FEDERAL COURT OF AUSTRALIA

VRAW v Minister for Immigration and Multicultural and Indigenous Affairs

[2004] FCA 1133

MIGRATION – application for asylum –persecution by "rogue" state officials – police inaction – adequate state protection – test to be applied

Horvath v Secretary of State for the Home Department [2001] 1 AC 489 referred to
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 followed
Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 78 ALJR 678 followed
Osman v United Kingdom (1998) 29 EHRR 245 considered
Regina v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 cited
Risak v Minister of Employment and Immigration (1994) 86 FTR 67 approved
Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891 applied
Zhuravlvev v The Minister of Citizenship and Immigration [2000] 4 CF 3 cited

VRAW & VRAX v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V 635 of 2003

FINKELSTEIN J
3 SEPTEMBER 2004
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 635 of 2003**

BETWEEN:	**VRAW & VRAX** **Applicants**
AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Respondent**

JUDGE:	**FINKELSTEIN J**
DATE OF ORDER:	**3 SEPTEMBER 2004**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. A writ of certiorari issue to the Refugee Review Tribunal removing into this court and quashing the decision of the Tribunal given on 20 June 2003.
2. A writ of mandamus issue to the Refugee Review Tribunal directing it to hear and determine the matter in accordance with law.
3. The respondent pay the applicants' taxed costs.

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

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PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The applicants, husband and wife, are Russian citizens who arrived in Australia in late 2000. They claimed refugee status by reason of a well-founded fear of persecution if required to return to Russia. The wife based her claim on her sexuality; she is bisexual and it is accepted that bisexuals can form a particular social group for the purpose of the Refugees Convention. The husband based his claim on his political opinion coupled with his wife's sexuality.

2 Briefly, these are the facts as told by the applicants. The applicants lived in Krasnoyarsk which is in south-western Siberia. The wife graduated from high school in 1992 when she was 17. She then enrolled at the Siberian Technological University to study for a diploma in economics. While a student at the university she began to have sexual relations with men (it was during her time as a student that she met her future husband whom she married in 1994) and women. Students began to suspect that she was a lesbian. She was attacked and beaten by some students and others constantly tried to break into her room to force her to have sex. They demanded that she prove that she had a "normal sexual orientation". Obscenities were written on the doors and walls around her room. On one occasion a fellow student tried to cut her ear. The wife reported these incidents to the dean. However, he was only interested in determining whether she was in fact a lesbian. The dean said that the wife had no reason to complain if she was a lesbian and that he was not going to

tolerate "such a terrible disgrace in the University".

3 The husband completed an engineering degree at Tomsk University in 1985. In 1990 he and a number of other men established a successful business constructing service stations. In January 1996 he attended a conference in Moscow as part of a delegation from Krasnoyarsk. His wife accompanied him as did the deputy mayor of Krasnoyarsk, who was also a member of the delegation. One evening the deputy mayor tried to seduce the wife. To ward off his advances she told the deputy mayor that she was not interested in men and that although married, her husband accepted her situation.

4 Shortly after the Moscow conference the applicants travelled to Australia on business. Upon their return they encountered serious problems. Apparently the deputy mayor had informed the husband's business associates that his wife was a lesbian. The associates demanded that the husband leave his wife. The wife described this as imposing "terrible" pressure. She was also threatened with and harassed by anonymous telephone calls.

5 Ultimately the husband left his business and established a new firm. This did not, however, put an end to the abuse. For example, the postman told occupants of their apartment block that the wife was a lesbian. This led to offensive comments being painted on their door. One of the neighbours even told the wife that he had a gun and would shoot her. The wife reported the threat to the police but they refused to take any action, asserting they were too busy. She made several requests for assistance but to no avail.

6 At the beginning of 2000 there was a federal election campaign. One of the candidates was openly supported by gay and lesbian groups. The news media attacked the candidate. During the course of the campaign a rock was thrown through the wife's window while her child was playing on the floor. Someone also wrote on her apartment door that a "Lesbian lives here". Again the wife reported these incidents to the police but they refused to take action. They made the comment: "We know you".

7 In May 2000 the wife was employed by the regional Administration office, which is a government department of some kind. In August 2000 she was dismissed by the head of that department because she was a lesbian. She was so upset that she began to cry. She went to the bathroom to wash her face. In the bathroom she was humiliated by a number of her

former co-workers. One of them called the security guards, probably to have her removed from the premises. She was raped by the guards who wanted to teach her "the right way to love". This led to her hospitalisation. Following her discharge she and her son left Russia for Australia. Her husband followed soon after.

