FEDERAL COURT OF AUSTRALIA

SYLB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 942

MIGRATION – application for review of decision of Refugee Review Tribunal – internal flight alternative – relocation – whether Tribunal failed to ask itself the right questions

MIGRATION – application for review of decision of Refugee Review Tribunal – particular social group – women who have been victims of sexual violence and their families

Migration Act 1958 (Cth)

Applicant S v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 242 referred to
Craig v South Australia (1995) 184 CLR 163 applied
Hoxha v Secretary of State for the Home Department [2005] UKHL 19 referred to
Karanakaran v Secretary of State for the Home Department [2003] 3 All ER 449 referred to
Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 applied
NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 37 referred to
R v Immigration Appeal Tribunal; Ex parte Jonah [1985] Imm AR 7 referred to
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 applied

JC Hathaway, *The Law of Refugee Status,* Butterworths Pty Ltd, 1991

SYLB AND SYMB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

SAD 38 of 2005

BRANSON J
8 JULY 2005
SYDNEY (HEARD IN ADELAIDE)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **SAD 38 of 2005**

BETWEEN:	**SYLB** **FIRST APPLICANT**
	SYMB **SECOND APPLICANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**

JUDGE: **BRANSON J**

DATE OF ORDER: **8 JULY 2005**

WHERE MADE: **SYDNEY (HEARD IN ADELAIDE)**

THE COURT ORDERS THAT:

1. There be an order in the nature of certiorari quashing the decision of the second respondent handed down on 5 March 2004.
2. There be an order in the nature of mandamus requiring the second respondent to review according to law the decision made by a delegate of the first respondent on 29 January 2002.
3. The first respondent pay the applicants' costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **SAD 38 of 2005**

BETWEEN:	**SYLB** **FIRST APPLICANT**
	SYMB **SECOND APPLICANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**

JUDGE:	**BRANSON J**
DATE:	**8 JULY 2005**
PLACE:	**SYDNEY (HEARD IN ADELAIDE)**

REASONS FOR JUDGMENT

INTRODUCTION

1 This application for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal') requires consideration of the approach that a decision-maker is required to take when determining whether it is reasonable to expect an applicant for a protection visa, who has a well-founded fear of persecution in the part of the applicants' country from which he or she has fled, to relocate to another part of that country.

BACKGROUND FACTS

2 The applicants are a married couple. The reasons for decision of the Tribunal record that they claimed to be citizens of the Federal Republic of Yugoslavia. I note that in February 2003 the Federal Republic of Yugoslavia was renamed Serbia and Montenegro. The applicants are ethnic Albanians. Before travelling to Australia they had fled with their son from the city of Mitrovice in the province of Kosovo to Gjokove in the same province and thereafter to Albania. Apart from a short visit made by the male applicant to Mitrovice to assess circumstances there, they remained as refugees in Albania until they arrived in Australia in March 2001. They lost contact with their son while in Albania. They do not

know if he is alive or dead.

3 On 24 April 2001, with the assistance of a firm of solicitors, the applicants applied for protection visas under the *Migration Act 1958* (Cth) ('the Act'). By his application the male applicant claimed to fear that if he returned to Kosovo in Albania he would be killed as a KLA deserter. He also claimed that if he returned to Kosovo he would be persecuted as a Catholic and as a Kosovar. By her application the female applicant claimed to fear that if she returned to Kosovo or Albania she would suffer persecution as the wife of a KLA deserter. She also claimed that if she returned to Albania she would be persecuted as a Catholic and as a Kosovar.

4 A delegate of the first respondent refused to grant the applicants protection visas. They sought review by the Tribunal of the decision of the delegate.

DECISION OF THE TRIBUNAL

5 Both applicants gave evidence before the Tribunal.

6 The female applicant gave evidence of harassment, including torture and other ill-treatment, of her husband by the Serbian authorities in Kosovo. She said that after being hit on the head on one occasion he has become withdrawn and silent. The female applicant also gave evidence that she was raped by a Serbian soldier. She said that she continued to suffer nightmares about the rape and had not told her husband about it because she did not think that his mental state was strong enough. She did tell her mother-in-law and a nurse after she and her husband had fled from Mitrovice to Gjokove. The Tribunal had difficulty taking evidence from the male applicant apparently because of his neurological condition.

7 Evidence was placed before the Tribunal showing that each of the applicants is in a poor psychological state and suffering from depression. The female applicant has been diagnosed as suffering profound post traumatic stress disorder.

