

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural & Indigenous Affairs v SWZB

[2005] FCA 53

**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS
AFFAIRS v SWZB & REFUGEE REVIEW TRIBUNAL**

No S 221 of 2004

**FINN J
ADELAIDE
2 FEBRUARY 2005**

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY**

S 221 OF 2004

**BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 APPLICANT**

**AND: SWZB
 FIRST RESPONDENT**

**REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT**

JUDGE: FINN J

DATE OF ORDER: 2 FEBRUARY 2005

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. A writ of certiorari be issued, directed to the Refugee Review Tribunal removing its decision in this matter into this Court for the purpose of quashing it.
2. A writ of mandamus be issued, directed to the Refugee Review Tribunal, requiring it to hear and determine according to law the matter the subject of the decision.
3. The first respondent pay the applicant's costs of the application.

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

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S 221 OF 2004

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 AND INDIGENOUS AFFAIRS
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**REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT**

JUDGE: FINN J

DATE: 2 FEBRUARY 2005

PLACE: ADELAIDE

REASONS FOR JUDGMENT

1 The central issue that arises in this application under s 39B of the *Judiciary Act 1903* (Cth) to review a decision of the Refugee Review Tribunal (“the Tribunal”) can be stated shortly.

2 The first respondent (“the respondent”) applied for and was granted a subclass 785 (Temporary Protection) visa on the ground that he had a well-founded fear of being persecuted by reason of his membership of a family which was engaged in what, for convenience, I will describe as an Albanian blood feud.

3 That visa was granted on 14 November 2000.

4 On 1 October 2001 the *Migration Legislation Amendment Act (No 6) 2001* (Cth) commenced. This added s 91S to the *Migration Act 1958* (Cth). All that I need say of this is that provision now has direct relevance to any claim of fear of persecution advanced on grounds such as were relied on by the respondent in his 2000 application: see *SCAL v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 301.

5 On 18 April 2002 the respondent applied for a Permanent Protection (Subclass 866) visa. He

relied upon his fear of persecution as a member of a family engaged in a blood feud and as a member of the class of “Albanian citizens who are subject to customary law, the code of Leke Dukagjini or the Kanun”. That application was refused by a delegate of the Minister but in review proceedings before the Tribunal was later allowed, although I would note that in so doing the Tribunal seems only to have considered the first basis upon which the application for his visa was made, even though that basis was not prosecuted before the Tribunal.

6 The Tribunal, as is conceded by the respondent, proceeded on a basis that is inconsistent with a line of cases beginning with *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1373 and which includes my own decision in *SVYB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 15. The Tribunal’s error was that it failed to consider at the time of its decision on the respondent’s second visa application, whether the respondent then had a well-founded fear of persecution for a Convention reason. Before a visa could be granted on that application, it had to be satisfied then that the respondent was a person to whom Australia owed protection obligations: see Schedule 2, Subclass 866.22 of the Migration Regulations and s 36(2) of the Act; hence the present significance of s 91S.

7 The course taken by the Tribunal was to determine the application under Article 1C(5) of the Convention on the basis that, having previously been recognised as having refugee status, the respondent retained that status unless and until the circumstances in connection with which he has been recognised as a refugee had ceased to exist. The Tribunal concluded that no such change had occurred.

8 Faced with the line of cases to which I have referred, the respondent’s submission is that those decisions are incorrect, although it is also acknowledged correctly that, in these proceedings, I will follow them. The respondent frankly concedes that he wishes to preserve his position in any appeal in relation to the applicability of Article 1C to circumstances such as the present.

9 In reaching its decision the Tribunal went on to consider whether the respondent had “effective protection” in a third country, i.e. Greece. It found that he did not have such protection there or in any other country.

- 10 Apart from focussing on the error to which I have already referred, the Minister has raised a further matter in this application and that is that the Tribunal failed, when addressing the requirements of s 36(3)-(5) of the Act, to consider their application to Albania even assuming that Article 1C(5) imposed some different test to that embodied in Article 1A(2).
- 11 I merely note this submission. It raises an issue which does not arise given the view I take of the inapplicability of Article 1C(5) to a case such as the present. It is for this reason I express no view on it or on the respondent's contrary submission.
- 12 I will declare that the purported decision of the Refugee Review Tribunal is not a privative clause decision and is void and of no effect.
- 13 I will order that (i) a writ of certiorari be issued, directed to the Refugee Review Tribunal removing its decision in this matter into this Court for the purpose of quashing it; and (ii) a writ of mandamus be issued, directed to the Refugee Review Tribunal, requiring it to hear and determine according to law the matter the subject of the decision.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 7 February 2005

Counsel for the Applicant: Mr S Lloyd
Solicitor for the Applicant: Sparke Helmore
Counsel for the Respondent: Mr G Barrett QC with Mr S Ower
Solicitor for the Respondent: McDonald Steed McGrath
Date of Hearing: 2 February 2005
Date of Judgment: 2 February 2005