FEDERAL COURT OF AUSTRALIA

QAAT of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 18

QAAT of 2004 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
QUD 244 of 2005

DOWSETT, ALLSOP & EDMONDS JJ
24 FEBRUARY 2006
BRISBANE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD 244 of 2005**

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

BETWEEN:	**QAAT of 2004** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**DOWSETT, ALLSOP & EDMONDS JJ**
DATE OF ORDER:	**24 FEBRUARY 2006**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The Refugee Review Tribunal be joined as the second respondent to the appeal;
2. The Minister for Immigration and Multicultural and Indigenous Affairs be hereinafter described as the first respondent;
3. The appeal be allowed;
4. The orders made on 15 July 2005 be set aside;
5. There be an order in the nature of certiorari, directed to the second respondent, quashing the decision of the Tribunal made on 29 September 2004 and handed down on 20 October 2004;
6. There be an order in the nature of mandamus, directed to the second respondent, it to review, according to law, the decision of the delegate of the Minister refusing the appellant's application for a protection visa; and
7. The first respondent pay the costs of the appellant at first instance and the costs of the appeal.

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

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BETWEEN:	**QAAT of 2004** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**DOWSETT, ALLSOP & EDMONDS JJ**
DATE:	**24 FEBRUARY 2006**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

DOWSETT J

1 I agree with the orders proposed by Allsop J and with his Honour's reasons. I wish only to add a few comments of my own.

2 A tribunal which regularly deals with a particular class of case may form instinctive responses to cases and then attempt to justify such responses. Sometimes, such instinctive response may be correct, but in giving its reasons, the tribunal may fail to identify the aspects of the case which have prompted it. That may have happened in this case.

3 To my mind, there are two substantial weaknesses in the case identified by Allsop J. One is whether or not the feared conduct amounts to persecution. No factual findings have been made about that matter, and therefore the Tribunal has not discharged its function in that regard.

4 The second is the source of the persecution. Counsel for the appellant puts it on the basis that the relevant source in this case is so close to a government as to be part of it. That may be so, but it is a matter which also requires examination. If the source of the persecution is not

sufficiently close to the authorities to be so characterized, then it will be necessary to consider the question of state protection from the feared persecution. Although that issue was addressed before the Tribunal, it was not addressed in connection with the case which has been identified today and which was clearly raised before the Tribunal.

5 In identifying potential weaknesses in the appellant's case, I do not wish to be taken as indicating that any particular result should be reached when the Tribunal reconsiders the matter. I mean only to assist the parties and the Tribunal in remedying the miscarriage which has occurred.

6 The orders will be those indicated by Allsop J.

I certify that the preceding six (6) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 10 March 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD 244 of 2005**

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

BETWEEN:	**QAAT of 2004** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**DOWSETT, ALLSOP & EDMONDS JJ**
DATE:	**24 FEBRUARY 2006**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

ALLSOP J

7 This is an appeal from orders made by a judge of the Court dismissing an application brought under s 39B of the *Judiciary Act* for review of a decision of the Refugee Review Tribunal (the "Tribunal") made on 29 September 2004 and handed down on 20 October 2004, in which the Tribunal affirmed the decision of a delegate of the Minister not to grant a protection visa to the appellant.

8 The appellant is a citizen of Afghanistan of Hazara ethnicity, who was granted a temporary protection visa by a delegate of the Minister after his arrival in Australia on 10 November 1999. This application, and the decision of the Tribunal, arise out of his application for a permanent visa.

9 A substantial issue that might arise in the matter is the correct approach to the operation of the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951, as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January

1967 (together the "Convention") and the notion of protection obligations in circumstances where there has been recognition of the appellant as someone who satisfies Article 1A(2) of the Convention at the point of time of the temporary protection visa application. That issue, which was dealt with by a Full Court of the Court in *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363, has also been argued before another Full Court in other matters that are presently reserved. *QAAH* was the subject of a successful special leave application of the High Court.

