FEDERAL COURT OF AUSTRALIA

A v Minister for Immigration& Multicultural Affairs [1999] FCA116

ADMINISTRATIVE LAW – immigration law – grant of protection visa – whether person of dual nationality unable to find protection in second state of nationality because of their fear of persecution – question of level of protection available in second state – decision of Refugee Review Tribunal that unreasonable for applicant to relocate to second state – whether express finding on the question of effectiveness of protection necessary or implicit in Tribunal's reasons.

Migration Act 1958 (Cth) s 29, s 36

Migration Regulations

Convention Relating to the Status of Refugees 1984

Hathaway – *The Law of Refugee Status* (Torronto: Butterworths, 1991)

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

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

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

Canada (Attorney-General) v Ward (1993) 103 DLR 1 cited

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

Rajendran v Minister for Immigration and Multicultural Affairs (unrep. Fed Court, Full Court, No. 1085 of 1998, 4 October 1998) cited

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 referred to

A, B AND C v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 182 OF 1998

FRENCH, MERKEL AND FINKELSTEIN JJ

23 FEBRUARY 1999

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 182 OF 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	A, B AND C Appellants
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	FRENCH, MERKEL AND FINKELSTEIN JJ
DATE OF ORDER:	23 FEBRUARY 1999
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal is allowed.

2. The decision of the learned trial judge given on 9 April 1998 be set aside.

3. In lieu thereof it be ordered that the application be dismissed.

4. The respondent is to pay the appellants' costs of the appeal and of the application for review.

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

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DATE:	23 FEBRUARY 1999
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REASONS FOR JUDGMENT

THE COURT:

Introduction

1 A person claiming to be a refugee under the *Convention Relating to the Status of Refugees* 1954 (*Refugee Convention)* must satisfy certain requirements set out in Article 1A of the Convention. The requirements are that the person has a well-founded fear of being persecuted for a reason of race, religion, nationality, membership of a particular social group or particular opinion. The claimant must also show that he or she is outside the country of nationality and is unable or, owing to such fear is unwilling to avail himself or herself of the protection of that country. In the case of persons with more than one nationality, this applies to each country of which he or she is a national.

2 This case concerns a person of dual nationality. That fact, however, does not underlie the critical issue. What is critical in this case is what a decision-maker must find as facts about the availability of protection in the country of nationality and whether effective protection is to be presumed in the absence of evidence to the contrary from the claimant.

Factual History

3 This case concerns an application by a woman and her two young children for protection visas. She holds citizenship of two countries, one in her country of birth, the other in a country to which she travelled and in which she lived from 1990 until 1995. In order to reduce the risk of her identification neither she nor her children nor her countries of birth and acquired citizenship will be referred to by name. To that end she is referred to as “A” and her children as “B” and “C”. Her country of birth is “X” and her country of acquired citizenship is “Y”.

4 A graduated in medicine in X in 1986. She married a national of that country in 1988. When A and her husband were married they were both of the same religion although her membership was of a particular variant of that religion. It is a minority religion in X. Subsequently her husband converted to the majority religion in that country.

5 A suffered constant discrimination and harassment in X by virtue of her religion. She was unable to complete a Masters Degree in that country, her family was threatened and a red cross was painted on the door of their

apartment. Her husband became involved in drug use. He wanted A and their son, B, who was born in 1989 to convert to his new religion. He started to show violence towards her. In 1990 A left X and travelled to Y to escape the religious discrimination, to get away from her husband and to improve her standard of living. Her husband followed her to Y in the same year and for a time they lived together. Their second child, C, was born in 1992.

6 Prior to her husband's arrival A had worked as a medical assistant in a hospital in Y. Her husband prevented her from working for a time. A tried to leave him but he forced her to return. She was terrorised and abused by him over the next few years. In April 1995 he violently assaulted her. A's neighbours called the police. Her husband was charged with assault, convicted and imprisoned. A was hospitalised with multiple contusions. A restraining order was also made against her husband.