8 The Tribunal accepted that the applicants were living in Mitrovice in 1998 when the fighting between the KLA and the Serbs escalated and Serb forces began committing atrocities against ethnic Albanian civilians. It further accepted that the male applicant was seriously mistreated on a number of occasions and that the female applicant was raped. It was satisfied

that at the time that the applicants fled to Gjokove, and then to Albania, they each had a well-founded fear of persecution in Kosovo.

9 However, it concluded that changed conditions in Kosovo meant that there was not a real chance that the male applicant would be persecuted in Kosovo because he deserted his position in the KLA or that the female applicant would suffer in Kosovo because of her husband's conduct in deserting the KLA.

10 The Tribunal did not accept that either applicant would face persecution in Kosovo for reason of his or her religion.

11 The Tribunal rejected the contention that women in Kosovo constituted a particular social group within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Refugee Convention'). Further, it did not accept that women are persecuted in Kosovo because of their gender. Additionally, while accepting that in Kosovo a severe stigma attaches to victims of rape and their families, the Tribunal did not accept that either women who were raped by Serbian soldiers, or their families, are persecuted there.

12 The Tribunal accepted that the applicants' home is located on the northern side of Mitrovice and that there is a real chance that if they return there they will be persecuted by Serbians who are in a majority there. It was therefore necessary for the Tribunal to consider whether the applicants can access effective protection from persecution in another area of Kosovo.

13 The Tribunal's conclusion on the issue of internal relocation is expressed in its reasons for decision as follows:

> *'The Tribunal notes that the applicant husband was born in Gjokove and lived there until he was 24 years old. The applicants were married in Gjojove* [sic] *and lived there for four years until they moved to Mitrovice in 1979. When they fled Mitrovice they went to Gjokove where they stayed with the applicant husband's family for 3-4 months. The Tribunal understands that members of the applicant husband's family are still living in Gjokove. It appears to the Tribunal that relocation to Gjokove or to some other part of Kosovo would be a reasonable option for the applicants if they felt it was not safe to return to Mitrovice. The Tribunal attempted to discuss this option with the applicant wife, but she refused to countenance the possibility if* [sic] *returning to Kosovo at all. She stated that Serbs were everywhere, and she did not wish to*

live with her husband's family in Gjokove. She did not identify any particular reasons why she did not want to live in Gjokove, apart from the presence of Serbs. The issue of relocation was not addressed in the adviser's post-hearing letter to the Tribunal.

The Tribunal accepts that the applicant wife suffers from PTSD and finds it very distressing to even consider the possibility of having to return to anywhere in Kosovo. However, in most places in Kosovo ethnic Albanians are safe from persecution for a Convention reason. It appears to the Tribunal that it would not be unreasonable to expect the applicants to relocate to Gjokove, which is familiar to them and where they would not be persecuted and have family ties. The Tribunal finds that the applicants could avoid the harm which they fear by relocating within Kosovo.'

14 The Tribunal did not consider it necessary to determine whether the applicants would be granted protection from persecution in Albania. It concluded its reasons for decision by expressing its view that there are strong reasons for considering the grant of visas to the applicants on compassionate grounds.

GROUNDS OF REVIEW

15 The applicants have applied for the issue of writs of certiorari and mandamus on two substantive grounds. First, that the Tribunal failed to ask itself the right questions in considering whether the applicants could relocate to Gjokove (ie in considering the 'internal flight alternative'). Secondly, whether the Tribunal ignored relevant material or asked itself the wrong question in considering whether the female applicant has a well-founded fear of persecution in Kosovo for reason of membership of a particular social group. The relevant social group is contended to be *'women who have been victims of sexual violence in the past'* or a similar group.

POSITION ADOPTED BY THE RESPONDENT

16 At my request counsel for the first respondent obtained formal instructions on two issues. These instructions were obtained and conveyed to the Court in writing in the following terms:

> '
> - *The Minister's position is that the case of* Randhawa v Minister for Immigration, Local Government and Ethnic Affairs *(1994) 52 FCR 437 was correctly decided.*
>
> - *If the Honourable Justice Branson finds (contrary to the submissions of the Respondent) that the Refugee Review Tribunal decision is infected by jurisdictional error in relation to only one of the*

> *Applicants, the Respondent's position is that the Applicants are entitled to the orders sought in paragraphs 1 and 2 of the Amended Application filed on 20 April 2005.'*

CONSIDERATION

Internal Relocation

17 In considering whether the applicants' fear of persecution related to the whole of their country of nationality the Tribunal confined its consideration to the whole of Kosovo. Neither party advanced any submissions touching on this issue and I proceed on the basis that it was appropriate for the Tribunal to confine its consideration of the applicants' internal relocation options in this way.

