The structure of Art.1 implies that status as a refugee is to be determined when recognition by the State party is sought and that, if granted, the status may thereafter be lost because the circumstances giving rise to recognition have ceased to exist. This view of refugee status as a contemporaneous assessment is supported by the judgment of Mason, Deane and Dawson JJ. in *Mayer*, at p 302. See also *The Queen v. Home Secretary; Ex parte Sivakumaran* [1987] UKHL 1; (1988) AC 958, at pp 992, 998.

20. Of course, such an approach does not and cannot exclude consideration of an applicant's circumstances at the time he left the country of his nationality; these circumstances are a necessary starting point of the inquiry. All that the approach demands is that a determination whether a person has a well-founded fear of being persecuted is a determination whether that circumstance exists at the time refugee status is sought. If circumstances have changed since the applicant left the country of his nationality, that is a relevant consideration. In an appropriate case the change (such as a new government) may remove any basis for a well-founded fear of persecution.

21. The use of the adjectival expression “well-founded” must be taken as qualifying in some way the “fear of persecution”. It is hard to conceive of a fear which has no objective foundation at all as well-founded, no matter how genuine the fear might be. If the test were entirely subjective, the expression “well-founded” would serve no useful purpose. On the other hand, it is fear of persecution of which Art.1A(2) speaks, not the fact of persecution. So it is apparent that while the requirement is not entirely subjective, it is not entirely objective. Both elements are present. There must be a fear on the part of the applicant and that fear must be of persecution. But what is meant by “well-founded”?

22. The view taken of the language of the Convention by the House of Lords in *Sivakumaran* was that “there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country” (Lord Keith of Kinkel, at p 994) or “where there is a real and substantial risk of persecution for a Convention reason” (Lord Goff of Chieveley, at p 1000).

23. In *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2d 434 the Supreme Court of the United States, endorsing what had been said in *Immigration and Naturalization Service v. Stevic* (1984) 467 US 407, gave an interpretation to the term “well-founded fear of persecution” to the effect that “so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility” (at p 453).

24. In the writings of commentators differing views have been expressed. Cox, “'Well-Founded Fear of being Persecuted': The Sources and Application of a Criterion of Refugee Status”, (1984) 10 Brooklyn Journal of International Law 333, at p 352, considers that a fear is well-founded if it is based “on reasonable grounds” and that such grounds are established if the applicant “can give a plausible account of why he fears persecution” and the account “is supported to the extent reasonably possible”. Goodwin-Gill, The Refugee In International Law, (1983), at p 24, considers that, while terms such as “a reasonable chance”, “substantial grounds for thinking” or “a serious possibility” lack precision, they “are appropriate ... for the unique task of assessing a claim to refugee status”. Grahl-Madsen, at p 181, makes this comment:

“But the real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'.”

25. It has been said, and rightly: “International instruments and national legislation in the protection field, while formulated in abstract terms, concern human fate, the fate of the refugees” (statement by Dr P. Weis, Executive Committee of the High Commissioner's Programme, 16th Session, 147th Meeting (1966), U.N.Doc.A/AC.96/349, at p 4). While the differences in some of the tests suggested above may be semantic only, it is clearly important that a determination of refugee status be made by the application of a test that is readily capable of comprehension and application. A plethora of tests, indeed what may amount to the same test though expressed in a variety of ways, can only lead to uncertainty and, all too likely, confusion in an area where the future of individuals is at stake.

26. The test suggested by Grahl-Madsen, “a real chance”, gives effect to the language of the Convention and to its humanitarian intent. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time.

27. If the test of “a real chance that he will suffer persecution” had been applied to the appellant, a determination refusing him refugee status is, in all the circumstances, one that could not reasonably have been made. In the course of argument some mention was made of “the Wednesbury principle”, a reference to Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] EWCA Civ 1; (1948) 1 KB 223. In Notts. C.C. v. Sec. of State for Envir. [1985] UKHL 8; (1986) AC 240, at p 249, Lord Scarman observed:

“'Wednesbury principles' is a convenient legal 'shorthand' used by lawyers to refer to the classical review by Lord Greene M.R. in the Wednesbury case of the circumstances in which the courts will intervene to quash as being illegal the exercise of an administrative discretion.”

In Wednesbury, at pp 230, 234, Lord Greene spoke of a decision being so unreasonable that no reasonable body could have come to it. That is very much the

language of the AD.(J.R.) Act (see *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* [1986] HCA 40; (1986) 162 CLR 24, at p 41) and that language is the yardstick when review is sought on that ground under the Act.

28. The reasons why the appellant has made out grounds for review under s.5(1)(e) read with s.5(2)(g) of the A.D.(J.R.) Act (or s.6(1)(e) read with s.6(2)(g)) are set out in the reasons of McHugh J. In essence the delegate concluded that while the appellant had a fear of persecution, that fear was not well-founded. However, the delegate had accepted that there may have been “discrimination” against the appellant. Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China.

29. In my view the Full Court fell into error because of the way it approached the current situation. While it is true that the determination of the appellant's refugee status was to be made in the light of the circumstances then prevailing, there was no basis for concluding that the political situation in China had changed relevantly since the appellant left it. If, as it did, the available material pointed to the appellant having a “well-founded fear of being persecuted for reasons of ... political opinion” at the time he left the country of his nationality, there was nothing to indicate that the circumstances giving rise to that well-founded fear had altered in any relevant respect at the time refugee status was sought.

30. It follows that the decision of the Full Court of the Federal Court should be set aside and the orders of Keely J. restored. Counsel for the respondent submitted that such a course would still leave the appellant without a temporary entry permit and therefore lacking one of the qualifications in s.6A(1)(c) of the Migration Act, so that there was no guarantee that an entry permit would be issued. That may be so, but it is not a reason for refusing the relief in question. The grant of a temporary permit is, in the circumstances of the present case, very much ancillary to the determination of the appellant's status as a refugee. Such a permit meets the situation that the applicant for refugee status would otherwise be a prohibited non-citizen and therefore liable to be required to leave Australia under s.31A of the Migration Act or deported under s.18 of that Act. But, as mentioned earlier, there is nothing in the Act that makes a determination of refugee status dependent upon the existence of a temporary entry permit.

31. None of this is to deny that the grant of a temporary entry permit is within the Minister's discretion in the sense explained by Beaumont and Gummow JJ. in *Minister for Immigration and Ethnic Affairs v. Maitan* (1988) 78 ALR 419, at pp 427-429. That is something the appellant must face but he will face it against a background in which the unfavourable determination of his application for refugee status has been set aside and is now to be reconsidered in the light of this Court's reasons. And it will be against that background that the respondent will consider whether a temporary entry permit should now be issued to the appellant, if one be sought.

