FEDERAL COURT OF AUSTRALIA

SBZD v Minister for Immigration and Citizenship [2008] FCA 1236

MIGRATION – visa – protection visa – particular social group – child sex offender or paedophile, or person perceived to be a child sex offender or paedophile – fear of persecution based on risk of serious harm inflicted by vigilante groups – whether Tribunal applied wrong test in determining that fear not well-founded – level of protection satisfying international standards – whether higher level of protection or absolute protection, required

Migration Act 1958 (Cth) ss 5(1), 36, 200

Convention relating to the Status of Refugees done at Geneva on 28 July 1951 Art 1A(2)
Protocol relating to the Status of Refugees done at New York on 31 January 1967

Applicant A99 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 773 (2004) 83 ALD 529 cited
Horvath v Secretary of State for the Home Department [2001] 1 AC 489 cited
Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18 (2004) 222 CLR 1 followed
SBZD v Minister for Immigration & Anor [2007] FMCA 1624 affirmed

SBZD v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
SAD 159 OF 2007

GRAY J
14 AUGUST 2008
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 159 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SBZD** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**GRAY J**
DATE OF ORDER:	**14 AUGUST 2008**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal.

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

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AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**GRAY J**
DATE:	**14 AUGUST 2008**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

The nature and history of the proceeding

1 The essential question in this proceeding is whether the Refugee Review Tribunal ("the Tribunal") applied the wrong test when considering the issue of the availability of state protection in the context of an application for a protection visa. The proceeding is an appeal from a judgment of the Federal Magistrates Court of Australia, which dismissed an application for judicial review of the Tribunal's decision and ordered that the appellant pay the first respondent's costs of that proceeding. The judgment of the learned federal magistrate was delivered, and the orders made, on 11 October 2007. See *SBZD v Minister for Immigration & Anor* [2007] FMCA 1624. The Tribunal's decision, dated 9 May 2007, was to affirm a decision of a delegate of the Minister for Immigration and Multicultural Affairs (now the Minister for Immigration and Citizenship, the first respondent) (in both cases, "the Minister") to refuse to grant to the appellant a protection visa.

2 The appellant is a citizen of the United Kingdom, who arrived in Australia on 29 October 1982. With the benefit of an appropriate visa, he resided lawfully in Australia. During the course of his residence in Australia, he was convicted and sentenced on charges of

sexual offences in relation to his adopted daughter, and was imprisoned. As a result of his conviction and sentence, the appellant had his visa cancelled on character grounds, and was the subject of a deportation order, pursuant to s 200 of the *Migration Act 1958* (Cth) ("the Migration Act"). On 16 September 2005, the appellant applied for a protection visa. The Minister's delegate's decision to refuse to grant the visa was made on 30 January 2006. The appellant applied to the Tribunal to review that decision. On 1 June 2006, the Tribunal affirmed the decision of the Minister's delegate. The appellant sought review of that decision of the Tribunal in the Federal Magistrates Court. On 22 September 2006, by consent, the Federal Magistrates Court set aside the decision and remitted the matter to the Tribunal, to be determined according to law. The decision of the Tribunal the subject of this proceeding followed that remittal.

3 By s 36 of the Migration Act, there is a class of visas to be known as protection visas. A criterion for a protection visa is that the applicant for the visa be 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. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951, and the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967. It is convenient to refer to these two instruments, taken together, as the "Convention". For present purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to a person who is a refugee, as defined in Art 1 of the Convention. By Art 1A(2) of the Convention, a refugee is (relevantly) a person who:

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

4 The substance of the appellant's case before the Tribunal was that he is a member of a particular social group, defined in various ways, but in each case depending on the fact that the offences of which he was convicted are such as to make him a child sex offender or paedophile, or a person perceived to be a child sex offender or paedophile. His fear of persecution is based on the existence in the United Kingdom of vigilante groups, who target paedophiles, or suspected paedophiles, for assault and even death.

