

FEDERAL COURT OF AUSTRALIA

SZBBP v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCAFC 167

MIGRATION – application for a protection visa – whether jurisdictional error made in respect of a finding of effective and adequate state protection against religious persecution

Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 - applied

**SZBBP v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS**
NSD 163 OF 2005

WILCOX, BRANSON AND MERKEL JJ
19 AUGUST 2005
SYDNEY

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

NSD 163 OF 2005

On appeal from a judgment of the Federal Magistrates Court

**BETWEEN: SZBBP
 APPELLANT**

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

JUDGES: WILCOX, BRANSON AND MERKEL JJ

DATE OF ORDER: 19 AUGUST 2005

WHERE MADE: SYDNEY

THE COURT ORDERS THAT the appeal be dismissed with costs.

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

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DATE: 19 AUGUST 2005

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The appellant is a citizen of Egypt and is a Christian who belongs to the Coptic Church. He applied for a protection visa on the ground that he is a refugee as defined in Art 1A(2) of the Refugees Convention ('the Convention') because he has a well-founded fear of religious persecution if he returned to Egypt. His application was refused by a delegate of the respondent and the Refugee Review Tribunal ('the RRT') affirmed the decision of the delegate. The Federal Magistrates Court ('the FMC') dismissed the appellant's application to review the decision of the RRT, despite concluding that the RRT had made two errors in relation to the issue of state protection. The appellant has appealed to a Full Court against the decision of the FMC.

2 Initially, the appellant's claim to fear religious persecution in Egypt was based on, or related to, the occupations and activities of his son, a lawyer, and his wife, who was an employee in the Attorney-General's office responsible for determining applications to visit detained persons in the Egyptian prison system. The RRT did not accept that the appellant's initial claim constituted religious persecution and the findings of the RRT in relation to that aspect of the case are not challenged on the appeal.

3 The issues raised on the appeal relate to an additional claim made by the appellant for the

first time during the hearing before the RRT. The RRT's description and findings in respect of that claim are as follows:

'The applicant then goes on to describe a series of events which took place between August 2000 and February 2001 before he departed Egypt for Australia. He says that one evening he heard a terrible explosion and when he went to investigate he found a picture of St Mary which he kept on his balcony torn to pieces. He became angry and went out and swore abuse at the members of the local community who he held responsible for the destruction of his picture. Following this he had a succession of abusive and threatening phone calls including threats to kill. He stated that these calls occurred from 1995 to 2001. One morning he found that his dog had been poisoned and he received a phone call which referred to the death of the dog and threatening him also with death. The Tribunal is satisfied that members of the local community destroyed the applicant's picture of St Mary. The Tribunal is satisfied that the applicant became angry and swore abuse at members of the local community. It is satisfied that as a result of this incident members of the community made abusive and threatening telephone calls for a lengthy period of time and that someone in the community poisoned his dog. The Tribunal is satisfied that these incidents arose out of a neighbourhood dispute and that the persons who were responsible for the harassment, telephone calls and death of his dog were motivated by their anger at the applicant's swearing and abuse when he discovered his torn picture and not for reasons of religion. The destruction of the religious picture was a catalyst for the dispute between the applicant and members of the community and the content of some of the harassing telephone calls concerned matters of religious belief; however the Tribunal is not satisfied that the essential and significant reason for the harassment of the applicant was because of his religious affiliation. The applicant himself stated that this had all happened because he swore at somebody who smashed a picture of St Mary. He had only reacted in this way because he thought something had happened to his house when he heard the large explosion.'

4 The reference by the RRT to 'the essential and significant' reason for the harassment of the appellant arises as a result of s 91R(1)(a) of the *Migration Act 1958* (Cth) which provides that, where there is more than one reason for a claim of persecution that is based on Art 1A(2) of the Convention, the article does not apply unless, inter alia, the Convention reason is the 'essential and significant' reason for the persecution. The appellant challenged the approach of the RRT in respect of the additional claim but the FMC saw 'no legal error in the approach taken' by the RRT.

5 We are troubled by the conclusion of the RRT that the neighbourhood dispute, rather than the appellant's religion, was the essential and significant reason for the appellant's harassment. The appellant's evidence, which the RRT appeared to accept, was to the effect that some of

the more serious threats made to him were specifically related to his religion. In the context of the Convention, it may have been somewhat unrealistic and artificial for the RRT to have classified the respective causes of the harassment as it did: see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 314-316 per Kirby J. In particular, the RRT's approach raises the question of whether the RRT fell into jurisdictional error because it failed to ask the correct question.

6 We have concluded, however, that it is unnecessary to finally resolve the issue of whether the RRT fell into jurisdictional error on that issue as we are satisfied that the appellant's claim was correctly rejected by the RRT on the alternative ground that, even if the appellant had a well-founded fear of religious persecution by reason of being a Coptic Christian, Egypt provides adequate and effective protection to Christians against the harm claimed to have been feared by the appellant.

