FEDERAL COURT OF AUSTRALIA

SZBBE v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCA 264

MIGRATION – Appeal from Federal Magistrate – protection visa –legal action in Egypt - fear of revenge - Convention nexus - Imputed political opinion – Reasonable State Protection

Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 considered
Minister for Immigration and Multicultural Affairs v Singh (2002) 209 CLR 533 distinguished
Minister for Immigration and Multicultural and Indigenous Affairs v VFAY [2003] FCAFC 191 cited
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 referred to
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 referred to
MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1261 referred to
Saliba v Minister for Immigration and Ethnic Affairs (1988) 89 FCR 38 distinguished
SHKB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 545 referred to

SZBBE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N 1741 of 2004

JACOBSON J
SYDNEY
24 MARCH 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 1741 of 2004**

ON APPEAL FROM A JUDGMENT OF A FEDERAL MAGISTRATE

BETWEEN:	**SZBBE** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**JACOBSON J**
DATE OF ORDER:	**24 MARCH 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs in the proceeding.

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

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JUDGE:	**JACOBSON J**
DATE:	**24 MARCH 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION:

1 This is an appeal from a decision of Federal Magistrate Raphael given on 8 November 2004 dismissing an application for review of a decision of the Refugee Review Tribunal ("the RRT"). The decision of the RRT was handed down on 2 July 2003. The RRT affirmed a decision of a delegate of the Minister refusing to grant the appellant a protection visa.

2 The appellant is a citizen of Egypt. He claimed to have a well-founded fear of persecution from a group of persons described as an organisation of Egyptian vegetable traders ("the vegetable traders") who also operated as drug dealers. He claimed that the vegetable traders had conducted a vendetta against him since late 1998 when the appellant, in his capacity as an Egyptian lawyer, exposed members of the vegetable traders to criminal charges. This was said to have come about as a result of actions taken by the appellant to secure the release of his client from charges falsely brought against the client by the vegetable traders.

3 The appellant claimed that following the release of his client, he was threatened by a member of the vegetable traders and that he was subsequently assaulted and injured and his office was attacked and smashed. He also claimed that after he came to Australia the vegetable traders burned down his office and murdered his brother-in-law. He claimed that the murder was a

case of mistaken identity and that he was in fact the intended victim of the murder.

4 The RRT found that the appellant did not identify a Convention related reason as the basis of his fear. However, the RRT said that it had considered the appellant's evidence to determine whether there was a Convention nexus. It was not satisfied that the appellant's fear arises from a Convention related reason.

5 The RRT was also satisfied that reasonable state protection is available.

6 There were two issues on the application for review before the Federal Magistrate. The first was whether the RRT had committed jurisdictional error in failing to ask itself whether the appellant's actions in pursuing justice on behalf of his client could be perceived to involve an imputed political opinion.

7 The second issue before the Federal Magistrate was whether the RRT had failed to apply the correct test in considering whether the Egyptian authorities provided the necessary level of state protection to allay any well-founded fear of persecution.

8 The Federal Magistrate found that there was no jurisdictional error on either of the two bases raises before him. The issues on the appeal are essentially the same. That is to say, whether the learned Federal Magistrate was in error in his findings on those two issues.

The evidence before the RRT

9 The RRT set out the background to the application. The applicant arrived in Australia on 10 April 1999 on a three month visitors visa. His wife and children arrived on 19 February 2000. On 27 November 2000 he lodged an application for protection visas. All of the family members were applicants before the RRT, although only the husband applied for judicial review. He is, accordingly, the sole appellant.

10 The RRT set out the appellant's evidence and claims in some detail. The appellant told the RRT that his client had been charged and found guilty, in absentia, on false charges brought by the vegetable traders. He claimed that in a successful appeal from the verdict, he had demonstrated that the case was brought on fabricated evidence given by members of the

vegetable traders. He said that in defending the case he had shown that members of the vegetable traders were engaged in serious criminal activity.

11 The appellant claimed to have entered the witness box himself in the proceedings in Egypt. He also claimed that, as a result of his actions, members of the vegetable traders were charged with various offences.

