FEDERAL MAGISTRATES COURT OF AUSTRALIA

S2012 of 2003 v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 954*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicants claiming racial and other persecution in Fiji – tribunal accepting harm suffered by applicants in the past, including deprivation of land and assault but finding the applicants could safely return to Fiji – whether the Tribunal overlooked integers of the applicants' claims considered – Tribunal failed to deal adequately or at all with the issues of deprivation of land and the risk of psychological harm.

Migration Act 1958 (Cth), ss.91R, 424A

Kadiroglu & Ors v Minister for Immigration [1998] FCA 1656
S395/2002 v Minister for Immigration [2003] HCA 71
SBTF v Minister for Immigration [2007] FCA 1816
SZALM & Ors v Minister for Immigration [2004] FMCA 262
SZFKC v Minister for Immigration [2006] FMCA 1227

Applicants:	APPLICANTS S2012 OF 2003
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 878 of 2008
Judgment of:	Driver FM
Hearing date:	10 July 2008
Delivered at:	Sydney
Delivered on:	31 July 2008

REPRESENTATION

The First Applicant appeared by telephone

Counsel for the Respondents: Mr T Reilly

Solicitors for the Respondents: Sparke Helmore

ORDERS

(1) A writ of certiorari shall issue quashing the decision of the Refugee Review Tribunal handed down on 27 February 2007.

(2) A writ of mandamus shall issue requiring the Refugee Review Tribunal to reconsider the review application before it according to law.

(3) The Minister shall reimburse the applicants the filing fee of $350 paid by them.

(4) The Minister shall pay the setting down fee of $419 which remains outstanding.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 878 of 2008

APPLICANTS S2012 OF 2003
Applicants

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 27 February 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants protection visas. There are two applicants, a husband and his wife. The majority of claims were made by the first applicant, the applicant husband. Some claims were also made by the second applicant, the applicant wife. They are from Fiji and made claims relevant to the Convention grounds of race, religion and political opinion.

2. The applicants arrived in Australia on 28 January 1996 and applied to the Minister's Department for protection visas on 1 March 1996. That application was refused by the Minister's delegate on 1 November 1996. The applicants applied for review to the Tribunal, differently constituted, which affirmed the delegate's decision on 4 April 1997. The applicants

sought review of the Tribunal's decision by the Federal Court and on 3 October 2006 the Federal Court set aside the decision and remitted the matter to the Tribunal to be determined according to law[1].

3. The present Tribunal was unwilling to make a favourable decision on the papers and invited the applicants to a hearing, which they attended, on 29 January 2007[2]. The first applicant claimed at both the first and second Tribunal hearings to have been the victim of a number of crimes perpetrated by indigenous Fijians. In 1987 the family home was robbed and they were warned not to support the Fiji Labor Party, of which the first applicant's father had been a prominent member. The incident was reported to the police, who recovered some of the stolen property but made no arrests. The second robbery occurred when thieves broke into the family home in 1998. In mid 1990, the first applicant was robbed by masked men when returning home from work. Many of the people with whom he worked, both Fiji Indians and indigenous Fijians, had been robbed in a similar fashion. He reported the incident, but was unable to identify his attackers and no arrests were made. In late 1994, three masked men broke into his home, stole some jewellery and threatened to rape his wife. Before the second Tribunal he stated that his wife had actually been assaulted, and that she continued to suffer the effects of the assault[3]. The attack was reported, but no arrests were made. In mid 1995, while working on his farm, he was approached by five indigenous Fijians, who told him that he should leave the area or would be killed. They came back twice and soon afterwards someone set fire to his sugar cane crop. These incidents occurred about six months before the applicants left Fiji. The first applicant believed that the events happened because the Fijians were jealous of the fact that he owned a tractor which he loaned to other Indian Fijians. He again reported the incident to the police, who wrote out a report but were unable to do anything more. The first applicant told the Tribunal that his siblings had not experienced the same problems as him. He feared that the lease on his property, which was due to expire later in 1997, would not be renewed. The first applicant confirmed that all of the incidents occurred at Tavua and that his land and home had been at Tavua.