7 Militant co-religionists of her husband were present in court during his trial on the assault charge. He subsequently threatened her from prison. She was subjected to threats from his co-religionists. The neighbours who had called the police over her assault have also suffered threats and have moved house as a result. The government prosecutor who had carriage of the case against A's husband told her orally that she could not be offered adequate protection but that he could not put this in writing. A moved three times to different parts of Y but her husband's friends were able to locate her within days and make abusive and threatening calls even when he was in prison. She belongs to a religion which has identifiable communities in various parts of Y.

8 A's husband has become wealthy because of his involvement in drugs and terrorism. He has stated that he wants to divorce her and to get custody of their children to convert them to his religion. He is willing and able to take dramatic and violent action against her when he knows where she is. He has abused one or more of his children physically and emotionally. They fear him. A could not return to X. A group of co-religionists of which her husband is a member had sent pictures of her and the children there. She would be regarded as an apostate by other members of her husband's religion.

9 In 1995 A and her children travelled to Australia on a visa issued in Y. In October 1995 A applied for a protection visa for herself and her children. On 6 February 1996 a delegate of the Minister for Immigration and Ethnic Affairs refused the application. In his reasons he found that A feared violence which went beyond domestic violence and contained elements of violence based on her religion. He also accepted that violence was directed to her because of her social status as a woman and was therefore "…convention related". What A feared in both X and Y did amount to persecution. He concluded however that her fear was not well founded because of the "adequate and meaningful protection" that could be afforded to her by law enforcement agencies in Y. Accordingly, he found that A was excluded from refugee status by virtue of Article 1A(2) of the *Refugee Convention*.

10 A applied to the Refugee Review Tribunal on 26 February 1996 for review of the delegate's decision. On 4 January 1997 the Tribunal found that A, B and C were refugees. It remitted the matter for reconsideration and directed that A, B and C be taken to have satisfied the criterion set out in s 36(2) of the *Migration Act* 1958 (Cth) for the grant of protection visas.

11 The Minister lodged an application for an order of review of the Tribunal's decision on 9 September 1997. The matter came on for hearing before the learned trial judge on 11 March 1998 and on 9 April 1998 his Honour made orders setting aside the decision of the Tribunal and directing that the matter be remitted to it for consideration according to law. There was no order as to costs. A, B and C filed a notice of appeal from his Honour's decision on 30 April 1998. The appeal came on for hearing on 25 November 1998.

The Decision of the Refugee Review Tribunal

12 The factual findings of the Tribunal are largely reflected in the history set out above. The Tribunal accepted A as a credible witness and found that she and her children had been "physically abused, threatened and harassed by her husband and that [they] are, in the circumstances justifiably frightened of him".

13 The Tribunal said it was clear that there was some discrimination, even some persecution, of persons of A's religion in country X. It referred to the US State Department *Country Reports on Human Rights Practices for 1996* which indicated a significant incidence of terrorist attacks directed specifically against persons of A's religion. The Tribunal observed:

"The situation appears to be that most [persons of A's religion], most of the time, must cope with minor harassment and discrimination, with occasional acts of violence. Nonetheless, anyone who is specifically targeted by the fundamentalists is at greater risk. The [X government] has clearly tried to crack down on fundamentalist violence, and equally clearly has not been successful."

14 The Tribunal accepted that A faced a real chance of violence being inflicted on her by fundamentalist colleagues or friends of her husband and that the government of X could not provide her with the requisite level of protection. The reason she was at risk was because of her religion and she could expect more hostility and less protection than other citizens of X. A's fear of persecution in X was well-founded, based on the convention ground of religion, on the alternate bases that she adheres to a minority religion in X and is seen as an apostate of the majority religion. Moreover while the situation for persons of her religion appeared to be more dangerous in one part of X than another, there was nothing to indicate that A could not be found anywhere in the country should her husband's associates want to find her.

