FEDERAL COURT OF AUSTRALIA

CITIZENSHIP AND MIGRATION - refugee status - applicants for protection visas - whether applicants unable or unwilling to avail themselves of the protection of the country of their second nationality - whether Australian law recognizes a presumption that national protection is effective - whether Tribunal incorrectly interpreted the relocation principle - whether Tribunal made an express or implied finding of ineffectiveness of protection - whether Tribunal wrongly applied the relocation principle to the facts in failing to make a finding of ineffectiveness of protection.

Migration Act 1958 (Cth), ss 476(1),s 476(1)(e), 476(2), 476(1)(e)

Refugee's Convention Art 1A(2)

Migration Regulations

Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1, not applied

Jong Kim Koe v Minister for Immigration and Multicultural Affairs (1997) 143 ALR 695, discussed

Prathapan v Minister for Immigration and Multicultural Affairs (1997) 47 ALD 41, discussed

Thiyagarajah v Minister for Immigration and Multicultural Affairs (1997) 151 ALR 685, discussed

Ratnam v Minister for Immigration and Ethnic Affairs (1997) 47 ALD 203, referred to

Randhawa v Minister for Immigration Local Government and Ethnic Affairs (1994) 52 FCR 437, referred to

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS v A, B and C

VG 335 of 1997

R D NICHOLSON J

PERTH (HEARD IN MELBOURNE)

9 APRIL 1998

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	vg 335 of 1997

BETWEEN:	minister for immigration & multicultural affairs Applicant
AND:	a First Respondent B Second Respondent C Third Respondent

JUDGE:	r d nicholson j
DATE OF ORDER:	9 april 1998
WHERE MADE:	melbourne

THE COURT ORDERS THAT:

1. The application be allowed.

2. The decision of the Refugee Review Tribunal made on 4 June 1997 be set aside.

3. The matter be remitted to that tribunal for reconsideration in accordance with the law.

4. Costs be reserved pending submissions from the parties.

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

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IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRar	vg 335 of 1997

BETWEEN:	minister for immigration & multicultural affairs Applicant
AND:	a First Respondent B Second Respondent C Third Respondent

JUDGE:	R d nicholson j
DATE:	9 APRIL 1998
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

HIS HONOUR: This is an application to review the decision of a Refugee Review Tribunal ("the Tribunal") made on 4 June 1997. The Tribunal set aside a decision of the applicant relating to the respondents and remitted the matter for re-consideration with the direction the respondents be taken to have satisfied the criterion set out in

s 36(2) of the *Migration Act 1958 (Cth)* ("the Act") for the grant of protection visas ("the Decision").

To comply with directions made on 1 August 1997, these reasons are expressed in a way which avoids anything likely to identify the respondents.

Tribunal's findings

The Tribunal made the following findings of fact.

Respondent A was born in country 1. She completed a professional degree there and then married a person from country 1 who, like her, was a member of religion A. However, he subsequently converted to religion B. Respondents B and C are children of respondent A and her husband. They are minors and it is accepted their case falls to be decided as family members of respondent A.

Respondent A's husband became involved in drugs while they were living in country 1. He also became violent towards respondent A and wanted her and her children to convert to religion B. To a large extent to get away from her husband for these reasons, also partly to improve her standard of living and partly to escape harassment and discrimination implicit in being a member of religion A in country 1, respondent A obtained employment in country 2. She was eventually granted citizenship of that country. In the same year her husband followed her to country 2 and problems started for her after that.

Respondent A's husband terrorised and abused her over a number of years. There were reports by her to police in respect of his conduct from 1992.

In 1995 respondent A's husband tried to kill her (a finding now contested by the applicant). Police were summoned and he then attacked the police. He was charged and convicted of assaulting respondent A and imprisoned for the offence. He was also made the subject of a restraining order. The Tribunal accepted thereby the authorities of country 2 had tried to protect respondent A.

The Tribunal also found the husband threatened respondent A even while he was in prison and he or his friends (the evidence was these were religion B militants) frightened her and the neighbours (the evidence was there were threats of violence). The neighbours were forced to move elsewhere.

The Tribunal also found the evidence of respondent A credible when she said she had tried leaving home and staying in other areas of country 2 but her husband's militant religious friends had been able to track her down. Her evidence was, due to threatening telephone calls from these people, she had tried to move a number of times going to three different regions in country 2. However, on each occasion threats had resumed within a short time. The Tribunal's finding was that, in the period after her husband's conviction and her departure from the country 2 (a period of approximately four months), respondent A did not face any violence although she had moved to three different cities to avoid his associates.

