FEDERAL COURT OF AUSTRALIA

VNAG v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 555

MIGRATION – refugees – 'particular social group' – whether businessmen or entrepreneurs constitute social group

Applicant S v Minister for Immigration and Multicultural Affairs (2004) 78 ALJR 854 applied
Horvath v Secretary of State for the Home Department [2001] 1 AC 489 cited
Lai v Canada (Minister of Employment & Immigration) (1989) 8 Imm LR (2d) 245 applied
Minister for Immigration and Multicultural Affairs v Zamora (1998) 85 FCR 458 referred to
Osman v United Kingdom (1998) 29 EHRR 245 cited

VNAG v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

VID 832 of 2004

MELBOURNE
FINKELSTEIN J
5 MAY 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 832 of 2004**

On Appeal from a Magistrate of the Federal Magistrates Court

BETWEEN:	**VNAG** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Respondent**

JUDGE: **FINKELSTEIN J**

DATE OF ORDER: **5 MAY 2005**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's taxed costs.

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

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AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **Respondent**
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PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 The appellant is a Russian citizen. He arrived in Australia on a tourist visa and shortly thereafter applied for a protection visa. He claims that if he were required to return to Russia there is a real chance that he will face persecution on account of his membership of a particular social group. The description of the social group has changed from time to time. At first the group comprised Russian businessmen or entrepreneurs. It then became a group of active businessmen or entrepreneurs. At any rate, neither the Minister's delegate, who refused his application for a protection visa nor the tribunal, which affirmed the delegate's decision, was satisfied of the existence of the particular social group. According to the tribunal "[t]he groups postulated do not meet the criterion of being cognizable social groups" for the purposes of the Refugee Convention.

2 The appellant applied to the Federal Magistrates Court to review the tribunal's decision. That application was unsuccessful. He has now brought an appeal from the magistrate's decision.

3 On the appeal the principal criticism the appellant makes of both the tribunal's decision, and the magistrate's acceptance of that decision, is in relation to its finding about the particular social group. In large measure the criticism is based on the High Court's recent decision in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854. Prior

to that decision, the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 85 FCR 458, 464 had laid down that under the Refugee's Convention a particular social group had to display the following features: "First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community." In part this statement of the relevant characteristics was in error. The error was in the description of the third criteria. According to *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854 the principle is not that the group must be recognised or perceived within the society, but rather that the group is distinguished from the rest of society. The joint judgment of Gleeson CJ, Gummow and Kirby JJ puts the matter thus (at 861):

> *"Therefore, the determination of whether a group falls within the definition of 'particular social group' in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic of attribute common to all members of the group cannot be the shared fear or persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'. As this Court has repeatedly emphasised, identifying accurately the 'particular social group' alleged is vital for the accurate application of the applicable law to the case in hand."*

See also McHugh J who (at 867) said:

> *"Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally* ***within the society*** *as a collection of individuals which constitutes a group that is set apart from the rest of the community. To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle."* (Emphasis in the original).

4 In order to understand how the tribunal arrived at its decision, as well as to determine whether it committed jurisdictional error in arriving at that decision, it is necessary to say something about the facts. In this connection I will confine myself to the appellant's

statement of the facts which the tribunal accepted as true or, at least by not having rejected what the appellant said, appeared to accept as true. There is no allegation, and nor could there be in this case, that the tribunal erred in the manner in which it rejected or did not accept evidence of other "facts" which the appellant asserted to be true.

5 The appellant is a businessman from Severodvinsk. He is a qualified engineer. Following his military service, he worked in the Russian Centre for Nuclear Shipbuilding. In about 1990 the appellant established his own business, known as Forum. The business operated a car service workshop, manufactured and repaired car batteries, published books and was both a wholesaler and retailer of consumer goods, food products and spare parts for motor vehicles.

6 In 1996 local criminal elements attempted to extort "protection money" from Forum but the appellant refused to make any payments. In November 1996 the appellant and his neighbour, who was the director of a large building and renovation cooperative were beaten by some "Caucasian people" which caused them serious injuries. The appellant was able to identify the ringleader and reported his conduct to the authorities. This produced further threats from the "bandits", who must have discovered that their activities had been reported.

7 The appellant contends that the authorities did not adequately investigate the bandits' actions. The appellant says that "my easy case was exceeded all possible terms and seven and the half months later was transferred to the Investigation Dept. On 17.06.1997 I was asked by the captain Tretyakov after which the file was closed without explanation and notification. By our request the file was open again and closed once again, and nothing was changed at all."

8 Among the documents which the appellant produced to the tribunal were communications from the authorities who were investigating his complaints. One document advised the appellant that the Arkhangelsk Regional Department of Internal Affairs would investigate the matter "[u]pon the establishment of [the perpetrators'] whereabouts." Another document advised that the "previously suspended" investigation "has been re-opened … and is currently under [a particular individual's] supervision." It also appears from other documents that some kind of investigation was in fact carried out.

