# FEDERAL COURT OF AUSTRALIA

## Minister for Immigration and Multicultural and Indigenous Affairs v SVBB

## [2005] FCAFC 12

**MIGRATION** – refugee status – membership of a particular social group – whether fear of persecution to be disregarded –respondent an Albanian national – blood feud – respondent's father fearful of revenge killing – respondent's fear of persecution arising as a result of father's fear of persecution for non-Convention reason – fear of persecution to be disregarded under s 91S of the *Migration Act 1958* (Cth).

*Migration Act 1958* (Cth), s 91S

*SDAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1102 cited
*SCAL v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 548 cited
*SCAG v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 302 cited
*SCAL v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 301 cited
*STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266 followed

**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v SVBB**

**SAD 170 of 2004**

**SPENDER, HEEREY AND LANDER JJ**
**22 FEBRUARY 2005**
**SYDNEY (HEARD IN ADELAIDE)**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA**

**SOUTH AUSTRALIA DISTRICT REGISTRY** **SAD170 OF 2004**

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

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| **BETWEEN:** | **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**<br>**APPELLANT** |
| **AND:** | **SVBB**<br>**RESPONDENT** |

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|---|---|
| **JUDGES:** | **SPENDER, HEEREY AND LANDER JJ** |
| **DATE OF ORDER:** | **22 FEBRUARY 2005** |
| **WHERE MADE:** | **SYDNEY (HEARD IN ADELAIDE)** |

**THE COURT ORDERS THAT:**

1. The appeal is allowed.
2. The orders made by the primary judge on 9 July 2004 are set aside.
3. The application for a review of the decision of the Refugee Review Tribunal dated 9 February 2004 and notified to the respondent on or about 2 March 2004 is dismissed.
4. The respondent to pay the appellant's costs of the application for review.
5. The respondent to pay the appellant's 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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| **JUDGES:** | **SPENDER, HEEREY AND LANDER JJ** |
| **DATE:** | **22 FEBRUARY 2005** |
| **PLACE:** | **SYDNEY (HEARD IN ADELAIDE)** |

**REASONS FOR JUDGMENT**

**THE COURT:**

1 This is an appeal by the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) from orders made by a judge of this Court granting certiorari to quash a decision of the Refugee Review Tribunal (RRT) made on 9 February 2004 and ordering mandamus directed to the RRT requiring it to hear the application for review according to law.

2 The respondent is an Albanian citizen who was born on 28 May 1976. He entered Australia on 27 September 2000. On 26 October 2000 he applied for a protection (Class XA) visa claiming to be a refugee within the meaning of s 36(2) of the *Migration Act 1958* (Cth) (the Act). On 27 March 2002 the Minister's delegate determined that the respondent was not a person to whom Australia had protection obligations under the Refugees Convention and refused to grant him a protection (Class XA) visa.

3 The respondent applied to the RRT for a review of the Minister's delegate's decision. On 9 February 2004 the RRT dismissed the respondent's application for a review and affirmed the Minister's delegate's decision not to grant a protection visa.

4 On 29 March 2004 the respondent applied to a judge of this Court for a review of that decision.

5 On 9 July 2004 the primary judge made the following orders:

> *'1. Certiorari to issue bringing up the decision of the Refugee Review Tribunal the subject of these proceedings, made on 9 February 2004 and quashing it.*
>
> *2. Mandamus to the Refugee Review Tribunal requiring the Tribunal to hear the application for review according to law.*
>
> *3. The first respondent to pay the applicant's costs.*
>
> *4. No order as to the costs for the second and third respondents.'*

6 The grounds of the Minister's appeal are that the learned judge erred:

> *'1. In the application of section 91S of the* Migration Act, 1958 (Cth) *("the Act").*
>
> *2. In finding that the Refugee Review Tribunal ("RRT") proceeded on an erroneous understanding of section 91S of the Act.*
>
> *3. In finding that the RRT acted upon the understanding that, if the event which caused the fear of persecution was an event caused by a family member then section 91S of the Act does not apply, when the RRT decision discloses no such understanding.*
>
> *4. In not finding that the RRT made a finding of fact that the Applicant's father feared persecution for a reason other than membership of the family group.*
>
> *5. In not finding that the analysis and application of the law by the RRT was consistent with the authorities of this Court including* SDAR v Minister for Immigration and Multicultural and Indigenous Affairs *[2002] FCA 1102 and* SCAL v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCAFC 301.*
>
> *6. In not following the decision of* SCAL v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCAFC 301.'*

7 There is no dispute that the respondent is an Albanian national. His account of his leaving Albania and the reasons for it have remained consistent.