7 In a number of respects, the appellant's claims concerning the issue of state protection are similar to those made by the applicants in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 ('S152'). In S152, the applicants, who were de facto husband and wife, were Ukrainian nationals. The applicant husband claimed to fear religious persecution because he was a Jehovah's Witness, if he were to return to Ukraine. The claim was based on physical assaults perpetrated by non-state actors on the applicant husband as a result of his status as a Jehovah's Witness. The applicants alleged that the Ukrainian Government had instigated, or had not prevented, the attacks and could not provide assurances regarding their safety. Gleeson CJ, Hayne and Heydon JJ, after citing the House of Lords in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, stated at 493 [21]:

'...a majority of the House of Lords in Horvath took the view that, in a case of alleged persecution by non-state agents, the willingness and ability of the state to discharge its obligation to protect its citizens may be relevant at three stages of the enquiry raised by Art 1A(2). It may be relevant to whether the fear is well-founded; and to whether the conduct giving rise to the fear is persecution; and to whether a person such as the respondent in this case is unable, or, owing to fear of persecution, is unwilling, to avail himself of the protection of his home state.'

8 At 494-495 [26]-[29] their Honours stated:

'[26] No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australian courts deal with

criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.

*[27] In fact, there was no evidence before the tribunal that the first respondent sought the protection of the Ukrainian authorities, either before he left the country or after he arrived in Australia. According to the account of events he gave to the tribunal, he made no formal complaint to the police, and when the police interviewed him after the first attack, he made no statement because he could not identify his attackers. The tribunal considered the response of the police on that occasion to be appropriate. It is hardly surprising that there was no evidence of the failure of Ukraine to provide a reasonably effective police and justice system. That was not the case that the first respondent was seeking to make. The country information available to the tribunal extended beyond the case that was put by the first respondent. Even so, it gave no cause to conclude that there was any failure of state protection in the sense of a failure to meet the standards of protection required by international standards, such as those considered by the European Court of Human Rights in *Osman v United Kingdom*.*

[28] The first respondent sought to explain and justify his unwillingness to seek the protection of the Ukrainian authorities, either at home or abroad, on the basis that they were the instigators, directly or indirectly, of the attacks on him. That case was rejected by the tribunal. The Full Court found no fault with that part of the tribunal's decision. The only other basis upon which the first respondent's unwillingness to seek the protection of the Ukrainian government could be justified, and treated as satisfying that element of Art 1A(2), would be that Ukraine did not provide its citizens with the level of state protection required by international standards. It is not necessary in this case to consider what those standards might require or how they would be ascertained. There was no evidence before the tribunal to support a conclusion that Ukraine did not provide its citizens with the level of state protection required by such standards. The question of Ukraine's ability to protect the first respondent, in the context of the requirements of Art 1A(2), was not overlooked by the tribunal. Because of the way in which the first respondent put his claim, it was not a matter that received, or required, lengthy discussion in the tribunal's reasons. If the Full Court contemplated that the tribunal, in assessing the justification for unwillingness to seek protection, should have considered, not merely whether the Ukrainian government provided a reasonably effective police force and a reasonably impartial system of justice, but also whether it could guarantee the first respondent's safety to the extent that he need have no fear of further harm, then it was in error. A person living inside or outside his or her country of

nationality may have a well-founded fear of harm. The fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify unwillingness to seek their protection. For example, an Australian court that issues an apprehended violence order is rarely, if ever, in a position to guarantee its effectiveness. A person who obtains such an order may yet have a well-founded fear that the order will be disobeyed. Paradoxically, fear of certain kinds of harm from other citizens can only be removed completely in a highly repressive society, and then it is likely to be replaced by fear of harm from the state.

[29] The tribunal's finding that it was not satisfied that the Ukrainian government was unable to protect the first respondent, and its finding that the first respondent was not a victim of persecution, must be understood in the light of the terms of Art1A(2), the evidence that was before the tribunal, and the nature of the case the first respondent sought to make. Once the tribunal came to the conclusion that the contention that the Ukrainian authorities instigated or encouraged the harm suffered by the first respondent must be rejected, and that the attacks on him or his property were random and unco-ordinated, then its finding about the government's willingness and ability to protect the first respondent must be understood as a finding that the information did not justify a conclusion that the government would not or could not provide citizens in the position of the first respondent with the level of protection which they were entitled to expect according to international standards. That being so, he was not a victim of persecution, and he could not justify his unwillingness to seek the protection of his country of nationality. It was not enough for the first respondent to show that there was a real risk that, if he returned to his country, he might 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.'

9 In the course of hearing the present case, the RRT observed that independent country information indicates that the Egyptian Constitution provides for freedom of religion and that, generally, apart from isolated incidents, there is a good relationship between the Islamic and Christian communities. The appellant's response was to present a number of examples of discrimination against Christians. In its reasons for decision, the RRT considered the examples and concluded that they did not evidence the discrimination against Christians for which the appellant had contended.

