

FEDERAL COURT OF AUSTRALIA

SVRB v Minister for Immigration & Multicultural & Indigenous Affairs

[2006] FCAFC 123

**SVRB & SVSB v MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS and REFUGEE REVIEW TRIBUNAL**

SAD 20 of 2006

**MANSFIELD, RARES & BESANKO JJ
28 JULY 2006
ADELAIDE**

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

SAD 20 OF 2006

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

**BETWEEN: SVRB
FIRST APPELLANT**

**SVSB
SECOND APPELLANT**

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

**REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT**

JUDGES: MANSFIELD, RARES & BESANKO JJ

DATE OF ORDER: 28 JULY 2006

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of Lander J on 22 December 2005 be set aside.
3. The Refugee Review Tribunal be joined as Second Respondent.
4. The Refugee Review Tribunal decision number V04/17211 dated 31 January 2005 be quashed.
5. The matter be remitted to the Refugee Review Tribunal for further consideration according to law.
6. The first respondent pay the appellants' costs of the application for review.
7. The first respondent pay the appellants' 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
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INDIGENOUS AFFAIRS
FIRST RESPONDENT**

**REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT**

JUDGES: MANSFIELD, RARES & BESANKO JJ

DATE: 28 JULY 2006

PLACE: ADELAIDE

REASONS FOR ORDERS

THE COURT:

- 1 The appellants are citizens of Albania. They are husband and wife, although in Albania they lived apart as the husband fears for his safety by reason of a blood feud. They arrived in Australia on 25 December 2002 and applied for protection visas under the *Migration Act 1958* (Cth) (the Act). Their applications were initially refused both by a delegate of the first respondent and by the Refugee Review Tribunal. The Tribunal decision was quashed by a judge of the Court on 9 September 2004.
- 2 The protection visa applications met the same fate upon reconsideration by the Tribunal on 31 January 2005. An application to quash the second Tribunal decision was refused by the primary judge on 22 December 2005.

3 This is an appeal from that decision. The parties are agreed that the appeal be allowed, that the decision at first instance be set aside, that the second Tribunal decision be quashed, and that the matter be remitted to the Tribunal for further consideration according to law. They are also agreed that the Minister should pay the appellants' costs of the appeal and at first instance. Those orders are proposed because the Minister accepts that:

'it may be found that there has been a failure by the [Tribunal] to consider whether the [appellants] were a member of a combined particular social group and [a] possible failure to adequately consider whether there was effective state protection for the [appellants].'

4 We are prepared to make orders in the terms proposed by the parties. They include joining the Refugee Review Tribunal as the second respondent, as its decision is to be quashed: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162. It is desirable to explain briefly why we are prepared to make those orders.

5 The appellants' claimed eligibility for protection visas depended upon the Tribunal being satisfied that the first appellant (the wife) was a person to whom Australia owed protection obligations under the Refugees Convention as amended by the Refugees Protocol (the Convention). She claimed that status on the basis of a well-founded fear of being persecuted if she returned to Albania for reasons of her being a Roman Catholic, or a member of a social group (namely women in Albania living alone without male protection or without an adult male relative to protect them), or of a social group comprising tax collectors, or for a combination of one or more of those elements.

6 The second Tribunal found that:

- (a) The wife worked as a tax collector in the town of Kosmac.
- (b) Her work involved making demands in person at ratepayers' houses.
- (c) The population in Kosmac is predominantly Muslim. Between October 2001 and June 2002 the wife was subjected to three armed assaults by residents of Kosmac who were Muslims.
- (d) They told her that she should stay at home, wear a veil and remarked on her

Catholicism in the course of the three attacks. During the second attack the men ripped her gold crucifix from her neck.

(e) She claimed that the police were unable to protect her from such assaults.

