AUSTRALIAN
LAW REPORTS

BEING REPORTS OF CASES DECIDED BY THE HIGH COURT OF AUSTRALIA, THE FEDERAL COURT OF AUSTRALIA, AND STATE SUPREME COURTS EXERCISING FEDERAL JURISDICTION AND OTHER FEDERAL COURTS AND TRIBUNALS; INCORPORATING THE AUSTRALIAN CAPITAL TERRITORY REPORTS AND THE NORTHERN TERRITORY REPORTS

FTZK v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and Another

HIGH COURT OF AUSTRALIA

FRENCH CJ, HAYNE, CRENNAN, BELL and GAGELER JJ

11 March, 27 June 2014 — Canberra

[2014] HCA 26

Citizenship and migration — Refugees — Refusal of protection visa — Whether "serious reasons for considering" appellant committed "serious non-political crime" — Relevance of standard of proof — Proper approach to interpretation of international convention — (CTH) Migration Act 1958 ss 36, 483, 500 — (CTH) Refugees Convention 1951 Arts 1A, 1C, 1D, 1E, 1F, 35 — (CTH) Universal Declaration of Human Rights Art 14.

Administrative law — Appeal — Administrative tribunals — Whether tribunal misconstrued its functions and powers — Jurisdictional error — Whether rational connection between evidence and conclusion — Probative evidence — Whether evidence equally supported inference of innocence as well as guilt — Whether tribunal took into account irrelevant considerations — (CTH) Administrative Appeals Tribunal Act 1975 s 44.

The appellant, FTZK, was a Chinese national. He arrived in Australia in early February 1997 on a temporary business visa. He was granted a bridging visa in December 1998. In May 1997, in China, FTZK was implicated in the kidnapping and murder of a 15-year-old schoolboy. His two alleged co-accused were executed for the crimes in late May 1998. In June 1998, the Australian Federal Police received an arrest warrant for FTZK from the Chinese authorities. After his bridging visa expired, FTZK lived in Australia as an unlawful non-citizen. In February 2004, he was placed in immigration detention. On one occasion, he attempted to escape. Between early December 1998 and mid-May 2010, he was involved in proceedings before the Refugee Review Tribunal, which culminated in the first respondent, the Minister for Immigration and Border Protection, having the matter remitted to him in order for reconsideration. In late May 2011, a delegate of the minister refused to grant FTZK a protection visa pursuant to s 36 of the Migration Act 1958 (Cth). In late May 2012, the second respondent, the Administrative Appeals Tribunal (the AAT), affirmed the delegate's decision. See *Re FTZK and Minister for Immigration and*

Citizenship [2012] AATA 312. By majority, the Full Court of the Federal Court of Australia (Gray and Dodds-Streeton JJ, Kerr J dissenting) dismissed an appeal against the AAT's decision. See *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158; 60 AAR 195; [2013] FCAFC 44. FTZK was granted special leave to appeal to the High Court of Australia.

Held, allowing the appeal (per French CJ, Hayne, Crennan, Bell and Gageler JJ):

Per French CJ and Gageler J:

(i) The Full Federal Court should have found that the AAT's decision was affected by jurisdictional error. There was no logical pathway to its conclusion because the AAT failed to address the fundamental inquiry before it, namely whether there was a rational connection between the evidence before it and the inference that FTZK had committed a serious non-political crime in China: at [4], [6], [13], [19], [20].

(ii) The test under Art 1F of the Refugees Convention is not to be equated with a standard of proof in domestic law. Even as an analytical tool, a standard of proof can become a substitute for the relevant test and either set the standard too high or too low: at [15].

Per Hayne J:

(iii) The AAT failed to address the real question it needed to decide, thereby committing a jurisdictional error. Three of the four factors identified and relied upon by the AAT were not logically probative of FTZK's commission of his alleged crimes. These factors could equally support an inference of FTZK's innocence, as well as his guilt: at [25], [31], [39], [40], [42], [43].

(iv) However, these factors were not irrelevant considerations. The fact that the AAT had regard to these considerations did not constitute jurisdictional error: at [41], [42].

(v) To describe the test of 'serious reasons for considering' as a standard of proof is apt to mislead. This is because the decision-maker is an administrative tribunal, not a court. The origin of the test is an international treaty, which provides a different context from the one in which issues of standards of proof ordinarily arise. Treating the test as a standard of proof might also distract the decision-maker from making the actual decision required to be made: at [33]–[36].

Per Crennan and Bell JJ:

(vi) Article 1F of the Refugees Convention should be interpreted restrictively because of the serious consequences of excluding a person with a well-founded fear of persecution from protection: at [75].

> *Al-Sirri v Secretary of State for the Home Department* [2013] 1 AC 745; [2013] 1 All ER 1267; [2012] UKSC 54, applied.

(vii) It is not an error to refer to the inquiry under Art 1F of the Refugees Convention as a 'standard of proof'. However, the inquiry does not derive from or replicate any standard of proof in any domestic legal system. All that is required to satisfy the relevant inquiry is strong evidence that the appellant engaged in a serious non-political crime: at [79], [81].

> *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465; 63 ALD 321; [2000] FCA 1889; *Al-Sirri v Secretary of State for the Home Department* [2013] 1 AC 745; [2013] 1 All ER 1267; [2012] UKSC 54, applied.

(viii) The AAT failed to address the issue of whether there was probative evidence before it to conclude that there were "serious reasons for considering" that FTZK had committed the alleged crimes. It found that FTZK had lied about his occupation, inter alia, but did not consider how those lies related to his commission of his alleged crimes. It did not reject his denial that he had committed those crimes, nor did it find that his conduct constituted an admission against his own interest in relation to those crimes. The reasoning by which the AAT reached its decision was flawed, such that it revealed jurisdictional error. The Full Federal Court also erred in refusing to quash the AAT's decision: at [91], [93], [96]–[98].

Appeal

This was an appeal against a decision of the Full Federal Court (*FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158; 60 AAR 195; [2013] FCAFC 44) in relation to a decision not to quash a ruling by the Administrative Appeals Tribunal that there were "serious reasons for considering" that the appellant had committed a "serious non-political crime" and therefore was not entitled to refugee status.

P G Nash QC and *N P Karapanagiotidis* instructed by *Maddocks* for the appellant (FTZK).

S P Donaghue SC and *R J Sharp* instructed by the *Australian Government Solicitor* for the first respondent (Minister for Immigration and Border Protection).

Submitting appearance for the second respondent (Administrative Appeals Tribunal).

French CJ and Gageler J.

Introduction

[1] This appeal concerns the construction and application of Art 1F(b) of the Refugees Convention,[1] which provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> …
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

Article 1F intersects, in Australian domestic law, with s 36(2)(a) of the Migration Act 1958 (Cth), which specified at the relevant time, as a criterion for a protection visa, that the applicant was:[2]

> … a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

In *NAGV and NAGW of 2002*,[3] Art 1F was said to have been adopted by the Migration Act.[4] It limits the reach of the definition of refugee in Art 1 and thereby gives content to the criterion in s 36(2)(a), which depends upon the subsistence of protection obligations owed by Australia under the Refugees Convention with respect to the visa applicant.[5]

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1. Convention relating to the Status of Refugees (1951) as amended by the protocol relating to the Status of Refugees (1967).
2. The Act has been amended to substitute the words "to whom" with "in respect of whom": Sch 1, Item 7 of the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth). As to the earlier version see the observation in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; 213 ALR 668; [2005] HCA 6 at [27] (*NAGV and NAGW of 2002*) per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; that s 36(2) assumes more than the Refugees Convention provides by assuming that obligations are owed thereunder by contracting states to individuals.
3. (2005) 222 CLR 161; 213 ALR 668; [2005] HCA 6.
4. *NAGV and NAGW of 2002* at [57] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ. See also at [33], [42] and [47].
5. *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243; 86 ALJR 1372; [2012] HCA 46 at [37] per French CJ, at [132] per Gummow J, at [186] per Hayne J.

[2] The Migration Act provides for review by the Administrative Appeals Tribunal (the AAT) of a decision made by the minister to refuse to grant a protection visa relying, inter alia, on Art 1F of the Refugees Convention.[6] In the exercise of that review function, the AAT applied Art 1F(b) to affirm a decision of a delegate of the minister to refuse the appellant, a Chinese national, a protection visa.[7] That refusal was based upon the appellant's alleged involvement in the kidnapping and murder of a student in China in 1996. The protection visa had been sought on the basis that the appellant had a well-founded fear of persecution in China on account of his religion.