[1] see *S2012/2003 v Minister for Immigration* [2006] FCA 1294
[2] court book ("CB"), pages 123-124
[3] CB 137

4. The first Tribunal had discussed these claims with the first applicant and it noted that Fiji's land holding laws were biased against Indian Fijians, but there was no fundamental right to own property and even if the lease on his property were not renewed, he had been in full time employment at the time he left Fiji and it did not appear that he would be seriously disadvantaged if he could no longer live on the farm. The first applicant had told the first Tribunal that he would have problems with indigenous Fijians if he returned home.

5. The second applicant supported her husband's claims.

6. At the hearing before the second Tribunal the first applicant said that he could not return to Fiji because his lease had expired on his land and he could not live with his brother or parents and his sister was about to migrate to Australia as her husband was migrating to Australia on a religious worker visa[4]. He added that he had been working at a gold mine in Fiji for five years before leaving Fiji but the firm had closed down its activities in January 2007. The applicant's representative submitted to the Tribunal that the second applicant continued to suffer the effects of trauma arising from the assault on her by indigenous Fijians[5].

7. The applicants made a post-hearing submission through their representative which was received by the Tribunal on 31 January 2007. In that submission the applicants drew attention to law and order issues in Fiji, including violence and robbery, land ownership threats and harassment. The representative conceded that the applicants had not been in Fiji for some ten years and that in the intervening period the lease on his land had been extinguished so their capacity to live at the premises where they were attacked was no longer at issue. It was submitted that the applicants would not be able to live at that specific location because the first applicant did not own or lease property in Fiji[6]. The representative also conceded that the likelihood of physical harm would inevitably be defused by the material change in circumstances (no land and absence) and effluxion of time[7]. It was noted that the first applicant had expressed concerns about the internal flight option as he would face insurmountable difficulties with respect

[4] CB 136
[5] CB 138
[6] CB 138
[7] CB 139

to obtaining employment and suitable accommodation, particularly as his family were unable to assist him because of their own circumstances. The first applicant's former employment at the gold mine was not an option as the mine had closed. He could pursue employment in administration using skills he had acquired in Australia, however, he was concerned by the adverse impact of the most recent coup in Fiji and the fact that there was "positive discrimination" in government employment.

8. The Tribunal referred extensively to country information. In its findings and reasons it found the first applicant to have been entirely frank and open and did not doubt the plausibility of his account. The Tribunal was satisfied that the first applicant was truthful[8]. The Tribunal found that there were multiple factors motivating three incidents of theft between 1987 and 1990 and the attack on the second applicant in 1994 and the threats in 1995 which culminated in the burning of the applicants' sugar cane crop. A specific factor accepted by the Tribunal was that local indigenous Fijians wanted to take over the applicants' land before the expiry of their lease and, because they lived in a rural area, the applicants were vulnerable and easy victims. The Tribunal accepted that the essential and significant reason for the harm suffered by the applicants was their race[9].

9. The Tribunal noted that the harm suffered by the applicants had occurred between 12 and 20 years ago and that the applicants had left Fiji some 10 years before the Tribunal hearing. The Tribunal accepted that the applicants could not live on the land they formerly leased in Tavua for the reason that the lease on the land had expired and had not been renewed by its indigenous owners. The Tribunal was satisfied and found that if the applicants returned to Fiji they would be living in some other part of the country. The Tribunal found that the harassment and threats and attacks on the applicants came from villagers from the area of Tavua and around their farm and that one reason for the harassment was that they wanted the applicants to vacate their leased land so that local indigenous Fijians could take it over. The Tribunal noted that the first applicant accepted that those indigenous Fijians had

[8] CB 146
[9] CB 146

achieved their aim and the Tribunal was not satisfied that those persons would have any continuing interest in the applicants.