GAUDRON J.:

1. The facts are set out in the judgment of McHugh J. and, save to the extent that they are later referred to, it is unnecessary to repeat them. The issue raised in the present matters is whether a decision by the Minister's delegate that the appellant Chan Yee Kin lacked a "well-founded fear of being persecuted", as that expression is used in Art. 1A(2) of the United Nations Convention relating to the Status of Refugees ("the Convention"), constituted an improper exercise of power within s.5(1)(e) or s.6(1)(e) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("A.D.J.R. Act"). On behalf of the appellants it was contended that it did, being, in terms of ss.5(2)(g) and 6(2)(g) of the A.D.J.R. Act, "an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power".
Application of A.D.J.R. Act

2. The decision made by the Minister's delegate was made in the course of determining an application by Mr Chan for refugee status under the 1967 United Nations Protocol relating to the Status of Refugees ("the Protocol"). The Protocol operated, inter alia, to amend the definition of "refugee" in Art. 1A of the Convention so that for presently relevant purposes that definition reads:

"(T)he term 'refugee' shall apply to any person who:

...

(2) 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 ..."

3. The decision that Mr Chan lacked a well-founded fear is readily described as a decision under the Convention, a decision under the Protocol or both. The A.D.J.R. Act permits of the making of an order for review in relation to a decision (s.5), in relation to conduct engaged in for the purpose of making a decision (s.6) and in relation to a failure to make a decision (s.7), provided in each case that the decision is one "to which (the) Act applies". Section 3(1) of the Act confines the application of the Act to "a decision of an administrative character made, proposed to be made, or required to be made ... under an enactment", other than certain excluded decisions which are not presently relevant.

4. The matter has proceeded thus far on the basis that the decision was made under the Migration Act 1958 (Cth). It seems that at some stage after Mr Chan arrived in Australia he was granted a temporary entry permit and that when it expired he applied for a further temporary entry permit and an entry permit pursuant to ss.6 and 6A(1)(c) respectively of the Migration Act. By s.6A(1)(c) Mr Chan could only be granted an entry permit if he held a temporary entry permit and the Minister determined that he had the status of refugee under the Convention or the Protocol.

5. Mr Chan's claim to refugee status was determined separately from and, it seems, independently of his applications for a temporary entry permit and an entry permit. As matters transpired he did not hold a temporary entry permit at the time of the determination of his claim to refugee status. It was not argued on behalf of the Minister that Mr Chan's claim to refugee status was not reviewable under the A.D.J.R. Act. Instead, and somewhat unhelpfully, counsel for the Minister drew attention to the terms of s.6A(1)(c) of the Migration Act and the decision in *Gunaleela v. Minister for*

Immigration and Ethnic Affairs (1987) 15 FCR 543 and submitted that it was for this Court to be satisfied that the decision was one to which the A.D.J.R. Act applied.

6. In *Gunaleela* it was held by the Full Court of the Federal Court of Australia that the determination of a claim to refugee status does not constitute a decision under s.6A(1)(c) of the Migration Act if the claimant, although present in Australia, is deemed not to have entered Australia. The question whether in those circumstances a determination constitutes or may constitute conduct engaged in for the purpose of a decision under the Migration Act was left open. The present case is quite different. Whether or not the expiry of Mr Chan's temporary permit bears upon the question whether the determination of his claim to refugee status was a decision under s.6A(1)(c) of the Migration Act, the circumstances, as they relate to Mr Chan, serve to render that determination one which is reviewable under s.6 of the A.D.J.R. Act as "conduct engaged in for the purpose of making a decision" under the Act.

7. Section 3(5) of the A.D.J.R. Act defines "conduct engaged in for the purpose of making a decision" to include "the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation".

8. The only reasonable inference that can be drawn in the context of Mr Chan's applications for a temporary entry permit and an entry permit is that the purpose which originally attended the reference of the question of Mr Chan's refugee status to the Minister's delegate was that of enabling a decision to be made by the Minister under s.6A(1)(c) of the Migration Act. However, if that decision were adverse to Mr Chan, other decisions would need to be made under the Act. Mr Chan was and is physically present in Australia. As he does not hold a temporary entry permit he has been a "prohibited non-citizen" by force of s.6(1) of the Migration Act since the expiry of his temporary entry permit. If he were not to be allowed to remain in Australia it would be necessary for the Minister to decide whether he should be required to leave Australia pursuant to s.31A or whether he should be deported pursuant to s.18 of the Migration Act. In the circumstances as they related to Mr Chan a decision to deport would necessarily involve a consideration as to whether he should be deported to China or elsewhere. A decision that Mr Chan should be deported to China, if taken without determining his application for refugee status (involving, as it did, the question whether he had a well-founded fear of being persecuted if he returned to China), would involve a failure to take a relevant consideration into account.

9. The question whether Mr Chan had a well-founded fear of being persecuted if he was returned to China was a question which was directly relevant to any decision to be made under the Act as to his continued presence in or his departure from Australia. And, if Mr Chan were to be granted a temporary entry permit, it would become a matter necessarily requiring determination under s.6A(1)(c) of the Migration Act. Given these considerations and the purpose which attended the reference of the matter to the Minister's delegate, the delegate's determination assumes the character of an act to "lay the ground" for any decision later to be made by the Minister under the Act concerning Mr Chan. Unless some other purpose can be identified as attending the determination (and no such purpose either suggests itself or was suggested on behalf of the Minister) the determination is properly to be characterized as an "act ...

preparatory to the making of (a) decision” under the Migration Act and thus within the statutory definition of “conduct engaged in for the purpose of making a decision” and, therefore, reviewable under s.6 of the A.D.J.R. Act.

Well-Founded Fear of Being Persecuted

10. The Convention, in speaking of “well-founded fear of being persecuted”, posits that there should be a factual basis for that fear. The words “well-founded fear” do not, as a matter of ordinary language, convey any precise relationship between fear and its factual basis. In the exercise of judicial power there is a natural tendency to invest an expression such as “well-founded fear” with some degree of specificity. And it is inevitable that a court, in considering the exercise of administrative powers involving the application of that expression, will seek to invest the expression with some specific content. Thus, in *Reg. v. Home Secretary; Ex parte Sivakumaran* [1987] UKHL 1; (1988) AC 958 the House of Lords, in considering the Convention, adopted as the criterion of a well-founded fear that the circumstances should give rise to a reasonable degree of likelihood of persecution. By contrast, in *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2d 434 the United States Supreme Court rejected a construction of the expression “well-founded fear” in its municipal legislation implementing the Protocol which would require the objective circumstances to give rise to a “clear probability” of persecution, without identifying an alternative construction. What was required, it was said in the concurring judgment of Blackmun J. (at p 459), was “a particular type of analysis - an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear”.