7 The second Tribunal found that the three assaults were by persons who wished to avoid paying taxes to the local authority, and were not motivated by reason of her religion. It was not satisfied that the wife faced a real chance of being persecuted by reason of being a woman living alone in Albania without male protection. It did not accept that she was a member of a 'social group' comprising 'employees or former employees of local councils who were' tax collectors because it did not accept that there was such a social group. Consequently, it was not satisfied that the appellant might be persecuted by reason of her membership of a social group.

8 The second Tribunal also found that the Albanian authorities were not unwilling or unable to respond to the attacks upon the wife, so that there was no State indifference to her circumstances or State inability to protect her.

9 It is not necessary to refer to the reasons of the judge at first instance. The reasons why the Minister now accedes to the proposed orders emerged in the course of submissions on the appeal, and were not the subject of direct submissions before his Honour. The Minister nevertheless acknowledged that the particular matters so raised were in a general way raised on the material before the second Tribunal, even though it did not address them. The Minister also accepts that there is no prejudice by those matters being raised on the appeal, because the relevant primary material to support them was before the second Tribunal.

10 That brief recital of the wife's claims, and of the second Tribunal's reasons for its decision, is sufficient for present purposes.

11 The Tribunal appears to have failed to consider whether the attacks upon the wife as a tax collector, by those wishing to avoid paying local taxes, was motivated also by the wife's status as a Catholic or would not have taken place but for her status as a woman in Albania living alone without male protection. The second Tribunal appears to have drawn a sharp demarcation between her claims of victimisation by reason of her religion and by reason of

her employment, when she claimed that they operated together as reasons for her victimisation and, furthermore, on her evidence, occurred because she was a weak person who had nobody to support her and no relatives. There was evidence that she had been verbally abused for being a Catholic at the time of the assaults. As the determination of the existence and identification of a particular social group is a matter of law (see *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389), such an error by the Tribunal would in the circumstances amount to jurisdictional error, as that particular claim by the wife would not have been considered: see *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

12 The second Tribunal might also be seen to have committed jurisdictional error when addressing the adequacy of State protection available to the wife in relation to the violence which she had experienced and which she feared. The issue was obliquely raised by the amended notice of appeal, and refined by a further amendment to the notice of appeal.

13 The second Tribunal made no finding on the wife's claim that the police did not assist her in the past when she had been assaulted. It accepted that the Albanian police are poorly trained, poorly paid, and have elements of corruption. It said there was no evidence to suggest that the Albanian authorities would deny the wife protection for a Convention reason, but that does not address their capacity to do so. Nor does it address her claim that they had not done so in the past, and – if they had not done so – why they had not done so. The second Tribunal concluded that the Albanian authorities 'would be willing and able' to protect the wife from any serious harm she fears from non-State actors. The conclusion is something of a leap from its primary findings. Its reasons may therefore, as the parties agree, indicate failure to adequately consider whether there was effective State protection for the wife, as that concept was explained in *Minister for Immigration & Multicultural Affairs v Ibrahim* (2000) 204 CLR 1; and in *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1.

14 For those reasons, as indicated above, we are prepared to make the orders proposed by the parties. The orders are:

1. The appeal be allowed.
2. The orders of Lander J on 22 December 2005 be set aside.
3. The Refugee Review Tribunal be joined as Second Respondent.
4. The Refugee Review Tribunal decision number V04/17211 dated 31 January 2005 be

quashed.

5. The matter be remitted to the Refugee Review Tribunal for further consideration according to law.
6. The first respondent pay the appellants' costs of the application for review.
7. The first respondent pay the appellants' costs of the appeal.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield, Rares & Besanko.

Associate:

Dated: 28 July 2006

Counsel for the Appellants: S Churches

Solicitor for the Appellants: Jane Nunan & Associates

Counsel for the First Respondent: S Roder

Solicitor for the First Respondent: Sparke Helmore

Date of Hearing: 4 May 2006

Proposed Minutes of Consent Order received: 21 June 2006

Date of Judgment: 28 July 2006