10. The Tribunal then went on to consider discrimination against Fijian Indians generally in Fiji and found that while there was some discrimination, there was no significant trend of ethnically motivated violence directed at Fijian Indians by indigenous Fijians. The Tribunal also considered the capacity of the first applicant to obtain employment in Fiji. The Tribunal found that, while economic factors might limit the applicants' opportunities to find jobs and earn an income, it was not satisfied that they would be denied employment because of their race.

11. The Tribunal went on to consider the applicants' claims based on religion and political opinion and found that even cumulatively, the applicants did not face a real chance of treatment amounting to persecution for the reason of their race, religion or political opinion in Fiji.

12. The Tribunal concluded by considering the continuing effect on the second applicant of the assault on her which occurred shortly before the applicants left Fiji. However, the Tribunal found that this and some other matters were matters of a "humanitarian nature" over which the Tribunal did not have jurisdiction[10].

The application

13. These proceedings began with a show cause application filed on 11 April 2008. The applicants continue to rely upon that application. The grounds in that application are:

> *1. The Tribunal's decision was infected with Jurisdictional error.*
>
> *The Decision of the Member Philippa McIntosh was guilty of procedural unfairness because the Tribunal did not address specific issues with the applicant and then to reach the conclusion it did as part of its decision in spite of the applicant having sufficient grounds for a Protection Visa.*
>
> *2. It was important to give evidence and present arguments relating to the issues and for that purpose to conduct a*

[10] CB 148

hearing which was "real and meaningful" and not to be a hollow shell or empty gesture.

3. *On page 4 of 19 "*[The first applicant] *made no comment in response to evidence that members of the FLP were not at risk of harm at that time.*

4. *By conducting the hearing in the manner in which it did the Tribunal's decision was infected by jurisdictional error because it circumvented the hearing process without following the procedures and allowing for questions pertinent to the hearing.*

5. *It must be noted that the conduct of the hearing is controlled by the Tribunal. It is the Tribunal who has the responsibility to focus on questions that is directed to the applicant so that the Tribunal can ascertain the claims.*

6. *On page 4 of 19* [the second applicant] *was threatened to rape and this attack was reported but no arrests were made. In mid-1995* [the applicant] *while working on his farm he was approached by five indigenous Fijians who told him he should leave the area or would be killed and soon afterwards someone set fire to his sugar cane.*

7. *As indicated in (6) above, and that the Applicants would not get their employment is totally out of question in fact that it is that a re location was not a reasonable proposition for them (AB 149(25)). If his Honour had been suggesting that there was some onus of proof lying with the appellants, he may have been at odds with the approach taken in the Federal Court to administrative decision-making procedures, as set out by Olney J in* Re Nagalingam and MILGEA & Anor *(1992) 8 FCR 11 at 200. Also* Jong Kim Koe v Minister for Immigration and Multicultural Affairs *(1997) 143 ALR 65.*

8. *The fact that the Tribunal had raised the issue of relocation in a letter to the appellants shows that the issue was in the Tribunal's mind. Whether the appellants addressed it or not, the Tribunal should have considered the question in the light of all of the evidence and, particularly, in the light of its findings in respect of that evidence.*

9. *One of the decisions was impugned due to a failure with s.424A (see* SAAP v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] HCA 15). The*

other basis for the decision were untouched by the error. The Tribunal member decline to remit the case to the Tribunal. Philippa McIntosh approach has been followed in a number of cases in the Court and Federal Magistrates Court.