Respondent A's religion and the succour of it is vital to her. She places importance on maintaining strong ties with that religious community. There are a limited number of such communities. Because of this and the importance respondent A places on maintaining strong ties with them, the Tribunal found there is a real chance her husband or his associates would be able to track her down within a fairly short time even if she were to use a false identity.

Respondent A is a professionally trained person and wants and needs to be able to practice her profession. If she were taken into a witness protection style program in country 2 she would be expected to change her name which would mean she could not work in her chosen profession or in any related field.

Having moved for the third time and being contacted by her husband's associates, respondent A decided to come to Australia with her children. Her evidence was her husband wished to divorce her and gain custody of these children in order to convert them. There was a finding she and the children had been physically abused, threatened and harassed by the husband and were in the circumstances justifiably frightened of him.

When in Australia the respondent started proceedings to change the children's surname but discontinued them when told she needed her husband's permission. She also could not file for a divorce as she would require the service of papers on him and the disclosure of her and the children's location.

On 4 October 1995 the respondents applied for protection visas. The applications were refused by a delegate of the Minister on 2 February 1996. That decision was then the subject of review by the Tribunal.

Tribunal's reasoning

After reviewing the jurisdictional base for its decision, setting out the relevant law and the respondents' case, the Tribunal addressed three issues. These were whether the respondents' fears were well-founded in relation to country 1 and in relation to

country 2 and if so, whether they were based on a Convention ground. That is a reference to the ground set out in Art 1A(2) of the *Refugee's Convention* as defined by cl 866.111 of Schedule 2 of the *Migration Regulations* ("the Regulations") where a refugee is defined as any person who:

"Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; ... "

The second paragraph of this definition states:

"In the case of a person who has more than one nationality, the term the 'country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

In relation to country 1, having accepted respondent A's husband and his associates, being involved with religion B fundamentalist groups, had threatened her because they regarded her as an apostate, the Tribunal accepted she faced a real chance of violence being inflicted on her by fundamentalist colleagues or friends of her husband and the government could not provide her with the requisite level of protection. She was at risk because she was a member of religion A and seen as an apostate by religion B. The Tribunal therefore found her fear of persecution in country 1 was well-founded and was Convention based on the ground of religion either because she was a member of religion A or because she was seen as an apostate.

In relation to the country 2, the Tribunal accepted it did provide protection. However, it considered "the issue for the Tribunal is not whether the 'system' as a generalisation provides such protection but whether for this individual the protection is adequate." To this end reliance was placed on the decisions in *R v Immigration Appeal Tribunal; Ex parte Jonah* [1985] Imm AR 7 and *Randhawa v Minister for Immigration Local Government and Ethnic Affairs* (1994) 52 FCR 437, particularly at 451 as well as J Hathaway*, The Law of Refugee Status* (Toronto: Butterworths, 1991) at 134.

The Tribunal accepted respondent A may be safe if she were prepared to change her name and her religion but considered such relocation would be unreasonable for her: *cf Woudeneh v Milgea* (Federal Court of Australia, 16 September 1988, unreported, G86 of 1988).

The Tribunal found respondent A feared harm for two reasons, one a non-Convention reason and the other a Convention reason. The first was that her husband wished her harm. The second was she was seen by both her husband and his associates as an apostate. The Tribunal concluded the fact respondent A was at risk for the first reason did not negate her fear for the second Convention reason. The second reason was a Convention reason because if she were not perceived as an apostate there was no evidence to indicate the husband's associates would be willing to help him in his pursuit of her.

The Tribunal stated it did not give consideration to two matters. The first was whether if respondent A entered into country 2's witness protection style program, so she could therefore not work in her chosen profession or in any related field, that would amount to persecution. The second was whether her fear of persecution was by reason of her membership of the particular social group arguably said to be constituted by victims of domestic violence.

Grounds of review

Although the amended application contains a number of grounds, respondent A's case as pressed at the hearing relies only upon those grounds introduced by way of amendment to the application. These are to the effect the following alleged errors constituted errors of law within the meaning of s 476(1)(e) of the Act:

" '(4) The Tribunal erred in law in finding that the respondent faced a real chance of persecution in [country 2] in circumstances where the Tribunal found -

(a) that 'as a system [country 2] does provide protection';

(b) the law enforcement system in [country 2] has been invoked and has resulted in the imprisonment of the respondent's husband for a serious assault; and

(c) effective protection could be available were she to change her name.

