FEDERAL COURT OF AUSTRALIA

SZDWR v Minister For Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 36

IMMIGRATION – judicial review – protection visa – appellants claimed fear of persecution by Liberation Tigers of Tamil Eelam ("LTTE") – claim of fear of persecution of Sri Lankan on ground of race (Tamil) – inadequate police protection – refugee Review Tribunal found appellants could be protected by state authorities and did not have well-founded fear of persecution – whether leave to raise new ground of appeal should be granted – persecution by "rogue" state officials – police inaction – Sri Lankans fearing LTTE and extortion by police – appellants subjected to instances of violence by the LTTE – avenues of protection which are available to the appellants

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 cited
H v Minister for Immigration [2000] FCA 1348 cited
Horvath v Secretary of State for the Home Department [2001] 1 AC 489 referred to
Minister for Immigration and Multicultural Affairs v Kandasamy [2000] FCA 67 cited
Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003 [2004] 205 ALR 487 cited
NAWN v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 328 affirmed
Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891 followed
SZDWR & Anor v Minister for Immigration & Anor [2005] FMCA 860 cited
VRAW v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1133 not followed

JC Hathaway, *The Law of Refugee Status*, Butterworths, Canada, 1991

SZDWR AND SZDWS v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS and REFUGEE REVIEW TRIBUNAL
NSD 1166 OF 2005

HEEREY, KIEFEL & BENNETT JJ
21 MARCH 2006
MELBOURNE (HEARD IN SYDNEY)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1166 OF 2005**

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

BETWEEN:	**SZDWR** **FIRST APPELLANT**
	SZDWS **SECOND APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**

JUDGES:	**HEEREY, KIEFEL, BENNETT JJ**
DATE OF ORDER:	**21 MARCH 2006**
WHERE MADE:	**MELBOURNE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appellants have leave to amend their Notice of Appeal in terms of grounds 4(a) and 5 as referred to in the reasons of the Court.

2. The appeal be dismissed.

3. The appellants pay the respondents' 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:	**HEEREY, KIEFEL, BENNETT JJ**
DATE:	**21 MARCH 2006**
PLACE:	**MELBOURNE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

THE COURT:

1 The appellants are husband and wife and citizens of Sri Lanka. The first appellant is of Tamil ethnicity. Their application for a protection visa was refused by the Minister's delegate and affirmed by the Refugee Review Tribunal ('the Tribunal') (No 3/47380). A Federal Magistrate dismissed an application to set that decision aside: *SZDWR & Anor v Minister for Immigration & Anor* [2005] FMCA 860.

THE TRIBUNAL'S DECISION

2 The first appellant claimed that he feared persecution from the Liberation Tigers of Tamil Eelam ('the LTTE'). He recounted a history of harassment, assaults and threats of death by the LTTE directed to him and his wife. This course of action appears to have commenced after the appellants assisted the police in investigating the murder of their son. He was placed in a difficult situation when the police and security forces used him to assist in identifying

LTTE militants and this led to further assaults and threats by the members of the organisation and neighbours who supported it. On another occasion he was arrested and interrogated by the police about his support for the LTTE. The LTTE repeatedly demanded money from him and threatened to kill him and his wife if they did not pay. As a result they moved out of their house, leaving the keys of the house with a relative. The relative later contacted him and advised that members of the LTTE had demanded the keys to his house.

3 The first appellant told the Tribunal that he reported this matter to the police and the army. The police interrogated him about his involvement with the LTTE and accused him of collecting money for it. A police officer said he had information about his involvement from the army and that he should hand over the keys to the appellant's house together with a written note saying that he had given the house to the police to use. The police also demanded a bribe whilst threatening the first appellant with prison. At the same time the appellants received letters from the LTTE demanding that the first appellant present himself at their office. They decided to flee from Sri Lanka at this time. They feared persecution from the LTTE should they return to Sir Lanka.

4 The first appellant had sought other assistance and protection from the actions of the LTTE. He wrote to the President of Sri Lanka, whose Secretary forwarded the letter on to the Ministry of Defence. The Tribunal asked the first appellant whether he had reported the extortion by the police and he said that it was very difficult to take action against the police. The Tribunal also identified a number of avenues of protection which were available to the appellants, including an approach to the Human Rights Commission. He said that he was told to take his letter to a particular officer. That person was not there when the appellant attended at the Commission and he did not take the matter any further.