10. *The Tribunal was required to afford the applicant an opportunity "to give evidence and present arguments relating to the issues." And for that purpose to conduct a hearing was … "real and meaningful" and not to be "a hollow shell or an empty gesture". – (see. s.425 and* NALQ v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FACFC 121 at (30), and* Minister for Immigration & Multicultural and Indigenous Affairs v SCAR *[2003] FCAFC 126; (2003) 128 FCR 553 – evidence taken at the hearing was required "to be given a proper, genuine and realistic consideration in the decision to be subsequently made by the* [Tribunal] *see* NAIS v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] HCA 77 – conduct in relation to the hearing which might cause the relevant apprehension that the Tribunal did not have a mind prepared to allow the applicant that opportunity and genuinely to maintain its detachment of judgment until that opportunity was fully afforded, would reveal a jurisdictional failure by the Tribunal such conduct should be found in the present proceedings.*

11. *There is no defence on the part of the Tribunal to state that it allowed the applicant to state whatever was required. Moreover the applicant is not from a legal background and he would have no knowledge in how to conduct the own hearing as a result ended up with frustration and well founded fear of persecution "should they have to return to Fiji".*

12. *The Tribunal's decision should be quashed due to features of its hearing and reasons which might cause a fair minded lay observer to reasonably apprehend that the member constituting the Tribunal might not have brought an "impartial" mind to deciding whether the claim was legitimate.*

13. *The critical element in* VBAP *is the independence of the unaffected ground. The present case can be distinguished from* VBAP *because the Tribunal's finding in relation to relocation is not unaffected by the three errors identified by the Federal Magistrate. It cannot be said with any certainty*

that, had the Tribunal not made one or more of those errors. It would have come to the same conclusion in respect of the relocation issue.

14. *In dealing with relocation, on the issue of denial of natural justice, the Federal Magistrate identified material that was not provided to the appellants which the Tribunal used to counter the claim of lack of state protection. It goes without saying that a lack of State protection is not a circumstance that is likely to be resolved by relocation to another part of the same country. If there was any possibility of the Tribunal returning a finding of inadequate state protection, this would have necessarily influenced its findings in relation to relocation.*

15. *The Tribunal's reasoning on the relocation issue could not be said to be independent of a correct understanding of the discrimination inherent in the nationwide land tenure laws.*

16. *The Tribunal's finding on relocation was dependent to a not insignificant extent on each of the issues where the Federal Magistrate identified jurisdictional error. It cannot stand alone as an independent ground of refusal of the type identified in* VBAP. *The appeal should be allowed.*

17. *Given this premise, the adequacy of state protection is not relevant to support the relocation finding. There could be complete absence of state protection and if the person did not face Convention-related harm, the person could not fall within the definition of refugee.*

18. *The Tribunal found that the appellants may not be able to renew their lease however did not consider that this amounted to persecution. First it was said that the land tenure system was not motivated with the intention to harm but rather to protect the indigenous community's traditional* [way] *of life. The Court below held that the Tribunal erred in concluding that persecution must be motivated by an intention to harm.*

19. *Conduct in relation to the hearing which might cause the relevant apprehension that the Tribunal did not have a mind prepared to allow the applicant that opportunity, and genuinely to maintain its detachment of judgment until that opportunity was fully afforded, would reveal a jurisdictional failure by the Tribunal.*

20. The Tribunal erred in not providing the applicant the opportunity to comment on the information pursuant to section 424A of the Act. On the basis of the available information, the Tribunal is not satisfied that such harm is essentially and significantly related to a Convention ground, or that the applicant has a well founded fear on that basis.

21. The Tribunal at no stage disclose to the applicant the very nature of the evidence it relied upon. This denied the applicant the opportunity to rebut the Tribunal's available information.

22. The applicant submits that this is the evidence that is used to highlight the inconsistency between the information held by the Tribunal and the applicant's claims. The Tribunal did not believe the applicant's version of claim in relation to events in Fiji.

Constructive failure to exercise jurisdiction/failure to carry out the statutory function

23. The applicant contends that the Tribunal is charged with the Statutory function of fact finding and assessing the claims. The Tribunal has a statutory duty and function of fact finding and in the instances quoted above the Tribunal did not direct the hearing to specifics and let the hearing continue on its general "unchartered course". The Tribunal was jurisdictionally wrong in the manner in which it questioned the appellant for it did not direct any specific questions in relation to the applicant's claims or towards the Conventional based reasons.