8 The respondent said that his father sold some land to an Albanian family (family A). One fifth of the purchase price was payable immediately, the balance to be paid over a period of six months from the date of the agreement.

9 Before the date for payment of the balance of the purchase price had passed, family A commenced a business on the land.

10 When family A failed to pay the balance of the purchase price the respondent's parents approached that family at the business premises.

11 The respondent's parents were told that they would not get the balance of the money for the land and that they could 'forget about it'. The parties became angry and persons began pushing and shoving each other. The respondent's father was hit and his mother was struck when she tried to intervene in support of her husband.

12 The respondent's father became extremely angry that his wife had been struck. He returned home, seized a gun, returned to family A's business premises and shot two members of that family, as a result of which one died and the other was seriously wounded. His father went into hiding because he was being sought by the government for the offences committed and by family A who were seeking revenge. The respondent has not seen his father since that time.

13 The respondent's case was that Albanian people are subject to the ancient code of the Kanun of Lek Dukagjini which lays down a code of 'laws' governing birth, marriage, inheritance, hospitality and death, and which has 'traditionally served as the foundation of social behaviour and self government for the clans of northern Albania'. The Kanun regulates killings resulting from blood feuds between families.

14 At the time, the respondent was living in Tirana. Shortly after the shooting, the respondent's uncle advised him to leave Albania and provided him with US$10,000 for that purpose.

15 The respondent's case was that, as a result of his father shooting the two members of family A and killing one of them, it was inevitable that the surviving members of family A would seek revenge for the killing. He and his father were the only two male members of the family and therefore both of them are in extreme danger in Albania.

16 He said that the only reason he left Albania was because of the blood feud and that he is much safer in Australia than in Albania. He fears that if he returned to Albania his life would be at risk, because he would be likely to be killed by members of family A and that the Albanian authorities will not protect him as Albania is in chaos and the law of Kanun predominates in the Albanian countryside.

17 The RRT accepted the respondent's account but concluded that the respondent was not entitled to claim the status of a refugee because his fear of persecution was not for a Convention reason.

18 The RRT said:

> *'Although the Tribunal is satisfied that in the Albanian context the applicant's family can be considered to be a particular social group under the Convention, I find that the motivation of family A to harm the applicant or any other member of the applicant's family is revenge for a murder committed by the father of the applicant. Revenge for any criminal act, including murder, is not a reason for harm which comes under the Refugees Convention unless it can be linked to a Convention reason.*
>
> *The effect of s91S is that I must disregard the fear of persecution of a person such as the applicant whose fear arises because he or she is the relative of a person targeted for a non-Convention reason whose fear of persecution must be disregarded.'*

19 There can be no quarrel with the finding in the first sentence of the first paragraph. That finding reflects the respondent's case. The second sentence is undoubtedly correct. The second paragraph contains a further finding which, taken with the finding in the first paragraph to which we have referred, also reflected the respondent's case. The findings of the RRT were that the respondent fears persecution because he is the son of a man who fears persecution for a non-Convention reason.

20 The RRT followed the decision of Merkel J in *SDAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1102 and the later decision of *SCAL v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 548.

21 The RRT said, in relation to an alternative argument put forward by the respondent:

> *'The applicant's adviser in a submission argued that s.91S of the Act did not apply in the applicant's case as his family was being targeted collectively and that the applicant's father's actions or fears should not be relevant in the applicant's case. I do not accept this line of reasoning because if the applicant's father had not murdered Mr CA the applicant would not be targeted by family A in any way. I find that the essential and significant reason that the applicant fears persecution is because family A are seeking revenge for the murder of their family member by the father of the applicant and therefore s.91S must apply to prevent the applicant from relying on this action by his father to bring him within the scope of the Refugees Convention because the persecution or fear of persecution is motivated by a non-Convention reason.*
>
> *I find that the applicant's fears of Convention-related persecution are not well-founded.'*

22 On the application for review before the primary judge the respondent put two arguments. First, he argued that the RRT failed to consider whether or not he was a member of a broader social group other than his family and, secondly, he argued that the RRT also failed to consider whether or not the Albanian authorities persecuted him.

23 The primary judge rejected the second argument on the basis that it had never been put to the delegate or to the RRT.

24 The primary judge did not, in his reasons, address the first argument. That argument has not been pursued on this appeal. In any event, that argument could not have succeeded unless the respondent first established that he had an objective well founded fear of persecution for a Convention reason.