11. In *Buchanan & Co. Ltd v. Babco Ltd* (1978) AC 141 Lord Wilberforce said (at p 152) that an international convention should be interpreted “unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance”. See also *Fothergill v. Monarch Airlines Ltd* [1980] UKHL 6; (1981) AC 251 at pp 281-282, 285, 293; *Shipping Corporation of India Ltd v. Gamlen Chemical Co. A/Asia Pty Ltd* [1980] HCA 51; (1980) 147 CLR 142 at p 159. I accept that general approach and add that a convention should be interpreted in a manner that accords with its general international purpose and reflects the general range of circumstances in which it will fall for implementation.

12. The humanitarian purpose of the Convention, the fact that questions of refugee status will usually fall for executive or administrative decision and in circumstances which will often not permit of the precise ascertainment of the facts as they exist in the country of nationality serve, I think, to curb enthusiasm for judicial specification of the content of the expression “well-founded fear” as it is used in the Convention. Perhaps all that can usefully be said is that a decision-maker should evaluate the mental and emotional state of the applicant and the objective circumstances so far as they are capable of ascertainment, give proper weight to any credible account of those circumstances given by the applicant and reach an honest and reasonable decision by reference to broad principles which are generally accepted within the international community.

Changed Circumstances

13. Mr Chan's application for refugee status fell for determination in a context in which there had been some degree of political change in China since the events which led him to leave in 1974. It is clear from the delegate's findings and reasons for decision that the fact of political change and Mr Chan's inability to "convey in detail" his differences with the new government were matters taken into account in reaching his decision. They were factors which the Full Court of the Federal Court thought relevant to the reasonableness or otherwise of the decision, holding that the question of the existence of a well-founded fear was to be judged "in terms of the situation prevailing ... at the time the matter was being considered, not in terms of the situation that obtained there in or prior to 1974".

14. On behalf of the appellants it was argued that a person was a refugee if at any time he satisfied the conditions of the definition and so remained until the Convention ceased to apply as provided in Art. 1C. For presently relevant purposes Art. 1C provides:

"This Convention shall cease to apply to any person falling under the terms of Section A if:

...

(5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; ... "

15. If the appellants' argument were correct it would follow that, if at any time Mr Chan satisfied the requirements of the definition, subsequent political change would only be relevant if the change were such that the decision-maker could be satisfied that Art. 1C(5) applied. In the present case there was nothing in the delegate's reasons to indicate that he was so satisfied.

16. The definition of "refugee" is such that the status of refugee is acquired by satisfaction of its requirements rather than by recognition that its requirements have been satisfied. See Grahl-Madsen, *The Status of Refugees in International Law*, vol.1, (1966), pp 340-341; Goodwin-Gill, *The Refugee in International Law*, (1983), p 20. See also *Handbook on Procedures and Criteria for Determining Refugee Status*, (1979), issued by the Office of the United Nations High Commissioner for Refugees ("the U.N.H.C.R. Handbook"), at p 9. However, as Art. 1C(5) refers to a person who "has been recognised as a refugee" its terms provide no support for the appellants' argument. Moreover, the definition of "refugee" is couched in the present tense, thus suggesting that an applicant must have a well-founded fear which accounts for unwillingness to avail himself of the protection of the country of his nationality at the time that his application for recognition as a refugee is considered. That interpretation, which accords with the decision in *Sivakumaran* and gives due recognition to the humanitarian purpose of the Convention and the Protocol, is, I think, to be preferred in the light of the quite specific operation of Art. 1C(5) with respect to persons whose refugee status has been recognized.

17. It is one thing to say that an applicant must have a well-founded fear of being persecuted at the time his application is considered. It is quite another thing to say, as was said by the Full Court of the Federal Court, that, in a case involving changed circumstances, the question whether such fear is well-founded is to be answered by

reference to the situation prevailing when the application is considered. Of course, and I do not understand this to be excluded by the Federal Court's formulation, a political situation can only be properly evaluated in the context of its supporting political structures. Those structures are not necessarily revealed by a consideration of current political activities and policies. And where, as here, the claim is to an extent based on political structures, something more is required than a mere evaluation of current political activities and policies. But even allowing for these considerations, I do not think it correct to say that the question whether a fear is well-founded is to be answered by reference to the situation at the time of the determination and in isolation from the past experiences of the applicant.

18. The definition of “refugee” looks to the mental and emotional state of the applicant as well as to the objective facts. It is a commonplace, encapsulated in the expression “once bitten, twice shy”, that circumstances which are insufficient to engender fear may also be insufficient to allay a fear grounded in past experience. Although the definition requires that there be “well-founded fear” at the time of determination it would be to ignore the nature of fear and to ignore ordinary human experience to evaluate a fear as well-founded or otherwise without due regard being had to the applicant's own past experiences.

19. If an applicant relies on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality. To require more of an applicant for refugee status would, I think, be at odds with the humanitarian purpose of the Convention and at odds with generally accepted views as to its application to persons who have suffered persecution. See the United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems, (1950), United Nations Document E/1618, at p 39; the U.N.H.C.R. Handbook, at p 13; Grahl-Madsen, at pp 176-177; *Kashani v. Immigration and Naturalization Service* (1977) 547 F 2d 376, at p 379 (7th Cir.); *Cardoza-Fonseca v. INS* (1985) 767 F 2d 1448, at p 1453 (9th Cir.), *affd* (1987) 94 L Ed 2d 434.

Reasonableness of the Determination

20. As is pointed out by McHugh J. the delegate impliedly found that Mr Chan had been exiled and detained and expressly found that he had “been discriminated against to a limited degree due to the apparent perception the local authorities had of his family”. The latter finding must proceed on the basis that the family was perceived to be “anti-revolutionary”, that being the only aspect of the family - and itself a credible aspect - advanced as an explanation for the actions of the local authorities. In the light of the delegate's finding that Mr Chan “was unable to ... provide any credible explanations that his internal exile and periods of detention were related to any political activities on his behalf”, the only reasonable inference open to the delegate was that Mr Chan was the victim of discrimination because he was perceived to share his family's anti-revolutionary political opinion. It matters not whether Mr Chan did or did not share his family's political opinion, for persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of

actual belief. See Grahl-Madsen, p 250; Goodwin-Gill, p 31; McMullen v. INS (1981) 658 F 2d 1312 at p 1318 (9th Cir.). Put in terms of the Convention, Mr Chan was discriminated against “for reasons of ... political opinion”.