15 In relation to country Y the Tribunal accepted that A's husband had been convicted of assaulting her and had been imprisoned for that. That is to say the authorities in Y had tried to protect her. However, the Tribunal also accepted that the husband threatened A even while he was in prison and that he or his friends frightened neighbours who called police to the extent that neighbours moved and that although A tried leaving her home and staying in other areas of Y the husband's friends were able to track her down.

16 The Tribunal referred to the extent of activities and influence of fundamentalists of the husband's religion in Y. It referred to particular incidents of violence said to have been perpetrated by fundamentalists and then went on:

"I accept that as a system, [Y] does provide protection. 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. It is true that the applicant did not in fact face any actual violence in the period between her husband's imprisonment and her departure from [Y]. However the husband was jailed in April 1995, the applicant left [Y] in August 1995, that is only about four months later. In the intervening period, she had to three different cities (sic) to avoid his associates, and from the West Coast to the East Coast and back."

17 Importantly, the Tribunal found A's religion and the succour of her church to be vital to her. In Y there are some sixty four centres of that church or related institutions. A's husband had already shown his willingness and ability to take dramatic violent action against her when he knew where she was. He had also shown that he and his associates were able to track her down when she was staying with friends or acquaintances. The Tribunal concluded:

"Given the limited number of …communities [of A's religion], and the importance the applicant places on maintaining strong ties to that community, there seems to be a real chance that the husband or his associates would be able to track down the applicant within a fairly short time. Even were she to use a false identity, the community is not so large that the arrival of a single woman with two small boys, going to the local [church] school but unwilling or unable to account for her background, would go unnoticed."

18 The Tribunal found that A had a well-founded fear of persecution on religious grounds in both her countries of nationality and that it was unreasonable for her to relocate in Y. It was not necessary for the Tribunal therefore to decide whether A also faced persecution as a victim of domestic violence and whether or not that was a "particular social group" for the purposes of the Convention.

The Decision of the Learned Trial Judge

19 The application for an order of review of the Tribunal's decision was brought under Part 8 of the *Migration Act* 1958 (Cth) and asserted that the decision involved various errors of law. The Minister relied only upon grounds introduced by way of amendment to the application. His Honour identified the issue encompassed in all the alleged errors of law to be 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 Article 1A(2) of the Convention. Such exclusion would be on the basis that it could not be concluded the applicant "is unable or, owing to such fact, is unwilling to avail himself of the protection of that country…". It was submitted for the Minister that the Tribunal fell into error of law because it failed to recognise a presumption in the Convention that national protection is effective. His Honour held that there was no policy reason to construct a presumption noting that the failure of an applicant to lead any evidence that the country of relevant nationality would not look after its nationals would result in that applicant failing to make out a case on that basis.

20 The second line of argument with which his Honour dealt related to the relocation principle namely that the international protection afforded by the Convention only comes into play when a country cannot afford a claimant protection within its own frontiers. His Honour found that the Tribunal had not erred in its interpretation of the applicable law in holding that the issue it had to decide was not whether the "system" as a generalisation provided the necessary protection but whether for the individual the protection was adequate. This accorded with the approach taken by the Full Court in *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 143 ALR 695 where it was 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)." (at 707)

21 Nevertheless his Honour found there was an issue whether the Tribunal had made "an incorrect application of the law to the facts". The Tribunal was obliged to decide whether A was unable or due to a Convention based fear, unwilling to avail herself of the protection of country Y. In the case of country X the Tribunal found "the government cannot provide her with the requisite level of protection". In the case of country Y, his Honour held, there was no such finding. What was found was that it was unreasonable for A to relocate in Y and that she faced a real chance of persecution in Y. His Honour said:

"Neither of these findings involve 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 [Y]."

22 Moreover his Honour did not consider the reasons of the Tribunal could be read to construe or imply the requisite finding. The fact that A experienced threatening telephone calls from her husband's militant co-religionists 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 such a finding but the finding of effectiveness was not made. In the event his Honour concluded that 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 was made within s 476(1)(e) of the Act.