[3] This appeal is brought pursuant to a grant of special leave[8] to appeal against a decision of the Full Court of the Federal Court dismissing an appeal against the decision of the AAT.[9] The factual and procedural history is set out in the joint reasons for judgment of Crennan and Bell JJ.[10] The proceeding in the Federal Court invoked the original jurisdiction conferred upon that court by s 44 of the Administrative Appeals Tribunal Act 1975 (Cth)[11] and designated in that section as an "appeal". The Full Court held that the appeal was incompetent by reason of s 483 of the Migration Act.[12] The Federal Court, however, has original statutory judicial review jurisdiction under the Migration Act equivalent to that conferred on the High Court by s 75(v) of the Constitution.[13] The minister conceded that the appeal could be treated as having invoked that jurisdiction or that the originating process could be amended accordingly.[14]

[4] The Full Court dealt with the substantive argument on the basis that the utility of any amendment to the originating process necessary to properly invoke its jurisdiction would depend upon whether the substantive argument would succeed. As the majority recognised, this was not the most satisfactory way to proceed.[15] It would have been preferable for the appellant to have been required to amend his originating process and to claim appropriate relief.[16] For the reasons that follow, the Full Court ought to have found that the AAT had committed a jurisdictional error, it should have allowed the appellant to amend his originating process and it should have granted writs of certiorari to quash the AAT's decision and mandamus to require the AAT to determine the appellant's application according to law.

6. Section 500(1)(c)(i) of the Migration Act.
7. *Re FTZK and Minister for Immigration and Citizenship* [2012] AATA 312 at [3] (*FTZK*) per Constance DP.
8. [2013] HCATrans 270 per Crennan, Kiefel and Bell JJ.
9. *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158; 60 AAR 195; [2013] FCAFC 44 (*FTZK v MIC*).
10. Reasons for judgment at [58]–[67].
11. Section 44 provides that a party to a proceeding in the AAT may appeal on a question of law from any decision of the AAT in that proceeding.
12. *FTZK v MIC* at [12]–[13] and [51] per Gray and Dodds-Streeton JJ, Kerr J agreeing at [79]. Section 483 of the Migration Act provides that s 44 of the Administrative Appeals Tribunal Act does not apply to privative clause decisions or purported privative clause decisions under the Migration Act — the decision of the AAT falling into that category.
13. Section 476A(1)(b) of the Migration Act.
14. *FTZK v MIC* at [21] per Gray and Dodds-Streeton JJ.
15. *FTZK v MIC* at [21] per Gray and Dodds-Streeton JJ.
16. *FTZK v MIC* at [21] per Gray and Dodds-Streeton JJ. Kerr J at [79] would have granted the appellant leave to amend his originating process so as to invoke the court's jurisdiction.

The AAT's reasons

[5] The AAT recorded that it was not in dispute that the crimes alleged against the appellant were serious non-political crimes for the purposes of Art 1F(b).[17] The AAT stated that it sufficed for the application of Art 1F(b) that there be "strong evidence" that the person seeking refuge had committed the alleged offence. The evidence did not have to be of such weight as to meet either the criminal or civil standard of proof. It was not necessary that the decision-maker be satisfied that the alleged crime had been committed.[18] There was no error disclosed in those propositions. The statement of reasons in support of the AAT's decision to affirm the delegate's decision recorded the following steps:

(1) The transcripts of interviews by Chinese authorities with the appellant's alleged co-offenders constituted "direct evidence" implicating the appellant in the crimes.[19]

(2) The appellant had left China shortly after the alleged crimes were committed. He had provided false information in order to obtain a visa and again when applying for a protection visa in 1998.[20]

(3) The appellant's evidence to the AAT that he was detained and tortured in China on account of his religious affiliations was fabricated in order to strengthen his claim to remain in Australia.[21]

(4) The appellant remained in Australia between January 2000 and February 2004 without lawful permission. His testimony that he believed he was entitled to remain in Australia during this period was not accepted.[22]

(5) The appellant attempted to escape from detention in 2004 after his application for a long stay business visa was refused. His claimed reasons for attempting to escape were not accepted.[23]

(6) The witnesses called by the appellant to cast doubt upon the veracity of the transcripts of interviews with his alleged co-offenders were well-qualified to express the opinions they did. However, their arguments that features of the legal system in China affected the investigation into the crimes alleged against the appellant were based on speculation as to what may have happened.[24]

[6] In an important paragraph in the reasons, the Deputy President said (at [73]):[25]

> [73] The conclusion I have reached is based on the totality of the evidence I have referred to above. Any one of the various factors would not have been sufficient to establish serious reasons; it is the combination of factors which gives rise to reasons of sufficient seriousness to satisfy Article 1F of the Convention.

On the findings of fact stated by the Deputy President, no logical pathway to that conclusion was disclosed. That deficiency evidenced a failure on the part of the AAT to ask itself the question which Art 1F(b) required — namely whether there

17. *FTZK* at [8] per Constance DP.
18. *FTZK* at [66].
19. *FTZK* at [69].
20. *FTZK* at [70].
21. *FTZK* at [71].
22. *FTZK* at [72].
23. *FTZK* at [72].
24. *FTZK* at [74]–[75].
25. *FTZK* at [73].

was a rational connection between the material before it and an inference that the appellant had committed a serious non-political crime in China.

The Federal Court decision

[7] The majority in the Full Court of the Federal Court (Gray and Dodds-Streeton JJ) decided the case on the basis that the central question concerned the relevance of the facts found by the AAT to its conclusion that there were serious reasons for considering that the appellant had committed serious non-political crimes.[26] The correctness of the construction of Art 1F(b) adopted by the AAT was assumed. The majority discerned relevance on the basis that although the AAT did not say so explicitly, it clearly regarded the facts which it had found about the appellant's departure from China and subsequent falsehoods as indicating a consciousness of guilt and a desire to escape from the consequences of what he had done.[27] The connection was "readily apparent" and reflected in the appellant's conduct of his case in the AAT and failure to object to cross-examination on his conduct.[28]

[8] Kerr J, in dissent, was not prepared to find that the AAT had reasoned as inferred by the majority. His Honour said that for the AAT to have concluded that the appellant's departure from China and subsequent falsehoods indicated a consciousness of guilt and a desire to escape from the consequences of what he had done would have required the AAT to grapple with and reject considerations standing against those conclusions. A decision-maker conscious of that responsibility could be expected not only to have recorded those conclusions, but also to have recorded how those conclusions had been reached.[29]

The orders made by the Federal Court

[9] The orders made by the Federal Court on 6 May 2013 were:

1. The applicant's application to amend his amended notice of appeal be dismissed.
2. The appeal be dismissed.
3. The applicant pay the first respondent's costs of the appeal.

The issues on the appeal

[10] The issues raised in the notice of appeal to this court, variously expressed, are:

- whether the AAT misconstrued or misapplied Art 1F of the Refugees Convention; and
- whether the AAT took into account irrelevant considerations in concluding that there were serious reasons for considering that the appellant had committed the crimes alleged.

The construction and application of Art 1F(b)

[11] The appellant made submissions to this court in support of a construction of Art 1F(b) favourable to his case. He accepted correctly that Art 1F(b) did not require a finding that an applicant for asylum had committed a serious non-political crime. He submitted, again correctly, that the article required

26. *FTZK v MIC* at [19].
27. *FTZK v MIC* at [45].
28. *FTZK v MIC* at [46].
29. *FTZK v MIC* at [147]–[158] and [164]–[165].

"strong evidence" of the commission of a serious non-political crime before it could be said that there were "serious reasons" for considering that the crime had been committed. He submitted that the strength of the evidence required was informed by the potential seriousness of the consequences if Art 1F(b) applied.

[12] The appellant invoked *Briginshaw v Briginshaw*,[30] a case which concerned the degree of satisfaction necessary to discharge the civil standard of proof in relation to an allegation, in civil proceedings, of criminal conduct by a party. The requisite degree of satisfaction is informed by the seriousness of the allegation. The *Briginshaw* approach underpinned the appellant's analogous proposition that the characterisation of evidence as providing "serious reasons for considering" that an applicant for refuge had committed a "serious non-political crime" should be informed by the possible consequences of that characterisation. One such consequence was that a person otherwise qualifying as a refugee might be refouled to a country in which he or she would face persecution for a convention reason. The proposition that the consequences of refoulement for an individual applicant for refuge should inform the application of the criterion of "serious reasons for considering" that the applicant has committed a serious non-political crime does not fit readily with the logical structure of Art 1F(b).[31] That argument, however, is not reached in the present case, in which the ultimate question is not about the strength of the evidence necessary to attract the application of Art 1F, but about the logical connection of the facts found by the AAT to the allegation that the appellant had committed a serious non-political crime. Nevertheless, the correct construction of Art 1F(b) does set the framework within which the AAT must undertake its task.