21. It is not reasonable by the standards of civilized nations to categorize exile and detention for reasons of political opinion as discrimination “to a limited degree” not constituting persecution. Whatever else may lie within the meaning of “persecution”, significant deprivation of liberty certainly falls to be so characterized. See U.N.H.C.R. Handbook, p 14; Goodwin-Gill, p 38; Grahl-Madsen, p 193. The only reasonable finding open to the delegate was that Mr Chan had been persecuted for reasons of political opinion.

22. Once it is accepted that the delegate should have found that Mr Chan was persecuted for reasons of political opinion, the considerations which might reasonably lead to a determination that he lacked a well-founded fear of being persecuted if returned to China are limited. If the material before the delegate showed Mr Chan to be extraordinarily brave or extraordinarily foolhardy it might reasonably be found that his persecution engendered no fear. But if it were accepted that those experiences engendered a fear of being persecuted then it would be unreasonable to characterize that fear as other than well-founded at the time of and immediately following those experiences. On that latter basis, Mr Chan's claim to a well-founded fear of persecution if returned to China might reasonably be rejected if it were found that he no longer held that fear. Alternatively, for the reasons given, his claim might reasonably be rejected on the ground that the fear of a reasonable person in his position would be allayed by knowledge of the changes in China subsequent to 1974.

23. Even allowing for the significance in the delegate's reasoning process of Mr Chan's stated preference, if deported, to be returned to China, and his inability “to convey in detail his claimed political differences with the current regime in the P.R.C.”, I cannot find in the delegate's reasons a finding that Mr Chan's experiences engendered no fear of being persecuted if returned to China, or that he no longer held that fear. Nor is there any finding that the fear of a reasonable person in Mr Chan's position would be allayed by knowledge of the changes in China subsequent to 1974. In the absence of one or other of these findings the decision that Mr Chan lacked a well-founded fear of being persecuted if returned to China is to be characterized as an unreasonable exercise of power within the terms of s.6(2)(g) of the A.D.J.R. Act.

24. The appeals should be allowed. The orders of the Full Court of the Federal Court of Australia should be set aside and in lieu thereof it should be ordered that the appeal to that Court be dismissed with costs.

McHUGH J:

1. The question in these three appeals is whether a delegate of the Minister for Immigration and Ethnic Affairs acted unreasonably in deciding that the appellant Chan Yee Kin did not have a “well-founded fear of being persecuted for reasons of ... political opinion” if he was returned to the People's Republic of China. The appeals are brought by Chan Yee Kin, Soo Cheng Lee, who lives with him, and Kelly Kar Chun Chan, who is their son, against a decision of the delegate that Chan Yee Kin did not have “the status of refugee within the meaning of the Convention relating to the

Status of Refugees that was done at Geneva on 28 July 1951 ... or the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967". The orders in the appeals of Soo Cheng Lee and Kelly Kar Chun Chan will be the same as the order in the appeal of Chan Yee Kin ("the appellant").

2. The decision of the delegate was made upon an application by the appellant for an entry permit pursuant to s.6A of the Migration Act 1958 (Cth) which, so far as relevant, provides:

"(1) An entry permit shall not be granted to a non-citizen after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say -

...

(c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967; ..."

3. For the purposes of the Convention and Protocol a refugee, so far as is presently relevant, is a person who "owing to well-founded fear of being persecuted for reasons of ... political opinion, is outside the country of his nationality ...".

4. In an application made under s.5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth), ("the AD(JR) Act") Keely J. held that the decision of the delegate was unreasonable. He set it aside and remitted the matter to the Minister for further consideration. However, on appeal the Full Court of the Federal Court (Sweeney, Jenkinson and Neaves JJ.) set aside the order of Keely J. and restored the decision of the delegate.

The Appellant's History

5. The appellant was born on 23 May 1951 in the People's Republic of China. He is a citizen of that country. In an interview with an officer of the Department of Immigration and Ethnic Affairs (the Department) in June 1986, he claimed that he joined the Red Guards after leaving school and for some time supported the policy and philosophy of Chairman Mao. Later he came to believe that Mao's ideas concerning inheritance and opposition to all "rich people" were wrong. He became sympathetic to the ideas of a section of the Red Guards who opposed Mao's ideas. After that faction lost the struggle for control of the Red Guards in the appellant's local area, its members were questioned by police. The appellant said that in 1968 he was detained for two weeks at a police station. Later his name was publicly listed in his local area as a person opposed to the policies and ideas of the State. He was assessed as "anti-revolutionary" and exiled by a local people's committee to another area.

6. The appellant said that, although his sympathy with the faction opposed to Mao caused him problems, "another reason could be my family background". His father had been a member of the Kuomintang which the Communist Party had overthrown. His father left China in 1950. However, the appellant's mother and other members of

the family had remained in China. The appellant claimed that even before the Cultural Revolution the authorities had discriminated against his family which they regarded as anti-revolutionary. At factory meetings his mother had been asked to reform. She had been compelled to retire from work at an early age. The appellant said, however, that before the Cultural Revolution the authorities had not discriminated against him. He also conceded that his father returned to China from time to time to visit his mother.

7. The appellant said that he was free to move around the area to which he was sent. But he could not return to his home village; nor was he able to travel anywhere without a certificate from local officials. He claimed that between 1972 and 1973 he tried to escape from the area on three occasions and received increasing periods of detention after each capture. They ranged from three to seven months detention. He was warned that any further escape attempt would bring two years detention in another part of China.

8. In 1974 the appellant escaped to Macau where his father organised the issue of a Macau identity card with the status of temporary resident. After some months, the appellant stowed away on a ship to Hong Kong where he remained illegally for some years. He was deported to Macau after he applied for permanent residence in Hong Kong. He was imprisoned in Macau for 15 days. He immediately returned illegally to Hong Kong where he remained until he stowed away on a ship to Australia which he entered illegally in August 1980.

9. The appellant sought to explain an earlier statement that he preferred to be deported to China rather than Hong Kong or Macau by claiming that eventually he would be deported to China from either place and that he would “rather straightly (sic) be sent back to China”. He conceded that he was not sure that what had happened in 1966-1967 in China was relevant in 1986. He said that the Government would be different from that in 1966 “but basically it would not have changed very much”. He knew that the Chinese authorities still paid attention to him and had opened letters which he had sent to members of his family. He said that in 1983 the police had questioned his sister concerning his whereabouts. He said that he was worried that he would be imprisoned for two years if he returned to China.