The conclusions that follow from this are that there has been a constructive failure to exercise the jurisdiction. Such a failure is a basis for review.

24. The applicant submits that the Tribunal being fixated with pre determined conclusions about this case or possibly became engrossed by the details of their sad lie and that the Tribunal failed to address specific issues about the Convention definition and his or her specific claims.

25. The decision being affected by Wednesbury unreasonableness in light of the fact that the Tribunal has failed to address the applicant's claim. The applicants submit that in light of the findings the conclusions reached by the Tribunal, the decision is manifestly unreasonable.

26. The Tribunal did not take into consideration the applicant's spouse who was a woman and should be placed in a special vulnerability and the threat to rape is indicative that she would be raped being a woman and of a particular group.

27. The particular characteristics of the applicant's spouse being a woman of a social class:

(a) lack of family support;

(b) high vulnerability of attacks because of racial and political indifference;

(c) high vulnerability of attack on the perception for being a young woman of rape;

(d) the spouse contends that she is a member of such a group. The Tribunal has failed to identify this vulnerable group. Having not done so, it is unlikely that it would then make a finding of effective state protection against the group it did not identify.

The Tribunal failed to consider the applicants' claim of "well founded fear of persecution". A failure to deal with a particular claim is a failure on the part of the Tribunal to properly exercise its jurisdiction.

14. The application is supported by an affidavit which had an annexure to it, which I received as a submission. Those submissions go in part to the applicants' delay in bringing the application to the Court which is no longer material. The submissions also assert that the Tribunal did not take into consideration that the second applicant was a woman who is specially vulnerable as a member of a particular social group as a woman subject to the threat of rape. The submissions further assert that the Tribunal failed to deal with the issue of relocation.

15. Submissions were filed on behalf of the Minister on 30 June 2008. In those submissions the Minister asserts that the findings of fact made by the Tribunal were open to it on the material before it, including the country information which the Tribunal referred to. On the question of procedural unfairness, the Minister relies upon s.422B of the *Migration Act 1958* (Cth) ("the Migration Act") and asserts that the applicants have not provided any evidence as to any unfairness at the Tribunal

hearing. On the question of relocation and in relation to other aspects in the grounds of the application the Minister submits as follows:

> *It is difficult to understand what the basis of the allegation of procedural unfairness (or other jurisdictional error) is from the Application. To the extent that the Application complains of a failure by the Tribunal to make a finding as to whether relocation was reasonable, this was not required as the Tribunal did not accept that the Applicant had a well founded fear of persecution anywhere in Fiji, although it accepted that he would not return to Tavua as he claimed (CB 146.9):* Sabaratnasingam v MIMA *[2000] fca 261 at [13]. There is nothing to suggest the breaches of s.425 or apprehended or actual bias or* Wednesbury *unreasonableness that the Application appears to allege. Contrary to what is stated in the Application, the Tribunal did not find that the Applicant may be unable to renew his lease for convention reasons, but found the lease had expired, as he claimed (CB 146.9). There was no information requiring disclosure under s.424A; in particular it is well accepted that country information falls within s.424A(3)(a):* MIMIA v NAMW *(2004) 140 FCR 572 (FC) at [64-74], [112-138];* WAJW v MIMIA *[2004] FCAFC 330 at [44-46];* QAAC of 2004 v Refugee Review Tribunal *[2005] FCAFC 92 at [7-30];* VJAF v MIMIA *[2005] FCAFC 178 at [11-16]. And there was no failure to accept or address the Applicant's claims. As already stated, the claims of past harm were accepted, but the Tribunal was not satisfied that as at the date of its decision those claims established a well founded fear of persecution. The Tribunal accepted that the Second Applicant had been threatened with rape in 1994 (CB 137.1) and that this was for a Convention reason (race): CB 146.4, so whether it could also have said to be for reason of her membership of a social group is irrelevant (and in any case such a suggestion was never put to the Tribunal or so clearly arose on the materials before the Tribunal to require consideration within the principles in* NABE v MIMIA (No 2) *2004) 144 FCR 1 (FC)). It was open for the Tribunal to find that there was not a well founded fear of such harm being repeated for the reasons it gives at CB 146.9-147.2.*