[13] The construction of Art 1F(b) in its application to s 36(2)(a) of the Migration Act begins with the ordinary meaning to be given to its terms, read in context and in the light of its purpose.[32] That ordinary meaning does not require a finding that the applicant for refuge has committed a serious non-political crime. The requirement that there be "reasons for considering" that an applicant for refuge has committed such a crime indicates that there must be material before the receiving state which provides a rational foundation for that inference. The question for the decision-maker, and in this case the AAT, was whether the material before it met that requirement. To answer that question in the affirmative the AAT had to demonstrate a logical pathway from the material to the requisite inference.

[14] The qualifying term "serious" indicates that the reasons must be sufficient to support a strong inference. There are a variety of mechanisms, administrative and judicial, by which a receiving state may determine whether that threshold is reached. Weinberg J, in a careful consideration of the construction of Art 1F(b) in *Arquita v Minister for Immigration and Multicultural Affairs*,[33] stated the position accurately when he said (at [54]):[34]

30. (1938) 60 CLR 336; [1938] ALR 334; [1938] HCA 34 (*Briginshaw*).
31. That observation does not import any conclusion about the application of a proportional or balancing approach to characterisation of an alleged non-political offence as "serious": see for example, G Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd ed, Oxford University Press, Oxford, 2007, pp 180–4.
32. Vienna Convention on the Law of Treaties, Art 31(1). The other provisions of Art 31 and the provisions of Art 32 were not invoked and are not necessary for the disposition of this appeal.
33. (2000) 106 FCR 465; 63 ALD 321; [2000] FCA 1889 (*Arquita*).
34. *Arquita* at [54].

> [54] It is sufficient … if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement the evidence must be capable of being regarded as "strong". It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant. Nor need it be of such weight as to do so on the balance of probabilities. Evidence may properly be characterised as "strong" without meeting either of these requirements.

Baroness Hale of Richmond JSC and Lord Dyson MR observed in *Al-Sirri v Secretary of State for the Home Department* (at [75]):[35]

> [75] … It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable.

Underpinning the requirement for strong evidence is a consciousness of the potentially profound adverse consequences of exclusion from the protection of the Refugees Convention for a person otherwise entitled to that protection.

[15] The criterion for exclusion from the application of the convention, defined by Art 1F(b), is not to be equated to a standard of proof. Standards of proof are applied in judicial proceedings for the purpose of making findings of fact which attract legal consequences, including civil liabilities and criminal sanctions. They are not substitutes for the application of the ordinary words of Art 1F(b). There is a degree of risk in the use which has been made of them as parameters defining necessary or sufficient conditions for the application of the article. It has been held that satisfaction on the balance of probabilities that an applicant for refuge committed a serious non-political crime may be necessary to engage Art 1F(b).[36] It has also been held that satisfaction that it is more likely than not that an applicant for refuge has *not* committed the alleged crime is sufficient to support a conclusion that Art 1F(b) is not engaged.[37] The proposition that a state of satisfaction beyond reasonable doubt that an applicant for refuge has committed the alleged crime is sufficient to enliven Art 1F(b) may be uncontroversial. However, if there is material strong enough to support such a conclusion it is probably unnecessary to go further than a finding that the material constitutes serious reasons for considering that the alleged crime has been committed. The risk with the use of domestic standards of proof as analytical tools is that they can evolve into substitutes for the words of the article and may result in the bar being placed too high or too low, according to the circumstances.

[16] It should be said, however, that the absence of a requirement under Art 1F(b) for a positive finding that the applicant has committed a serious non-political crime does not mean that the criterion requires anything less than "meticulous investigation and solid grounds".[38] In particular, and relevant to the present case, the decision-maker must pay close attention to the probative relevance of the material said to engage the application of Art 1F(b) in order to answer the question which the article poses.

35. [2013] 1 AC 745 at [75]; [2013] 1 All ER 1267; [2012] UKSC 54 (*Al-Sirri*), with whom Lord Kerr of Tonaghmore and Lord Wilson JJSC and Lord Phillips of Worth Matravers agreed.
36. *Al-Sirri* at [75] per Baroness Hale and Lord Dyson.
37. *Al-Sirri* at [75] per Baroness Hale and Lord Dyson.
38. *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 579; 211 ALR 398; [2004] FCA 1245 at [52] per French J.

The application of Art 1F(b)

[17] The appellant claimed that the AAT committed a jurisdictional error warranting the remedies of certiorari and mandamus. That claim does not involve an examination of the correctness of the findings of fact made by the AAT. It does involve, first, a consideration of whether the findings of fact made by the AAT disclosed reasons for considering that the appellant committed the alleged crimes. That is to say, was there a rational basis, on those findings of fact, for an inference that the appellant had committed the alleged crimes? That is the preliminary question.

[18] The AAT acknowledged that none of its findings of fact as to the police report and transcripts of interviews provided to it by authorities in China, or the conduct and testimony of the appellant, was sufficient of itself to engage Art 1F(b).[39] Its ultimate conclusion, that Art 1F(b) was engaged, was therefore critically dependent upon the existence of a rational connection between its findings of fact taken in combination and the commission by the appellant of the alleged crimes. A rational connection of that kind existed with respect to the material produced by the Chinese government and accepted by the AAT as "direct evidence" of the allegations, albeit the AAT did not regard that material, taken by itself, as constituting serious reasons for considering that the appellant had committed the alleged crimes.[40] No such connection was made or was able to be implied from the balance of the AAT's findings with respect to the conduct of the appellant in leaving China when he did, making false statements in support of his visa applications, or giving testimony to the AAT, which it did not accept, about his religious affiliations and fear of persecution if he returned to China. Those findings are consistent with the appellant having the purpose of leaving China and living in Australia. Whether or not they evidence a consciousness of guilt of the alleged offences was not the subject of any explicit finding by the AAT. Nor, contrary to the views of the majority in the Full Court of the Federal Court, is a finding on the part of the AAT that they evidence consciousness of guilt so apparent that the finding should be implied. The fact that the proceedings before the AAT were argued on the basis that the conduct of the appellant, after leaving China, could lead to conclusions adverse to him is not surprising. Adverse findings as to his conduct, representations to officials and testimony before the AAT would no doubt go to his credibility. That he contested those issues does not imply a concession that the facts found by the AAT taken collectively constituted reasons, much less "serious reasons", for considering that he had committed serious non-political crimes.

[19] The AAT in this case based its ultimate conclusion on findings of fact which it did not demonstrate by its reasons to respond to the question it had asked.[41] That those findings of fact might possibly be characterised, as the appellant sought to characterise them, as irrelevant considerations reflects the ways in which specific grounds of judicial review may overlap. Importantly for the present case, the AAT's process of reasoning did not comply with the logical framework imposed on its decision-making by Art 1F(b). The AAT did not respond to the question it was required to ask in order to determine whether Art 1F(b) applied. By that omission it committed a jurisdictional error.

39. *FTZK* at [73].
40. *FTZK* at [73].
41. *FTZK* at [7].

[20] The Full Court erred in failing to find that the AAT had committed a jurisdictional error amenable to review in the original jurisdiction conferred upon that court by the provisions of the Migration Act. It should have allowed the appellant to amend his originating process and should have granted relief accordingly.

Conclusion

[21] We agree with the orders proposed by Crennan and Bell JJ.

[22] **Hayne J.** The facts and circumstances giving rise to this appeal, together with the relevant provisions of the Migration Act 1958 (Cth) and the Refugees Convention,[42] are described in the reasons of Crennan and Bell JJ. It is not necessary to repeat any of that material except to the extent necessary to explain my reasons.

[23] I agree with Crennan and Bell JJ that the appeal should be allowed and consequential orders made in the form proposed.

[24] In his amended notice of appeal to the Full Court of the Federal Court of Australia the appellant alleged that the Administrative Appeals Tribunal (the tribunal) "erred in its interpretation and/or in its application of the expression 'serious reasons for considering that [the appellant] has committed a serious non-political crime'". The Full Court should have held that this allegation was established. It may be accepted that the Full Court was right to conclude that the "appeal" which the appellant brought to that court against the tribunal's decision was not governed by s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) and that the proceedings were to be treated as seeking judicial review of the tribunal's decision for jurisdictional error.

[25] For the reasons which follow, the error of law the appellant identified was a jurisdictional error.[43] The tribunal failed "to apply itself to the real question to be decided or [misunderstood] the nature of the opinion it [was] to form".[44]

Four factors

[26] In its reasons for decision, the tribunal identified four "factors" for reaching the conclusion that there were "serious reasons for considering" that the appellant had committed the crimes of kidnapping and murder. The tribunal said that "[a]ny one of the various factors would not have been sufficient to establish serious reasons" but that the "combination of factors" gave rise "to reasons of sufficient seriousness to satisfy" Art 1F of the Refugees Convention.