8 The husband faced his own problems. The business which he established was profitable and he soon became one of the wealthiest men in the region. In June or July 1997 he was approached by a colonel in the Federal Security Service (FSB) (which succeeded the KGB) and asked to contribute US$200,000 to support the election campaign of a particular candidate. The husband was told that if the money was paid his and his wife's safety would be guaranteed. He refused to make the contribution and a little later his office and storage facilities were destroyed by a fire. One of his relatives who was working in the office was killed in that fire. The police refused to conduct an investigation. They said that arson could not be proved. Later, the fire team investigator informed the husband that the police had "indicated that the 'desirable' cause for [the] fire [was an] electrical wires' fault".

9 Shortly after the fire the husband was again asked to contribute to the candidate's campaign. This time he paid US$500,000, a payment which breached both federal and local election laws. The husband decided to expose the politician. He approached the state television authority and asked whether they would broadcast the story, but they refused. The authority warned him that if he pursued the matter there would be serious consequences. Undeterred, the husband approached a private television station and asked them to investigate and report the incident. An investigation was undertaken and a program compiled. In the end, however, the television station was not prepared to broadcast the program. The husband believes that the station was concerned about possible reprisals.

10 The tribunal accepted the applicants' version of events and found that each was "forthright and open" in the evidence that they gave. Nevertheless the tribunal found that neither applicant was a Convention refugee. The tribunal proceeded on the basis that the purpose of the Refugee Convention was to enable a person who did not have the benefit of protection from persecution in his own country to obtain that protection (surrogate or substitute protection) from a signatory country. On that basis (that is on the basis of what has come to be called the "protection theory"), to achieve refugee status a putative refugee must establish acts of persecution which involve serious harm, plus the failure of state protection:

Regina v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629, 653. According to the "protection theory" a state has a positive obligation to take reasonable measures to protect those of its citizens whose lives are at risk: *Osman v United Kingdom* (1998) 29 EHRR 245, 305. The content of the duty is a matter to which I will return. Applying the "protection theory" the tribunal found that if the applicants returned to Russia they would have available to them the "effective protection" of the Russian government and that consequently their fear of persecution was not well-founded.

11 In two recent decisions, *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678, (the second handed down after the tribunal had delivered its reasons in this case), the High Court (by majority) adopted the protection theory at least in the sense that the ability or unwillingness of a state to protect its citizens is a relevant consideration when determining whether a putative refugee's fear of persecution is well-founded.

12 In considering whether the protection afforded by the state is sufficient the distinction between persecution by the state (or where the persecution is carried out by state agents) and persecution by non-state agents must be born in mind. In relation to persecution by the state, if the feared harm is sufficiently serious and inflicted for a Convention reason the victim will in almost all cases be a refugee. When the state is the agent of persecution there is no need for an inquiry into the extent or effectiveness of state protection; it is by definition absent. With respect to persecution by non-state agents the victim will only be a refugee if the state condones or tolerates the persecution or refuses or is unable to offer adequate protection: *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 13 per Gleeson CJ. Here the attitude or capacity of the state is directly relevant to the question whether the subjective fear of persecution is well-founded: *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678, 683 per Gleeson CJ, Hayne and Heydon JJ and 686 per McHugh J.

13 In *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 Gleeson CJ (at 13) explained that references in the authorities to state agents of persecution and non-state agents of persecution "should not be understood as constructing a strict dichotomy". He said, by way of example that "[p]ersecution may also result from the

combined effect of the conduct of private individuals in the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in the circumstances where the state has a duty to provide protection against harm". There is another situation where the strict dichotomy cannot be applied. The situation I have in mind is where the persecution is by the hands of rogue state officials who act illegally or in abuse of their authority. In this circumstance it cannot be said that state protection is necessarily absent. I will discuss later what must be established to make out a case for surrogate protection. But before I do I must first explain why these issues are relevant in this case.