18 In *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 (*'Randhawa'*) the Full Court of this Court gave consideration to a claim for refugee status made by a person who, although he had a well-founded fear of persecution in his home region, could avail himself of the protection of his country of nationality outside that region. The leading judgment on this issue was written by Black CJ. The Chief Justice at 441 cited with approval the following passage from *The Law of Refugee Status,* JC Hathaway, 1991 at p 133:

> *'A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be at one's own State.'* (Footnotes omitted)

At pp 442-443 the Chief Justice observed:

> *'In the present case the delegate correctly asked whether the appellant's fear was well-founded in relation to his country of nationality, not simply the region in which he lived. Given the humanitarian aims of the Convention this question was not to be approached in a narrow way and in her further analysis, the delegate correctly went on to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.*
>
> *This further question is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not*

> *reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.*
>
> *Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in* R v Immigration Appeal Tribunal; Ex parte Jonah *[1985] Imm AR 7. Professor Hathaway, op cit at p 134, expresses the position thus:*
>
> > *"The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad. It should be restricted in its application for persons who can* genuinely access *domestic protection, and for whom the reality of protection is* meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."* [Original emphasis]
>
> *If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded.'*

19 I note that the circumstances present in *R v Immigration Appeal Tribunal; Ex parte Jonah*, to which the Chief Justice referred in *Randhawa,* were humanitarian circumstances personal to the applicant. To avoid persecution in his country of nationality, the applicant in that case, who was a former senior trade union official, would have had to relocate to a remote family village where he would be separated from his wife and unable to pursue his vocation of thirty years.

20 *Randhawa* was decided before *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 (*'Respondents S152/2003'*). In *Respondents S152/2003* Gleeson CJ, Hayne and Heydon JJ at [19] explained that the protection of which Article 1A(2) of the Refugee Convention speaks is the diplomatic or consular protection extended abroad by a country to its nationals. The principle expounded in *Randhawa* must now be understood in the light of *Respondents S152/2003.*

21 In *NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 37 the Full Court remitted a matter to the Tribunal for determination according to law where the Tribunal had taken the view that an applicant could reasonably relocate to another area of her home country. The Full Court concluded that the Tribunal had not given consideration to the practical realities facing the applicant should she seek to relocate within her home country. The practical realities to which the Full Court referred arose from the personal circumstances of the particular applicant, namely her age, status as a widow, and need for a home and supporting care.

22 I conclude from the above authorities that humanitarian considerations personal to a particular applicant, such as the applicant's marital status and need for care, are relevant to the assessment of whether the applicant can reasonably be expected to relocate within his or her country of nationality. By analogy, it seems to me, factors such as the possible impact of relocation on an applicant's psychiatric health must also be relevant to this assessment.

23 The above conclusion appears consistent with the approach adopted in England and Wales. The Court of Appeal in *Karanakaran v Secretary of State for the Home Department* [2003] 3 All ER 449 held that the cumulative effect of a whole range of considerations, including the applicant's personal characteristics, might have to be taken into account when assessing whether it would be *'unduly harsh'* to expect an applicant to relocate within his or her home country.

24 The issue that the Tribunal was ultimately required to determine was whether the applicants are persons in respect of whom Australia owes protection obligations under the Refugee Convention. Australia will owe protection obligations in respect of each applicant if he or she is a person who:

> *'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his* [or her] *nationality and is unable or, owing to such fear, is unwilling to avail himself* [or herself] *of the protection of that country.'* (Article 1A(2) of the Refugee Convention)

25 The Tribunal was satisfied that the applicants are both persons who, owing to a well-founded fear of persecution for a Convention reason, are outside the country of their nationality. The applicants were thus entitled to protection visas if the Tribunal was also satisfied that they

were at the time of its decision unable, or owing to such fear, unwilling to avail themselves of the protection of that country. As mentioned above, the relevant protection in this respect is the diplomatic or consular protection extended abroad by their country to its nationals.

26 In the case of the female applicant it was plain that she was at the time of the Tribunal's decision unwilling to avail herself of the diplomatic or consular protection extended abroad by her country. The Tribunal was thus required to form a view as to the reason for her unwillingness to avail herself of that protection. The Tribunal did not undertake that enquiry. Rather it gave consideration simply to whether it would be unreasonable to expect the applicants to live in Gjokove, a city in which, as the Tribunal found, they would be safe from persecution for a Convention reason.