25 However, the primary judge did uphold the respondent's application for review on another ground. After referring to the RRT's reasons, he said at [10]-[11]:

> *' It seems to me, with respect, that this analysis is clearly based upon the understanding that, if the event which caused the fear of persecution was an event caused by a family member, then s 91S does not apply. In particular, it seems to be based upon an understanding that s 91S does not apply as a*

*matter of law where the event that gave rise to the fear of persecution was a criminal act by a family member. For the reasons given by me in* STXB v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 860 at par 32 to 34, this seems to be an erroneous understanding of s 91S of the Act.*

*In that case, there had been a factual finding by the Tribunal that the reason for persecution of the person who committed the alleged act was that person's alleged act. In the relevant paragraphs I proceeded to discuss why, in my view, that was a factual finding and not a legal one:*

> "This is not to say that the factual finding made by the Tribunal was inevitable. Some care needs to be taken in applying s 91S of the Act in circumstances involving claims based on customary or traditional law. The application of that section is dependent upon a factual finding that the initial or original fear of persecution arises for a reason other than membership of the family group. Obviously there must be someone in the family group who fears persecution for some reason other than that membership. In the cases that have considered the issue in the context of Albanian blood feuds under the Kanun the relevant 'someone' is the person whose act caused the blood feud. That person's fear of persecution is usually expressed as a personal fear of revenge by the family of the person who was injured or (usually) killed: see, for example SDAR v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 72 ALD 129; [2002] FCA 1102 ('SDAR') at [24]; SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 ('SCAL 1') at [24]; SCAL 2 at [10], [19]. Where such factual findings have been made then s 91S is applicable: see SCAL 2.
>
> However, the applicability of s 91S depends upon the relevant factual findings. In some traditional or customary legal systems which include the concept of family feud it is not appropriate to characterise the relevant 'source' of the feud as a separate and distinct individual responsibility for which the family group is, in effect, vicariously liable. Rather it is the family group, including the individual as a member of that group, which is primarily responsible for the alleged wrong. The individual who in fact caused the affront in the first place is only subject to persecution because he or she is a member of the family, not because he or she caused the affront. In at least one of the examples of feud in traditional Indigenous Australian societies given by Ronald and Catherine Berndt in The World of the First Australians (5th ed, 1988) responsibility for the alleged wrong is 'ascribed to the clan as a whole' (see at 358). Indeed, it would appear that in some traditional or customary legal systems the proper analysis of the feud is not in terms of 'revenge', but rather in terms of 'debt', with one family group being indebted

> to the other by reason of the initial transgression: see, for example, Norbert Rouland *Legal Anthropology* (1994) at 239-243, 274-277. It would seem to me that if it were established as a fact that a family group was a 'particular social group' for the purposes of the Convention and that each member of the group was persecuted by reason only of their membership of that group then s 91S would not have application even if the reason why the group was being persecuted was in revenge arising out of act of a member of the family.
>
> Some of the reasoning of the various Tribunals that have considered claims for refugee status based upon Albanian blood feuds might suggest that if the original cause for the alleged fear of persecution was an unlawful act by someone then this would be sufficient to exclude s 91S. If so I do not think that is a correct understanding of the section. For the purposes of s 91S of the Act the 'reasons mentioned in Article 1A(2) of the Refugee Convention' include 'membership of a particular social group' and that, in turn, may include membership of a family. The question is not whether the ultimate cause of the feud was an illegal act by a family member or not, but whether any member of the relevant family feared persecution for a reason other than a Convention reason (including, for this purpose, membership of the relevant family)' see *SDAR* at [24].'"

26 The primary judge found that the RRT had misunderstood the decisions of the Court in *SDAR v Minister for Immigration & Multicultural & Indigenous Affairs* and *SCAL v Minister for Immigration & Multicultural & Indigenous Affairs*. He concluded that those decisions rested upon findings of fact peculiar to the decisions themselves.

27 The primary judge reasoned that, because the RRT had proceeded upon that basis, it had failed to consider whether the respondent's fear of persecution arose out of his membership of the family group and the responsibility of that family group for the alleged wrong.

28 The Minister has argued that the primary judge erred in his analysis of the RRT's reasons and the construction and application of s 91S of the Act. Further, the Minister argued he has erred in failing to consider himself bound by the decisions of the Full Court of this Court in *SCAG v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 302 and *SCAL v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 301.