23 His Honour's conclusion was that the decision of the Tribunal that A, B and C are refugees should be set aside and the matter remitted to the Tribunal for determination according to law in accordance with his reasons. He made no order as to costs.

Statutory Framework

24 The grant of visas is authorised by s.29 of the *Migration Act*, which provides, in part:

"29(1) Subject to this Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:

(a) travel to and enter Australia;

(b) remain in Australia."

25 The Act provides for prescribed classes of visa and for the prescription of criteria for visas of specified classes (s.31). Section 36 specifies a class of visa known as "protection visas" in the following terms:

"36(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

26 Regulations are authorised to provide that visas or visas of specified classes may only be granted in specified circumstances (s.40). Regulation 2.04 of the *Migration Regulations* provides that for the purposes of s.40, and subject to the Regulations, the only circumstances in which a visa of a particular class may be granted to a person who has satisfied the criteria in a relevant Part of Schedule 2 are the circumstances set out in that Part.

27 Schedule 2 sets out various sub-classes of visa. Subclass 866 is the Protection (Residence) visa. Clause 866.211 of subclass 866 specifies the following criteria for the grant of such a visa:

"866.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention; or

(b) claims to be a member of the same family unit as a person who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class AZ) visa."

It is also a criterion that the Minister must be satisfied that the applicant is a person to whom Australia has protection obligations under the *Refugee Convention* (866.221).

28 The *Refugee Convention* is to be read with the *Protocol Relating to the Status of Refugees* 1973. Article 1A of the Convention, read with the Protocol, defines a refugee as a person who fulfils the following conditions:

"...owing to 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; or who, not having a nationality and being

outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

29 Relevantly for present purposes Article 1A(2) deals specifically with the case of a person with more than one nationality as follows:

“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.”

30 Section 411 of the Act sets out a class of decisions designated as "RRT-Reviewable Decisions". The class of decisions so designated includes a decision to refuse to grant a protection visa (s.411(1)(c)). An application for review of an RRT-Reviewable Decision is made to the Refugee Review Tribunal (s.412(1)). Where a valid application is made for review of an RRT-Reviewable Decision, the Tribunal is required to review the decision (s.414(1)). The Tribunal may, for the purposes of the review, exercise all the powers and discretions conferred by the *Migration Act* on the person who made the decision (s.415(1)). The Tribunal is expressly empowered to affirm or vary the decision under review, remit it for reconsideration or set it aside and substitute a new decision (s.415(2)).

31 Part 8 of the Act provides for the review of decisions by the Federal Court and in s.475 sets out a class of decisions known as "judicially-reviewable decisions". This includes decisions of the Refugee Review Tribunal (s.475(1)(b)).

32 An application for review by the Federal Court of a judicially-reviewable decision is limited to one or more of the following grounds:

"(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(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;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision."

Grounds of Appeal

33 The grounds of the appeal are as follows:

"1. His Honour erred in holding that the Refugee Review Tribunal ("the Tribunal") had committed an error of law in failing to make a specific finding that country [Y] did not offer the appellant "effective protection".

2. His Honour should have held that:

(a) The concept of effective protection in Article 1A(2) requires an inquiry into and findings about the applicant's unwillingness or inability to avail himself or herself of the protection of the country of nationality, which is a different exercise from a consideration of the theoretical ability of the country of nationality to protect the applicant;

(b) The assessment of effective protection, from an applicant's point of view, is to be undertaken by reference to the country of nationality to protect the applicant;

(c) In this case, the Tribunal undertook the assessment of effective protection by country [Y] without committing an error of law because it concentrated on the first appellant's willingness and ability to avail herself of the protection of country [Y] in the particular circumstances faced by the first appellant.

3. His Honour erred in holding that, in the context of the application of Article 1A(2) of the Refugees Convention, a finding on effective

protection must necessarily precede any finding about the reasonableness of relocation:

(a) His Honour should have held that the issue of reasonable relocation to another part of the country of nationality is but an aspect of the assessment of effective protection and is not a separate component to be determined after an assessment of effective protection has been completed.