5 The Tribunal understood the first appellant to claim a fear of persecution by both the LTTE and the Sri Lankan police. The LTTE was alleged to have persecuted him because he is Tamil and because its members imputed to him a political opinion of opposition to the LTTE. The police had attempted to extort money from him and persecuted him because he was a Tamil and a supporter of the LTTE, he claimed. The Tribunal did not consider it likely that the police held any particular belief about the first appellant's political opinions or ethnicity, but rather that he was a convenient target for extortion. It did not go on to make findings about this because it was satisfied that the appellants were able to access effective State

protection for the illegal activities of the police and of the LTTE. In this regard it had referred to a body of Country Information. That information showed that there were various avenues open to citizens to obtain protection from extortion by the LTTE and by corrupt police and to challenge the failure of the police to perform their duty to investigate his complaint against the LTTE. Access to justice in Sri Lanka is effective, albeit slow and inefficient, it found. There were other non-Court avenues of protection, such as the Human Rights Commission. The information about the Commission, which the Tribunal had referred to earlier in its reasons, was that it had power to investigate infringement of fundamental rights and to recommend protection. The information had also identified a Committee which enquires into harassment by the police.

6 The Tribunal was not satisfied that had the first appellant sought redress and protection from the harm inflicted by the LTTE and the corrupt police, that the government was unable to provide such protection or that it would have refused or declined to provide protection. The police officer had acted illegally, but nothing in the independent evidence suggested that the Sri Lankan government encourages, condones or is unable to prevent the commission of crimes by police officers against Sri Lankan citizens. There are a number of avenues of redress for illegal acts of police officers, but the first appellant had not availed himself of them. The Tribunal was not satisfied that the first appellant would have been refused the protection available to any other Sri Lankan citizen had he sought that protection. It said that the Full Federal Court, in *Minister for Immigration and Multicultural Affairs* v *Kandasamy* [2000] FCA 67 ("*Kandasamy"*), had held that there cannot be a failure of State protection where a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming. It was not satisfied that "*the protection available to Sir Lankan citizens is so ineffectual as to give rise to a real chance that the applicant would be persecuted"*. It considered that it was reasonable to expect a mature and educated person such as the first appellant to access the available protection. To be effective protection did not require an absolute guarantee against harm.

THE DECISION OF THE FEDERAL MAGISTRATE

7 His Honour did not accept that the decision in *Kandasamy* stood for the proposition as stated by the Tribunal. In any event the question was not whether there had been a failure of State protection in the present case, given the Tribunal's position, finding that effective protection

was available to the appellants, his Honour held.

8 The focus of the appellants' case before his Honour was that the Tribunal had applied the wrong test in considering whether there was adequate State protection from the police. It was submitted, in reliance upon the reasoning in *VRAW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1133 ("*VRAW*"), that the Tribunal had failed to appreciate that a different standard or test of effective protection should be applied in the case of rogue state agents, such as the police in the present case. Finkelstein J had held in *VRAW* that, in the case of rogue state agents, there would only be adequate protection if the State was taking action to curb their illegal and unauthorised actions (at [19]), referring to *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891 at 1897 ("*Svazas*"). The second error Finkelstein J had found in the Tribunal's approach in *VRAW* was that it failed to appreciate that human rights organisations and the like do not offer practical protection from persecution. The appellants in this case conceded before the Federal Magistrate that the Tribunal did not make this error.

9 His Honour the Federal Magistrate expressed a preference for a single test to be applied to the question of State protection from rogue state agents rather than a "*different standard*" as referred to in *Svazas*' case. A single test would focus upon the particular circumstances of the feared persecution and the measures of protection available in the country of nationality. His Honour did not consider it necessary or helpful to apply different standards as to the effectiveness of State protection depending upon a particular classification of the "*agent of persecution*". In his Honour's view, however, a "*universal test*" operated in the same way as the "*different standard*" approach in the assessment of the adequacy of protection measures in the present case. This was because both approaches required the Tribunal to appreciate the different risks attaching to persecution by State agents and of the need to find available and effective protective measures to deal with "*this type of persecution*" before finding that fear is not well-founded. It was therefore not necessary for his Honour to consider whether *VRAW* should be followed.

10 His Honour was not persuaded that the Tribunal failed to address the issue as to whether the normal criminal processes and special complaints mechanisms would be available and would provide sufficient and effective protection against extortion attempts by corrupt police in Sri Lanka. It had made findings on that matter and as to whether protection was available from

the LTTE. In the process its reasons showed that it was aware that the actions of the police required special consideration. The requirements of *VRAW* were therefore satisfied. No jurisdictional error was shown.