9 There was another incident of potential relevance. The appellant brought legal proceedings

to recover 120,000,000 rubles from a particular individual. That individual was connected to a Chechen criminal group and was a close friend of a former Vice-Minister in the Ministry of Foreign Trade in the Chechen Republic. As a result of the action, the appellant was threatened by Chechen individuals.

10 As I have said, the tribunal accepted, or should be taken to have accepted, that these events occurred. Yet it found against the appellant. Two reasons were given for rejecting the appellant's claim for refugee status. The first reason is encapsulated in the following paragraph of the tribunal's reasons:

> *"In summary, the Tribunal accepts that the applicant was beaten in the course of extortion episodes by the mafia. It finds that the harm suffered by the applicant does not fall within the ambit of the Convention as it was not motivated by one of the convention reasons. The Tribunal does not accept that the applicant belonged to a particular social group or groups as defined by the applicant's adviser. The groups postulated do not meet the criterion of being cognizable social groups."*

11 In other words, the tribunal rejected the appellant's claim that he was persecuted for a Convention reason because it did not accept that "active businessmen" or "entrepreneurs" constitute a particular social group and that the appellant's membership of that social group was the reason for his mistreatment. It is clear that the tribunal rejected the existence of businessmen or entrepreneurs as a particular social group because (in its view) it did not meet the third requirement laid down in *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 85 FCR 458, 464, namely that the group be recognised within society as a group set apart from the rest of the community. We now know, however, that this is not a necessary requirement. It follows, therefore, that the tribunal, having misinterpreted the effect of the Convention, fell into jurisdictional error on this aspect, although through no fault of its own.

12 If the tribunal had applied the test laid down in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 78 ALJR 854 (a decision which of course was not available to the tribunal as it was published well after the tribunal's decision), it would have been impossible for it to reject the existence of businessmen or entrepreneurs as a particular social group. At the very least the tribunal would have been required to find that there was a similar group to that which the appellant had described. The evidence before the tribunal was that there is in Russia a social group comprised substantially of what are referred to as "new

entrepreneurs" or "merchants". This group is similar to the capitalists recognised in *Lai v Canada (Minister of Employment & Immigration)* (1989) 8 Imm LR (2d) 245, 246.

13 The finding that the tribunal had erred in its characterisation of entrepreneurs or businessmen as a particular social group does not, however, dispose of the case in the appellant's favour. The tribunal also found, and this is the second reason why it rejected the appellant's claim, that "[i]t does not accept the applicant's claims that the state was unwilling or unable to deal with his reports of corruption since there is evidence of efforts by the state to pursue what the applicant had complained about." Earlier in its reasons the tribunal made reference to the appellant's claim that there was a lack of state protection afforded to him by the Russian authorities. The tribunal found that there was nothing to suggest that the authorities were motivated by factors other than a lack of evidence, or a lack of admissible evidence against those who had been accused of mistreating the appellant. According to the tribunal the appellant had interpreted the lack of State action as an indication of corruption on the part of the authorities. However, the tribunal noted that the conduct of the authorities in "receiving complaints, investigating them, calling people as witnesses and taking their statements does not indicate either an incapacity or unwillingness of the state apparatus to deal with the matters raised by the [appellant]. That these matters were not concluded to the satisfaction of the [appellant] does not indicate that protection was not available or not given."

14 According to the authorities 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, however, is not absolute. Rather, there must be a practical approach, which recognises that not all forms of ill treatment or persecution will be punished and that crimes will occur even if the State takes reasonable action to prevent them from occurring: *Osman v United Kingdom* (1998) 29 EHRR 245, 305.

15 There was some evidence before the tribunal to the effect that Russia may be lawless and that the authorities face difficulties in dealing with government corruption and organised crime. It is well known that the Russian legal system is far from perfect, which suffers at certain levels from corruption and at others from a chronic lack of resources including a lack of experienced judges. So far as I can tell, however, it was not suggested that the Russian authorities are incapable of providing its citizens with protection from persecution, especially

if the authorities are minded to give that protection. And this is where the appellant faces an insurmountable hurdle. While he might claim that the authorities failed to take the necessary steps to protect him from persecution, the evidence which the tribunal ultimately found persuasive was that the protection to which the appellant was entitled to expect from the Russian authorities would be forthcoming provided the authorities had the appropriate evidence upon which they could act. If there be any error in this finding it is an error of fact not of law.

16 It follows that the appeal must 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 Justice Finkelstein.

Associate:

Dated: 5 May 2005

Counsel for the Appellant:	Mr J Gibson
Solicitor for the Appellant:	Victorian Legal Aid
Counsel for the Respondent:	Mr C Horan
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	11 February 2005
Date of Judgment:	5 May 2005