16. On 30 June 2008 the first applicant faxed a further affidavit to the Court which, as became apparent at the hearing, was an application for an adjournment so that the applicants could seek additional evidence from Fiji of an asserted rape of the second applicant in Fiji. Neither applicant appeared when the matter was called on 10 July 2008 but the Court was successful in contacting the first applicant by telephone. I

refused the adjournment request on the basis that additional evidence of a rape of the second applicant would not assist me because the Tribunal had accepted that the second applicant had been assaulted. Additional evidence, which the Tribunal would not have had before it, would not bear on the issue of jurisdictional error. I offered to hear the first applicant by telephone and he accepted that opportunity. The first applicant made brief oral submissions emphasising the difficulty he and his wife faced in returning to Fiji and his wife's fear to go back because of the attack upon her.

Reasoning

17. The grounds of review raised by the applicants are numerous and expressed somewhat discursively. I reject the contentions that the hearing attended by the applicants was an empty gesture or hollow shell. The hearing was procedurally fair. There was a thorough discussion of the issues with the applicants and they also had the advantage of making a post hearing submission. There is no substance whatsoever to the apparent allegation of bias.

18. I also reject the contention that there was a breach of s.424A of the Migration Act. The Tribunal decision plainly turned upon the applicants' own evidence and country information, neither of which was required to be disclosed pursuant to that section.

19. There was no substance at all to the assertions of unreasonableness or credibility issues. The Tribunal engaged in an active intellectual process in relation to the applicants' claims and found the applicants to be entirely credible.

20. The applicants assert that the Tribunal erred by failing to consider properly the issue of relocation. The fact is, as is conceded by the Minister, there was no consideration of relocation at all in the terms that that expression is understood in relation to the Refugees Convention. The Tribunal accepted that the applicants would have to relocate from their original place of residence if they returned to Fiji but did not accept that the applicants would be subject to a well-founded fear of persecution anywhere in Fiji. Accordingly, on the basis of the Tribunal's reasoning, the issue of relocation did not arise for the purposes of the Convention

and the Migration Act. However, the issue of relocation would have needed to be considered if the Tribunal was wrong in concluding that the applicants did not face a well-founded risk of harm anywhere in Fiji. The Tribunal avoided considering in any detail whether the applicants would be subject to a well-founded risk of persecution in Tavua by finding that they would not return there. The Tribunal was satisfied that the "tensions" in Tavua had been "resolved". It was apparent that, in the case of the applicants, those tensions had been resolved by the removal of them from their farm. That effectively removed the risk of further physical harm to the applicants at Tavua.

21. In my view, there are two issues of substance that arise in this matter. They are:

a) whether the Tribunal overlooked an element or integer of the applicants' claims which squarely arose from the material, namely that they suffered ongoing persecution by reason of being driven from their land at Tavua; and

b) whether the Tribunal overlooked an element or integer of the applicants' claims which squarely arose from the material in relation to the second applicant's fear of sexual assault.

