FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZCWF [2007] FCAFC 155

MIGRATION – application for a protection visa – Albanian blood feud – particular social group comprised of applicant's family – s 91S *Migration Act 1958* (Cth) – Tribunal did not explicitly address criteria for application of s 91S – death of family member in exchange of fire – single incident may in context of blood feud constitute persecution – persecution not related to Convention reason – disregard persecution under s 91S

WORDS AND PHRASES – "*persecution*" "*systemic and discriminatory conduct*"

Migration Act 1958 (Cth) ss 91R, 91S
Migration Legislation Amendment Act (No 6) 2001 (Cth)

Convention Relating to the Status of Refugees done at Geneva 28 July 1951 and the Protocol relating thereto done at New York on 31 January 1967 Art 1A

Abdalla v Minister for Immigration and Multicultural Affairs (1998) 51 ALD 11 cited
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 applied
Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387 applied
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 discussed
Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 discussed
Mohamed v Minister for Immigration and Multicultural Affairs (1998) 83 FCR 234 cited
Murugasu v Minister for Immigration and Ethnic Affairs [1987] FCA 414 discussed
SCAL v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 301 cited
SDAR v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 124 FCR 436 cited
STCB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 266 cited
STCB v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 231 ALR 556 applied
STYB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 295 cited

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZCWF AND REFUGEE REVIEW TRIBUNAL
NSD709 OF 2007

GYLES, STONE & ALLSOP JJ
27 SEPTEMBER 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD709 OF 2007**

ON APPEAL FROM A JUDGE OF THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZCWF** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**GYLES, STONE & ALLSOP JJ**
DATE OF ORDER:	**27 SEPTEMBER 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrate made on 5 April 2007 be set aside.
3. The application for review of the decision of the Refugee Review Tribunal be dismissed with costs.
4. The first respondent to pay the appellant'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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JUDGES:	**GYLES, STONE & ALLSOP JJ**
DATE:	**27 SEPTEMBER 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal by the Minister for Immigration & Citizenship from a decision of a Federal Magistrate setting aside a decision of the second respondent, the Refugee Review Tribunal; [2007] FMCA 444. On 29 September 2006 the Tribunal rejected the first respondent's application for a protection visa and, in so doing, affirmed a decision to that effect made by a delegate of the Minister.

2 The first respondent claims to be a citizen of Albania whose family has become involved in a blood feud with another Albanian family. The blood feud started with the accidental killing in 1998 of the first respondent's brother by a member of that other family. Almost two years later, having resisted attempts to reconcile him with the other family, the first respondent's father went to the other family's home armed with an automatic shotgun and intent on revenge. In the ensuing interchange of fire three members of that family (including the killer of the first respondent's brother) were killed along with the first respondent's father.

3 The first respondent claimed that, as a result of this incident, he was liable to be killed by members of the other family. He claimed that his two surviving brothers had also left Albania. One brother had gone to Greece and the other to New York.

4 The first respondent based his claim for protection on the basis that he feared persecution as a member of a particular social group. Initially he identified that social group as his family. Subsequently he described it as citizens of Albania who are subject to the customary law known as the Kanun or the Code Lekë Dukagjini. The first respondent claimed that the Albanian authorities were powerless to protect him.

The Tribunal's decision

5 The Tribunal accepted the first respondent had been living in northern Albania and that the Kanun commonly applies in agricultural and regional parts of northern Albania. The Tribunal accepted that, with the collapse of the Communist regime in Albania, the Kanun had re-emerged. It accepted that blood feuds are a recognised part of the Kanun and added:

> *The rules of a blood feud require a male member of one family to be killed as a matter of honour where a member of that family had been involved in the killing of a member of another family. Under the blood feud, the family of the victim is to "take blood" by seeking revenge against any male relative on the other side.*

6 The Tribunal did not accept that Albanian citizens who are subject to the Kanun form a particular social group within the meaning of Article 1A(2) of the *Convention Relating to the Status of Refugees* done at Geneva 28 July 1951 and the Protocol relating thereto done at New York on 31 January 1967 Art 1A (*Refugees Convention*). It observed:

> *The potential social group of Albanian citizens who are subject to the laws of the Kanun could reasonably be said to comprise at least a third of the population of Albania being northern Albania. I do not accept that such a group of people could be said to be a united, cognisable or distinguishable from the rest of Albanian society. The only attribute common to all members of the group is the shared fear of persecution from another family group.*

The Tribunal continued:

> *Nor do I accept that the "citizens of Albania who are subject to customary feudal law" suffer harm for their membership of this group. Their fear of harm is because of what a family member has done and not for the membership of the group. Their group does not possess characteristics that distinguish it from society at large. In the case of people involved in a blood feud in Albania there is no evidence that they share common beliefs, concerns,*

> *interests, or gaols* [sic] *and the like. Their only common trait is that they fear being harmed by a member of another family.*

7 The Tribunal accepted that the first respondent's family constituted a particular social group but held that the events on which the first respondent relied as giving rise to his fear of persecution as a member of his family were not motivated by Convention related reasons. In summary the Tribunal held that any violence that might in the future be directed at the first respondent by the other family would be motivated by revenge because he is the son of the person who murdered three members of their family. It therefore concluded that s 91S of the *Migration Act 1958* (Cth) applied and required it to disregard those events.

8 Relying on independent information about Albania and the "generally amicable relationship among religions" there, the Tribunal also rejected the first respondent's claim to fear harm because his family is Christian and the other family is Muslim. In particular the Tribunal rejected the first respondent's claim that attempts to reconcile the two families had failed because of their religious differences.

Section 91S of the Migration Act

9 Section 91S was inserted into the Act on 1 October 2001 by the *Migration Legislation Amendment Act (No 6) 2001* (Cth). It provides that the decision maker must:

> *For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:*
>
> *(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and*
>
> *(b) disregard any fear of persecution, or any persecution, that:*
>
> *(i) the first person has ever experienced; or*
>
> *(ii) any other member or former member (whether alive or dead) of the family has ever experienced;*
>
> *where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.*

Review in the Federal Magistrates Court

10 The first respondent applied to the Federal Magistrates Court for judicial review of the Tribunal's decision. The Federal Magistrate found that in applying s 91S the Tribunal had erred in two respects.

11 First, his Honour found that the Tribunal had not correctly asked itself the threshold questions required by s 91S, namely whether the first respondent's father was a person who experienced persecution or fear of persecution for a non-Convention reason and whether the first respondent's own fear would not exist if his father had not experienced persecution or fear of persecution. The Federal Magistrate expressed the problems he found in the Tribunal's approach as follows:

> *The difficulty in this case is that the persecution feared by the applicant appears to arise out of the conduct of a person who probably never feared persecution himself. That is to say, the applicant's father was killed in the attack on the* [other] *family and may never have had the opportunity to be persecuted or to fear persecution as a result of his acts. Although s 91S(a) contemplates the possibility that the person whose persecution or fear of persecution leads to other family members' derivative claims may be dead, that test still requires that that first person himself or herself experienced persecution or fear of persecution for a non-Convention reason.*

12 The Federal Magistrate was of the opinion that there was no evidence that the first respondent's father was ever persecuted or ever had a fear of persecution. Rather his Honour felt that such evidence as was before him tended to the contrary "if only because his own death was so close in time to his own crimes". His Honour concluded that in the absence of such evidence "the Tribunal could not conclude that the test in s 91S(a) had been satisfied and if that test was not satisfied then the section does not apply to the applicant".

13 The Federal Magistrate also found that, although the Tribunal discussed whether the Albanian state could protect the first respondent, it failed to address the issue correctly and had thus failed to exercise its jurisdiction. The problem his Honour found here was that the Tribunal had not addressed the issues raised by the definition in s 91R, that is whether that which the first respondent feared involved "serious harm" within the meaning of s 91R(2).

14 On the basis of these two errors the Federal Magistrate found that the Tribunal had fallen into jurisdictional error. His Honour set aside the Tribunal's decision and remitted the

matter to the Tribunal for determination according to law.