(5) The Tribunal erred in law in holding that the respondent was unable or unwilling, for the purposes of Article 1A(2) of the Convention, to avail herself of the protection of [country 2] by taking such steps as were necessary to conceal her identity from her husband and his associates.

(6) In circumstances where there was no State complicity in the persecution of the respondent and in circumstances where an effective system of law enforcement was in operation and was available to protect her, the Tribunal erred in that there was no basis for holding that the respondent was relevantly unable or unwilling to avail herself of the protection of that country".

It is contended that these errors constituted errors of law within the meaning of s 476(1)(e) of the Act.

The issue encompassed in all the errors of law alleged by respondent A is therefore whether the existence of a system of protection in the country of nationality (in the case of a democracy with an apparently fair and independent judicial process) is sufficient to exclude an applicant for refugee status from the definition of "refugee" in Art 1A(2) of the Convention because, in that circumstance, it cannot be concluded the applicant "is unable or, owing to such fact, is unwilling to avail himself of the protection of that country; ...".

Although ground (4)(c) refers only to evidence relating to change of name, it was pressed additionally in relation to the finding of change of religion.

The paragraph of the Act upon which the grounds rely provides as follows:

"476. (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

...

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;".

Subsection 476(2) to which par 476(1)(e) is subject, reads:

" (2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

In *Eshetu v Minister for Immigration & Multi-Cultural Affairs* (1997) 71 FCR 300 Davies J and Burchett J were of the opinion that subs 476(2) excluded from subs 476(1) the rules ofthecommon law within the scope of subs 476(2) but not the procedures mandated by the Act. Relevantly they were of the opinion that for the purposes of par 476(1)(e) the "applicable law" would include not only criteria specified in the Act and Regulations but also the substantive elements of par 420(2)(b) which requires the Tribunal to act "according to substantial justice and the merits of the case". Opinions being divided in the Court as to the correctness of this obiter view, special leave has now been granted for *Eshetu* to be appealed to the High Court. The uncertainty pertaining to it has no bearing on the applicant's contentions in this case.

Legal presumption

The first way in which the case for the applicant is put is the Tribunal fell into error of law because it failed to recognise there is a presumption in the Convention that national protection is effective.

This contention for the applicant receives its prime support from the decision of the Supreme Court of Canada in *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1. That case involved an appeal by a former member of a Northern Ireland paramilitary terrorist organisation suspected by the organisation of permitting hostages to escape. After being court martialled by the organisations and sentenced to death he came to Canada and sought refugee status. The Federal Court of Appeal had set aside the decision of an Immigration Appeal Board allowing his application for re-determination. In allowing his appeal, the Supreme Court, in a judgment delivered by La Forest J, addressed two aspects of the issue of persecution and State complicity. In relation to the first it held that State complicity, either through direct persecution, collusion with the persecuting agents, or wilful blindness to the actions of the persecuting agents, was not a pre-requisite to a valid refugee claim under the definition. The definition extended to situations in which the State is not an accomplice in persecution but is unable to protect its citizens. On the second, whether the claimant was only to be considered "unable" to avail the protection of the State they were physically unable to seek out its protection, the Court held the term "unable" contemplated circumstances beyond the will of the claimant. The term "unwilling" was held to apply to applicants who did not wish to accept the protection of the country of their nationality because of their fear of persecution and the inability of their country of nationality to provide protection to them. State complicity in either case was not a necessary consideration.

The Court stated at the outset the rationale underlining the International Refugee Protection Regime was that International Refugee Law was formulated to serve as a back-up to the protection expected from the State of which an individual is a national. It was meant to come into play, said the Court, only in situations where the latter protection was unable and then only in certain situations.

Turning to the issue of how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals, as well as the reasonable nature of the claimant's refusal actually to seek out that protection, the Court said in the absence of a state admission the requirements were (at 23):

"... clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, ... it should be assumed that the state is capable of protecting a claimant".

This was supported by reference to a decision of the Canadian Federal Court of Appeal in *Minister of Employment and Immigration v Satiacum* (1989), 99 N.R.171; 16 ACWS (3d) 191 (FCA). That case involved an American Indian Chief convicted of federal criminal charges in the United States who fled to Canada before sentencing. Arrested there, he claimed refugee status. The persecution he was alleged to fear was a risk to his life if incarcerated in a federal United States prison. The Court of Appeal found this fear did not meet the objective component of the test for fear of persecution as it must be presumed that the United States' judicial system is effective in affording a citizen just treatment. At 176, cited by the Supreme Court at *Ward* at 23-24, the Court said:

"In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself."