22. As to the first issue, in *SZALM & Ors v Minister for Immigration* [2004] FMCA 262 I considered the issue of land seizures in Zimbabwe. I found in that case that the Tribunal fell into error by failing to consider whether the applicants had been, and would be continued to be persecuted, by the loss of their farm. At [20] I said:

> *It is not entirely clear whether the dispossession of land is serious harm amounting to persecution. In Kadiroglu & Ors v Minister for Immigration [1998] FCA 1656 Moore J was prepared to assume that the expropriation or confiscation of property is a matter founding a claim for refugee status under the Convention. The answer probably depends upon the circumstances. Where land is seized unjustly or unlawfully by a government or its agents (or where a government condones or approves of seizure by individuals using threats of violence) and the land provides the livelihood of the person dispossessed, and the seizure is part of a pattern of seizures based on race, religion, political opinion or targeted at an identifiable social group, in my view all of the elements needed to satisfy the test of persecution under the Convention and s.91R of the Migration Act are present.*

23. In the present case, the Tribunal accepted that the applicants had been driven from their leased land by indigenous Fijians because of their race. The Tribunal did not dispute material before the first Tribunal that Fiji's land holding laws were biased against Indian Fijians and that there was no fundamental right to own property. The Tribunal suggested, and the applicants accepted, that their alleged persecutors had achieved their objective by driving them from their land. The applicants had been able to relocate elsewhere in Fiji and to obtain other employment over a reasonably short period before leaving Fiji. However, the applicants disputed that they would be able to obtain employment should they return to Fiji now. The applicants asserted, and the Tribunal accepted, that they could not and would not return to Tavua because there was nothing there for them. Their land had been lost and they could not get it back. In my view, the Tribunal fell into error by proceeding on the assumption that the applicants must accept the victory of their persecutors and live their lives differently elsewhere in Fiji. The fact that the applicants were resigned to this course, and had indeed relocated and changed employment, did not mean that the permanent deprivation of land as a means of earning a livelihood was not a continuing act of persecution which the applicants could be expected to accept. As I said in *SZALM* at [19] it is erroneous to assume that it is reasonable to expect applicants to accept their dispossession and live their lives differently: *S395/2002 v Minister for Immigration* [2003] HCA 71. The applicant had not made a positive choice not to return to Tavua. That choice had been made for them by indigenous Fijians who drove them from their farm there, which provided both a home and a livelihood.

24. If the Tribunal accepted that the applicants would suffer ongoing persecution in Tavua through the loss of their land, it would then be necessary for the Tribunal to consider the issue of relocation in accordance with the Convention.

25. In my view, the Tribunal also erred in failing to consider whether the second applicant faced a well-founded fear of persecution because of the risk of psychological harm should she be required to return to Fiji. The Federal Court has accepted that psychological harm may be serious harm

within the meaning of s.91R(2) of the Migration Act[11]. The Tribunal accepted that the second applicant had been threatened with rape and assaulted. The applicants' representative had submitted to the Tribunal that the second applicant continued to suffer the effects of trauma arising from the assault on her[12]. These factors, taken together, in my view, necessarily raise for consideration whether the second applicant would face harm in the form of psychological harm should she be required to return to Fiji. The Tribunal failed to consider that as a Convention issue. It only considered the issue as a humanitarian issue beyond the Tribunal's jurisdiction[13]. In my view, in failing to consider that issue, the Tribunal fell into the same error identified by me in *SZFKC v Minister for Immigration* [2006] FMCA 1227, in particular at [14]. In that case the applicant had been sexually assaulted as a child. This applicant was not a child at the time of the assault but was a woman who was allegedly traumatised and the risk of psychological harm from a forced return in circumstances where country information disclosed that random attacks might still occur was an issue requiring consideration in order for the Tribunal to complete its function.

26. For the above reasons, the applicants should receive relief in the form of the constitutional writs of certiorari and mandamus.

27. As to costs, the applicants were not legally represented and have not incurred any legal costs. They have paid the Court's filing fee of $350 which should be reimbursed by the Minister. The Minister should also pay the Court's setting down fee of $419 which the applicants are liable to pay but have not paid.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 31 July 2008

[11] *SBTF v Minister for Immigration* [2007] FCA 1816
[12] CB 138
[13] CB 148