27 To determine whether it was unreasonable to expect the female applicant to avail herself of the diplomatic or consular protection of her country on the basis that she would on return to Kosovo relocate to Gjokove the Tribunal was obliged to review the personal circumstances of the female applicant. It was also obliged to consider the circumstances that she could be expected to face should she return with her husband to Kosovo and relocate to Gjokove. Having undertaken these two steps it was then obliged to make a judgment as to whether it would be unreasonable to expect the female applicant, having regard to her personal circumstances and the circumstances that she could be expected to face in Gjokove, to avail herself of the diplomatic or consular protection of her country on the basis that she would relocate to Gjokove.

28 On the material before the Tribunal the personal circumstances of the female applicant include that:

(a) she subjectively fears persecution in Kosovo;
(b) she is suffering from profound post traumatic stress disorder, depression and uterine cancer;
(c) her husband has suffered neurological damage; and
(d) she is apparently receiving support from a small extended family in Australia.

29 As to the circumstances that the female applicant could be expected to face in Gjokove, the Tribunal was satisfied that she could expect to face stigmatisation in Kosovo generally should

it become known that she has been raped by a Serbian soldier. It does not appear that the Tribunal otherwise gave consideration to the circumstances that the female applicant could expect to face should she relocate to Gjokove. In particular it did not give consideration to the health services that might be available to her or the family or other support, if any, that she might receive there. In this respect the Tribunal simply noted that the applicants have *'family ties'* in Gjokove.

30 It does not appear that the Tribunal appreciated the need for it to make a judgment as to whether it would be unreasonable to expect the female applicant, having regard to her personal circumstances and the circumstances that she could be expected to face in Gjokove, to avail herself of the diplomatic or consular protection of her country on the basis that she would relocate to Gjokove.

31 I conclude that the Tribunal misunderstood the legal test to be applied for the purpose of determining whether the female applicant was unwilling, owing to a well-founded fear of persecution, to avail herself of the protection of her country. Its decision is thus affected by jurisdictional error (*Craig v South Australia* (1995) 184 CLR 163). By reason of the position adopted by the respondent (see [16] above) it is unnecessary for me to give separate consideration to whether the decision of the Tribunal is affected by jurisdictional error so far as it concerns the male applicant.

Particular Social Group

32 In the circumstances it is also unnecessary for me to determine whether, as the applicants contend, the Tribunal erred in its consideration of whether the stigma that would attach to the applicants in Kosovo were it to become known that the female applicant had been raped meant that the applicants have, or alternatively that the female applicant has, a well-founded fear of persecution in Kosovo for reason of membership of a particular social group.

33 However, I note that the Tribunal expressed the view that women are not a particular social group in Kosovo. It seems to me that the decision of the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 206 ALR 242 means that it is hard, if not impossible, to imagine a society in which women do not constitute a particular social group within the meaning of Article 1A(2) of the Refugee Convention (see Gleeson CJ, Gummow and Kirby JJ at [36] and McHugh J at [69]). The same may, of course, be said

with respect to men. It is appropriate to record that *Applicant S v Minister for Immigration and Multicultural Affairs* was published after the decision of the Tribunal.

34 I note further that the reasons for decision of the Tribunal are perhaps to be understood as incorporating a finding that the stigma that would attach to the female applicant if she were recognised as a rape victim would of itself be insufficient to constitute *'serious harm'* within the meaning of s 91R of the Act. I express no view on the merit of that finding assuming it to have been made. However, I draw attention to the following observation made by Baroness Hale, with whom Lord Brown of Eaton-Under-Heywood agreed, in *Hoxha v Secretary of State for the Home Department* [2005] UKHL 19 at [36]:

> *'To suffer the insult and indignity of being regarded by one's own community (in Mrs B's words) as "dirty like contaminated" because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape directed against that very community is the sort of cumulative denial of human dignity which to my mind is quite capable of amounting to persecution. Of course the treatment feared has to be sufficiently severe, but the severity of its impact upon the individual is increased by the effects of the past persecution. The victim is punished again and again for something which was not only not her fault but was deliberately persecutory of her, her family and her community."*

CONCLUSION

35 It will be ordered that there be an order in the nature of certiorari quashing the decision of the Tribunal handed down on 5 March 2004. It will be further ordered that there be an order in the nature of mandamus requiring the Tribunal to review according to law the decision made by a delegate of the first respondent on 29 January 2002. The first respondent will be ordered to pay the applicants' costs.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 8 July 2005

Counsel for the Applicant: S Ower

Solicitor for the Applicant: McDonald Steed McGrath

Counsel for the Respondent:	K Tredrea
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	10 June 2005
Date of Judgment:	8 July 2005