29 There is no dispute that the blood feud which arose between the respondent's family and family A had its origins in the respondent's father shooting two members of that family.

30 In our opinion, the findings made by the RRT to which we have referred in [19] conclude this matter.

31 Section 91S of the Act provides:

> *'For the purposes of the application of this Act and the regulations to a particular person (the* **first person***), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:*
>
> *(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and*
>
> *(b) disregard any fear of persecution, or any persecution, that:*
>
> *(i) the first person has ever experienced; or*
> *(ii) any other member or former member (whether alive or dead) of the family has ever experienced;*
>
> *where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.'*

32 The respondent's father fears that he will be persecuted because he shot two male members of family A arising out of a dispute involving money and an assault on the respondent's mother.

33 The respondent's father has a fear of persecution for a reason not mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol.

34 In those circumstances, s 91S(a) of the Act applies and the respondent's father's fear of persecution must be disregarded.

35 So also s 91S(b) applies and the respondent's fear of persecution must be disregarded because that fear of persecution would not exist if it were assumed, as s 91S(b) requires, that the respondent's father's fear of persecution had never existed.

36 In our opinion, on the uncontroverted facts and the RRT's findings which were not challenged on appeal, s 91S meant that the respondent's application for refugee status had to be refused.

37 Indeed, on the RRT's findings, that was, on the proper construction of s 91S, the only conclusion.

38 In *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 266, the Full Court dealt with a similar argument and a claim that the RRT, in that case, failed to make findings that the grandfather, who had committed the murder, feared persecution for a Convention or non-Convention reason. In the Court's reasons, with which we agree, the Court said at [19]:

> *'In analysing the motivation of the other family there are two elements to consider, first the reason why that family would want to do harm and second the criterion for selecting a victim. It cannot be doubted that, irrespective of the identity of the potential victim, the motivation to do harm stemmed from the murder of a member of the other family. In fact this motivation was put to the Tribunal as an element of the appellant's claim. The Tribunal's finding, quoted at [7] above, shows that it accepted that the other family's motivation is "revenge" for a murder committed by the appellant's grandfather. Similarly, the Tribunal accepted that the reason the appellant's family was involved in a blood feud was that the appellant's grandfather had killed a member of the other family. Implicit in this is an acceptance of the fact that the appellant might be targeted because of his relationship to his grandfather. Given those findings it beggars belief to suggest that the appellant's grandfather would be vulnerable for any reason other than that he was the killer. No analysis is required; the conclusion is inherent in the appellant's claim. It is obvious that this is a finding made by the Tribunal or perhaps more accurately, this is a fact that the Tribunal accepted as an element of the appellant's account. The argument that the grandfather might be targeted because he is a member of his own family is not only far fetched but also circular. This ground of appeal must be rejected.'*

39 In this case, there was no suggestion on the evidence, or on the findings, that the respondent's father's fear of persecution arose because he was a member of the family which was primarily responsible for the alleged wrong. His fear of persecution arose because he committed the offences for which family A wished to extract revenge.

40 The respondent's fear of persecution arises because he is a member of his father's family.

41 Even if it were the case that the family group became primarily responsible for the alleged wrong, that does not mean that any or all members of the family could claim refugee status. If a member of a family (the first family) committed crimes against another family of the kind in this case and, as a result, the second family persecuted the first family, the persecution, and more importantly the fear of it, would not arise for a Convention reason. The fear would be of the second family extracting revenge for a crime committed by the first family.

42 In any event, this was a case in which, on the respondent's own account, s 91S meant that the respondent was not entitled to claim refugee status.

43 In our opinion, the appeal should be allowed and the orders made by the primary judge set aside.

44 In lieu thereof, there should be orders as follows:

1. The appeal is allowed.
2. The orders made by the primary judge on 9 July 2004 are set aside.
3. The application for a review of the decision of the Refugee Review Tribunal dated 9 February 2004 and notified to the respondent on or about 2 March 2004 is dismissed.
4. The respondent to pay the appellant's costs of the application for review.
5. The respondent to pay the appellant's costs of the appeal.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Court.

Associate:

Dated: 22 February 2005

| | |
|---|---|
| Counsel for the Appellant: | M Clisby |
| Solicitor for the Appellant: | Mark W Clisby |
| Counsel for the Respondent: | S Maharaj |
| Solicitor for the Respondent: | Sparke Helmore |
| Date of Hearing: | 14 February 2005 |
| Date of Judgment: | 22 February 2005 |