Of this the Supreme Court in *Ward* said (at 25) that although the presumption increased the burden on the claimant, it served to reinforce the underlying rationale of international protection as a surrogate coming into play when no alternative remains to the claimant. See *Ward* also at 12.

Later in *Ward* (at 43-44) the same reasoning was applied by the Supreme Court to the assessment of the claimant's fear in his second country of nationality so where the fear is grounded in the concept of inability to protect, that is to be assessed with respect with each and every country of nationality. The Court said (at 44) where, as in the case of *Ward*, the second state has not actually been approached by the claimant, it should be presumed capable of protecting its nationals.

On behalf of the applicant it is contended this Court should recognise the existence in the law of Australia of a presumption in the same terms as that recognised by the Supreme Court of Canada in *Ward* - namely, that in the absence of any evidence of approach to the State by the claimant, the State in which nationality is held is to be presumed capable of providing protection in the absence of any evidence directed to showing the character of the State is non-democratic.

I understand this to be a contention for a rebuttable presumption of law being one in which the conclusion of the existence of the presumed fact must be drawn in the absence of evidence to the contrary.

In support of this contention the applicant's case refers to three Australian authorities. The first is the decision of the Full Court of this Court in *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 143 ALR 695. There the Court (Black CJ, Foster and Lehane JJ at 706) cited James G Hathaway, *The Law of Refugee Status,* 1991, at 59, where the learned author pointed out it is "an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection". Additionally, the Court cited the commentary in the UNHCR Handbook at par 107 where it is stated "as a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective".

The issue in *Jong*, relevantly, was the construction of the second paragraph of Art 1A(2) of the Convention. The Full Court held the word "nationality" where it first appears in that paragraph referred to nationality that is effective as a source of protection and is not merely formal. The Court continued (at 707):

"Effective nationality for this purpose of course means something that must be assessed in the light of all the circumstances of a particular case. The inquiry must thus extend to a range of practical questions, parallel to those posed by the expression 'unable' in the first paragraph Art 1A(2).

It follows from the construction we considered to be correct that findings that a person has dual nationalities but lacks a well-founded fear of persecution in one of the countries of nationality will not necessarily preclude a finding that the person is a refugee".

The Full Court acknowledged this was contrary to an observation of La Forest J in *Ward* (at 42) to the effect that an applicant for recognition as a refugee bears a burden which "includes a showing of well-founded fear of persecution in all countries of which the claimant is a national". However the Court considered his Lordship's judgment had recognised an exception in the case where the second country of nationality did not offer protection to the applicant. In *Jong* the Full Court found the decision of the Tribunal under review involved error because the Tribunal had proceeded on the basis that once Portuguese nationality was established that was the end of the matter. The error identified by the Full Court was the failure of the Tribunal to recognise the necessity, in applying the definition of refugee in circumstances of dual nationality, of considering the effectiveness in terms of State protection of the applicant's Portuguese nationality, as a distinct issue. The Court considered these were questions of fact for the Tribunal. The Court added the material before the Tribunal indicated the applicant Jong's circumstances were not appropriately dealt with by applying a presumption of national protection, citing *Ward* at 44.

Despite this parting reference by the Full Court to Ward, the whole structure of its reasons in *Jong* exposes judicial reasoning entirely devoid of any reference to a presumption such in the nature of that referred to in *Ward*. It is no authority that such a presumption exists.

The second Australian authority relied on for the application to support the existence of a presumption is in *Prathapan v Minister for Immigration and Multicultural Affairs* (1997) 47 ALD 41 in which it was said by Madgwick J (at 48):

"...having regard to the realities of nations and the practicalities of applying the Convention, the framers and keepers of the Convention would hardly have envisaged that a reasonable level of efficiency of police, judicial and allied services and functions, together with an appropriate respect on the part of those administering the relevant state organs for civil law and order, and human rights, in a modern and affluent democracy, would not ordinarily amount to effective and 'available' protection.

... a person claiming refugee status is not, ... ordinarily entitled to rely on the supposed inadequacy of reasonable State protection available to him or her if it is not inferior to that available to a fellow citizen at risk of serious, criminal harm for non-Convention reasons".

The expression in these reasons is prefaced by reference to the need for an actual inquiry into the question of effectiveness and the second paragraph conditioned by a recognition the matter remains a question of fact. This is not language supportive of a presumption; it is language addressing the practicalities of evidence in what must be a factual inquiry.