[27] The four factors can be described as follows. First, Chinese authorities alleged that the appellant had committed the crimes and they provided transcripts of interrogation of two men (later convicted of and executed for participation in the crimes) who alleged that the appellant was complicit in their crimes. The tribunal said that there was "nothing in the evidence [before the tribunal] to suggest that [the two men] conspired to name" the appellant (scil as a co-offender).

42. Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).
43. *Craig v South Australia* (1995) 184 CLR 163 at 179; 131 ALR 595 at 602; 39 ALD 193 at 199; [1995] HCA 58; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; 180 ALR 1; 62 ALD 225; [2001] HCA 30 at [41] (*Yusuf*) per Gaudron J.
44. *Yusuf* at [41] per Gaudron J.

[28] Second, the tribunal found that the appellant had left China shortly after the crimes were committed and that he had provided false information to Australian authorities in order to obtain a visa to travel to and enter Australia. In addition, the tribunal concluded that the appellant had "deliberately provided false information when applying to the Australian authorities for a protection visa".

[29] Third, the tribunal found that the appellant was evasive in giving evidence about his religious affiliations and about what had happened to him in China before he left that country. The evidence, the tribunal concluded, was given in this way to strengthen his claim to remain in Australia.

[30] Fourth, the tribunal took into account that the appellant had attempted to escape from immigration detention.

[31] The reasoning of the tribunal reveals error of law. None of the second, third or fourth factors identified by the tribunal could support a conclusion that there were "serious reasons for considering" that the appellant had committed the crimes alleged against him. They could not support that conclusion because, in the circumstances of this case, none of those three factors was logically probative of the appellant's commission of the alleged crimes. Reliance upon those factors shows that the tribunal must have misconstrued the expression "serious reasons for considering".

"[S]erious reasons for considering"

[32] The central question for the decision-maker (here the tribunal) was whether Art 1F(b) of the Refugees Convention applied. Were there, at the time of the decision, "serious reasons for considering that [the appellant] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee?". The expression of the question is important. Effect is to be given to all of its elements, recognising that what is required is an evaluation of matters advanced in support of a proposition: that the person has committed a crime of the identified kind. And the decision-maker must actually be persuaded that those matters are *serious reasons for* considering that the person concerned *has committed* the crime: that is, that the matters are or give serious reasons for considering that the relevant proposition is true.

[33] It will be observed that no mention is made of common law notions of burden or standard of proof. From time to time, the expression "serious reasons for considering" has been referred[45] to in decisions of the Federal Court of Australia as a "standard of proof". To describe "serious reasons for considering" as providing a "standard of proof" is apt to mislead. There are at least three reasons.

[34] First, the relevant decision is to be made, in the first instance, by an administrative decision-maker, not a court. It is, therefore, a decision which is to be made *outside* the adversarial processes of a court, in which issue is joined between parties. For a common lawyer, the notion of a "standard of proof" marches hand in hand with onus of proof. Neither notion finds ready accommodation in administrative decision-making, where no issue is joined between parties.

45. But see *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 579; 211 ALR 398; [2004] FCA 1245 at [51].

[35] Second, the relevant question for the decision-maker is identified in an international treaty to which effect must be given in very different domestic administrative and judicial settings. There is no warrant for reading[46] the text of the treaty as operating by reference to common law judicial or procedural precepts.

[36] Third, describing the expression "serious reasons for considering" as a standard of proof distracts attention from the need for the decision-maker to decide whether he or she is actually persuaded that there are serious reasons for considering that the person has committed a crime of the relevant kind. As Sedley LJ has rightly said[47] of Art 1F, it "sets a standard above mere suspicion. *Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention*: it has to be treated as meaning what it says" (emphasis added).

Allegation and incriminating statements judged insufficient

[37] The bare fact that an allegation of crime is made (whether by one or more public officials of the country in which the crime is alleged to have been committed, or by one or more private individuals) represents the starting point for the inquiry about "serious reasons for considering", not its end. Putting the matter shortly, the decision-maker must decide what credence may be given to the allegations that are made. But always it remains important to recall that the ultimate question is whether there are serious reasons for considering that the person has committed the crime. And the decision-maker must be persuaded of the existence of serious reasons for considering that the person has committed the crime, not of actual guilt.

[38] In this case, the tribunal concluded that none of the four factors it identified was sufficient in itself to persuade it that there were "serious reasons for considering" that the appellant had committed the alleged crimes. More particularly, the tribunal concluded that, standing alone, the making of the allegation by public officials, even when coupled with incriminating statements by the alleged co-offenders, did not provide serious reasons for considering that the appellant had committed the alleged crimes.

The remaining factors

[39] As already indicated, none of the three other factors relied on by the tribunal could, in the circumstances of this case, logically support the conclusion which the tribunal reached. Each of those factors was as consistent with the appellant's innocence of the crimes alleged as it was with his guilt. Each could support the conclusion which the tribunal reached only if, considered separately or in conjunction with other matters, the appellant, by that conduct, impliedly admitted guilt of the crimes alleged. But once it is recognised that the appellant was found to have a well-founded fear of persecution for a convention reason, his departure from China, his telling lies to obtain the first visa he obtained and his telling lies or giving evasive testimony in connection with his application for a protection visa are as readily explained by his desire to escape from China for innocent reasons as they would be by a desire to run away from the scene of a

46. Compare *Povey v Qantas Airways Ltd* (2005) 223 CLR 189; 216 ALR 427; [2005] HCA 33 at [41]. See also *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2011] 1 AC 184 at [41]–[42]; [2010] 3 All ER 881 (*JS*) per Lord Hope of Craighead DPSC.
47. *Al-Sirri v Secretary of State for the Home Department* [2009] Imm AR 624 at [33], cited with approval in *JS* at [39] per Lord Brown of Eaton-under-Heywood JSC.

crime. Likewise, his attempt to escape from immigration detention might be thought to bespeak a disregard for authority and a willingness to break Australian immigration law. But neither of those conclusions bears upon whether there are serious reasons for considering that he has committed kidnapping and murder.

[40] None of the second, third or fourth factors upon which the tribunal relied supported a conclusion that the appellant had committed the alleged crimes. That is, in the circumstances of this case, none of those factors was logically probative of the appellant's guilt. Because none of those factors was logically probative of that fact, none was a reason, let alone a serious reason, for considering that the appellant had committed the alleged crimes.

Not irrelevant considerations

[41] The conclusion that, in the circumstances of this case, the second, third and fourth factors relied on by the tribunal did not support the finding that the appellant committed the alleged crimes does not demonstrate that the tribunal committed a jurisdictional error by taking into account irrelevant considerations. Leaving the place where a crime was committed, telling lies and fabricating evidence are matters which may properly be taken into account in deciding whether there are serious reasons for considering that a person committed an alleged crime. They are not matters which the tribunal is forbidden[48] from considering.

[42] Their importance in this case is that, *because* they were not logically probative of the appellant's having committed the crimes alleged, and *because* they therefore *could not* be a reason for considering that he had done so, the tribunal's reliance upon them must show that the tribunal misconstrued the test it had to apply.

Conclusion and orders

[43] Because the tribunal misconstrued the test it had to apply, it fell into jurisdictional error.

[44] The "appeal" to the Full Court of the Federal Court should have been allowed; the appeal to this court must be.

[45] Crennan and Bell JJ. The appellant, a national of the People's Republic of China (the PRC), applied unsuccessfully for a protection visa under s 36 of the Migration Act 1958 (Cth) (the Act) claiming to be a person to whom Australia had protection obligations under the Refugees Convention[49] as amended by the Refugees Protocol[50] (the convention). At that time, a criterion for the grant of a protection visa was that the first respondent, the Minister for Immigration and Border Protection, be satisfied that an applicant was a person to whom Australia had such obligations.[51] In refusing the application, a delegate of the minister

48. Compare *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40; 66 ALR 299 at 308–9; [1986] HCA 40 per Mason J. See also M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th ed, Thomson Reuters (Professional) Australia, Sydney, 2013, pp 274–5 [5.30].
49. Convention relating to the Status of Refugees done at Geneva on 28 July 1951.
50. Protocol relating to the Status of Refugees done at New York on 31 January 1967.
51. Section 36(2)(a) of the Act. Section 36(2)(a) has since been amended by the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth), which replaced the words "to whom" with "in respect of whom". See also s 31(3) of the Act and Sch 2, cl 866.221(2) of the Migration Regulations 1994 (Cth).

found that the appellant was excluded from Australia's protection obligations pursuant to Art 1F(b) of the convention, which is part of Australian law.[52]

[46] The appeal in this court raises two issues of administrative law which arise out of a decision of the second respondent, the Administrative Appeals Tribunal (the tribunal), to affirm the delegate's decision. The first is whether the tribunal misconstrued its functions and powers in respect of Art 1F(b) in determining whether there were "serious reasons for considering" that the appellant had committed "serious non-political crime[s]". The second is whether the tribunal took into account irrelevant matters when deciding that the appellant fell within the scope of Art 1F(b).