14 The tribunal did not regard any part of the wife's claim as founded on persecution by state agents. In so far as the wife relied upon mistreatment at the hands of the good citizens of Krasnoyarsk, the tribunal treated her claim as one based on non-state agent persecution in respect of which it was necessary for the tribunal to decide whether the state was unable or unwilling to provide protection. The tribunal's approach in this regard was correct, although whether it applied the correct test in determining the adequacy of state protection will require separate consideration.

15 The tribunal considered the actions of the head of the Administration unit and the security guards, who were state agents or employees, to be those of non-state agents. The tribunal explained its reasons for this approach. The tribunal said that the action of the head of the Administration Unit "could not have been undertaken as part of his official position in the regional administration because the Russian government does not encourage, condone or fail to protect against such discrimination". The security guards' conduct was also regarded as conduct of private individuals because it was "serious criminal [conduct] … and as such the Russian government cannot be said to have condoned that harm or to be unwilling or unable to extend protection and redress to the Applicant for that harm".

16 Now, I think the tribunal made a serious mistake when it treated the acts of the head of the department and the security guards as non-state action. I appreciate that for many purposes there is a difference between the illegal actions of state agents which are tolerated or encouraged by a state and wholly unauthorised actions of rogue officials. However, as *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891 shows, the actions of rogue officials should be treated as actions of the state for the purposes of considering a claim for asylum.

17 On the other hand, when the tribunal has to determine whether a person has adequate state protection, the authorities establish that there is a different standard in the case of persecution by non-state agents and rogue state agents.

18 As a general rule a state should have a system of law which makes attacks by persecutors punishable. It should also have law enforcement agencies that will enforce those laws: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 494. The obligation of enforcement is not absolute. In *Osman v United Kingdom* (1998) 29 EHRR 245, the European Court of Human Rights (at 305) said:

> *"[T]he State's obligation [to safeguard the lives of its citizens] extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted [that] the ... Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.*
>
> *For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."*

According to Lord Hope in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 500:

> *"The standard to be applied is therefore not that would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its nationals. As Wood LJ said in [2000] INLR 15, 44G, ... it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection".*

See also Lord Clyne who (at 510) said that there must be in place "a system of domestic protection and machinery for the detection, prosecution and punishment of [acts] contrary to the purpose which the Convention requires to have protected" as well as, more importantly "an ability and a readiness to operate that machinery".

19 In the case of rogue state agents a different standard applies. Here there will only be adequate protection if the state is taking action to curb their illegal and unauthorised actions. In *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891 Sedley LJ dealt with this issue. He said (at 1897):

> *"The concept of 'non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state' seems to me to give a precise edge to the Convention scheme in the present context, and to make a clear distinction between state and non-state agents of persecution. While the state cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own agents do unless it acts promptly and effectively to stop them."*

Later (at 1898) he said that there must be:

> *"... convincing evidence, where the agents of persecution are themselves officers of the state, that the state not only possesses mechanisms for controlling its officials but operates them to real effect. In this respect, which is practical in form but constitutional in nature, it differs from the standard of protection from persecution by non-state agents ..."*

20 The tribunal did not adopt this test. It ignored the distinction between state action and non-state action when it found that there was adequate state protection. On this score the tribunal said:

> *"[T]he Applicant made no attempt to seek redress for the failure of the local police to take seriously and investigate her complaints of harassment, nor did she seek redress from any other avenue available to her, such as to pursue the matter with more senior police or the Procurator, the Ombudsman or the human rights organisations which operate in Russia. Similarly, the Applicant made no attempt to seek the protection of the Russian government from the criminal assault she suffered at the hands of security guards at her place of employment, nor the discriminatory dismissal of her by her former superior. In the absence of such approaches, I am not satisfied that had she done so she would have been prevented, because of her sexuality, from accessing protection or redress."*

And later:

> *"I am satisfied, on the information available to me that ... protection would have been and in future will be forthcoming. I cannot be satisfied that there was, or in the future would be, a failure of State protection where the Russian government was not given the opportunity to respond to the harm alleged by the Applicant."*

21 These passages demonstrate further error. A person who is in imminent risk of serious injury, or has just suffered serious injury, will approach the police for help. It is the natural thing to do. It is the unit of government charged with the responsibility of protecting citizens and from which citizens expect to secure protection. But for the wife that protection was not forthcoming. The tribunal accepted that when the wife made complaints about harassment and property damage inflicted by neighbours and strangers she was "rebuffed by the police". It is true that the wife did not complain to the police about the actions of her superior and the security guards but, as I have already pointed out, by reason of her past experience, she no doubt had good reason to believe that any complaint would be ignored.