THE APPEAL

11 The appellants sought leave to amend their Notice of Appeal at the hearing in the following terms:

> *"2. The Court erred in failing to hold that the Refugee Review Tribunal had itself erred in failing to consider whether the attempt by a police officer to extort money from the appellant (when he sought the protection of the police from the Liberation Tigers of Tamil Eelam (the LTTE)) itself entailed a failure of state protection.*
>
> *3. The Court erred in failing to hold that the Tribunal had itself erred in failing to consider whether the appellant had,*
>
> *(a) made a sufficient attempt at accessing state protection from police corruption and,*
> *(b) if so whether such protection that may have been available from the Sir Lankan authorities was inaccessible.*
>
> *4. The Court erred in finding that the Tribunal has applied the correct test in considering whether the appellant had adequate state protection from the police available to him.*
>
> *Particulars*
>
> *a. The information relied on by the Tribunal in finding that adequate state protection from police corruption was available indicates that it failed to consider whether the state* "…not only possesses mechanisms for controlling its officials but operates them to real effect" *(Svazas v Secretary of State for the Home Dept* (2002) 1 WLR 1891*).*
>
> *b. The Tribunal failed to consider, in accordance with VRAW v Minister for Immigration* [2004] FCA 1133 *that the Sri Lankan Human Rights Commission, to which it said that the appellant should have complained against the attempt by police at extortion, was able to provide the applicant with immediate protection.*
>
> *5. The Court erred in holding that the Tribunal reached its decision with an awareness of the special considerations to be applied when deciding whether state protection is available from the conduct of 'rogue state agents'."*

12 The proposed grounds 4(a) and 5 fall within the compass of the issues determined by the

Federal Magistrate. That is to say they concern the application of the cases of *Svazas* and *VRAW*. Ground 4(b) was further explained on the basis of the second error identified in *VRAW* – that the Tribunal had not understood that human rights organisations do not offer practical protection. This ground was however expressly disclaimed by counsel appearing for the appellants before his Honour. They should not be permitted to raise it now. Grounds 2 and 3 are entirely new issues which were not agitated below and no explanation has been offered as to why they were not argued before his Honour. The appellants submitted that because they raise matters of law leave should be granted. Their counsel however acknowledged that a party is bound by the conduct of their case and the broader public interest in efficient judicial administration is not served by appellate Courts considering matters which ought to have been raised before the primary judge: *H v Minister for Immigration* [2000] FCA 1348. Moreover grounds 2 and 3 do not arise from the judgment in *VRAW*. Leave to amend should therefore be limited to the matters argued below, which is to say grounds 4(a) and 5.

13 The first respondent also seeks to rely upon a notice of contention, filed out of time, which challenges the correctness of *VRAW* and the Federal Magistrate's acceptance of it. We do not consider that his Honour did accept the decision to be correct. His Honour's view was that whether one applied a single test of the efficacy of state protection or considered the particular problems thrown up by rogue agents of the State, the Tribunal's reasoning covered both approaches. Nevertheless the correctness of *VRAW* can be raised in response to the appellants' argument.

DISPOSITION OF THE APPEAL

14 In *VRAW* Finkelstein J held that when a Tribunal has to determine whether a person has adequate State protection, the authorities establish that there is a different standard in the case of persecution by non-state agents on the one hand and rogue state agents on the other. With respect to his Honour, we do not understand that to be the case and the question, in cases where the State does not itself actively condone or tolerate persecution, is whether the protection it offers is sufficient by international standards.

15 In *Svazas* the alleged persecutors were the police force. The evidence accepted by the fact-finding Tribunals was of a police force which "*systematically or endemically abuses its power"*, Sedley LJ observed (at [15]) and this was so "*despite the law and the will of the*

government to stop it". His Lordship accepted that there may be another form of persecution other than that emanating from the State, as described by JC Hathaway, *The Law of Refugee Status*, Butterworths Ltd, Canada, 2 January 1991 pp 125-126, namely "*non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the State"*. In his Lordship's view a State is responsible for what its own agents do unless it acts promptly and effectively to stop them.

16 The views of Sedley LJ were not shared by the other members of the Court of Appeal in *Svazas*. Whilst Sir Murray Stewart-Smith thought that a distinction needed to be drawn between action by the State's officials and non-state agents, which was because it was necessary to determine whether the standard of protection offered by the State was sufficient where the police were involved. He did not suggest that their acts were to be taken as those of the State, as Sedley LJ's approach implies. Moreover Sir Murray did not consider it correct to require the State to immediately rectify such behaviour. No State can guarantee protection and what has to be attained is a practical standard:

> *"… which takes proper account of the duty the State owes to all its nationals' (per Lord Hogue of Craighead the* Horvath *case [Horvath v Secretary of State for the Home Department]* [2001] 1 AC 689, 500) – *a* "system of domestic protection and machinery for the detection, protection and punishment of [persecution]" … *More importantly there must be an ability and a readiness to operate that machinery. (per Lord Clyde at p 510)."*
> (Svazas [47]*).*"

17 Simon Brown LJ (at [54]-[55]) considered that the relevant question was whether the asylum seeker could establish a need for protection by the international community for want of *sufficient* protection in the person's home State. In that regard, if the State itself through its agents is actively persecuting the refugee it is plainly not protecting that person. In cases where the State was not wholly complicit, the question to be addressed is whether or not the State can be said to be providing sufficient in the way of protection.