4. His Honour erred in requiring of the Tribunal an express finding on the effectiveness of protection in relation to country [Y].

(a) His Honour should have applied the approach prescribed by the High Court and the adopted repeatedly by the Federal Court of Australia (sic), in the analysis of the written reasons for decisions of Tribunals. His Honour should have held that reasons of Tribunals, including the reasons before his Honour:

(i) are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way the reasons are expressed;

(ii) must be read as a whole, and individual sentences must not be closely examined in the hope of finding infelicity or error;

(iii) should not be analysed minutely with an eye keenly attuned for the perception of error;

(iv) should be examined with regard to the substance of the decision, and the substance not form of the decision is controlling

(b) His Honour should have held that the tribunal's reasons will not necessarily disclose an error of law by reason of there being no express finding on a particular matter. If the finding identified by his Honour in relation to effective protection was a necessary part of the determination of effective protection (and the appellants contend that it was not) then His Honour erred in not holding that such a finding was implicit in the tribunal's reasons, and in the other findings the tribunal made about the ability and willingness of the first appellant to avail herself of the protection of country [Y]."

Grounds 5 and 6 were abandoned.

Effective Protection

34 To qualify for refugee status under Article 1 of the *Refugee Convention* it must be shown that a person, owing to well founded fear of persecution for a Convention reason "…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". In the case of a person with more than one nationality, as Article 1A(2) provides, that principle applies to each of the countries of which the person is a national. So such a person will not be treated as 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.

35 In the present case the Tribunal had accepted that A faced a real chance of violence being inflicted on her by fundamentalist colleagues or friends of her husband and that the government of X could not provide her with the requisite level of protection. There was no issue as to the want of protection for A and her children in X. The primary issue in this case concerned the question whether A and her children were unable to avail themselves of the protection of Y or were unwilling, because of their fear of persecution in that country, to do so.

36 The application of the obligations imposed on States by the *Refugee Convention* is conditioned upon the need for protection which is an element of the definition of a refugee in Article 1A. It is limited by the proposition that a person:

"…cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be at one's own state." Hathaway – The Law of Refugee Status (Torronto: Butterworths, 1991) at p 135.

37 By virtue of Article 1A(2) this so called "internal protection" or "relocation" principle applies to any country of which the person claiming refugee status is a national. It is connected not so much with the protection that the country of nationality might be able to provide in some particular region but upon a more general notion of protection by that country – *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 441 (Black CJ). In his discussion of the principle in that case the Chief Justice accepted that:

"…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." (at 442)

Assessment of those practical realities involves determination of questions of "fact, albeit secondary fact, involving a degree of judgment" – *Randhawa* at 452 (Beaumont J).

> 38 It can be accepted, as was submitted for the appellants, that the language of Article 1A focuses upon the well-founded fear of persons claiming Convention protection and their inability or unwillingness, owing to such fear, to avail themselves of the protection of the country of nationality. In that sense the willingness or ability of the country of nationality to provide protection is not the ultimate question. But it is a question which must be considered in the assessment of refugee status. The availability of protection in the country of origin or nationality is relevant to the existence of an objective basis upon which the well-founded fear of persecution that is necessary for Convention protection rests.
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> 39 The level of protection that may be available will vary from State to State and perhaps also according to the class of persons claiming refugee status and their circumstances. There is no golden rule which says that a person may never be given refugee protection if they come to Australia from a democratic country governed by the rule of law and with generally effective judicial and law enforcement institutions.
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> 40 It has been suggested that a person claiming refugee status is not ordinarily entitled to rely upon 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 – *Prathapan v Minister for Immigration and Multicultural Affairs* (1997) 47 ALD 41 at 48 (Madgwick J). That however is a proposition which may need to be treated with caution. Convention protection is available for a particular category of harm and outside that category is not available for protection from "other serious harm". The considerations adverted to by Madgwick J would undoubtedly be of relevance and indeed of considerable weight in deciding whether the person in question was unable or unwilling, owing to a well-founded fear of persecution, to avail himself or herself of the protection of the country of nationality. There is always a risk however in elevating classes of relevant factors in evaluative or discretionary judgments to quasi legislative rules or principles. Thus is ~~Thus is~~ evaluation blinkered and discretion fettered.
>
> 41 The fact finding and evaluation to be undertaken by decision-makers in relation to applications for protection visas and by the Refugee Review Tribunal on review of their decisions is administrative in character. In consequence it is not appropriate for those decision-makers to draw too closely upon the rules of evidence applied in civil proceedings: see *Minister for Immigration and Ethnic Affairs v Liang* (1996) 185 CLR 259 at 282 where the High Court drew attention to the confusion likely to occur if the Refugee Review Tribunal was to decide questions of fact by adopting the civil standard