This appeal

15 The appellant takes issue with the Federal Magistrate's interpretation of s 91S and submits that the section applies to the circumstances of this case. The impact of s 91S on claims arising from Albanian blood feuds has been considered by this Court in a number of cases; see for example *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 301; *SDAR v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 436; *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266 and *STYB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 295. The issue has most recently been considered by the High Court in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 556 where the Court dismissed an appeal from the decision of the Full Federal Court; *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266. All of these cases concern applicants for protection visas who claim to have a well-founded fear of persecution arising in the context of a blood feud. All have been unsuccessful.

16 In many of these cases an issue was whether the relevant applicant could base a claim for protection on being a member of a particular social group comprising a wider group than the applicant's own family such as "Albanian citizens subject to the Kanun" or "persons subject to a blood feud". Such formulations have been rejected at every level because they rely on the shared fear of persecution as the defining attribute of the class; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 263 per McHugh J; *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 400-401. In the main these attempts to identify a wider group than the applicant's family as the particular social group have been a response to the impact of s 91S.

17 Before the Tribunal the first respondent relied on being a member of such a class. Consistent with these authorities the Tribunal rejected this claim as did the Federal Magistrate. In this appeal the first respondent did not press this claim but relied on being a member of a particular social group comprised of his family.

18 In all of the cases mentioned in [15], a member of the applicant's family had killed a member of another family thus precipitating a blood feud with a consequent fear of persecution. The member of the applicant's family whose actions precipitated the blood feud did not fear persecution for any reason mentioned in Art 1A(2) of the *Refugees Convention* but because that person had committed a criminal act and could anticipate that the other family would seek revenge. For this reason, pursuant to s 91S(a), that person's persecution or fear of persecution had to be disregarded. In addition, pursuant to s 91S(b), the applicant's derivative fear also had to be disregarded and consequently the application for a protection visa was not successful.

19 The first respondent contends that the critical difference in this case is that, in reaching its decision, the Tribunal did not address the essential questions in relation to s 91S(a) identified by the High Court in *STCB.* Those questions set out in [26] of *STCB* and approved in [29] are:

> *(a) whether any other member or former member of the appellant's family had been persecuted in the past or had a fear of persecution;*
> *(b) if so, what the reason for that persecution was; and*
> *(c) whether the reason was mentioned in Art 1A(2) of the Convention.*

20 It is true that the Tribunal here did not formally set out and answer these questions however, as *STCB* shows, it is not necessary that the Tribunal do so.

21 In *STCB* the appellant feared persecution because his grandfather had killed a member of the Paja family. He submitted that the Tribunal had erred in not explicitly addressing each of these questions. In their joint judgment, Gleeson CJ, Gummow, Callinan and Heydon JJ held that the Tribunal had done so "to the extent necessary" and, at [30], explained as follows:

> *When the tribunal accepted the appellant's "claim that his family is involved in a blood feud with the Paja family", it accepted that at least the following members of the appellant's family feared persecution by the Paja family – the appellant's grandfather, the appellant's father, the appellant's brother and the appellant himself. As indicated earlier, this proposition was inherent in the appellant's claim and in what he told the tribunal. So far as the appellant was suggesting that other members of his family feared persecution, that suggestion was also accepted by the tribunal when it made that finding.*

Their Honours continued:

> *The appellant criticised the Full Court for using similar reasoning in relying*

> *on matters inherent in the appellant's claim in relation to the vulnerability of the appellant's grandfather, and submitted that this was an attempt to remedy the defects in the tribunal's decision by constructing its own findings of fact to fill the vacuum left by the failure of the tribunal to make them. This is not a sound criticism. An appellate court which elucidates, by analysis, the findings of another body in the light of unchallenged factual averments by a claimant is not "constructing" its own different findings.*

22 The "unchallenged factual averments" in the first respondent's claims include that his family was involved with a blood feud with the other family. That blood feud began when the first respondent's brother was accidentally killed by a member of the other family. This is shown by the evidence of the first respondent, that after his brother's death, respected older men in their community tried to negotiate with his father and dissuade him from taking revenge. It was also supported by the first respondent's evidence that prior to the killing of his brother there was no problem between the two families. The continuation of the feud after the death of the father was supported by certificates from the National Agreement Mission provided by the first respondent and by the first respondent's evidence that members of the other family have stated that they intend to kill a member of his family.