10. The appellant first applied for refugee status on 29 November 1982. The Determination of Refugee Status (DORS) Committee considered his application on 22 July 1983. The Committee unanimously recommended that he should not be recognised as a refugee. A review of the decision was undertaken by a delegate of the Minister who accepted the Committee's recommendation and determined that the appellant was not a refugee. Apparently because there were legal doubts about the validity of the determination, the appellant's application for refugee status was reconsidered. In June 1986 he was again interviewed by an officer of the Department. His application for refugee status was re-examined by the DORS Committee on 21 August 1986. The Committee again unanimously recommended that he should not be recognised as a refugee. In August 1986 the recommendation was reviewed by Mr D.J. Richardson, as delegate of the Minister, who determined that, for the purposes of s.6A of the Migration Act, the appellant did not have the status of refugee “within the meaning of the Convention relating to the Status of Refugees that was done at Geneva on 28 July 1951 or of the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967”.

11. The appellant has no temporary entry permit. An application for one was refused by the Minister. Although a challenge to that refusal succeeded in a separate application heard by Keely J., under s.5 of the AD(JR) Act the Full Court of the Federal Court reversed his Honour's decision. The appellant has not appealed against that order of the Full Court.

12. When the application, the subject of these appeals, was before Keely J., the Minister gave consideration to submitting that the decision of Mr Richardson on 21 August 1986 was “not made under any enactment and therefore is not reviewable” under the AD(JR) Act but decided against advancing the submission. In this Court, counsel for the Minister said that there would be no attempt to resile from the stand which the Minister took before Keely J. and maintained in the Full Court. Nevertheless, counsel for the Minister did suggest that there was some doubt whether the decision was made “under an enactment” within the meaning of the AD(JR) Act. He referred us to *Gunaleela v. Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543. There the Full Court of the Federal Court held that, where a non-citizen does not hold a temporary entry permit and has not entered Australia “for the purposes” of the Migration Act, a decision that he does not have refugee status is not made under s.6A(1)(c) of the Migration Act.

13. However, in *Minister for Immigration and Ethnic Affairs v. Mayer* [1985] HCA 70; (1985) 157 CLR 290 this Court held that, where a non-citizen is the holder of a current temporary entry permit, a decision by the Minister that the non-citizen does not have “refugee status” is made “under an enactment” because s.6A(1)(c) of the Migration Act impliedly confers on the Minister the function of determining whether an applicant for an entry permit has the status of a refugee.

14. When the delegate decided that the appellant did not have the status of refugee for the purpose of s.6A(1)(c), he did so in circumstances where the appellant was applying for a temporary entry permit and where, if his application for refugee status was recognised, he would apply for an entry permit under s.6A(1). In this context there is a powerful case for saying that, if the decision was not made “under an enactment”, there was at least “conduct engaged in for the purpose of making a decision” under s.6A: see AD(JR) Act ss.3(5), 6(5). In these circumstances I see no reason to doubt that the Federal Court had jurisdiction in these matters.

The Reasons of the Delegate

15. In April 1987 Mr Richardson gave a statement of reasons for the decision which he made in August 1986. After summarising some of the claims made by the appellant when interviewed in June 1986 and after referring to the decision of the DORS Committee, Mr Richardson said:

“6 I accepted the recommendation of the Determination of the Refugee Status Committee.

7 A refugee is defined in the Convention, as amended by the Protocol, as a person who, owing to a 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.

8 I considered that the Applicant had no real political profile in the People's Republic of China (P.R.C.). I noted that he was unable to convey in detail his claimed political differences with the current regime in the P.R.C., nor provide any credible explanations that his internal exile and periods of detention were related to any political activities on his behalf.

9 I accepted that he may have been discriminated against to a limited degree due to the apparent perception the local authorities had of his family, but I considered that this did not amount to persecution within the terms of the Convention.

10 I accepted the Committee members' views that while he may be the subject of some attention having escaped from the area where he was assigned in the P.R.C., any such attention would not constitute a basis for a well-founded fear of persecution.

11 I also noted that his original preference if made to leave Australia was to return to the P.R.C., a statement not likely to be made by someone with a well-founded fear of persecution in that country. Although I note his latest preference of return to Macau (within guarantees), I consider it inconsistent with a well-founded fear that he would not have at all times considered the suggested alternatives of Hong Kong or Macau as preferable to his country of citizenship.

12 I concluded that the Applicant did not have a well-founded fear of persecution should he be returned to the P.R.C. Accordingly, I determined he was not a refugee within the meaning of the Convention and Protocol.

13 In making the above findings, I had regard to files 82/09342 and 83/25698 of the Department of Immigration and Ethnic Affairs, and in particular to the following material on that file:

(a) Application for Refugee Status and the Determination of Refugee Status Questionnaire completed by the Applicant on 29 November 1982.

(b) Transcript of interview held on 28 June 1986 between the Applicant and P. Smits.

(c) Minutes of the DORS Committee meeting of 21 August 1986.

(d) Submission from M. Koivisto of DORS Secretariat dated 21 August 1986."

16. The statement of reasons of the delegate does not articulate the precise grounds upon which he reached his decision. He seems to have accepted that the appellant had been exiled from his local area and that he had escaped to Macau. The delegate must also have found that the appellant's exile was probably the result of the local authority's perception of his family background. The only discrimination of which the appellant complained was his interrogation by police, his original detention for two

weeks, his public listing, and his subsequent exile and later periods of detention. When the delegate said that he accepted that the appellant might “have been discriminated against to a limited degree due to the apparent perception the local authorities had of his family”, he must have been referring to the matters about which the appellant complained. The delegate's finding that the discrimination against the appellant did not constitute “persecution within the terms of the Convention” probably means that he thought that the exile of the appellant was not persecution “for reasons of ... political opinion”. It is conceivable, however, that the delegate simply found that the appellant's exile was not “persecution”.

17. Another finding whose basis is far from clear is the proposition that “some attention” from the authorities for having escaped from China “would not constitute a basis for a well-founded fear of persecution”. Probably, the delegate thought that the nature of the “attention” would be such that objectively the fear was not “well-founded”.

18. The terms of par.11 of the reasons also are not clear. They are capable of the construction that the delegate found that the appellant did not in fact hold any fear of persecution. However, the more natural construction of this paragraph is that the delegate thought that objectively a well-founded fear of persecution was inconsistent with any preference for a return to China over Hong Kong or Macau.

19. Upon the express and implied findings of the delegate, three issues arise in these appeals. Did the delegate act unreasonably in holding that the exile and subsequent periods of detention of the appellant arising out of the local authority's perception of his family's political activities did not amount to persecution for the purposes of the Convention and Protocol? Did the delegate act unreasonably in holding that subjecting the appellant to “some attention” for escaping from the area to which he was assigned in the People's Republic of China did not constitute a basis for a well-founded fear of persecution within the meaning of the Convention and Protocol? Did the delegate act unreasonably in finding that there was no well-founded fear of persecution because the appellant's original preference, if deported, was to go back to China?

