

# FEDERAL COURT OF AUSTRALIA

**SVTB v Minister for Immigration & Multicultural & Indigenous Affairs**

**[2005] FCAFC 104**

**MIGRATION** – protection visa – whether well-founded fear of persecution – particular social group accepted as single women in Albania without male protection – whether appellant faced a real chance of being sexually assaulted or trafficked by reason of her membership of that group – adequacy of state protection

*Migration Act 1958* (Cth)

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 cited

*Minister for Immigration and Multicultural Affairs v Khawar* (2002) (2002) 210 CLR 1 cited

*Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 cited

*Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473 cited

*Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 cited

*Minister for Immigration & Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 cited

*Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389 cited

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

**SAD 5 of 2005**

**MARSHALL, MANSFIELD & STONE JJ**

**3 JUNE 2005**

**ADELAIDE**

GENERAL DISTRIBUTION

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

**SAD 5 OF 2005**

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

**BETWEEN: SVTB  
APPELLANT**

**AND: MINISTER FOR IMMIGRATION & MULTICULTURAL &  
INDIGENOUS AFFAIRS  
FIRST RESPONDENT**

**REFUGEE REVIEW TRIBUNAL  
SECOND RESPONDENT**

**JUDGES: MARSHALL, MANSFIELD & STONE JJ**

**DATE OF ORDER: 3 JUNE 2005**

**WHERE MADE: ADELAIDE**

**THE COURT ORDERS THAT:**

1. The appeal be dismissed.
2. The appellant pay to the first respondent her costs of the appeal.

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

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

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SECOND RESPONDENT**

**JUDGES: MARSHALL, MANSFIELD & STONE JJ**

**DATE: 3 JUNE 2005**

**PLACE: ADELAIDE**

**REASONS FOR JUDGMENT**

**THE COURT:**

1 This appeal is from a decision of a judge of the Court declining to quash a decision of the Refugee Review Tribunal (the Tribunal) made on 16 March 2004 and declining other prerogative orders. The Tribunal affirmed a decision of a delegate of the first respondent of 21 June 2001 refusing to grant to the applicant a protection visa for which she had applied under the *Migration Act 1958* (Cth) (the Act). In large measure, determination of the appeal depends upon an understanding of the Tribunal's reasons.

**BACKGROUND**

2 The appellant was born in Albania on 8 March 1953. She was the youngest of her family. She completed schooling in 1973 and thereafter worked as a labourer and a cleaner on a farm until she came to Australia on a visitor visa on 30 September 1999. She was supported in procuring that visa by a sister who resides in Australia.

3 The appellant applied for a protection visa following an unsuccessful application for a remaining relative visa to enable her to remain in Australia. The Tribunal accepted that she is a single woman, and from January 1997 she lived on her own in Albania without family support. Her father is deceased. She told the Tribunal that, following her father's death, the family house had been taken over by two of her brothers who had left Albania in 1996 and 1997, and that before they left they sold the house to a third party. Her mother had left Albania with one of her sons at the time. The appellant was left to live in a small room in the house which had been sold. Two other brothers had already acquired their own houses in Albania with their families and (she said) both then apparently died whilst endeavouring to flee Albania in 1999. She has a sister living in England who left Albania in 1995, a sister in the United States who left Albania in 1996 and her sister in Australia. The Tribunal did not expressly make any finding as to whether it accepted that detailed family history, although it accepted her brothers left Albania in 1997. It also accepted that she now no longer has family members living in Albania.

#### **THE TRIBUNAL'S DECISION**

4 The appellant claimed to fear persecution if she were to return to Albania as a member of a particular social group, namely single Albanian women who do not have the protection of male relatives. She described a number of events which she claimed to have experienced in the past in Albania. The Tribunal did not accept her evidence, which it regarded as 'most unconvincing' and as 'evasive and contradictory'. It is not necessary to refer to the Tribunal's reasons for those conclusions. Those conclusions (which were not challenged on the appeal or at first instance) were that she had fabricated a claim to have been raped as a nine year old girl in Albania, that since she had been unsupported by relatives in Albania from January 1997 she had not left her house and had not worked, and that she had been sexually harassed in Albania since 1997 and had feared sexual assault over that period. Consequently it did not accept that the appellant had suffered conduct amounting to persecution for a Convention reason since 1997 as the appellant claimed.