10 That issue, however, in my view, need not arise. I am unable to agree, respectfully, with the learned primary judge's view that there was no jurisdictional error reflected in how the Tribunal dealt with the question of social group. What that issue is, and why I am not able to agree with the learned primary judge, is best understood by a brief description of the facts.

11 The appellant originally fled to Australia and was granted a temporary protection visa because of his fear of the Taliban. However, when he subsequently applied for a permanent protection visa he put forward other claims beyond his continued fear of harm by the remnants of the Taliban that might be seen to exist or operate within Afghanistan. This new claim was one that arose out of the marital affairs of his sister.

12 His sister had been married to a local commander of the relevant local area in the post-Taliban regime. The evidence appears to be that the local commander wished to take a second wife. The sister of the appellant, the local commander's first wife, took some objection to this and refused to continue in the marriage. The precise details of the divorce or the termination of the relationship it is unnecessary to dwell upon. However, it is clear from the reasons of the Tribunal that the Tribunal accepted that the local commander felt humiliated by this.

13 Apart from his initial claim of fear of the Taliban, the appellant's claim was that he feared persecution at the hands of the local commander by reason of his membership of a social group, that is, he feared persecution by the commander because of his relationship with his sister as a consequence of the local commander's humiliation and anger at what had happened in his marriage.

14 The appellant did not put forward any other Convention-based reason for his fear, and it is

clear that the anger and humiliation of the commander arose from entirely personal reasons. Nevertheless, the appellant's submission and claim was that his fear of persecution was that it would be directed at him because of his relationship as a brother to his sister, and so as a member of the familial social group.

15 The Tribunal made a number of relevant findings of fact. First of all, it accepted that the ex-husband, that is, the commander, was harassing the family of the appellant. There was material placed before the Tribunal which gave some content to this, about which no particular findings were made, but which illuminate that finding at page 22 of the reasons. There was material placed before the Tribunal by the relevant migration agent of the appellant that the local commander had arrested and mistreated the appellant's brother using a pretext of a missing gun. The pretext of the missing gun also comes into the factual skein in another way.

16 The commander, in pursuance of the post-Taliban regime's desire to disarm people in the community, had called for the surrender of guns. It was thought that the appellant had, when he had been in Afghanistan, a Kalashnikov automatic weapon and ammunition in his possession. The appellant had attempted to indicate that he no longer had the relevant armaments in his possession. However, the commander began to make demands for the gun.

17 At page 19 of its reasons, the Tribunal says the following about the claims of the appellant:

> *His second ground, his claim to fear harassment from his ex-brother-in-law, raises the issue of Convention nexus. His agent has suggested that the applicant's family may be a particular social group for Convention purposes. In other specific circumstances, this could be so, but such a claim cannot be sustained in this case since, according to the applicant, his father has (apparently successfully) responded to his ex-son-in-law by telling the man that it is not he but he applicant who is responsible for the rifle. There is, therefore, no "group".*
>
> *Neither is the pretext for the harassment – an alleged missing rifle and some boxes of ammunition – the real ground. As the agent himself submitted on 17 August: "it is extremely unlikely that these acts of persecution truly relate to the issue of the gun and much more likely that they relate to the anger of the commander over the divorce". I accept that submission. That means to me that the essential and significant reason for the Commander's actions is anger and humiliation because of his ex-wife's decision not to accept his taking a second wife. Therefore, I accept the facts as described by the applicant, but I do not accept that these facts engage the Refugees Convention. …*

18 In my view, these paragraphs, in the light of the acceptance of the fact that the ex-husband was harassing the family, on the previous page, and in the light of the apparent acceptance of the notion that a family could be the subject of the attention of a commander in social circumstances such as this in Afghanistan, reflect a number of fundamental errors in application of the Convention.