The Tribunal's reasons for decision

5 The Tribunal accepted that the appellant had a genuinely held fear of harm if he returned to the United Kingdom. It accepted that his name and photograph had been communicated publicly in the past by the British media, which had portrayed him as a child sex offender or paedophile. The Tribunal therefore accepted that the appellant has some public profile as a child sex offender or paedophile in the United Kingdom. The Tribunal accepted that if the appellant returned to the United Kingdom, there was a real chance that his name and photograph would again be publicised by British media, and that he would be portrayed in such publicity as a child sex offender or paedophile.

6 The Tribunal accepted that if the appellant returned to the United Kingdom in the reasonably foreseeable future, there was a real chance of serious harm to him from vigilante groups by reason of his identification as a known child sex offender or paedophile. The Tribunal accepted that the appellant was a member of a particular social group for the purposes of the Convention. The Tribunal was prepared to accept that, if the appellant returned to the United Kingdom immediately or in the reasonably foreseeable future, there was a real chance that he would face serious harm from various individuals and groups because of his membership of a particular social group, however that group was described.

7 The Tribunal then turned to consider whether the United Kingdom authorities would be able to provide the appellant with effective state protection from the harm that he feared. After referring to passages from the judgments in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18 (2004) 222 CLR 1, the Tribunal said:

> *What is required for the purposes of Article 1A(2) has been described in several ways. The joint judgment in* S152/2003 *refers to the obligation of the state to take "reasonable measures" to protect the lives and safety of its citizens, including "an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system", or a "reasonably effective police force and a reasonably impartial system of justice", indicating that the appropriate level of protection is to be determined by "international standards", such as those considered by the European Court of Human Rights in* Osman v United Kingdom *(1998) 29EHRR 245. Thus, an unwillingness to seek protection will be justified for the purposes of Article 1A(2) where the state fails to meet the level of protection which citizens are entitled to expect according to "international standards".*

8 The Tribunal found that the United Kingdom authorities do not take vigilante attacks against child sex offenders or paedophiles lightly and "aggressively pursue any vigilantes or other citizens who attack child sex offenders or paedophiles." The Tribunal also referred to the fact that a program known as Multi-Agency Public Protection Arrangements ("MAPPA") may provide some additional protection from possible vigilante attacks. The Tribunal then said:

> *the applicant agreed that if attacked by vigilante groups because of his identification as a child sex offender or paedophile, the police in the United Kingdom would come to his assistance but lamented the fact that he could not be provided with 24 hour assistance by the police and that by the time they responded to any request for help he may have already been harmed by vigilante groups. The Tribunal accepts that the applicant's safety cannot be guaranteed on a 24-hour basis by the United Kingdom authorities, however based on the findings in MIMA v Respondent S152/2003 (discussed above), such inability to guarantee 24-protection is not a denial of adequate protection.*

9 The Tribunal expressed its lack of satisfaction that an adequate level of state protection would not be available to the appellant if he returned to the United Kingdom, or that such protection would be denied to the appellant in any way. It expressed its crucial finding in the following terms:

> *the Tribunal finds that if the applicant was attacked by vigilante groups in the United Kingdom he would be able to access assistance from the police force and that any attackers would be actively pursued and upon arrest would be prosecuted for their crimes and further finds that this protection meets international standards. Therefore, the Tribunal finds that if he returned to the United Kingdom now or in the reasonably foreseeable future the applicant would be able to obtain effective state protection from the harm that he fears from non-state actors. The Tribunal also find* [sic] *that the applicant would not be denied such protection for reasons of his membership of a particular social group...Therefore the applicant's fears of harm from individuals and vigilante groups because he is an identified child sex offender or paedophile are not well founded.*