[47] The appellant also sought to pursue an additional question not raised below. That question was whether the tribunal, exercising functions and powers under Art 1F(b), was required to take into account, and to weigh up, the consequences of refoulement. However, as these reasons will explain, that question is not reached. The second respondent has filed an appearance submitting to this court's jurisdiction.

[48] Article 1F of the convention provides:

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

[49] The appellant appeals to this court against orders made by the Full Court of the Federal Court of Australia (Gray and Dodds-Streeton JJ; Kerr J dissenting) dismissing an appeal against the orders of the tribunal and refusing the appellant leave to amend process in that court.[53] That amendment would have enabled the appellant to overcome an objection to the competency of the appeal and to recast the proceedings as an application invoking the original jurisdiction of the Federal Court under s 476A(1)(b) of the Act to seek relief of the kind provided for in s 75(v) of the Constitution. With the concurrence of the minister,[54] the Full Court proceeded to deal with the matter as one involving the original jurisdiction of the Federal Court.[55] It can be noted that in this court the appellant seeks writs of certiorari and mandamus directed to the tribunal. The issue of substance before the Full Court[56] was whether the tribunal fell into jurisdictional error by taking into account irrelevant matters in making its decision.[57]

52. Section 36(2C)(a)(ii) of the Act.
53. *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158; 60 AAR 195; [2013] FCAFC 44 at [51] (*FTZK v MIC*).
54. *FTZK v MIC* at [21].
55. *FTZK v MIC* at [1] and [19] per Gray and Dodds-Streeton JJ, at [57] and [124] per Kerr J.
56. Exercising original jurisdiction pursuant to s 476A(1)(b) of the Act: *FTZK v MIC* at [21]–[27] and [79].
57. *FTZK v MIC* at [1] and [21].

The convention

[50] The convention is concerned with the status and protection of refugees. Chapter I contains Art 1, covering the definition of "refugee". Article 1 (comprising Arts 1A–1F) has three parts, distinguished in the Handbook of the United Nations High Commissioner for Refugees (the UNHCR) as "inclusion", "cessation" and "exclusion" provisions.[58]

[51] As explained recently in *Plaintiff M61/2010E v Commonwealth*,[59] the Act is the source of power for Australia to respond to its international obligations in respect of refugees. The Act incorporates Art 1 of the convention into Australian law.[60]

[52] Article 1A(2) of the convention (an "inclusion" provision) relevantly defines a "refugee" as a person who:

> … owing to well-founded fear of being persecuted for reasons of … religion … 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.

[53] The appellant was found to come within Art 1A(2) by reason of his political opinion. To that extent he qualified as a person to whom Australia has protection obligations under the convention.

[54] Article 1C (the "cessation" provision), which is not presently relevant and may be put aside, provides six conditions under which a refugee ceases to be a refugee.[61]

[55] Articles 1D, 1E and 1F (the "exclusion" provisions) all provide for different circumstances in which the convention does not apply to a person who otherwise comes within the definition of refugee.[62] Articles 1D and 1E may also be put aside for present purposes.

[56] Article 1F has been set out above. Notwithstanding the finding that he was a refugee within the meaning of Art 1A(2), the appellant was found to be excluded from Australia's protection obligations. That conclusion was reached because the tribunal was satisfied that there were "serious reasons for considering" that the appellant had committed "serious non-political crime[s]", as alleged, in the PRC prior to seeking protection in Australia.

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58. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1992) at 9 [30].
59. (2010) 243 CLR 319; 272 ALR 14; 123 ALD 244; [2010] HCA 41 at [27]. Affirmed in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; 280 ALR 18; 122 ALD 237; [2011] HCA 32 at [90] per Gummow, Hayne, Crennan and Bell JJ; *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243; 86 ALJR 1372; [2012] HCA 46 at [12] (*Plaintiff M47/2012*) per French CJ, at [90] per Gummow J, at [222] per Hayne J, at [381] per Crennan J and at [417] per Kiefel J.
60. Section 36(2) of the Act.
61. See Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, pp 27–32 [118]–[139].
62. See Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, pp 33–8 [140]–[163].

[57] Article 35 provides that member states are to cooperate with the UNHCR to facilitate its duty of supervising the application of the provisions of the convention.

Facts and history of the proceedings

[58] On 1 February 1997, the appellant entered Australia on a class UC temporary business subclass 456 visa. He was granted a bridging visa in December 1998, which expired on 21 January 2000. The appellant conceded that details on his visa recording his occupation as "Engineer" were incorrect as he is not an engineer and has never worked as an engineer. The appellant's explanation for this was that "this was the only way [he] could get the visa and leave [the PRC]".

[59] Meanwhile, in the PRC in May 1997, the appellant was implicated by two alleged co-accused in the crimes of kidnap and murder of a 15-year-old school boy in Tianjin in December 1996. The allegations are now the subject of criminal charges laid by the Chinese authorities against the appellant. In June 1998, the Australian Federal Police received a copy of an arrest warrant for the appellant issued by authorities in the PRC in May 1997.[63] The appellant's two alleged co-accused were executed by authorities in the PRC on 21 May 1998. On 22 May 2006, the Ministry of Foreign Affairs of the PRC provided written assurance to the Australian government that if the appellant were returned to the PRC and found guilty of the crimes charged against him, the death penalty would not be imposed.

[60] On 8 December 1998, the appellant applied to the minister for a protection (class XA) visa, claiming that he had left the PRC because he had been persecuted on the ground of his religious beliefs. A refusal of that application by a delegate of the minister was affirmed by the Refugee Review Tribunal (the RRT) in December 1999. On the cessation of the appellant's bridging visa, between January 2000 and February 2004 he lived in Australia as an unlawful non-citizen. In February 2004, the appellant was located and taken into immigration detention. In March 2004, soon after the refusal of a fresh application by the appellant for a bridging visa, he attempted to escape from immigration detention.[64] On 23 June 2004 the appellant was advised by an officer of the minister of the PRC arrest warrant.

[61] On 5 and 8 October 2007, the appellant filed applications in this court seeking judicial review of the RRT's decision made in December 1999 and an injunction to prevent his removal to the PRC.[65] An injunction was issued and the matter was remitted to the Federal Court and subsequently to the RRT to be determined according to law. Following a further decision made by the RRT and subsequent judicial review proceedings, the matter was again remitted to the RRT. On 11 May 2010, the RRT found that the appellant was a person to whom Australia had protection obligations under Art 1A(2) of the convention, and remitted the matter to the minister for reconsideration of any issues falling within the scope of Art 1F(b).

63. *Re FTZK and Minister for Immigration and Citizenship* [2012] AATA 312 at [26] (*FTZK*); *FTZK v MIC* at [32], [63] and [82].
64. *FTZK* at [52].
65. [2007] HCATrans 616.

[62] On 24 May 2011, a delegate of the minister concluded that the appellant was excluded from protection under the convention by Art 1F(b). The appellant appealed to the tribunal. It was not in dispute that each of the crimes alleged against him was a "serious non-political crime" within the meaning of Art 1F(b).[66] The appellant gave evidence before the tribunal in which he denied committing the alleged crimes. On 23 May 2012, relying on Art 1F(b), the tribunal affirmed the delegate's decision to refuse to grant the appellant a protection visa.

[63] The tribunal's conclusion, that there were "serious reasons for considering" that the appellant had committed the alleged crimes,[67] was based upon four findings in respect of the evidence. First, the tribunal accepted documentary evidence provided by the PRC Government, including transcripts of interrogation of the two alleged co-accused, as "direct evidence, albeit of possible accomplices", which implicated the appellant in the alleged crimes.[68] The tribunal noted that there were "many inconsistencies between the transcripts" although none that caused the tribunal to "disregard either or both of them".[69] The appellant accepted that the transcripts were relevant to the consideration by the tribunal of whether the appellant fell within the scope of Art 1F(b). The tribunal also considered unchallenged evidence of experts concerning coercive interrogation techniques which may have been employed in respect of the interrogation of the two alleged co-accused.