23 In these circumstances it is hardly surprising that the first respondent has a subjective fear that, as a member of his father's family he is likely to be killed should he return to Albania. The Tribunal accepted that the first respondent had such a fear but held that the fear was not related to a Convention reason but to the revenge killing of his father. The Tribunal was explicit on the point:

> *I am satisfied that the motivation for any hostile action that may in the future be directed at the applicant by the* [other] *family would be an act of revenge against his father's family, because he is the son* [of] *the person who murdered three of their family.*

24 At the hearing of the appeal Counsel for the first respondent conceded that on this finding s 91S(b) was satisfied and therefore, if s 91S(a) were also satisfied, the Tribunal would be required to disregard evidence of the first respondent's fear. The first respondent claims, however, that the Tribunal failed to address the question whether "any other member or former member of the applicant's family [has] been persecuted or possessed a fear of persecution". He submits that the circumstances here are unusual and distinguish the present circumstances from those considered in previous cases. On the evidence before the Tribunal it was not possible to answer this question affirmatively and had the Tribunal considered the

issue it must have concluded that the first respondent's father was not persecuted and had not been in fear of persecution at all.

25 In this case there is only one instance of conduct that could be considered as persecution of a member of the first respondent's family, namely the killing of the first respondent's father. The earlier shooting of the first respondent's brother is accepted on both sides as accidental. Although it began the blood feud it is not claimed that this killing was persecution.

26 Was the killing of the father persecution? Although persecution may more commonly be manifested by a series of incidents, it is generally accepted that if the harm complained of is sufficiently grave, a single incident may constitute persecution; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430, per McHugh J ("a single act of oppression may suffice"). The first respondent claims that even if in other contexts this is a proper use of the term "persecution", s 91R(1) of the Act must govern the use of the term for present purposes. Section 91R provides:

> *For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
> *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
> *(b) the persecution involves serious harm to the person; and*
> *(c) the persecution involves systematic and discriminatory conduct.*

27 The first respondent submitted that applying this section, there is no evidence that the father ever suffered persecution or a fear of persecution and therefore no basis on which s 91S applies. This submission involves two assertions: (a) that even if the killing of the father involved serious harm, there was no "systematic and discriminatory conduct" as required by s 91R(c); and (b) there was no evidence before the Tribunal that the father had any fear of persecution. In particular, the first respondent submits, there is no evidence that, before the day on which the father went to the other family's home seeking revenge, he was subjected to any form of harassment or oppressive treatment or any systematic or discriminatory conduct. There was no evidence of any threat to him from the other family. It follows, in the first respondent's submission, that the father could not have any fear of persecution. In any event, the first respondent submits that neither of these issues was

addressed by the Tribunal and its failure to enquire into and reach a conclusion on these issues was a jurisdictional error as found by the Federal Magistrate.

28 The written submissions for the first respondent address the meaning of persecution and quote the *The Macquarie Concise Dictionary* definition of the term as "to pursue with harassing or oppressive treatment; harass persistently". They also refer to the statement made in Hathaway, *The Law of Refugee Status* 1991 at 102 that in demonstrating persecution there is a "need to show a sustained or systemic risk, rather than just an isolated incident of harm". The first respondent submits that there was no evidence before the Tribunal that the father was subjected to harassment or sustained or systemic risk and therefore that he had not been subjected to persecution.