of proof. It is equally inappropriate for the Tribunal to apply curial devices such as presumptions of law or fact. In *Canada (Attorney-General) v Ward* (1993) 103 DLR 1 at 23 it was said, in relation to an application for convention protection that: "Nations should be presumed capable of protecting their citizens." But such a presumption, that is a presumption without a basic fact, is a rule of law relating to the existence of a burden of proof and such a rule has no part to play in administrative proceedings which are inquisitorial in their nature. Accordingly, ~~Nicholson J's conclusion~~ the trial judge's conclusion that "there is no foundation in authority or principle which should lead this Court to accept the [Minister's] submission for the existence of a presumption in terms of Ward" is plainly correct. Cases such as *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (supra), *Prathapan* (supra) and *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 151 ALR 685, are not authorities for the existence of any presumption.

42 On the other hand it is necessary that the decision-maker form a conclusion about the effectiveness of the relevant state protection and do so on some material whether presented by the claimant, otherwise available to the decision-maker or following additional inquiries by the decision-maker. A ministerial delegate or specialist tribunal dealing with a significant volume of refugee cases in which issues of national protection arise may well become familiar with material relating to particular countries. Thus the delegate may well have the view that a particular country is one which has effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort said to be feared by the claimants. In such a case and in the absence of evidence advanced by the claimant, the delegate will be entitled to reject the contention that the claimant is unable or unwilling because of a well-founded fear of persecution for a convention reason, to avail himself or herself of the protection of that country. So in dealing with the case of a Sri Lankan national claiming to have suffered persecution in New Zealand, where he had permanent resident status, a Full Court held that it was not impermissible for a trial judge to advert to the responsibility New Zealand had as a signatory to the convention and to assume that it would honour its obligations thereunder – *Rajendran v Minister for Immigration and Multicultural Affairs* (unrep, Fed Court, Full Court No. 1085 of 1998; 4 October 1998). In other cases a delegate or the Tribunal might be apprised of information indicating that for persons of particular classes or circumstances the relevant protection was ordinarily not forthcoming from their state of nationality.

43 These can all fall under the broad proposition that there must be information or material available to the decision-maker from some source or sources on the issue of effective protection. In some cases the claimant may have to do little more than to show that ~~it~~ he or she falls within a particular class of person or possesses particular attributes to make out want of effective protection as a basis for a well-founded fear of persecution and inability or unwillingness to avail itself of the relevant protection. In other cases the claimant may face a very difficult task indeed.

44 In assessing the approach taken by the Tribunal to dealing with the issue of protection in the second state of nationality it is necessary to bear in mind what the Full Court said in relation to appeals against Administrative Appeals Tribunal decisions in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287:

"The Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts…The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error….".

45 In this case his Honour observed that the Tribunal had held that in the case of country X, the country of A's first nationality "the government cannot provide her with the requisite level of protection". There was no such finding in the case of country Y. It was held to be unreasonable for A to relocate in Y and that she faced a real chance of persecution there. His Honour held that what was missing in the reasoning of the Tribunal was any finding of A's inability or unwillingness to avail herself of the protection of country Y.