5 The Tribunal then proceeded to determine whether there is a real chance that the appellant might be persecuted for a Convention reason if she were to return to Albania. After considering the decisions of the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 and *Minister for Immigration and Multicultural Affairs v*

*Khawar* (2002) 210 CLR 1, the Tribunal accepted that the appellant was a member of a particular social group, as that term is used in the Refugees Convention, namely 'a single woman in Albania without the protection of male relatives'. However, it was not satisfied that by reason of her membership of that social group the appellant had been persecuted in the past or that there was a real chance that she would be persecuted in the future if she were to return to Albania.

- 6 In reaching that conclusion, the Tribunal accepted that there is traditionally discrimination against women generally in Albania and that single women without the protection of male relatives would be regarded negatively by society as a whole and could be the subject of malicious gossip. It did not consider that that level of gender discrimination or social disapproval would be so severe as to amount to persecution. Persons within that social group may be employed, may own property, may vote and may avail themselves of educational opportunities. They are able to seek the assistance of government and non-government organisations.
- 7 The appellant claimed that if she were to return to Albania she would be vulnerable to robbery, rape and kidnapping as a consequence of her membership of that social group. She also claimed that the Albanian police were corrupt and ineffective, and would be unable to protect her from such conduct.
- 8 The Tribunal appeared not to accept that the appellant faces a real chance of being sexually assaulted by reason of her membership of that social group. Women in the particular social group, it found, were no more vulnerable to those consequences than other women generally in Albania. It concluded:

*'While the level of violence directed at women is clearly a serious problem in Albania, there is no evidence before the Tribunal that single women without male protection are at greater risk of being subjected to sexual abuse, assault, or any other crime than Albanian women who are married and/or who have male protection. In fact, domestic violence appears to be an area of criminality which is of particular concern for Albanian women, with married women at risk of spousal abuse. Noting the information set out above, the Tribunal is satisfied that the Albanian authorities have acknowledged that violence towards women is a problem and they have created institutional structures and put in place proper police and judicial procedures to address gender-related violence. Single women without male protection are not excluded from accessing these services. The Tribunal finds that the Albanian authorities would be able and willing to provide protection sufficient to*

*remove a real chance of persecution for the applicant if she feared she was at risk of being sexually assaulted or subjected to a criminal attack because she was a single woman without male protection.'*

9 It also did not accept that the appellant is at risk of being trafficked for sexual exploitation or in order to harvest her organs. It noted the country information that the number of Albanians being trafficked is declining in response to government measures, and that 'increasingly, Albanians who are trafficked are children between the ages of 14 and 17'. It observed that persons who are abducted are often orphans who are sold by family members, or are recruited because their economic circumstances make them susceptible to the rewards promised by traffickers. It noted that the appellant is not in a position where she is at risk of her family selling her against her will, and that she is aware of the dangers posed by traffickers and is not likely to succumb to false inducements from traffickers. Consequently, it concluded there is no real chance of the appellant being trafficked because of her individual attributes or because of her membership of the particular social group.

10 The appellant also claimed that if she returns to Albania she will be robbed because people know she has relatives in Australia and will perceive her to be wealthy. The Tribunal concluded that any robbery against her would not be for a Convention reason, and said that even if she belonged to a social group comprising people who are believed to be wealthy, she would not be targeted because of her membership of that group, nor because of her membership of the particular group she had earlier identified, but simply as a suitable victim for robbing. It also noted that the appellant can call on the protection of the Albanian authorities if she is the victim of robbery, and found that the authorities would not deny her protection because of her membership of a particular social group or for any other Convention reason.