[64] The tribunal then made three further findings (which the appellant contended were irrelevant) as follows (at [70]–[72]):[70]

> [70] Secondly, on the basis of the evidence of the [appellant] I am satisfied that he left China shortly after the crimes were committed and that he provided false information to the Australian authorities in order to obtain a visa to do so. I am satisfied also, again based on the evidence of the [appellant], that he deliberately provided false information when applying to the Australian authorities for a protection visa in 1998.
>
> [71] Thirdly, I am satisfied that the [appellant] was evasive when giving evidence as to his religious affiliations in Australia and China and I am satisfied that he was not detained and tortured in China as he alleges. I am satisfied that his evidence in this regard was fabricated in order to strengthen his claim to remain in Australia. The [appellant] was unable to explain satisfactorily why, when giving evidence to the Refugee Review Tribunal, he did not inform that Tribunal of what he now alleges happened to him before he left China.
>
> [72] Fourthly, I have taken into account also that the [appellant] attempted to escape from detention in 2004, shortly after his application for a long term business visa was refused. I am satisfied that in attempting to escape he intended to return to live unlawfully in the Australian community. I am satisfied of these facts on the basis of the [appellant's] evidence. I am not satisfied that his stated reasons for attempting to escape were accurate. I am satisfied also that the [appellant] remained in Australia from January 2000 to February 2004 without lawful permission to do so. In view of his experience in applying for various visas beforehand, I do not accept his evidence that he believed he was entitled to remain in Australia during this period. There is no evidence which suggests that an application was made to the Minister by, or on behalf of, the [appellant] during his period of unlawful residence.

66. *FTZK* at [8].
67. *FTZK* at [68].
68. *FTZK* at [69].
69. *FTZK* at [77].
70. *FTZK* at [70]–[72].

[65] After this description of lies and conduct of the appellant, which were admitted, the tribunal said (at [73]):[71]

> [73] The conclusion I have reached is based on the totality of the evidence I have referred to above. Any one of the various factors would not have been sufficient to establish serious reasons; it is the combination of factors which gives rise to reasons of sufficient seriousness to satisfy Article 1F of the Convention.

[66] On the appeal in the Full Court, the majority considered the tribunal's findings, extracted above, and said (at [45]):[72]

> [45] … The Tribunal clearly regarded these facts as demonstrating the [appellant's] consciousness of his guilt of the criminal offences and desire to escape from the consequences of his criminal conduct. It was unnecessary for the Tribunal to express this link in order to make it exist.

[67] In dissent, Kerr J found that each of those findings made by the tribunal was of no probative value unless linked to a further fact or circumstance which the tribunal was required to find, being motive or consciousness of guilt.[73] Relying on *Edwards v R*[74] and *Craig v South Australia*,[75] Kerr J concluded that the tribunal had relied on irrelevant considerations and had thereby fallen into jurisdictional error.[76] His Honour considered that a reviewing court was not entitled to be satisfied of an adverse conclusion under Art 1F(b) if the reasons given by the decision-maker did not consider properly, or at all, the evidentiary support for that conclusion. For a reviewing court to imply or infer critical findings of fact, not expressed in the decision-maker's reasons, would, his Honour said, "turn on its head the fundamental relationship between administrative decision-makers and Chapter III courts exercising the power of judicial review".[77] Kerr J's approach was correct and should be followed.

Article 1F(b) — Interpretation

[68] It was common ground that Art 1F(b) has an autonomous meaning to be found in international rather than domestic law.[78]

[69] In *Applicant A v Minister for Immigration and Ethnic Affairs*,[79] Gummow J remarked:

> The Convention resolves in a limited fashion the tension between humanitarian concerns for the individual and that aspect of state sovereignty which is concerned with exclusion of entry by non-citizens, "[e]very society [possessing] the undoubted right to determine who shall compose its members".[80]

71. *FTZK* at [73].
72. *FTZK v MIC* at [45].
73. *FTZK v MIC* at [134].
74. (1993) 178 CLR 193; 117 ALR 600; [1993] HCA 63 (*Edwards*).
75. (1995) 184 CLR 163; 131 ALR 595; 39 ALD 193; [1995] HCA 58 (*Craig*).
76. *FTZK v MIC* at [57] and [165].
77. *FTZK v MIC* at [118].
78. *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; 186 ALR 393; 67 ALD 257; [2002] HCA 7 at [93] (*Singh*) per Kirby J, citing *T v Secretary of State for the Home Department* [1996] AC 742 at 768; [1996] 2 All ER 865 at 882 (*T v Home Secretary*) per Lord Mustill. See also at [21] per Gleeson CJ, at [40] per Gaudron J.
79. (1997) 190 CLR 225 at 274; 142 ALR 331 at 367; [1997] HCA 4 (*Applicant A*).
80. *Robtelmes v Brenan* (1906) 4 CLR 395 at 413; 13 ALR 168; [1906] HCA 58.

That passage has been relied upon subsequently by this court[81] and has been considered with approval by Lord Bingham of Cornhill in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)*.[82]

[70] While Art 1A(2) exemplifies humanitarian concerns for the individual, Art 1F concerns that aspect of state sovereignty to which Gummow J referred, as "it recognises a state's interest in declining to receive and shelter those who have demonstrated a propensity to commit serious crime".[83] It operates to exclude from the protections afforded by the convention three types of persons who might otherwise qualify as refugees.

[71] The text of Art 1F, like the text of many international instruments, represents an accommodation of a kind directed to attracting a maximum number of contracting states,[84] by being drafted generally and with an eye to different legal systems. Notwithstanding a somewhat complicated drafting history,[85] the general language of the text, and a difficult distinction between "political" and "non-political crime",[86] the "ordinary meaning"[87] of Art 1F(b) is clear. The subject matter and purpose of Art 1F(b) is to ensure that criminals cannot avoid prosecution and punishment for serious non-political crimes committed outside the receiving country, by claiming refugee status in that country.[88]

[72] In *Dhayakpa v Minister for Immigration and Ethnic Affairs*,[89] French J described the exception in Art 1F(b) as protective of the order and safety of the receiving state, which should not be "construed so narrowly as to undercut its evident policy". That approach has been followed subsequently in decisions of the Federal Court.[90] His Honour stated that it is unnecessary for a receiving state to make a positive or concluded finding about the commission of a crime and that "strong evidence" is sufficient,[91] about which more will be said later.

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81. *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1; 175 ALR 585; 62 ALD 1; [2000] HCA 55 at [137]–[138]; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; 213 ALR 668; [2005] HCA 6 at [13]–[21]; *Plaintiff M47/2012* at [75] and [273]. See also *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; 187 ALR 574; 67 ALD 577; [2002] HCA 14 at [41]–[48].
82. [2005] 2 AC 1 at [15]; [2005] 1 All ER 527.
83. *Singh* at [15] per Gleeson CJ.
84. *Applicant A* at CLR 275; ALR 368. See also *Singh* at [94]–[96] per Kirby J.
85. See *T v Home Secretary* at AC 764 and 772; All ER 878 and 885 per Lord Mustill, at AC 778; All ER 890–1 per Lord Lloyd of Berwick; *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 187–9; 158 ALR 289 at 301–4; 51 ALD 549 at 561–4 (*Ovcharuk*) per Sackville J; A Grahl-Madsen, *The Status of Refugees in International Law*, Netherlands, Leyden, 1966, vol 1 pp 290–2; J C Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, Cambridge, 2005, pp 342–3.
86. *Singh* at [15] and [21] per Gleeson CJ, at [64]–[65] per Kirby J. See also at [40]–[47] per Gaudron J, at [165] per Callinan J.
87. As to which see Art 31(1) of the Vienna Convention on the Law of Treaties. See also *Ovcharuk* at FCR 183–4; ALR 297–8; ALD 557–8.
88. See generally *Ovcharuk* at FCR 187; ALR 301–2; ALD 561–2 per Sackville J; *Singh* at [94]–[95] per Kirby J.
89. (1995) 62 FCR 556 at 565 (*Dhayakpa*).
90. *Ovcharuk* at FCR 179; ALR 294; ALD 554 per Whitlam J, at FCR 185; ALR 300; ALD 560 per Branson J; *Applicant NADB of 2001 v Minister for Immigration and Multicultural Affairs* (2002) 126 FCR 453; 71 ALD 41; [2002] FCAFC 326 at [32]–[33].
91. *Dhayakpa* at 563.

[73] In this field of public international law, scholarly writings and international instruments can provide assistance to courts charged with the task of interpreting the autonomous meaning of certain provisions. While not binding on the courts of contracting states, the UNHCR's Background Note on the Application of the Exclusion Clauses (the UN Background Note) states:[92]

> 3. The rationale behind the exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. While these underlying purposes must be borne in mind in interpreting the exclusion clauses, they must be viewed in the context of the overriding humanitarian objective of the 1951 Convention.
> 4. Consequently, as with any exception to human rights guarantees, the exclusion clauses must always be *interpreted restrictively* and should be *used with great caution*. [Emphasis added.]