12 The appellant gave evidence of threats and said that he had been attacked with a knife about a month after the acquittal of his client. He said he reported the attack to the police but he could not identify his attackers. He was told by the police there was nothing they could do without further evidence.

13 His evidence as to the police's efforts in relation to each incident was to the same effect. That is to say, they could not assist because he was unable to identify the perpetrators. However, he gave evidence that the police had provided him with protection. There was also documentary evidence which pointed to action taken by the police in relation to the complaints made to them.

14 The appellant told the RRT that he was the "star witness" in the case against the members of the vegetable traders. He said it was "impossible to prevent the case going ahead as it was already in the Egyptian court system".

15 The RRT put it to him that if he feared for the safety of his family he could withdraw the case. The appellant said "this would be against God and against his principles".

The decision of the RRT

16 The RRT had some doubts about the appellant's claims in his written statements and in his oral evidence. However, the RRT did not consider it necessary to make findings about his claims because it was not satisfied that the appellant had established that the harm he fears is for a Convention related reason.

17 The RRT said that the appellant did not identify a Convention reason. But it said that it had carefully considered all his evidence to determine whether there was any possibility of a

Convention related claim.

18 The RRT then said:-

> *"The applicant claims that he fears harm as a result of his involvement in a criminal case in Egypt. The persons he fears are members of a criminal association of drug dealers. He claims they have targeted him because he is an important part of a prosecution case against them. The reason he gives of the threats of harm and mistreatment arise out of the criminal conduct of the persons involved in the appeal conducted by the applicant in 1998.*
>
> *His persecutors either want revenge for exposure of criminal activity or they hope to prevent him from being further involved in the case against members of their organisation. Even if the Tribunal accepted all the claims of the applicant the Tribunal is not satisfied that the fear of persecution claimed arises for any Convention related reason."*

19 The RRT made the following important findings on the appellant's claims that the police had been ineffective:-

> *"On the appellant's own evidence the police received and made written reports of each complaint made by the applicant and provided him with a police guard for one week at following an attack on him. The applicant admits that he was not able to identify the perpetrators of any of the criminal incidents against him and he was not even able to speculate on the names of persons who might be involved other than they were members of a group of vegetable traders. The documents provided by the applicant indicate that the police took the incidents seriously, investigated them and in most cases referred them to the Director of Prosecutions for further consideration."*

20 The RRT then stated that the test of reasonable state protection as being not whether the state can guarantee the safety of an applicant but whether there is a reasonable willingness on the part of law enforcement agencies and the courts to detect, prosecute and punish offenders. A number of authorities were cited.

21 The RRT's conclusion on the question of state protection was as follows:-

> *"The Tribunal is satisfied on the evidence of the applicant that the police acted reasonably to provide adequate state protection in circumstances in which the applicant was not able to identify his attackers or to provide any evidence to assist in establishing their identity."*

The Federal Magistrate's decision

22 The learned Magistrate referred at [9] to the appellant's argument that the RRT had failed to consider whether his actions may have given rise to a fear based on actual or imputed political opinion.

23 The Federal Magistrate referred at [10] – [11] to the decision of Sackville J in *Saliba v Minister for Immigration and Ethnic Affairs* (1988) 89 FCR 38 ("*Saliba*"). He observed that in *Saliba* the applicant was fighting to ensure the prosecution of his cousin's killers but noted that there was a political element to the organisation to which the killer allegedly belonged. He referred to Sackville J's observation at 49 that a claimant's political opinion need not be expressed outright.

24 The learned Magistrate was of the view at [12] that the RRT was aware of its duty to look at the factual material to determine whether there was any possibility of a Convention related claim. He drew attention to the passage of the RRT's decision in which it said it had carefully considered all of the applicant's evidence to determine whether there was a possibility of such a claim.