11 The Tribunal concluded:

*'Taking into account the above, the Tribunal finds that the applicant has not been persecuted in the past for a Convention reason and finds that if she were to return to Albania now or in the reasonably foreseeable future, there is not a real chance that she would be harmed for reason of her membership of a particular social group or for any other Convention reason. The Tribunal finds the applicant's fears are not well-founded.'*

## **THE JUDGMENT AT FIRST INSTANCE**

- 12 The learned judge at first instance, after noting the rejection of the appellant's particular claims of past adverse conduct towards her, said that the Tribunal had concluded 'implicitly' that the appellant did not fear that she would be persecuted for a Convention reason if she were to return to Albania, that she did not face a real chance of being sexually assaulted or trafficked for sexual exploitation or for her organs because of her membership of the particular social group and had rejected her other claims as not being well-founded, and alternatively if those fears were well-founded, that the Albanian authorities would be able to protect her if she were to return to Albania.
- 13 It was argued before his Honour that the Tribunal had implicitly found that the appellant had a fear of being harmed or sexually assaulted by non-state authorities, motivated to do so by reason of the appellant's membership of the particular social group, and that such harm would amount to persecution for the purposes of the Convention. His Honour regarded those claims as being contrary to the express findings of the Tribunal. His Honour said that the Tribunal primarily found that the appellant had not been subject to persecution in the past, and did not fear that she would be subject to persecution in the future, or that any such fear was well-founded, so that the question of state protection was irrelevant. His Honour regarded the availability of state protection as being an alternative basis for the Tribunal's decision. On that score, the Tribunal based its view upon evidence that the Albanian authorities have created institutional structures and put in place proper policies and judicial procedures to address gender-related violence. The challenge to the Tribunal's findings that the Albanian authorities could protect the appellant was found to be supported by evidence. His Honour regarded the attack upon the Tribunal's findings concerning state protection as going to the merits of its decision, and so as involving no jurisdictional error.
- 14 A further contention that the Tribunal had erred in relation to its consideration of the appellant's fear of being kidnapped and of people trafficking was also found, at first instance, simply to invite a merits review of that ground of the claim. His Honour added that the country information supported the finding that the appellant would not be at risk of being trafficked from her family, or from being lured by false promises, because there was no evidence to support a claim that women of the appellant's age were at risk.

## CONTENTIONS ON APPEAL

15 The appellant argued error on the part of the learned trial judge at first instance in the following respects:

- (1) in concluding that the Tribunal impliedly had found that the appellant did not have a subjective fear of persecution for a Convention reason if she were to return to Albania;
- (2) on the assumption that the Tribunal was satisfied (or did not reject the claim) that the appellant had a subjective fear of persecution, in concluding that the Tribunal had correctly addressed the adequacy of state protection; and
- (3) on the assumption that the Tribunal was satisfied (or did not reject the claim) that the appellant had a subjective fear of persecution, in concluding that the Tribunal had correctly addressed the substance of the appellant's claim to fear being kidnapped for trafficking.

## CONSIDERATION

16 It is axiomatic that, if the appellant were to be granted a protection visa, the Tribunal was required to be satisfied both that the appellant subjectively held a fear of persecution if she were to return to Albania by reason of being a single woman in Albania without the support of male relatives, that is by being a member of the particular social group to which the Tribunal accepted she belonged, and secondly that her fear was well-founded. Those two elements are aspects of the definition of refugee: see *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379; *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 (*Appellant S395/2002*) e.g. per Gummow and Hayne JJ at 498-499, [72]-[74]. The Tribunal clearly understood that. It recorded its awareness of those two elements in the opening part of its reasons.

17 In that context, in our view, it is significant that the Tribunal did not expressly make a finding that it was not satisfied that the appellant subjectively had a fear of persecution for a Convention reason if she were to return to Albania. It found that single women in Albania who do not have the protection of male relatives do constitute a particular social group. It accepted that the appellant was part of that group from January 1997. To an extent, therefore, it accepted her evidence as to her family history, although it expressed dissatisfaction with



her evidence overall. It found that gender violence and the trafficking of women are significant problems in Albania.