Well-Founded Fear of Being Persecuted

20. The issues which arise make it necessary to determine what constitutes a “well-founded fear of being persecuted for reasons of ... political opinion” for the purposes of the Convention and Protocol. Article 1 of the Convention defines “refugee”, so far as relevant, as follows:

“A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

...

(2) As a result of events occurring before 1 January 1951 and 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 ...

...

C. This Convention shall cease to apply to any person falling under the terms of Section A if:

...

(5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; ...”

21. Article 2 imposes upon every refugee “duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order”. The Articles impose on the contracting States many obligations in relation to refugees. Articles 32 and 33, for example, contain important obligations. They provide:

“ARTICLE 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

...

ARTICLE 33

Prohibition of Expulsion or Return (Refoulement')

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

22. The Protocol that “was done” at New York on 31 January 1967 recited that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 only applied to those persons who had become refugees as a result of events occurring before 1 January 1951 and that new refugee situations had arisen since the Convention was adopted. The Protocol further recited that it was considered desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951 and declared that the State Parties to the Protocol had agreed to apply Arts.2 to 34 inclusive of the Convention to refugees as defined in the Protocol. For the purpose of the Protocol, the term “refugee” was amended so that it applied to persons affected by events occurring after 1 January 1951. By Art.2 the State parties to the Protocol also undertook to co-operate with the Office of the United Nations High Commissioner for Refugees (“U.N.H.C.R.”) in the exercise of its functions and in facilitating its duty of supervising the application of the provisions of the Protocol. Australia is a party to the Convention and the Protocol.

23. To assist member States to carry out their obligations under the Protocol, the Office of the U.N.H.C.R. has issued a Handbook On Procedures And Criteria For Determining Refugee Status, (1979). Paragraph 28 under the heading “General Principles” states:

“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”

24. The Handbook also contains an exposition of the expression “well-founded fear of being persecuted” which is central to the definition of “refugee”. It provides:

“37. The phrase 'well-founded fear of being persecuted' is the key phrase of the definition ... Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear - a state of mind and a subjective condition - is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

...

42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”

25. Under the heading “Establishing the facts”, pars 203 and 204 provide:

“203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements ... It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.”

26. Writers who have examined the matter are agreed that many countries that are parties to the Convention and Protocol do not apply the interpretation of “refugee” which is set out in the Handbook. The interpretation of the term differs from country to country. Some countries interpret and apply the term liberally; other countries interpret and apply it restrictively. See Avery, “Refugee Status Decision-Making: The Systems of Ten Countries”, *Stanford Journal of International Law*, vol.19 (1983), 235, at pp 244-356; Cox, “‘Well-Founded Fear of Being Persecuted’: The Sources and Application of a Criterion of Refugee Status”, *Brooklyn Journal of International Law*, vol.10 (1984), 333, at pp 353-378; Howland, “A Comparative Analysis of the Changing Definition of a Refugee”, *Journal of Human Rights*, vol.5 (1987) 33, at pp 42-69. In particular, there are considerable differences of opinion among the State parties as to what constitutes a “well-founded” fear of being persecuted.

27. Courts in the common law world have also given different interpretations to the term “well-founded fear” in contexts arising out of the Convention or Protocol. In *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2d 434, the US Supreme Court, citing its earlier judgment in *Immigration and Naturalization Service v. Stevic* (1984) 467 US 407, at pp 424-425, said (at p 453) that in s.208(a) of the Immigration and Nationality Act 1952 (US), as amended by the Refugee Act 1980, a “moderate interpretation” of the term “well-founded fear of persecution” would indicate “that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility”. But in *Reg. v. Home Secretary; Ex parte Sivakumaran* [1987] UKHL 1; (1988) AC 958, the House of Lords held (at pp 994, 996, 997, 1000) that “the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country”. Lord Keith of Kinkel, who framed this definition, did so after referring to the passages which I have quoted from *Cardoza-Fonseca*. In that context, it seems likely that Lord Keith considered his own definition more restrictive than that of the U.S. Supreme Court. The House of Lords also unanimously rejected the holding of the Court of Appeal in that case that a well-founded fear was demonstrated by proving actual fear together with “good reason for this fear, looking at the situation from the point of view of one of reasonable courage circumstanced as was the applicant for refugee status” (p 964). In addition, Lord Goff of Chieveley, who also approved “the reasonable degree of likelihood” test, expressly rejected (pp 998-999) the argument that the applicant had only to show that on the objective facts his fear of persecution for a Convention reason was reasonable and plausible. Lords Bridge of Harwich, Templeman and Griffiths expressed their agreement with Lord Goff's speech.

28. Legal writers have also divided on the meaning of the expression “well-founded fear” of being persecuted. Thus Cox, *op. cit.*, argues (pp 351-352) that a fear is well-founded if it is based on reasonable grounds and that such grounds are established if the applicant can give a plausible account of why he fears persecution and that account is supported to the extent reasonably possible. Grahl-Madsen, *The Status of Refugees In International Law*, vol.1 (1966), asserts (p 181):

“... the real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a

real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'.”

Goodwin-Gill, *The Refugee In International Law*, (1983), thinks (p 24) that terms such as “a reasonable chance”, “substantial grounds for thinking” or “a serious possibility” are appropriate “for the unique task of assessing a claim to refugee status”.

29. Opinions also differ as to what constitutes “being persecuted”. One recent writer has criticised decisions of the Canadian Immigration Appeals Tribunal as requiring “harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government repression”: Hathaway, “Selective Concern: An Overview of Refugee Law in Canada”, *McGill Law Journal*, vol.33 (1988), 676, at p 709. But other decisions in countries including Canada demonstrate a more liberal approach in practice.

30. Since no particular definition or exposition of the phrase “well-founded fear of being persecuted” seems to have gained wide support, this Court must construe the phrase for itself.

31. The examination of *travaux preparatoires* to construe a treaty is a legitimate and perhaps a necessary tool for construing such a document. “It may now be regarded as a settled principle of interpretation of treaties that tribunals, international and national, will have recourse, in order to elucidate the intention of the parties, to the records of the negotiations preceding the conclusion of the treaty, the minutes of the conference which adopted the treaty, its successive drafts, and so on”: Lauterpacht, *International Law*, vol.1 (1970), at p 363. Unfortunately, the preparatory materials are of limited assistance in interpreting the present Convention and Protocol.