25 The Federal Magistrate then referred to the remarks made by Sackville J in *Saliba* (at 49) that the RRT would have needed, in considering the question of political nexus, to consider the motivation of the persecutor and the persecuted. He then said at [13]:-

> *"In my view this is exactly what the Tribunal did in this case. The Tribunal comes to a firm conclusion at [CB 163-164] about the persecutor's motivation which excludes a political imputation. It also puts no weight on the applicant's claim that his reason for continuing with the case was that it would be against God and against his principles to withdraw. In other words the Tribunal appears to have covered those matters which a consideration of political imputation would involve and has by implication found no such political imputation."*

26 The Federal Magistrate then turned to the question of whether the RRT had misdirected itself as to the test of what constitutes reasonable state protection. He noted that the RRT's decision was given before the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 ("*S152*"). He referred to two decisions of single judges of the Federal Court in which *S152* had been considered.

27 The conclusion which the Federal Magistrate reached on this issue, at [21], was that although

the RRT may not have articulated the test with absolute precision, it did, nevertheless, apply the correct test. He referred in particular to the passages from the RRT's decision which I have set out at [19] and [21] above. The learned Magistrate then said at [20] of his judgment:-

> *"A finding by the Tribunal on the facts, most of which were provided to it by the applicant, that the police were* ***not ineffective*** *in providing reasonable protection encompasses both the elements of ability and willingness. The Tribunal found that the police were as effective as they could be given the lack of information."*

Ground 1 – Political opinion

28 The appellant submitted that the RRT erred in law because it did not mention the possibility that the appellant's desire to obtain justice in Egypt may be a political opinion. He relied on *Saliba* in support of this proposition.

29 The appellant also submitted that the RRT was in error in failing to recognise that a motive of revenge was not antithetical to a political opinion and thus to a motive to persecute for an express or implied political opinion. The appellant relied on *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 ("*Singh*").

30 In my view, the difficulty with these submissions was accurately addressed by the learned Magistrate when he pointed to the passage of the RRT's decision in which it said it had carefully considered all of the appellant's evidence to determine whether there was the possibility of a Convention related claim.

31 It is true, of course, that a failure to make a finding on a material fact may reveal jurisdictional error. But the RRT is not obliged to set out its findings on every piece of evidence; see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [68] – [69] per McHugh, Gummow and Hayne JJ.

32 Nor, in my opinion, does the RRT have to state every finding expressly. It may do so by implication. That it precisely what it did here as the learned Magistrate recognised in the passage which I have set out at [25].

33 It seems to me that the Federal Magistrate was correct in finding that, here, unlike *Saliba*, the

RRT had come to a view about the motivations of the appellant and the vegetable traders which necessarily excluded the concept of imputed political opinion.

34 In *Saliba*, Sackville J said at 48:-

> *"The RRT did not refer in its reasons to the concept of imputed political opinion. Indeed, in its legal analysis, it did not refer to political opinion at all, beyond noting that political opinion is one of the five* Convention *grounds. Nor did the RRT address whether the applicant's fight for justice, by prosecuting his cousin's killer, was capable of being perceived, or was perceived, by Marada as a politically significant act: …"*

35 The applicant in *Saliba* feared death at the hands of Marada. It is true that this suggests some similarities to the present case. But the decision in *Saliba* turned on the fact that there was evidence before the RRT of Marada's political influence in Lebanon. That was the reason why Sackville J found that the RRT was in error in failing to consider that the applicant's prosecution of his cousin's killer may be perceived to have political significance. The Federal Magistrate correctly recognised this.

36 Nor does *Singh* assist the appellant's case. It is true, as their Honours observed in *Singh*, that revenge is a common feature of political crimes; at [18] Gleeson CJ, at [48] McHugh J, at [136] Kirby J. However, *Singh* is not authority for the proposition that a person who seeks revenge may be motivated by an imputed political opinion on the part of the victim.

37 Thus nothing turns on the RRT's finding that one possible motivation of the vegetable traders was revenge for exposure of their criminal activity. What was lacking was any factual material which might have pointed to political opinion as a reason for acts of revenge on the part of the alleged persecutors. The same may be said of the appellant's submission that his fight for justice could have given rise to a Convention claim of political opinion.

38 As a Full Court said in *VFAY v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 191 at [56] per French, Sackville Hely JJ, McHugh and Gummow J said in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, at 28, that the reason for the persecution must be found in the "singling out of one or more of the five attributes expressed in the Convention definition". That was not present here.