46 As to this it is submitted for the appellants that there was no need for an express finding because the question of effectiveness of protection was nothing more than an aspect of the determination whether the appellant's fear of persecution was well-founded. The Tribunal had made this determination when, in summarising its findings at the end of its reasons for decision, it said:

"74. She faces a real chance of persecution in [Y]. For the reasons set out above it would not be reasonable for her to relocate in [Y]."

47 If contrary to those submissions the Tribunal ought to have made a finding about effectiveness of protection offered to the appellants by Y such a finding was said to be implicit in the Tribunal's reasons. And an implicit finding would be sufficient in the context of principles to be applied to administrative decision making. It was submitted for the appellants that the substantive determination of the Tribunal was clear from its reasons; it took the view that A's fear of persecution in Y was well-founded because her husband had demonstrated a propensity to violence in order to convert her to his religion and that he and his associates who pursued her for the same reason had demonstrated an ability to track her down throughout Y and to continue to make threats of violence and harassment against her.

48 So it was said the Minister's contention concerning effective protection in Y in truth amounted to an attempt to revisit the merits of the case and to ask the Court to decide that the Tribunal should not have found Y to be a country that did not offer effective protection to one of its nationals. The determination whether nationality offered effective protection was a matter of fact for the Tribunal.

49 It was submitted for the Minister that the Tribunal was required but failed to make a finding in relation to whether A's nationality of Y provided her with effective protection for the purposes of Article 1A. In the absence of such a finding and in the absence of evidence to the contrary, the Tribunal erred in determining that she was a refugee.

50 The evidence before the Tribunal, which it accepted, involved A's attempted murder by her husband, his charging, trial, conviction and imprisonment for assault, the presence of his militant co-religionists in court during the trial, his threats directed at her from prison and threats to her neighbours who had to move. In addition, A was told by a government attorney that she could not be offered adequate protection. Her husband and his associates proved themselves able to trace her movements in Y.

51 In addressing the issue of A's well-founded fear of persecution in Y the Tribunal posed two questions for itself:

"2. Are the applicant's fears "well-founded" in [Y], or could they move to another area of region of [Y]?

3. Are these fears, even if well-founded are [sic] based on a Convention ground?"

52 The Tribunal noted that these issues, although conceptually separate, are in fact intertwined.

53 The Tribunal accepted that as a system Y did provide protection. It identified the issue for itself however as not whether the "system" as a generalisation provided such protection but whether for A the protection was adequate. In terms of relocation, the Tribunal referred to the limited and identifiable number of religious communities of the same denomination as A within Y and said that:

"Given the limited number of …communities, and the importance the applicant places on maintaining strong ties to that community, there seems to be a real chance that the husband or his associates would be able to track down the applicant within a fairly short time. Even were she to use a false identity, the community is not so large that the arrival of a single woman with two small boys, going to the local…school but unwilling or unable to account for her background would go unnoticed."

54 These findings of fact in relation to Y do not themselves form the basis for review of the Tribunal's decision. The question is whether the Tribunal has failed to address the issue whether the government of Y can provide her with the requisite level of protection. Reading the reasons as a totality, the factual conclusion that it cannot provide the requisite level of protection is implicit in them. It does not require explicit formulation. However surprising that finding of fact may be, and the Court acknowledges that the case presents unusual circumstances, that is not an issue into which the Court, within the scope of

this review, which does not allow for retrial of the issues on the merits, can inquire.

Conclusion

55 For the above reasons this appeal should be allowed. The decision of the learned trial judge should be set aside and the application at first instance dismissed with costs.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 23 February 1999

Counsel for the Appellants:	Ms D. Mortimer
Solicitor for the Appellants:	Erskine Rodan and Associates
Counsel for the Respondent:	Mr R. Tracey QC
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	25 November 1998
Date of Judgment:	23 February 1999