18 The Tribunal did not accept that the appellant had suffered the detriments which she claimed to have experienced in the past. In its recording of its findings and reasons, the Tribunal recited the claims of the appellant which it did not accept. Apart from in one respect, they are historical events. It said that it did not accept that the appellant was sexually harassed in the past 'and feared that she would be sexually assaulted'. In context, the reference to having feared sexual assault is a reference to what the appellant claimed to have experienced in the past rather than whether she feared in the future. The Tribunal explained why, by reference to her inconsistent claims as to her work history or activities after 1997, and to the fact that it was only at the hearing before the Tribunal that the appellant had claimed to have been sexually harassed or to have feared being sexually assaulted before 1997. That process of reasoning led the Tribunal to conclude that the appellant was not persecuted for a Convention reason after 1997 when she was living on her own after her brothers left Albania.

19 The reason why it was appropriate for the Tribunal to address the specific claims which the appellant made as to her experiences in the period up to when she left Albania is apparent. In *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 575 explained:

*'Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.'*

The fact that particular claimed events have not occurred in the past does not logically lead to the conclusion that there is no real chance of something occurring in the future, although it may be an indication of such a conclusion. As their Honours said at 574, past events are not a certain guide to the future, although in many areas of life they may provide a reliable basis for determining the probability of their recurrence. See also per Gummow and Hayne JJ in *Appellant S395/2002* at 499, [74].

- 20 The sequence of reasoning of the Tribunal also indicates that it took the separate step of considering whether the appellant faces a real chance of persecution for a Convention reason if she were to return to Albania after finding she had not been persecuted in the past. The question it posed, that is the real chance test, involves both subjective and objective elements. Its reasoning, after identifying the nature of the particular social group as claimed by the appellant, focused on the objective element of that question. It did not suggest that its findings adverse to the appellant in respect of her claimed past experiences made that inquiry unnecessary because it had rejected any claim she made to fear persecution if she were to return to Albania.
- 21 For those reasons, in our judgment the Tribunal did not find implicitly that the appellant did not fear being persecuted for a Convention reason if she were to return to Albania. To that extent, we respectfully disagree with the learned judge at first instance. We also do not agree with counsel for the appellant that, by implication, the Tribunal positively accepted that the appellant subjectively feared persecution for a Convention reason if she were to return to Albania. It has simply expressed no view on the matter. Our reading of its reasons is that the Tribunal simply assumed that the appellant held the fears she claimed for the future, and addressed the other steps necessary to determine if the appellant is a refugee. It then found her assumed fears not to be well-founded. Additionally it found that any well-founded fear she had of non-state violence would attract an appropriate level of state protection and so did not amount to persecution under the Convention.
- 22 The second matter argued on behalf of the appellant was based upon the proposition that, in relation to the appellant's fear of sexual assault or other criminal conduct, the Tribunal had assumed in her favour that the fear was well-founded. It was then contended that the Tribunal's approach to the issue of state protection was inconsistent with the approach required as a matter of law, as explained by the High Court in *Minister for Immigration & Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 (*Respondents S152/2003*).

23 In our view, the Tribunal rejected that claim in the first place because it did not consider that the appellant's fear of sexual assault or other criminal behaviour by reason of her membership of the particular social group was well-founded. The issue of state protection was then simply an additional reason for the Tribunal's conclusion in relation to that fear. The relevant passage of the Tribunal's reasons is that quoted at [8] above. Although not expressed in terms of a finding, in our view it is clear that the Tribunal concluded that the appellant is at no greater risk of sexual assault or other criminal conduct by reason of her being a single woman in Albania without male protection than any other Albanian woman. In other words, it did not accept that she was vulnerable to such conduct by reason of her membership of a particular social group. That is sufficient to dispose of the second ground argued on appeal.