State protection

39 Two errors were said to have been made by the Federal Magistrate. The first error is said to have been that he wrongly characterised the RRT's finding on this issue as a finding that the police were "not ineffective" in providing reasonable protection. This submission focuses upon the RRT's finding set out at [21] above that it was satisfied that the police acted reasonably. The appellant submits that acting reasonably is not "co-terminus" with being effective or "not ineffective".

40 The second error is said to be that the Federal Magistrate was wrong in finding that the RRT had applied the correct test of state protection.

41 I will deal first with the issue of the test of state protection. The appellant submits that *S152* is only authority for the proposition that if state protection is not sought, an applicant must provide a reasonable excuse, being that the standard of protection required by international standards is not available.

42 However, the appellant's submission on this question does not accurately express the principles stated in the judgment of the High Court in *S152*.

43 As Gleeson CJ, Hayne and Heydon JJ said in *S152* at [29], it was not enough for the applicant in that case to show that there was a real risk that if he returned to the Ukraine he may suffer further harm. He had to show that the harm was persecution and he had to justify his unwillingness to seek the protection of his country of nationality. Such a justification would have turned upon the willingness and ability of the state to provide its citizens "with the level of protection which they were entitled to expect according to international standards".

44 I respectfully agree with the view of Selway J in *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545 at [32] ("*SHKB*") that in *S152* the conclusion of the majority judgment was that the relevant state is required to provide a "reasonably effective police force and a reasonably impartial system of justice". What is "reasonably effective" is to be determined by "international standards" although these were not specified in their Honours' judgment.

45 But there is an important caveat to this as was noted by Selway J in *SHKB* at [32]. This is that the RRT cannot be satisfied that international standards have not been met unless there is

evidence to that effect. The observations of Heerey J in *MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1261 ("*MZ RAJ*") at [26] are to similar effect. The learned Magistrate referred to both of these authorities in his judgment.

46 It was not suggested either before the Federal Magistrate or on appeal that there was evidence put before the RRT of a failure to adhere to international standards which the RRT should have taken into account. As Heerey J said in *MZ RAJ* at [26], the ratio of *S152* does not include the proposition that there will be jurisdictional error unless the RRT identifies and specifies the content of "international standards" of protection and matches the law enforcement machinery of the state against those standards. It is for an applicant to put forward international standards of protection with which the state failed to comply.

47 It is true, as the learned Magistrate stated, that in this matter, the RRT may not have expressed the test of state protection with due precision. This may well be because the test was expressed before the decision in *S152*.

48 Nevertheless, I can see no error in the Federal Magistrate's finding that the RRT applied the correct test. The RRT stated, as was recognised in *S152* at [26], that the test is not whether the state can guarantee protection. The RRT expressed the standard by reference to "reasonable willingness" whereas the majority judgment in *S152* refers to "willingness and ability". But in the absence of any suggestion that international standards were not met, I do not see that anything turns on the distinction in the present case.

49 In any event, the RRT's finding that the police acted reasonably to provide adequate state protection seems to me to encompass both willingness and ability. Indeed, the RRT found that the Egyptian police had provided the appellant with protection for a week and had investigated the incidents, most of which they had referred to the Director of Public Prosecutions. Accordingly, I agree with the learned Magistrate that the RRT did apply the correct test.

50 Moreover, in my opinion, this finding, namely that the police acted reasonably, disposes of the appellant's complaint about the "not ineffective" formulation used by the Federal Magistrate. The RRT's finding was made in circumstances in which the appellant was unable to identify his attackers or provide evidence to assist in establishing their identity. I

do not consider that the learned Magistrate's formulation of the finding discloses error.

Order

51 The orders I will make are that the appeal be dismissed with costs.

52 I note that the appellant made a strong plea for consideration on humanitarian grounds. That is not a matter for me to determine.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 24 March 2005

Counsel for the Appellant:	Mr Karp
Counsel for the Respondent:	Ms Henderson
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	3 March 2005
Date of Judgment:	24 March 2005