22 The failure of the state to provide the wife with protection from the criminal conduct which she faced is not compensated by the fact that she could have sought "protection" from human rights organisations, the ombudsman or the procurator. In *Risak v Minister of Employment and Immigration* (1994) 86 FTR 67 Dube J said (at 70) that there is nothing in Canadian jurisprudence "to the effect [that an] applicant has the further burden to seek assistance from human rights organisations or, ultimately, launch an action in court against the government". Our jurisprudence should be the same. Agencies such as human rights organisations, the ombudsman or the procurator do not provide protection against violence. They are certainly avenues of complaint against police inaction. On the other hand, these organizations cannot and do not offer practical protection from persecution. They may be wonderful advocates and proponents of human rights. But a person who fears for his well being is in need of immediate protection and is not overtly interested in making complaints. In Russia the organisation that provides immediate protection from imminent danger is the police.

23 In substance, when one has regard to the practical rather than the theoretical, a person who for good reason has a subjective fear that he or she might be killed or tortured has an objective basis for that fear when the only avenue of "protection" is the ombudsman, human rights organisations, the procurator or something similar. These institutions do not offer and cannot provide practical protection from persecution.

24 I now turn to the husband's claims. The tribunal did not make any finding as to whether the harm which he faced was for a Convention reason. In relation to the extortion by the colonel in the FSB, the destruction by fire of his business and the death of his relative the

tribunal inclined to the view that the husband was targeted because he was a wealthy businessman who was financially capable of paying the money demanded. However, the tribunal said that his wife's sexuality "may well have been a secondary reason" for him being targeted. That is a sufficient basis upon which to conclude that the husband feared persecution for a Convention reason. It is not necessary to show that the Convention reason is the only reason for persecution. No doubt "skinheads" may persecute some people on account of their race, but they may be just as motivated by their enjoyment of inflicting harm. Their acts will be for a Convention reason.

25 The tribunal disposed of the husband's case in much the same way as it dealt with the wife's claim. It said that it was satisfied that the husband had available to him effective avenues of protection in Russia. In reaching this conclusion it wrongly treated the actions of the colonel in the FSB as non-state action and therefore applied the incorrect test for determining whether there was adequate protection against persecution. As I have demonstrated, this was a serious mistake on the tribunal's part. The mistake was even more serious in the husband's case when one bears in mind that (1) the principal agent of persecution was a senior officer in the FSB and (2) the tribunal's acceptance that "by accessing any of the avenues of protection and redress available, would have resulted in a level of risk to the [husband] and to his family." In these circumstances the tribunal's finding that protection was available to the husband is quite startling.

26 I propose to set aside the tribunal's decision and remit the matter to be decided in accordance with this judgment. When the tribunal reconsiders the matter it should bear in mind the following matters. First, the observations of Sir Murray Stuart-Smith and Simon Brown LJ in *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891. Sir Murray Stuart-Smith said (at 1907) that "[t]he more serious the ill-treatment [by rogue state agents] both in terms of duration, repetition and brutality, the more incumbent it is upon the state to demonstrate that it can provide adequate protection." Simon Brown LJ (at 1909) said: "The more senior the officers of state concerned, and the more closely involved they are in the refugee's ill-treatment, the more necessary it will be to demonstrate clearly the home state's political will to stamp it out and the adequacy of their system for doing so and for punishing those responsible …". Second, the country information before the tribunal does not suggest that Russia is taking any active steps to prevent rogue state agents from acting illegally. There might be such evidence, but for it to be accepted it must be cogent.

Third, internal flight or relocation may not be of much relevance in this case. In *Zhuravlvev v The Minister of Citizenship and Immigration* [2000] 4 CF 3, 18 Pelletier J reminded us that internal flight might not be applicable in states (like Russia) where internal movement is restricted. In this case there is the added problem that the husband faces harm from the FSB and this may not be avoided if he were to move to another city.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 3 September 2004

Counsel for the Applicants: Mr J Gibson

Solicitor for the Applicants: Haag Walker Lawyers

Counsel for the Respondent: Mr C Fairfield

Solicitor for the Respondent: Blake Dawson Waldron

Date of Hearing: 16 April 2004

Date of Judgment: 3 September 2004