18 The Australian jurisprudence on the issues of persecution and State protection do not support the notion of a third category of persecution. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233 (referred to with approval in *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* [2004] 205 ALR 487; HCA 18 at [19] ("*S152/2003"*), Brennan CJ said that the definition of refugee must be speaking of a fear of "*persecution that is official, or officially tolerated or*

uncontrollable by the authorities or the Courts of the Refugee's nationality". It follows that where the conduct of police, not acting as agents of the State, is said to amount to persecution, the question which arises is whether the State and its agencies are able and willing to deal with it. The standard of protection referred to in the cases is that of a reasonably effective police force and a reasonably impartial system of justice: see *S152/2003* at [28]. It is not complete efficacy and it does not require the State to act immediately. We respectfully agree with Sir Murray Stewart-Smith's view that these requirements would raise the standard to one of a guarantee of safety. *S152/2003* confirms that no country can be taken to offer such a guarantee (at [26]).

19 In *S152/2003* the majority pointed out that the context of a putative refugee is that of a person who is outside their country of nationality. That person's unwillingness to avail themselves of the protection of their country must be owed to their fear of persecution. That unwillingness must however be justified, not merely asserted (at [19]). Their Honours referred with approval to the views of Hale LJ in the Court of Appeal in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 497 (*"Horvath"*), that if the willingness and ability of the State to offer protection against the acts of non-state agents is sufficient, a person's fear of persecution will not be "*well founded"*; if it is insufficient it may turn the acts of others into persecution for a Convention reason; if it is insufficient it may be the reason why the applicant is unable or, if it amounts to persecution, unwilling, to avail himself or herself of the protection of their home State.

20 In the view of the majority in *S152/2003* the fact that the authorities may not be able to provide an assurance of safety, does not justify an unwillingness to seek their protection. Once the Tribunal in that case rejected the allegations that the State was complicit or encouraged harm, and that attacks were random and uncoordinated, its finding that the government had the ability to protect meant that the information before the Tribunal did not justify the conclusion that the government could not provide protection to international standards. That being so, the applicant in that case was not a victim of persecution and he could not justify his unwillingness to seek the protection of his country (at [28]- [29]).

21 Similar reasoning applies in this case (see also *NAWN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 328). The Tribunal found that the government of Sri Lanka did not condone the commission of crimes by police officers against

citizens. Even if the conduct of the officers towards the first appellant on the one occasion amounted to persecution, a finding not made by the Tribunal, (one must not lose sight of the necessity that the alleged persecutory conduct was for a Convention reason) there were a number of avenues of redress open to the first appellant, but he had not taken them. The Tribunal was not satisfied that if the appellants had sought protection from the LTTE and from the police officers it would have been denied. It follows that the Tribunal was not satisfied that the appellants had justified their unwillingness to seek that protection.

22 The appellants, during the latter stages of argument, sought to rely upon the Tribunal's finding that justice was slow. It was submitted that this meant that if the first appellant had complained about the police conduct there would have been delays. As we have said, the requirement of a system of protection is one of reasonable, but not perfect, efficiency. Moreover, as the first respondent points out, the reference to delay was to the Court system and not the other organisations and committees which could conduct investigations into the actions of police officers.

23 His Honour below was correct in dismissing the application for review. The Tribunal addressed the correct questions. The relevant enquiry for it concerning State protection did not require consideration of a subset of persecution not that of the State, but attributable to it. The standard of protection required was not that preferred by Sedley LJ and applied in *VRAW*. In our respectful view the reasoning in *VRAW* is not supported by authority and should not be followed.

24 The appeal should be dismissed with costs including costs of the Notice of Contention.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Heerey, Kiefel and Bennett.

Associate:

Dated: 21 March 2006

Counsel for the First and Second Appellants: LF Karp

Counsel for the First and Second Respondents:	R Beech-Jones
Solicitors for the first and Second Respondents:	Clayton Utz
Date of Hearing:	3 March 2006
Date of Judgment:	21 March 2006