19 In the first paragraph I have identified, there seems to me a logical flaw in the proposition that there is no group. Apparently, the commander had asked the father (of course, a member of the social familial group involving the sister) for the gun. The father had been able to deflect unwanted attention about the matter to the appellant, that is, the brother. The fact that the commander was not prepared to direct conduct to one member of the group - that is, the family - does not destroy the existence of that group. There may be all sorts of reasons why the perpetrator of any hypothesised persecution may not choose to direct his or her attention to one member of the group but is willing to direct it to another member of the group. The proposition that it is not directed to one member of the group does not deny the fact that it is being directed to the other member of the group because he or she is a member of the group.

20 This conclusion that there was no group, then, seems to have infected the reasoning in the next paragraph. The Tribunal accepts that the alleged missing rifle and boxes of ammunition is just a pretext, and accepts that what is motivating the commander is his anger and humiliation because of his ex-wife's decision not to accept his taking a second wife. That is then said to form the basis for the conclusion that these facts do not engage the Convention. With respect, it is a non sequitur. There is harassment of the family; that is found. The complaint about the missing rifle is accepted as a pretext. The commander is humiliated and angry about his former wife's conduct. What the appellant fears is that that humiliation and anger will be vented on him. If it is vented on him because he is his sister's brother, that is, because he is a member, in that capacity, of the family, it seems to me that there is a plain foundation for the operation of section 1A(2) of the Convention. It is not an answer to the claim to say that it is a personal motivation. As the cases show, in particular, *Minister for Immigration v Sarrazola* (2001) 107 FCR 184, the personal nature of the wellspring of the conduct may well disentitle the person who has caused that particular personal grievance from claiming protection under the Convention.

21 So, here, if the sister sought a protection visa, it would not be a Convention reason for her to

say that her former husband was venting his anger and humiliation against her. That would be seen to be, in all likelihood, an entirely private matter. It is feared to be vented here, not against her, but against her brother, because he is her brother. In those circumstances, there would be a foundation for the claim that the fear is Convention based. Thus, in my respectful view the learned primary judge was in error in failing to identify that, the reasons of the Tribunal, in particular the two paragraphs that I have quoted, in the light of the other findings of the Tribunal, did displayed jurisdictional error.

22 There was, in effect, a misconstruction of the Convention by requiring more than the humiliation as the motivating factor, and there was an additional error, that the social group seems to have been eliminated merely because one member of the social group was not a factual target of the conduct. For those reasons, in my view, the Tribunal has failed to address the matter according to law and relief should be given.

23 I should not be taken, as perhaps is self evident, as saying anything about what might be seen to be the strength or weakness of the claim for protection.

24 I do not understand the Tribunal to have been joined to the proceeding below. If that has not occurred, as the High Court has said on a number of occasions, that should occur. In my view, the relief should be as follows:

(1) The Refugee Review Tribunal be joined as a party to the appeal.

(2) The appeal be allowed.

(3) The orders made by the Federal Court on 15 July 2005 be set aside, and in lieu thereof the Court orders that:

  (a) The Tribunal be joined as a party to the application

  (b) There be an order in the nature of certiorari to quash the decision of the Tribunal made on 29 September 2004 and handed down on 20 October 2004.

  (c) There be an order in the nature of mandamus requiring the Tribunal to review, according to law, the decision of the delegate of the Minister to refuse a protection visa sought by the applicant

  (d) The first respondent Minister pay the costs of the applicant before the Federal Court at first instance.

(4) The first respondent Minister pay the appellant's cost of the appeal.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 10 March 2006

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JUDGES:	**DOWSETT, ALLSOP & EDMONDS JJ**
DATE:	**24 FEBRUARY 2006**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

EDMONDS J

25 I agree with the orders proposed by Allsop J for the reasons which he has given.

I certify that the preceding paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Edmonds.

Associate:

Dated: 10 March 2006

Counsel for the Appellant:	D Rangiah
Solicitor for the Appellant:	Terry Fisher & Co
Counsel for the Respondent:	M Brennan
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	24 February 2006
Date of Judgment:	24 February 2006