10 The Tribunal then dealt with the appellant's expressed fear of retribution by the brothers of his victim, who live in England and are aware of his crimes. It accepted that the brothers may report the appellant's possible or actual return to the media, but was not satisfied that this would constitute the type of serious harm that would amount to persecution for the purposes of the Convention. It found that there was no evidence that the brothers had

threatened the appellant with any physical harm or other type of harm apart from revealing his name to the media, or that they had taken any steps to harm him in the past. It was therefore not satisfied that there was a real chance that he would suffer any form of serious harm that would amount to persecution from the brothers. In any event, the Tribunal found that he would be able to obtain adequate state protection in accordance with international standards from any harm that he might suffer, and that he would not be denied such protection for any reason, including his membership of a particular social group. The Tribunal then discussed and rejected a submission that the MAPPA system itself amounted to persecution. It also rejected a submission that the appellant would be denied the opportunity to obtain employment, because he would have to disclose his conviction, but found that this was the result of the application of laws appropriate and adapted to achieving a legitimate object of the United Kingdom, being the protection of the general public from child sex offenders or paedophiles whilst providing some protection for child sex offenders or paedophiles, using proportionate means.

11 The Tribunal found that there was no real chance that the appellant would be persecuted for any Convention reason if he returned to the United Kingdom immediately or in the reasonably foreseeable future. It therefore found that he did not have a well-founded fear of persecution for a Convention reason. He was not, therefore, a person to whom Australia has protection obligations under the Convention.

The judgment of the Federal Magistrates Court

12 The federal magistrate dealt with a number of grounds of challenge to the Tribunal's decision. The only one relevant to this appeal was described as the Tribunal's failure to take account of evidence that the British authorities failed to protect members of the appellant's social group. At [35] of his reasons for judgment, the federal magistrate expressed the view that there was no evidence from which the Tribunal could reasonably conclude that the persecution feared by the appellant had an "official quality" within the United Kingdom. At [36]-[46], his Honour held that the Tribunal had to consider the level of protection available to child sex offenders in the United Kingdom and, in particular, whether vigilantes are beyond the control of the British authorities, so that the British Government would be unable to protect the appellant from the possibility of persecution to an unacceptable degree. His Honour recognised that some persons with the same attributes as the appellant had been

subjected to serious harm in the United Kingdom, solely because of those attributes, so that the state had failed to protect such persons. At [37], he posed the question "Does the possibility of this harm alone render the applicant a refugee?"

13 At [38]-[42], his Honour analysed *S152/2003*, quoting first from the judgment of McHugh J and then from that of the majority.

14 The federal magistrate's conclusions on the point were expressed at [43]-[46]:

> *In this case, I am satisfied that the RRT did consider whether the British authorities were capable of providing the applicant with the required level of protection, which was not an absolute guarantee of safety. This guarantee not being realistically achievable, short of detaining the applicant in the United Kingdom.*
>
> *In performing this assessment the RRT looked at the number of attacks concerned and the response the British authorities had made to them. The RRT found that the British police did respond to complaints of attack by sex offenders living in the community. It also found that the British criminal justice system had prosecuted and convicted the perpetrators of such violence.*
>
> *The RRT further found that, through the MAPPA system, the British Authorities would make a proper assessment of the level of threat to the applicant and provide him with a level of protection commensurate to that threat, which though not absolute was likely to be adequate in the circumstances.*
>
> *On the basis of this assessment, the RRT did not believe that the current situation in the United Kingdom was such that an adequate level of state protection would not be available to the applicant, if he was returned to the United Kingdom. I can find no discernable error in how the RRT conducted this assessment and the matters it took into account in reaching it. They are matters for evidence, which are in the sole domain of the RRT.*

The appeal

15 The appellant's original notice of appeal was obviously drawn without the benefit of legal advice, attempted to agitate issues of fact, and was accompanied by an affidavit. Pursuant to the scheme in O 80 of the *Federal Court Rules*, the appellant was referred to counsel for legal assistance. Amended grounds of appeal were filed, and the appeal proceeded on one of those grounds of appeal, with the consent of counsel for the Minister.