32. The definition of “refugee” in the Geneva Convention has been traced to the International Refugee Organization (“I.R.O.”) Constitution adopted by the General Assembly of the United Nations in 1946: Cox, *op. cit.*, at p 338. The I.R.O. Constitution stated that no refugee with “valid objections” should be compelled to return to his or her country of origin. One of the “valid objections” was persecution or “fear based on reasonable grounds of persecution because of race, religion, nationality or political opinion ...”. The I.R.O. Manual declared that “reasonable grounds” were to be understood as meaning that the applicant has given “a plausible and coherent account of why he fears persecution”. Subsequently, the Economic and Social Council of the United Nations in 1949 appointed an Ad Hoc Committee on Statelessness and Related Problems. The Committee drafted a provisional Convention in 1950 and this led to the Convention that was done at Geneva in July 1951. In its Final Report to the Council, the Committee declared that it had drafted the Convention to afford at least as much protection to refugees as had been provided by previous agreements. This declaration might suggest that a “well-founded” fear under the Convention is established, having regard to the I.R.O. Manual interpretation, if the applicant gives a plausible and coherent account of why she fears persecution. But as Cox, *op. cit.*, has pointed out (p 351) the I.R.O. approach was dictated by its inability to form an independent and objective view about conditions prevailing in the country of origin and the State parties to the Convention and Protocol will frequently have detailed knowledge of conditions in the country of the applicant's nationality. It is unlikely,

therefore, that a State party was expected to grant refugee status to a person whose account, although plausible and coherent, was inconsistent with the State's understanding of conditions in her country of nationality. The practice of the I.R.O. under its Constitution, therefore, is no guide to the meaning of "well-founded fear" in the Convention and Protocol definitions notwithstanding the declaration of the Ad Hoc Committee in its Final Report.

33. The Final Report of the Ad Hoc Committee also stated that "well-founded fear" meant "good reason" for fearing persecution. The English Court of Appeal in *Sivakumaran* referred to (p 964) and seems to have acted on this statement in formulating its definition of "well-founded fear". I have already pointed out that on appeal the House of Lords rejected this definition. Moreover, to substitute the notion of "good reason" for fear for that of "well-founded fear" does not assist in defining the latter term. It simply replaces one vague expression with another.

34. Courts, writers and the U.N.H.C.R. Handbook agree, however, that a "well-founded fear" requires an objective examination of the facts to determine whether the fear is justified. But are the facts which are to be examined confined to those which formed the basis of the applicant's fear? In *Sivakumaran* the House of Lords, correctly in my view, held that the objective facts to be considered are not confined to those which induced the applicant's fear. The contrary conclusion would mean that a person could have a "well-founded fear" of persecution even though everyone else was aware of facts which destroyed the basis of her fear.

35. The decisions in *Sivakumaran* and *Cardoza-Fonseca* also establish that a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the U.S. Supreme Court pointed out in *Cardoza-Fonseca* an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his fear should be characterised as "well-founded" for the purpose of the Convention and Protocol.

36. The term "persecuted" is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes "being persecuted". The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. She may be "persecuted" because she is a member of a group which is the subject of systematic harassment: *Gagliardi*, "The Inadequacy of Cognizable Grounds of Persecution as a Criterion for According Refugee Status", *Stanford Journal of International Law*, vol.24 (1987), 259, at p 269; *Goodwin-Gill*, *op cit.*, at pp 44-45; *Grahl-Madsen*, *op. cit.*, at pp 185-186; *M.A A26851062 v. Immigration and Naturalization Service* (1988) 858 F 2d 210 (4th Cir.), at p 214; *Gunaleela v. Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 543, at pp 563-564; *Periannan Murugasu v. Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, 28 July 1987, at p 13). Nor is it a necessary element of "persecution" that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm

and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, she is “being persecuted” for the purposes of the Convention. The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution: Goodwin-Gill, *op. cit.*, at p 38; Hyndman, “The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants”, *Human Rights Quarterly*, vol.9 (1987), 49, at p 67; U.N.H.C.R. Handbook, par.62; McMullen v. Immigration and Naturalization Service (1981) 658 F 2d 1312 (9th Cir.), at p 1315; M.A A26851062, at p 218; Rajudeen v. Minister of Employment and Immigration (1984) 55 NR 129, at p 134. Moreover, to constitute “persecution” the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute “persecution” for the purposes of the Convention and Protocol. Measures “in disregard” of human dignity may, in appropriate cases, constitute persecution: Weis, “The Concept of the Refugee in International Law”, *Journal du Droit International*, (1960), 928, at p 970. Thus the U.N.H.C.R. Handbook asserts that serious violations of human rights for one of the reasons enumerated in the definition of refugee would constitute persecution: par.151. In *Oyarzo v. Minister of Employment and Immigration* (1982) 2 FC 779 the Federal Court of Appeal of Canada held (p 783) that on the facts of that case loss of employment because of political activities constituted persecution for the purpose of the definition of “Convention refugee” in the Immigration Act 1976 (Can.), s.2(1). The Court rejected (p 782) the proposition that persecution required deprivation of liberty. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: Goodwin-Gill, pp 38 et seq. In *Reg. v. Immigration Appeal Tribunal; Ex parte Jonah* (1985) Imm AR 7 Nolan J., sitting in the Queen's Bench Division, held as a matter of law that there was a well-founded fear of persecution when the adjudicator had found “that if the appellant on his return to Ghana sought to involve himself once again in union affairs, he could be in some jeopardy, but there is no acceptable evidence to indicate that he would be at any material risk if he was to resume his residence in his remote family village where he spent a year and a half immediately prior to coming to this country” (p 12). His Lordship held (p 13) that being “subjected to injurious action and oppression - by reason of his political opinion and membership of a social group opposed to the government” constituted a well-founded fear of being persecuted “in the ordinary meaning of that word”. In the United States, the Ninth Circuit has also taken a liberal view of the term “persecution”. In *Kovac v. Immigration and Naturalization Service* (1968) 407 F 2d 102 (9th Cir.), the Court of Appeals construed (p 107) the phrase “persecution on account of race, religion, or political opinion” in the Immigration and Nationality Act as meaning “the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive”. This definition of “persecution” was re-affirmed by the Ninth Circuit in *Moghanian v. US Department of Justice* (1978) 577 F 2d 141 (9th Cir.), at p 142. In *Berdo v. Immigration and Naturalization Service* (1970) 432 F 2d 824 (6th Cir.), at pp 845-

847, the Sixth Circuit approved a similar construction.