24 In addition, we are also not persuaded that the Tribunal's approach to the issue of state protection involved legal error. The decision in *Respondents S152/2003* was delivered on 21 April 2004. That is about one month after the Tribunal's decision. Nevertheless, in our view, the Tribunal addressed the issue of state protection in a way which accords with the approach of the High Court in *Respondents S152/2003*, in particular as explained by Gleeson CJ, Hayne and Heydon JJ at 494-495, [26]-[27].

25 The Tribunal found that, in relation to sexual violence and other criminal conduct towards women in Albania, the authorities have put in place proper police and judicial procedures to address gender related violence, and that single women without male protection may access those protections. It also found that the Albanian authorities would be able and willing to provide protection sufficient to remove any real chance of persecution of the appellant for the reason she feared. Counsel for the appellant did not contend that the Tribunal's expression of those conclusions demonstrated legal error, but rather that by reference to the primary material to which it had referred earlier in its reasons, those conclusions went beyond the primary material upon which they were based and so accidentally immunised the Tribunal's decision from review in that regard when in fact it did not mean what it said. In our view, the contention necessarily involves an attempt to challenge the Tribunal's conclusions, clearly expressed, on the basis that there was insufficient evidence to support them. It was not argued that there was no evidence to support them. We regard that contention as involving an attack upon the merits of the Tribunal's decision rather than as possibly demonstrating

legal error on its part. We also do not accept the contention that the Tribunal's reasons demonstrate that it regarded non-government resources apparently available to the appellant to complain of criminal conduct to the authorities as satisfying the obligation of Albania to take reasonable measures to protect the lives and safety of its citizens, including the provision of a reasonably effective and impartial police force and justice system.

26 Consequently, the second ground of appeal must fail.

27 The third ground of appeal was that the Tribunal constructively failed to exercise its jurisdiction in relation to a particular claim of the appellant that she feared being kidnapped for trafficking or sexual exploitation, or as an organ donor. Counsel contended that she had made a clearly articulated claim to that effect, which the Tribunal had not addressed, so that the Tribunal had failed to exercise jurisdiction: see *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389 (*Dranichnikov*).

28 It is sufficient to observe that, in our view, the Tribunal recognised the appellant's claim and rejected it because it found there is not a real chance of her being kidnapped because of her membership of the particular social group for sexual exploitation or in order to harvest her organs. The Tribunal's reasons for that conclusion are summarised in [9] above. Unlike *Dranichnikov*, the Tribunal accurately understood the appellant's claimed fear, and addressed it. Counsel for the appellant argued that its reasons for rejecting that claim demonstrate that it did not accurately understand it, and so did not address it. We do not agree. Although its reasons refer to trafficking, rather than to kidnapping, it is obvious that the Tribunal understood that the appellant feared being kidnapped for trafficking for one of those two purposes. It referred to the country information about the practice of trafficking for those purposes in Albania, including common reasons for that conduct being engaged in. It concluded that in the appellant's circumstances she did not fall within those persons who are vulnerable to kidnapping for being trafficked for those common reasons. That does not lead to the view that the Tribunal did not understand, or address, her complaint. In our view it correctly understood and addressed her complaint, and its finding that there is no real chance of her being kidnapped and trafficked because she is a single woman in Albania without male protection, or because she is a member of that particular social group, was a finding available to the Tribunal.

29 For those reasons, in our view, the appeal should be dismissed. The appellant should pay to the first respondent her costs of the appeal. The second respondent appeared simply to submit to any order the Court may make and there is no need to make any order for its costs of the appeal.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Marshall, Mansfield & Stone.

Associate:

Dated: 2 June 2005

Counsel for the Appellant: S Ower

Solicitor for the Appellant: McDonald Steed McGrath

Counsel for the Respondents: S Maharaj

Solicitor for the Respondents: Sparke Helmore

Date of Hearing: 18 May 2005

Date of Judgment: 3 June 2005