[74] In *Al-Sirri v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)*,[93] the Supreme Court of the United Kingdom held that Art 1F (particularly Art 1F(c)) should be "interpreted restrictively and applied with caution"[94] because of the serious consequences of excluding from protection under the convention a person who has a well-founded fear of persecution.

[75] In adopting that approach, the Supreme Court acknowledged its UNHCR provenance. In determining the correct approach to the interpretation and application of Art 1F, the Supreme Court took into account not only the approach taken earlier in that court,[95] but also the approach taken by the Supreme Court of Canada[96] and the Grand Chamber of the court of Justice of the European Union.[97] That approach should be followed in respect of Art 1F(b).

[76] Before turning to the submissions concerning the appellant's case on jurisdictional error, it is convenient to say a little more about two specific expressions in Art 1F(b) relevant to those submissions.

Serious non-political crime — The concession

[77] The expression "serious non-political crime" has its roots in Art 14(2) of the Universal Declaration of Human Rights (1948)[98] and references to extraditable crimes found in the Statute of the Office of the United Nations High Commissioner for Refugees.[99] The competence of the High Commissioner is there said not to extend to a person "[i]n respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions

92. United Nations High Commissioner for Refugees, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees" (4 September 2003) at 3 [3]–[4].
93. [2013] 1 AC 745; [2013] 1 All ER 1267; [2012] UKSC 54 (*Al-Sirri*).
94. *Al-Sirri* at [16].
95. *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2011] 1 AC 184; [2010] 3 All ER 881 (*JS*) (concerning Art 1F(a)).
96. *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 (concerning Art 1F(c)).
97. *Federal Republic of Germany v B* [2012] 1 WLR 1076; [2010] All ER (D) 96 (Nov).
98. Article 14(2) provides that the right to seek and to enjoy in other countries asylum from persecution "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".
99. See Grahl-Madsen, 1966, vol 1 p 290.

of treaties of extradition".[100] The meaning of the expression "serious non-political crime", occurring in Art 1F(b), was considered by the House of Lords in *T v Home Secretary*.[101] As was explained in the reasons of Lord Mustill, notwithstanding a distinct echo in the expression of the political exception which had been a feature of extradition treaties for a considerable period, it is the purposes of asylum, rather than extradition, which bear on the meaning of Art 1F(b).[102] The purposes of asylum, seen in the light of the drafting history of Art 1F(b), support the conclusion that Art 1F(b) is not confined to crimes of an extraditable nature.[103]

[78] It is sufficient for this case to note that each of the crimes alleged against the appellant is a "common crime" (un crime de droit commun) as that expression is used in this field of discourse to refer "to 'ordinary crime', or conduct recognised as criminal by the common consent of nations".[104] Recognition that a crime is a "common crime" may be premised on the character and nature of the crime, the modes of prosecution and the penalties which can be imposed.[105] Given that frame of reference, the appellant was right to concede in the tribunal that the crimes alleged against him fell within the relevant requirement of Art 1F(b) as "serious non-political crime[s]".

"Serious reasons for considering" — The standard of proof

[79] The expression "serious reasons for considering" that a person has committed a "serious non-political crime" has been considered frequently by courts in Australia and elsewhere. As will become evident, the expression has been referred to consistently as a "standard of proof" in authorities and scholarly publications and is referred to as such in the UN Background Note. Had that usage been challenged in this appeal, which it was not, we would have been disinclined to accept the challenge. An Australian decision-maker applying Art 1F(b) who is assisted by, or who adopts, the usage does not, for that reason, make an error. The usage does not imply any requirement that a decision-maker be satisfied beyond reasonable doubt of a person's guilt.

[80] In *Arquita v Minister for Immigration and Multicultural Affairs*,[106] Weinberg J, following earlier Federal Court authorities,[107] said that "serious reasons for considering" that a person had committed a crime under consideration did not require a positive or concluded finding, but did require "strong" evidence of the commission of the crime.[108] His Honour explained (at [54]):[109]

100. Paragraph 7(d) of the Statute of the Office of the United Nations High Commissioner for Refugees.
101. [1996] AC 742; [1996] 2 All ER 865.
102. *T v Home Secretary* at AC 758–73; All ER 872–86. See also *Singh* at [105] per Kirby J.
103. As to which see *Ovcharuk* at FCR 187–9; ALR 301–4; ALD 561–4 per Sackville J.
104. *T v Home Secretary* at AC 759; All ER 873 per Lord Mustill; see also *Singh* at [21] per Gleeson CJ, at [99] per Kirby J.
105. It can be noted that the guidance in the UNHCR Handbook is that a "serious" non-political crime refers to a "capital crime or a very grave punishable act": Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p 36 [155]; see also UN Background Note at 14 [39]–[40].
106. (2000) 106 FCR 465; 63 ALD 321; [2000] FCA 1889 at [51]–[52] (*Arquita*).
107. Including *Dhayakpa* and *Ovcharuk*.
108. *Arquita* at [54].
109. *Arquita* at [54].

> [54] It is sufficient, in my view, if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement the evidence must be capable of being regarded as "strong". It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant. Nor need it be of such weight as to do so on the balance of probabilities. Evidence may properly be characterised as "strong" without meeting either of these requirements.

[81] That approach to the standard of proof set out in Art 1F(b) has now been followed many times in the Federal Court.[110] It is an approach also followed by the UNHCR[111] and by Professor Hathaway[112] and other commentators.[113] All reiterate that the standard of proof — "serious reasons for considering" — does not derive from, or replicate, a standard of proof in any domestic legal system.

[82] In *Al-Sirri*,[114] the Supreme Court considered the approaches to the standard of proof taken in authorities in the United Kingdom, Australia, Canada and New Zealand[115] and accepted the approach taken in *Arquita*. The court then set out the meaning of the expression "serious reasons for considering" (at [75]):[116]

> [75] We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions: (1) "Serious reasons" is stronger than "reasonable grounds". (2) The evidence from which those reasons are derived must be "clear and credible" or "strong". (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker. (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law. (5) It is unnecessary to import our domestic standards of proof into the question.

110. *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 579; 211 ALR 398; [2004] FCA 1245 at [51]. See also *NADB v Minister for Immigration and Multicultural Affairs* (2002) 189 ALR 293; [2002] FCA 200 at [27]; *SBAR v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1502 at [11]; *SZITR v Minister for Immigration and Multicultural Affairs* (2006) 44 AAR 382; [2006] FCA 1759 at [8]; *MZYVM v Minister for Immigration and Citizenship* [2013] FCA 79 at [67]–[68].
111. UN Background Note at 38–39 [107].
112. Hathaway, 2005, pp 342–3.
113. Bliss, "'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses", (2000) 12 *International Journal of Refugee Law (Special Supplementary Issue on Exclusion)* 92 pp 115–17; Gilbert, "Current issues in the application of the exclusion clauses", in E Feller, V Türk and F Nicholson (Eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, 425 p 470; European Council on Refugees and Exiles, "Position on Exclusion from Refugee Status", (2004) 16 *International Journal of Refugee Law* 257 pp 273–4.
114. [2013] 1 AC 745; [2013] 1 All ER 1267; [2012] UKSC 54.
115. *Re W97/164 and Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 432; [1998] AATA 618; *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306, compare *Poblete-Cardenas v Minister of Employment and Immigration* (1994) 74 FTR 214; *Tamil X v Refugee Status Appeals Authority* [2010] 2 NZLR 73; [2009] NZCA 488, affd in *Attorney-General (Minister of Immigration) v Tamil X* [2011] 1 NZLR 721; [2010] NZSC 107; *JS*.
116. *Al-Sirri* at [75].

[83] The passage draws together international consensus about an exacting standard of satisfaction which is not derived from domestic standards of proof.

Submissions

[84] The appellant relied on two grounds of jurisdictional error identified in *Kirk v Industrial Court (NSW)*[117] by reference to *Craig*.[118] The tribunal was said to have asked itself a wrong question[119] and to have taken into account, impermissibly, irrelevant matters.[120] Thus it was said that an examination of the matters which the tribunal treated as determinative showed that the tribunal misconstrued the limits of its functions or powers to decide whether Art 1F(b) applied to the appellant.[121]

[85] This case was an unusual one in which to invoke a relevancy ground for judicial review. Moreover, the two separate grounds of jurisdictional error complained about overlapped because each ground depended on the same failures or flaws alleged in the tribunal's reasoning. Those failures or flaws were said to be that the tribunal gave probative weight to matters which were not relevant; it relied on factors which were relevant only to the appellant's credibility; and it disregarded logically probative evidence, namely that of two experts, Dr Nesossi and Dr Sapio.