The Decision of the Delegate was Unreasonable

37. It remains to apply the definition of “refugee” in the Convention and the Protocol to the facts of the present case in order to determine whether the decision of the delegate was “so unreasonable that no reasonable person could have so exercised the power”: AD(JR) Act, s.5(1)(e), (2)(g). The appellant contended that in determining whether he was a “refugee” within Art.1A(2) the relevant date was the date when he left China. If he was a refugee at that date, so it was argued, he remained a refugee for the purposes of the Convention unless he lost its protection as the result of some supervening act or condition. Certainly, the terms of par.28 of the Handbook support this contention. The contention of the appellant is also supported by Grahl-Madsen, *op. cit.*, who asserts (at p 177) that “once a person has become a refugee, he remains a refugee until he falls under one of the cessation clauses in the Convention”. The appellant then submitted that s.C(5) of Art.1 was the only arguable excluding provision. Moreover, he submitted that the onus was on the respondent to show under that sub-section that the Convention had ceased to apply to the appellant because the “circumstances in connexion with which he has been recognised as a refugee have ceased to exist”. But as the argument for the appellant accepted, the words “circumstances in connexion with which he has been recognised as a refugee” create difficulties for the submission that s.A(2) of the definition looks at the situation when the applicant left his country of nationality or decided not to return to it and not to the situation where he seeks refuge in a particular country. It seems natural to construe the words of Art.1C(5) as meaning recognition as a refugee by the State party which has given him protection as a refugee. This gives rise to the inference that the Convention applies to a person when a State party recognises him as a refugee and ceases to apply to him when the circumstances which gave rise to that recognition cease to exist. This view is supported by the use of the present tense in Art.1A(2) - “is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself”. It is supported also by the fact that a State party does not have to determine whether it has any obligation to a person until he makes application to it to be recognised as a refugee.

38. Notwithstanding par.28 of the Handbook and the opinion of Grahl-Madsen, I think that the better view of the Convention and Protocol is that whether or not a person is a “refugee” within Art.1A(2) has to be determined upon the facts as they exist as at the date when he seeks recognition by a State party. The speeches of Lord Keith (p 993) and Lord Goff (p 998) in *Sivakumaran* support this conclusion.

39. In many cases, the same result will be reached whether one begins by asking whether an applicant was a refugee when she left her country of nationality and whether the circumstances have since changed or whether one simply examines the circumstances in the country of nationality at the time a claim for recognition is made on a State party. But in the present case the appellant claims that it is important to distinguish between the two approaches because if he was a refugee in 1974 there was no evidence that the circumstances which gave rise to him being a refugee at that time had ceased to exist. However, the delegate seems to have approached the case on the basis that the conditions which existed when the appellant left China have not

changed. On that basis the delegate must have reached the same decision whichever of the two approaches he adopted.

40. As I have earlier pointed out, the delegate impliedly found that the appellant had been exiled and detained. He also found that the appellant had “been discriminated against to a limited degree due to the apparent perception the local authorities had of his family”. That perception was that the family was anti-revolutionary. The discrimination to “a limited degree” included exile for six years. Hence the delegate must have found that the appellant was exiled for about six years because his family was considered “anti-revolutionary”. Yet he held that “this did not amount to persecution within the terms of the Convention”. It would not be reasonable for the delegate to have held that exile for six years did not amount to persecution if the restriction was imposed “for reasons of ... political opinion”. Exile for such a lengthy period for that reason would be a serious invasion of the appellant's freedom and would constitute “persecution” within the Convention.

41. The question, therefore, is whether the delegate could reasonably find that the exile of the appellant because of the perception that his family was anti-revolutionary was not “for reasons of ... political opinion”. I do not think that the delegate could reasonably make such a finding. The local authorities identified the family with the political opinions held by the Kuomintang or, at all events, with political opinions opposed to those held by the ruling party in the People's Republic of China. The appellant was exiled, therefore, because he was identified with political opinions opposed to those held by the authorities in that country. It is irrelevant that the appellant may not have held the opinions attributed to him. What matters is that the authorities identified him with those opinions and, in consequence, restricted his liberty for a long and indeterminate period. That constituted “persecution within the terms of the Convention”. The contrary finding of the delegate cannot be reasonably justified.

42. However, the critical question in the case was whether the appellant's fear that he would be imprisoned if he was returned to China constituted a well-founded fear of being persecuted for his political opinions. The delegate accepted that the appellant might “be the subject of some attention having escaped from the area where he was assigned in the P.R.C.”. It is not clear what the delegate meant by “some attention”. But since the appellant was identified with “anti-revolutionary” political opinion and had been exiled for it until he escaped from China, it would be unreasonable to hold that the appellant's fear of further exile or detention was not well founded. Notwithstanding the time which has elapsed since his escape, it would be unreasonable to hold that there was no real chance that he would again be exiled or detained if he returned to China. The authorities have continued to maintain interest in him. There is no reason in the evidence or elsewhere to suppose that he would no longer be identified with anti-revolutionary elements. In the state of the evidence, exile for an indeterminate period or imprisonment for up to two years must be regarded as having a real chance of occurring. To exile the appellant for an indeterminate period or to imprison him for two years because he is identified with political opinions hostile to those of the government of the country of his nationality is such a gross invasion of his human rights as to constitute persecution for reasons of political opinion within the meaning of the Covenant and Protocol. Upon the assumption that the appellant has a genuine fear that he will be imprisoned or exiled,

his fear of persecution must be regarded as “well-founded”. Important parts of the reasons of the delegate in pars 9 and 10 were therefore in error and can not be supported on any reasonable basis.

43. However, in par.11 the delegate gave a further reason for rejecting the appellant's claim. He noted that the appellant's original preference, if deported, was to return to China. The delegate said that he considered “it inconsistent with a well-founded fear that he would not have at all times considered the suggested alternatives of Hong Kong or Macau as preferable”. The delegate did not find that the appellant had no fear of persecution. Rather, as I earlier pointed out, he seems to have found that objectively a well-founded fear of persecution is inconsistent with a preference for return to China over Macau or Hong Kong. But it must depend on the circumstances of the case. The appellant's preference was not inconsistent with a well-founded fear of persecution in China if, as he asserted, he would be sent back to China in any event, perhaps after being imprisoned in Macau or Hong Kong. There was no evidence repudiating this assertion. Hence, the delegate could not reasonably find that the appellant's preference for a return to China was inconsistent with a well-founded fear.

44. Having regard to the findings, express and implied, of the delegate, his decision that the appellant did not have a well-founded fear of being persecuted within the meaning of the Convention and Protocol was unreasonable within the meaning of s.5 of the AD(JR) Act. The matter must be referred to the respondent for further consideration according to law.

Orders

45. The appeals are allowed. The order of the Full Court of the Federal Court is set aside. In lieu thereof, order that the appeal to that Court from the orders of Keely J. be dismissed with costs. The respondent is to pay the costs of and incidental to these appeals.

ORDER

Appeals allowed with costs.

Set aside the orders of the Full Court of the Federal Court and in lieu thereof order that the appeal to that Court be dismissed with costs.

Vary the orders of Keely J. by ordering that the application for refugee status by Chan Yee Kin be referred to the respondent for determination in accordance with this Court's reasons for judgment.