29 An early reference to the notion of "systematic conduct" is found in *Murugasu v Minister for Immigration and Ethnic Affairs* [1987] FCA 414 where Wilcox J said at 13:

> *The word "persecuted" suggests a course of systematic conduct aimed at an individual or at a group of people.*

30 In *Chan,* McHugh J drew on Wilcox J's observation and immediately following his observation that a single act of oppression may constitute persecution, said,

> *As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention.*

31 In *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 30 McHugh J clarified this statement:

> *The use of the term "systematic conduct" has proved unfortunate. Tribunals have read it as meaning that there can be no persecution for the purpose of the Convention unless there was a systematic course of conduct by the oppressor. That is not what I meant by using that expression in* Chan. *I used it as a synonym for non-random, and I think that in* Murugasu *Wilcox J intended to use it in the same way.*

At 30-31 of his reasons McHugh J referred with approval to other discussions of the term that also clarified the notion in the same way; see *Mohamed v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 234 at 239 and *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11. His Honour concluded at 32:

> *It is an error to suggest that the use of the expression "systematic conduct" in*

> *either* Murugasu or Chan *was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War.*

32 Section 91R was inserted into the Act at the same time as s 91S; see [9] above. Although the discussions of systematic conduct in *Chan* and *Haji Ibrahim* and others predate s 91R in using the phrase "systematic and discriminatory conduct" the drafters of the section must be assumed to have been aware of and to have adopted the meaning that the courts attributed to the notion of systematic conduct. Certainly, there is no indication in the relevant explanatory memorandum of an intention to attribute a different meaning to the notion.

33 In this case evidence of systematic and discriminatory conduct is found in the first respondent's own claim that a blood feud had arisen between the two families. Like the tribunal in *STCB* the Tribunal here accepted this claim. A blood feud of its very nature involves threats and counter-threats as each family exacts its revenge; it involves systematic and discriminatory targeting of each family. Given the background information concerning blood feuds and the father's rejection of attempts to reconcile the two families it would be reasonable to conclude that the father accepted that his family honour required him to seek revenge and that he would have known that a consequence of his doing so would be the other family seeking its own revenge. The first respondent himself says he pointed this out to his father in his unsuccessful attempts to encourage him make peace with the other family.

34 It goes without saying that the killing of the father involved serious harm. It was a **single** incident but it was not an **isolated** (or random) incident. It must be viewed in the context of the surrounding circumstances, namely the blood feud between the two families.

35 The only evidence before the Tribunal on the actual killing of the father is that he was killed in an exchange of gunfire between him and the other family on whom he was seeking revenge. It is worth noting that there is no evidence that the bullet that killed the father came from a weapon of the other family rather than, for instance, from his own weapon. It is, however, a reasonable assumption and one that the Tribunal made and was entitled to make. Similarly it was reasonable for the Tribunal to assume in all of the circumstances that the serious harm to the father involved systematic and discriminatory conduct. In those circumstances it would also be reasonable for the Tribunal to assume that the father suffered fear of persecution before he was killed.

36 The father was not, however, killed for a Convention reason. He was killed in the context of an ongoing blood feud, the immediate precipitating factor being his attack on members of the other family. That being so s 91S required that the persecution of the father be disregarded in determining the first respondent's application for a protection visa. Similarly the section required the first respondent's fear of persecution to be disregarded. For similar reasons any fear of persecution arising from the death of the father that the first respondent's brothers may have had must also be disregarded.

37 Though the language of s 91R is not without its difficulty, in the light of the reasoning of Merkel J in *SDAR v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 436 in particular at 443 [19], approved by the High Court in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 231 ALR 556 at 563 [31]-[32], we do not think that the resolution of this case can be decided otherwise than as we propose.

38 For these reasons the appeal should be allowed. The orders made by the Federal Magistrate should be set aside and the application for review of the decision of the Tribunal should be dismissed with costs. The appellant should have his costs of this appeal.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles, Stone and Allsop.

Associate:

Dated: 27 September 2007

Counsel for the Appellant:	C Gunst QC, M Roder
Solicitor for the Appellant:	Sparke Helmore
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Solicitor for the First Respondent:	Mallesons Stephen Jaques
Date of Hearing:	14 August 2007
Date of Judgment:	27 September 2007