The third Australian authority relied on is the Full Federal Court decision in *Thiyagarajah v Minister for Immigration and Multicultural Affairs* (1997) 151 ALR 685. In the course of his reasons von Doussa J, with whom the other members of the Court agreed, dealt with a submission for the respondent that information placed before the Tribunal relating to certain incidents which occurred in France and the murder of several Tamils in Paris and Switzerland were sufficient to rebut any presumption the French authorities were capable of protecting the respondent and his family. He cited *Ward* at 23 in the passage of La Forest J's reasons referring to the need for clear and convincing confirmation of a state's inability to protect and referred to the fact that absent some evidence, nations should be presumed capable of protecting their citizens. Read properly, the citation is supportive of the nature of the evidence required to establish ineffectiveness rather than any adoption of the legal notion of a presumption. It is apparent from this reasoning that the issue before me was not squarely raised there. I do not regard it as an authority supporting the establishment of such presumption. The issues in *Thiyagarajah* were decided on the basis the factual issues had been agitated before the Tribunal and it was open to the Tribunal to take the view which it did. There was no suggestion the Tribunal was bound to act in accordance with any presumption.

Furthermore, the existence of any such presumption would be inconsistent with the function of the Tribunal to act in an inquisitorial fashion. In *Jong* (at 701) the Full Court held it to be generally inappropriate to speak of an onus of proof in hearings by the tribunal, following *Ngalingam v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 38 FCR 191 at 200; *cf Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425; *McDonald v Director-General of Social Security* (1984) 6 ALD 6 at 9.

In my opinion there is no foundation in authority or principle which should lead this Court to accept the applicant's submission for the existence of a presumption in terms of *Ward*.

Since writing the above it has come to my attention that in *Ratnam v Minister for Immigration and Ethnic Affairs* (1997) 47 ALD 203 at 209 Emmett J said:

"Much of the applicant's approach appeared to be based upon a contention that there was a presumption of persecution. However, one must start with the presumption that the country of nationality will look after its nationals Canada (Attorney-General) v Ward [1993] 103 DLR (4th) 1. An applicant must rebut that presumption, although the onus is not necessarily a heavy one. The applicant needs to demonstrate no more than that there is a real chance that the country of nationality will not look after its nationals and that the applicant will be persecuted. Nevertheless, there must be some material from which such a conclusion can be drawn. Further, whether the conclusion can be drawn from the material available is a matter for the tribunal and is subject to review only on the very limited grounds set out in s 476(1) of the Act."

It does not appear that the issue of whether such a presumption is recognized in Australian law was argued before his Honour. I differ from him only in that I do not consider Australian law has until now recognized the existence of such a presumption. I agree with him on the nature of the proof required by an applicant so that, in practical terms, little may turn on the recognition of a formal presumption.

For the applicant it is contended the existence of a presumption has at least this effect, namely in a case where no evidence is led that the country of relevant nationality will not look after its nationals, then the presumption will prevail. In my view, in the absence of a presumption the failure of an applicant to make out that condition would result in that applicant failing to make out a case on that basis. There is no self-evident policy reason to construct a presumption in those circumstances.

Relocation principle

It is contended for the applicant the Tribunal misapplied the relocation principle. That principle expresses the value that the international protection afforded by the Convention will only come into play when a country cannot afford the claimant protection within its own frontiers: *Ward* at 12; *Thirunarukkarasu v Minister of Employment & Immigration* (1993) 109 DLR (4th) 682 at 687; *R v Secretary of State for the Home Department; Ex parte Robinson* [1997] 4 All ER 210 at 215-220. The principle required the Tribunal, if it found the respondent was unable or unwilling to avail herself of the protection of country 2 in the place of her residence (region X), to consider whether she was unable or unwilling to do so in other parts of country 2.

The Tribunal found it would be unreasonable for respondent A to relocate in country 2. This finding was based on a further finding that to relocate respondent A would have to change her name and her religion, the latter making it unreasonable for her. In reaching these findings the Tribunal relied on *Randhawa* as well as the citation from *Jonah* and Professor Hathaway. These are cited with approval in the reasons of Black CJ (with whom Whitlam J agreed on this point) in *Randhawa* at 442-443 where his Honour said:

“In the present case the delegate correctly asked whether the appellant’s fear was well-founded in relation to his country of nationality, not simply the region in which he lived. Given the humanitarian aims of the Convention this question was not to be approached in a narrow way and in her further analysis the delegate correctly went on to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.

This further question is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person’s fear of persecution in relation to that country will remain well-founded with

respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.

Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in R v Immigration Appeal Tribunal: Ex parte Jonah [1985] Imm AR 7. Professor Hathaway, op cit at p 134, expresses the position thus:

'The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad. It should be restricted in its application for person who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights: or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.' [Original emphasis.]

If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the persons' fear of persecution in relation to that country as a whole is well-founded."

Another useful statement on the circumstances in which unreasonableness may be found appears in *Robinson* at 217-218 per Lord Woolf MR.

The error which it is contended the Tribunal made was to apply the principle without it having been first established that in region X (or elsewhere) the authorities were unable or unwilling to provided protection. Specifically it is said what is entirely missing from the findings of the Tribunal is any finding respondent A sought to engage the protection of local law enforcement agencies and was refused, so that the protection proffered by the state was inadequate. It is contended this is a minimal finding to make good the objective determination of reasonableness.

The Tribunal said "the issue for the Tribunal is not whether the 'system' as a generalisation provides such protection but whether for this individual the protection is adequate".

In *Jong* at 707 the Full Court said:

"Effective nationality for this purpose is of course something that must be assessed in the light of all the circumstances of a particular case. The inquiry will thus extend to a range of practical questions, parallel to those posed by the expression "unable" in the first paragraph of Art 1A(2)."

The approach taken by the Full Court in *Jong*, requiring the effectiveness of Portuguese nationality to be considered, itself demonstrates that the existence of a democratic judicial system in a state is not alone sufficient to establish effective State protection for Convention purposes. When the Tribunal approached the question of effectiveness in this way it did not therefore fall into error of principle. There was no "error involving an incorrect interpretation of the applicable law" in this: s 476(1)(e) of the Act.

However there is an issue whether the Tribunal made "an incorrect application of the law to the facts as found by the person who made the decision": s 476(1)(e) of the Act. What the Tribunal was obliged to decide was whether respondent A was unable or, due to a Convention based fear, unwilling to avail herself of the protection of country 2. The application of that law required the Tribunal to make a finding to that effect. In the case of the country of respondent A's first nationality, country 1, the Tribunal found "the government cannot provide her with the requisite level of protection." In the case of country 2 there was no such finding. What was found was that it was unreasonable for respondent A to relocate in country 2 and that she faced a real chance of persecution in country 2. Neither of these findings involved a finding on the matters raised in the disjunctive portion of Art 1A(2). What is missing in the reasoning of the Tribunal is any finding of respondent A's inability or unwillingness to avail herself of the protection of country 2.

What the Tribunal found additionally was that "associates of the [respondent A's] husband were able to track her down and make threatening telephone calls to her in different parts of [country 2] within days." That was accompanied by a finding that it was not true groups from religion B in country 2 were involved with terrorism and that country 2 did provide protection. Examination of those findings highlights the absence of the finding which the applicant contends was essential. The express finding on effectiveness in relation to country 1 is not matched by an express finding on effectiveness in relation to country 2.

Furthermore, I do not consider the reasons can be read so as to construe or imply a finding of that character. The finding that respondent A experienced threatening telephone calls from her husband's militant religious friends and continued to do so while he was in prison, was not a finding of the required character. It may have been evidence relevant to a finding on effectiveness by the Tribunal but such a finding was not made. The question undecided was whether, even if respondent A was able to

be traced and was subjected to threats, the normal law enforcement processes in country 2 would provide her with effective protection. That is not a finding encompassed either by the findings of persecution or of unreasonableness of relocation.

For the applicant it was submitted a finding on effectiveness must necessarily precede any finding on relocation. Logically that must be the case because relocation only becomes relevant upon established ineffectiveness of state protection in a particular part of the state. However, that does not mean the relevant findings cannot both be made from examination of the body of evidence concerning the particular circumstances of an applicant for protection. What is absent here, however, is any express or implied finding concerning effectiveness.

For these reasons I consider the failure of the Tribunal to make a finding on effectiveness constituted an incorrect application of the law to the facts and so a relevant error of law within s 476(1)(e) of the Act.

Conclusion

I therefore conclude the decision of the Tribunal that respondent A (and the dependent members of her family respondents B and C) are refugees should be set aside and the matter

remitted to the Tribunal for determination according to law in accordance with these reasons.

I certify that this and the preceding seventeen (17) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice R D NICHOLSON

Associate:

Dated: 9 April 1998

Counsel for the Applicant:	R Tracey QC
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Solicitor for the Respondent:	Erskine, Rodan & Associates
Date of Hearing:	11 March 1998
Date of Judgment:	9 April 1998