10 The appellant's agent also made a number of submissions which were said by the agent to demonstrate that Egyptian Muslims had become less tolerant of the Christian community. In its reasons for decision the RRT's response to those submissions was as follows:

'There is no evidence, however, that there has been a shift in the attitudes of the general population. Such a change would be difficult to measure and

there are no reports which would indicate that there has been a large scale change in attitudes resulting in harm caused to Christian or other non Muslims. Even if there were a demonstrable shift in attitude as suggested by the applicant's agent, such a shift will only be relevant if it can be shown that it results in a real chance that the applicant will be persecuted for a Convention reason. Taking into account the independent country information the Tribunal is not satisfied that any shift in attitude by the Egyptian population has resulted in either a risk of serious harm to the applicant or a risk of systematic and targeted discrimination which would amount to persecution.

The applicant's agent states that the government cannot control persecution and protect its citizens. The independent information suggests that whilst the police have been criticised by some in the community for an inadequate response to incidents of communal violence the government does not accept this criticism and has made genuine efforts to contain violence and protect the Christian community. The independent country information suggests that the state has provided adequate protection to Christians (2002 International Religious Freedom Report, US-DOS 2001). The applicant does not claim that he sought the assistance of the police in relation to the threats made to himself and his late wife. The applicant's agent's submission is not supported by any credible evidence and accordingly the Tribunal is satisfied that the state provides adequate and effective protection to Christians.'

11 The FMC identified two errors in the RRT's approach to the issue of state protection:

'First, ... it was not relevant whether or not the applicant had sought the protection of the Egyptian police. The question was not whether the applicant was unwilling to avail himself of State protection in Egypt but rather, whether the applicant's unwillingness to avail himself of Egyptian protection provided a well founded basis for his unwillingness to return to Egypt. In my view the RRT asked itself the wrong question.

Secondly, the issue of State protection cannot be considered in abstract by reference to country information. Where State protection is in issue, the RRT must consider the ability of the State to protect the applicant from the risk of persecution that he faced. There was a constructive failure on the part of the RRT to consider the issue of State protection.'

12 Despite having identified these two errors, the FMC dismissed the appeal because it found that the finding by the RRT on the issue of state protection was unnecessary given that the earlier finding by it, that it was not satisfied that the essential and the significant reason for the harassment of the appellant was his religious affiliation.

13 The FMC erred in its approach to both of the above matters. First, as is clear from the passages we have cited from the majority judgment in *S152*, the question of whether state protection was sought is a matter, among others, that can be relevant to the three stages of the

enquiry raised by Art 1A(2), and which are referred to in [21] of the majority judgment in *S152*. Thus, the RRT was entitled to have regard to the failure of the appellant to seek state protection as a relevant matter. While it is correct that a failure to seek such protection is not, of itself, dispositive of any of the relevant questions, we do not consider that the RRT treated it as such. More particularly, on a fair reading of its reasons, it did not ask itself the wrong question on that issue.

14 Secondly, it is not correct to state, as the FMC did, that the RRT did not consider the ability of the state to protect the appellant from the risk of persecution ‘that he faced’, which we take to mean the risks of persecution he claimed to fear. As is apparent from our discussion of the RRT’s decision in relation to state protection, it addressed and rejected each of the bases put forward by the appellant and his agent for claiming that the appellant could not rely on the state to protect him because he was a Christian. Indeed, the RRT was satisfied that the state ‘has made genuine efforts to contain violence and protect the Christian community’ and appeared to accept independent country information that ‘the state provides adequate and effective protection to Christians’. In arriving at those conclusions the RRT was addressing the case the appellant was seeking to make. It is not suggested that those conclusions were not open to the RRT on the evidence and material before it. Rather, the appellant argued that the RRT failed to consider whether that protection met ‘international standards’ and also failed to deal with the discrete question of whether the state could adequately protect the appellant from the harm he feared as a result of the neighbourhood incident about which he gave evidence.

15 In our view, neither criticism of the RRT’s decision is warranted. The RRT addressed and rejected the case the appellant was seeking to make which was that adequate state protection was being denied to Christians in Egypt. In addressing that case, the RRT concluded that state protection was adequate and effective in respect of the kind of harm feared by the appellant. Thus, the RRT addressed the issues it was required to address in order to determine the appellant’s claims. It is also clear that the RRT, in regarding the protection as ‘effective and adequate’, was satisfied that it met the requisite standards. Thus, there is no substance in the criticisms made by the appellant concerning the issue of state protection which, in substance, impermissibly sought to reargue that issue on the merits.

16 For the above reasons, the finding by the RRT of adequate and effective state protection did

not involve jurisdictional error and, as a consequence, the RRT did not err in affirming the decision of the delegate. It must follow that the appeal is to be dismissed with costs.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Wilcox, Branson and Merkel.

Associate:

Dated: 18 August 2005

Counsel for the Appellant: LJ Karp

Counsel for the Respondent: J Smith

Solicitor for the Respondent: Blake Dawson Waldron

Date of Hearing: 15 August 2005

Date of Judgment: 19 August 2005