16 That ground is that the Tribunal failed to apply the correct legal test in ascertaining whether the appellant satisfied the requirement that his unwillingness to avail himself of the protection of the United Kingdom was the result of a well-founded fear of being persecuted. The argument put on behalf of the appellant rested heavily on the proposition that what the majority said in *S152/2003* does not constitute a definitive statement of the appropriate test in circumstances such as those faced by the appellant, and needs to be read in the context of the case with which the High Court was dealing. Rather, it was suggested that the correct test was stated by McHugh J in that case. To deal with this submission, it is necessary to analyse *S152/2003*.

17 That case involved applications by a couple of Ukrainian nationals for protection visas, on the basis that the husband, who was a Jehovah's witness, had a well-founded fear of persecution in Ukraine for the reason of his religion. Before the Tribunal, the case had been that the Government of Ukraine, directly and through the media it controlled, encouraged persecution of Jehovah's witnesses. The Tribunal rejected that proposition. It was also said that the police condoned violence towards Jehovah's witnesses. The Tribunal did not accept that. The Tribunal made specific findings that it was not satisfied that the Ukrainian authorities were unable or unwilling to protect citizens from violence based on antagonism of the kind involved. An application for judicial review in this Court was rejected. On appeal to the Full Court of this Court, an issue emerged that had not been raised at first instance. The Full Court held that the Tribunal was entitled to find that there was no evidence that the Ukrainian authorities encouraged persecution of Jehovah's witnesses, but that the Tribunal had failed to consider whether Ukraine had the ability, in a practical sense, to provide protection. On this ground, the Full Court allowed the appeal and set aside the Tribunal's decision. The High Court allowed an appeal from the judgment of the Full Court.

18 The following passage appears in the judgment of the majority, Gleeson CJ, Hayne and Heydon JJ, at [25]-[26]:

> *The first respondent is outside his country of nationality owing to a fear resulting from a violent response of some Ukrainian citizens to his religious proselytising. The Tribunal's conclusion that the violence was random and uncoordinated was not merely an assertion. It was a finding based on the evidence, and it was directly relevant to the case the first respondent was seeking to make, which was that the violence was orchestrated and State-sponsored. The first respondent did not set out to demonstrate that his*

> *country was out of control. On the contrary, he was claiming that the government was in control, and was using its power and influence to harm people like him. The new case, raised for the first time in the Full Court, has to be related to the terms of Art 1A(2). What kind of inability to protect a person such as the first respondent from harm of the kind he has suffered would justify a conclusion that he is a victim of persecution and that it is owing to a well-founded fear of persecution that, being outside his country, he is unwilling to avail himself of his country's protection?*
>
> *No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian State was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the Tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.*

19 At [27], their Honours referred to the absence of any "cause to conclude that there was any failure of State protection in the sense of a failure to meet the standards of protection required by international standards". At [28], their Honours referred to the nature of the case put to the Tribunal and to the Full Court's conclusion as to that case and continued:

> *The only other basis upon which the first respondent's unwillingness to seek the protection of the Ukrainian Government could be justified, and treated as satisfying that element of Art 1A(2), would be that Ukraine did not provide its citizens with the level of State protection required by international standards. It is not necessary in this case to consider what those standards might require or how they would be ascertained. There was no evidence before the Tribunal to support a conclusion that Ukraine did not provide its citizens with the level of State protection required by such standards. The question of Ukraine's ability to protect the first respondent, in the context of the requirements of Art 1A(2), was not overlooked by the Tribunal. Because of the way in which the first respondent put his claim, it was not a matter that received, or required, lengthy discussion in the Tribunal's reasons. If the Full Court contemplated that the Tribunal, in assessing the justification for unwillingness to seek protection, should have considered, not merely whether the Ukrainian Government provided a reasonably effective police force and a reasonably impartial system of justice, but also whether it could guarantee the first respondent's safety to the extent that he need have no fear of further harm, then it was in error. A person living inside or outside his or her country of nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to provide an*

> *assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the State.*

20 In a separate judgment, McHugh J discussed at length the requirements of a well-founded fear of persecution. After dealing with state persecution, and state condemnation of persecution by others, his Honour said at [77]:

> *The case that presents most difficulty is one where harm to individuals for a Convention reason may come from any one or more of a widely dispersed group of individuals and the State is willing but is unable to prevent much of that harm from occurring. In societies divided by strongly held ethnic or religious views, it commonly happens that members of one group have a real chance of suffering harm – often violent harm – because of the pervasive but random acts of members of another group. Such harm occurs although the State makes every effort to prevent it. In such cases, it would be a misuse of language to say that the fear of persecution is not well-founded because the State has "a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected".*

21 The quotation is from *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 510. At [78], McHugh J said:

> *If there is a real chance that the asylum seeker will be persecuted for a Convention reason, the fear of persecution is well-founded irrespective of whether law enforcement systems do or do not operate within the State.*

22 At [79], his Honour pointed out that an asylum seeker would have to show more than that persons whose circumstances were similar were being persecuted. The asylum seeker would have to show that there is "a real chance that he or she will be one of the victims of that persecution." This might be done either by showing that the particular person has a greater chance of harm than other persons, or to show that a very high percentage of such persons are persecuted. At [83], his Honour said:

> *once the asylum seeker is able to show that there is a real chance that he or she will be persecuted, refugee status cannot be denied merely because the*

> *State and its agencies have taken all reasonable steps to eliminate the risk. Nothing in the Convention supports such a conclusion.*

23 The remaining member of the High Court in *S152/2003*, Kirby J, discussed the issues but allowed the appeal without expressing a concluded view on the differences between the majority judgment and that of McHugh J. See the judgment of Kirby J at [111]-[112].

24 This examination of *S152/2003* demonstrates that it is impossible to uphold the contention, put on behalf of the appellant in the present case, that the majority judgment in that case cannot be taken as an expression of the authoritative test to apply when the issue is whether the country of nationality of an applicant for a protection visa alleges that that country lacks the ability effectively to protect him or her from the harmful actions of non-state antagonists. By the time the case reached the High Court, it was a case about the adequacy of state protection. It had become such a case because the Full Court had held that the Tribunal had failed to deal with the ability of the Ukrainian Government to prevent future harm. The majority of the High Court allowed the appeal on the basis that the Tribunal had no evidence before it that would have justified a finding that the necessary state machinery of Ukraine fell below the required standard for protection of its citizens. The majority expressed this norm by reference to international standards, and made it clear that there is no requirement that a state provide absolute protection for its citizens. In the light of what the majority said, the view of McHugh J cannot be regarded as authoritative. In *Applicant A99 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 773 (2004) 83 ALD 529 at [35]-[42], Mansfield J analysed *S152/2003*. It is clear that his Honour thought that the view expressed by the majority was authoritative. I respectfully share his Honour's view. Even if what the majority said could be characterised technically as obiter, it would be necessary to characterise the view of McHugh J in the same way. It would be a bold step for a judge of this Court, or a federal magistrate, and especially a Tribunal member, to ignore what the majority said in favour of adopting the view of McHugh J.

25 There can be no doubt that the Tribunal in the present case applied the test expressed by the majority in *S152/2003*. It specifically found that the appropriate level of protection was to be determined by international standards, and that the level of protection in the United Kingdom meets international standards. There was evidence before the Tribunal to justify this finding. Once it was reached, the Tribunal was bound to decide, as it did, that the

appellant's fear of persecution was not well-founded. Even if in fact the appellant might come to harm at the hands of vigilantes in the United Kingdom, his unwillingness to avail himself of the protection of that country because the protection would not be absolute would not be sufficient to bring him within Art 1A(2) of the Convention.

26 The appellant has therefore failed to make good the only ground on which this appeal was conducted.

Conclusion

27 For these reasons, the appeal must be dismissed. No reason appears, and none was suggested, why the ordinary principle that costs follow the event should not be applied. Accordingly, the appellant will be ordered to pay the costs of the first respondent of the appeal.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 14 August 2008

Counsel for the Appellant:	A Macdonald
Counsel for the Respondents:	C D Bleby
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	28 February 2008
Date of Judgment:	14 August 2008