[86] The appellant relied on the decision of Mason J in *Peko-Wallsend*,[122] in which his Honour explained that the ground of failure to take into account relevant considerations can only be made out if a decision-maker fails to take into account a consideration which the decision-maker is *bound* to take into account, having regard to the empowering legislation. The appellant proceeded on the basis that the same reasoning applies to the ground of taking into account irrelevant considerations.[123]

[87] The sole question before the tribunal was whether there were "serious reasons for considering" that the appellant had committed one or more of the crimes alleged against him. It was contended that the matters which the tribunal in this case was *bound* to take into account were matters probative of that question. It was further contended that the second, third and fourth matters identified by the tribunal (extracted above), being lies and conduct of the appellant, were not probative of that question. It was in this context that the appellant submitted that the tribunal's reliance on those matters showed that it had answered (and therefore asked) the wrong question and had taken into account matters which it was bound not to take into account.

[88] In response, the minister contended that in applying Art 1F(b) the tribunal was not limited to considering evidence which was directly probative of the commission of the alleged crimes and that evidence going to credit might also be considered. That submission is correct. It was further contended that since the

117. (2010) 239 CLR 531; 262 ALR 569; 113 ALD 1; [2010] HCA 1 at [67].
118. *Craig* at ALD 179; ALR 602; ALD 199.
119. *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; 180 ALR 1; 62 ALD 225; [2001] HCA 30 (*Yusuf*).
120. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40; 66 ALR 299 at 308–9; [1986] HCA 40 (*Peko-Wallsend*).
121. *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 176 ALR 219; 62 ALD 285; [2000] HCA 57 at [163] per Hayne J.
122. *Peko-Wallsend* at CLR 39–40; ALR 308–9.
123. See M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th ed, Thomson Reuters (Professional) Australia, Sydney, 2013, p 275 [5.30].

appellant gave evidence in which he advanced innocent explanations for his admitted lies and conduct, it was relevant for the tribunal to consider the appellant's conduct since coming to Australia. That submission can also be accepted.

[89] It was then submitted that even if it were proven that the tribunal relied on facts not probative of "serious reasons for considering" that the appellant had committed one or more of the alleged crimes, that circumstance, without more, would not constitute jurisdictional error or indicate that the tribunal had asked itself the wrong question. In particular, the minister relied on the transcripts provided by the PRC, demonstrated a degree of consistency between them, and urged that lies and conduct taken into account by the tribunal amounted to circumstantial evidence capable of corroborating the evidence of the alleged co-accused to be found in those transcripts. It can be accepted that the lies and conduct relied on by the tribunal may have been capable of corroborating the transcripts, but the path by which the tribunal reached its conclusion that the appellant fell within Art 1F(b) did not establish any such corroboration.

Was there jurisdictional error?

[90] The tribunal's reasons cannot be equated with a total failure to give reasons, as considered by this court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*.[124] Nevertheless, empowering legislation can show that a tribunal's identification of what it considered to be relevant matters may demonstrate that it asked itself the wrong question, as explained in *Yusuf*.[125] Equally, it may demonstrate that a tribunal has misconstrued its functions and powers to decide, by taking into account matters which are irrelevant given the language of the empowering provision and the scope and purpose of the whole Act.[126] Either form of error requires the impugned decision to be set aside.

[91] Here, the tribunal took into account (and treated as determinative) the timing of the appellant's departure from the PRC, lies told by the appellant both to obtain a visa and to obtain protection under the convention, and the appellant's conduct in escaping from detention and living in Australia unlawfully. An equally probable explanation for all of these matters is a desire on the part of the appellant to live in Australia. That desire is not unique to the appellant, particularly as he has been found to fall within Art 1A(2) of the convention. A correct application of Art 1F(b) to the facts required the tribunal to ask of the evidence before it whether that evidence was probative of "serious reasons for considering" that the appellant had committed one or more of the alleged crimes.

[92] In *Edwards*[127] this court considered the instructions which need to be given to a jury by a trial judge if lies by an accused are relied upon as corroboration of other evidence. In a key passage in the majority opinion it was recognised that "[a] lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence".[128] It was then said that in any case where a lie is relied upon to prove guilt (here, the

124. (2003) 216 CLR 212; 201 ALR 327; 76 ALD 1; [2003] HCA 56.
125. *Yusuf* at [69].
126. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 at [91]–[93].
127. (1993) 178 CLR 193; 117 ALR 600; [1993] HCA 63.
128. *Edwards* at CLR 210; ALR 613.

commission of an offence) "the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest".[129] Furthermore, Brennan J identified the inherent difficulties in treating false denials of guilt as admissions constituting independent proof of guilt.[130]

[93] The path by which the tribunal reached its conclusion that the appellant fell within Art 1F(b) did not include any consideration of whether, and if so how, the lies and conduct relied upon were concerned with circumstances or events connected with one or more of the alleged crimes. The tribunal's findings in respect of the appellant's credit did not involve a rejection of his denial that he committed the alleged crimes or amount to a finding that the lies and conduct constituted an admission against interest by him in respect of those crimes.

[94] As to the relevancy ground, undoubtedly the language of Art 1F(b) and the scope and purpose of the Act obliged the tribunal not to rely on irrelevant considerations when considering whether there were "serious reasons for considering" that the appellant (who qualified for protection under Art 1A(2)) had committed the alleged crimes before entering Australia.[131] The appellant's submission on relevancy depended critically on the tribunal's finding that the transcripts of the alleged co-accused were insufficient to persuade the tribunal that there were "serious reasons for considering" that the appellant had committed those crimes.

[95] In the Full Court, the dissenting judge demonstrated that to the limited extent that the tribunal addressed the appellant's motives for lying and for his other conduct, there was no finding that the lies and other conduct had anything to do with motive or consciousness of guilt in respect of the alleged crimes.[132] Further, his Honour found that adverse conclusions in respect of the lies and other conduct, namely that they constituted admissions against interest, were not the only conclusions open to the tribunal.[133]

[96] The tribunal was bound to consider whether the matters it relied upon, in addition to the transcripts — which it said were insufficient — were probative of "serious reasons for considering" that the appellant had committed one or more of the alleged crimes. As already demonstrated, the tribunal's path to its conclusion in that respect was flawed.

[97] The criminal standard of proof — "beyond reasonable doubt" — is not to be subsumed into "serious reasons for considering" that an alleged crime has been committed. Nevertheless, the absence of any finding by the tribunal that the lies and conduct were concerned with circumstances or events connected with the alleged crimes shows that the tribunal misconstrued its functions and powers under Art 1F(b) to determine whether the appellant was excluded from Australia's protection obligations under the convention. It is impossible to state that this failure or flaw in the reasoning could not have materially affected the decision.[134]

[98] The tribunal's reasons reveal jurisdictional error. The majority of the Full Court erred in refusing to quash the tribunal's decision.

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129. *Edwards* at CLR 210–211; ALR 613.
130. *Edwards* at CLR 201; ALR 605.
131. Section 36(2C)(a)(ii) of the Act.
132. *FTZK v MIC* at [154].
133. *FTZK v MIC* at [152].
134. Compare *Peko-Wallsend* at CLR 40; ALR 309.

Refoulement consequences

[99] Finally, it can be noted that the appellant sought to raise an argument in this court which was not raised below. The appellant contended that the tribunal was required to have regard to the consequences of refoulement when assessing the degree of satisfaction needed for "serious reasons for considering" that a "serious non-political crime" had been committed. That argument was said by the minister to be contrary to a concession made by the appellant before the tribunal. There was no reason advanced as to why the argument had not been raised in the Full Court or why the Full Court was not asked to consider earlier decisions of the Federal Court making some reference to the point. The argument raises considerations of considerable significance: whether the purpose of Art 1F(b) would be defeated if the more serious the crime, the harder it would be to apply Art 1F(b), and whether it would be necessary for a decision-maker to ascertain the consequences of committing a serious non-political crime in the country in which the crime was alleged to have been committed. In the light of the finding that jurisdictional error was made by the tribunal, the argument about the consequences of refoulement is not reached.

Conclusions and orders

[100] For the reasons given, the following orders should be made:

(1) Appeal allowed.

(2) The order of the Full Court of the Federal Court of Australia made on 6 May 2013 be set aside and, in its place, order that:

  (a) the proceedings be heard and determined as though instituted under s 476A of the Migration Act;

  (b) a writ of certiorari issue directed to the second respondent quashing the decision made on 23 May 2012;

  (c) a writ of mandamus issue directed to the second respondent requiring a differently constituted Administrative Appeals Tribunal to review according to law the decision of the first respondent to refuse the appellant a protection (class XA) visa; and

  (d) the first respondent pay the appellant's costs of the proceedings in the Federal Court of Australia.

(3) The first respondent pay the appellant's costs in this court.

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DR DAVID ROLPH