

FEDERAL COURT OF AUSTRALIA

AZAAR v Minister for Immigration and Citizenship [2009] FCA 912

MIGRATION – reasonably effective State protection – domestic violence – finding that appellant faced a real chance of serious harm from her husband in the reasonably foreseeable future if she returned to her country of origin – existence of State laws and other mechanisms capable of addressing domestic violence claims – allegation that agents of the State nonetheless unwilling or unable to afford protection – discrimination against women embedded in traditional cultural norms and practices – whether Tribunal misapprehended the inquiry it was obliged to undertake in relation of effective protection – jurisdictional error found

Migration Act 1958 s 476

Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 222 CLR 1 applied

Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 applied

Horvath v Secretary of State for the Home Department [2001] 1 AC 489 applied

SZAIX v Minister for Immigration (2006) 150 FCR 448 cited

Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353 cited

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited

AZAAR v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

SAD 44 of 2009

FINN J

19 AUGUST 2009

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	
GENERAL DIVISION	SAD 44 of 2009

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:

AZAAR

Appellant

AND:

MINISTER FOR IMMIGRATION AND CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

JUDGE:	<u>FINN J</u>
DATE OF ORDER:	19 AUGUST 2009
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of Lindsay FM made on 3 March 2009 be set aside and in lieu thereof:
 - 2.1 An order in the nature of certiorari to quash the decision of the Second Respondent signed on 4 October 2008 and sent on 15 October 2008 in RRT Case Number 0802686.
 - 2.2 An order in the nature of mandamus requiring the Second Respondent to review the decision made by a delegate of the Minister for Immigration and Multicultural Affairs on 17 April 2008 according to law.
 - 2.3 An order that the First Respondent pay the Appellant's costs of the application.
3. The First Respondent 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.

The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	
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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	AZAAR Appellant
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AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent
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JUDGE:	FINN J
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DATE:	19 AUGUST 2009
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PLACE:	ADELAIDE
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REASONS FOR JUDGMENT

1 This appeal from a decision of a Federal Magistrate in judicial review proceedings which upheld a decision of the Refugee Review Tribunal not to grant a Protection (Class XA) Visa to the appellant raises a short question. The appellant, a citizen of Vanuatu, claimed she was the subject of significant domestic violence in that country at the hands of her husband but was not able to be provided – and would not, if she returned to Vanuatu, be provided – with reasonably effective State protection because of systemic discrimination against women resulting from cultural norms and practices.

2 The Tribunal accepted that the appellant had suffered – and would, if she returned to Vanuatu, face a real chance of suffering – serious harm from her husband. It found she belonged to “a particular social group” for the purposes of the Refugees Convention, this being either “Vanuatu

women” or “married Vanuatu women”. It considered the law to be settled in this country that the failure of the State to afford its citizens protection from non-State actors can amount to persecution in a Convention sense. Nonetheless, it concluded that the harm inflicted on her was not because of her membership of a particular social group, and it was not satisfied that there was a real chance of her being denied protection by the authorities in Vanuatu should she require it upon her return there.

3 The Federal Magistrate in turn concluded that the Tribunal committed no jurisdictional error in reaching this conclusion.

4 The appeal to this Court is founded on the Tribunal’s alleged misunderstanding of, or misconception concerning, the questions properly to be considered when the issue before it was that of persecution resulting from the insufficiency of State protection against the acts of violence of non-State agents.

THE LEGAL SETTING

5 There has been systematic, recent authoritative analysis of when conduct giving rise to a well founded fear of serious harm at the hands of a non-State actor may constitute persecution because of the unwillingness or inability of the State (or State agents) to discharge its obligation to protect its citizens: see *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489; see also *SZAIK v Minister for Immigration* (2006) 150 FCR 448. I need only note the following for present purposes. It is drawn from the above authorities.

6 (i) It is the obligation of a State to provide an adequate or reasonable armoury of laws and other mechanisms capable of providing international standards of protection: *Respondent S152/2003* at [27]; *Horvath*, at 510; against the perpetration of violence on its citizens: *Respondent S152/2003*, at [26].

7 (ii) Those standards cannot provide an “absolute guarantee” of protection: *Hovath*, at 510; the measures taken to protect the lives and safety of citizens must be “reasonable”: *Respondents S152/2003*; but they cannot be expected to protect against “individual and random” incidents of harm: at [119].

8 (iii) There must be a reasonable willingness and ability by the State and its agents to invoke those laws and mechanisms against the perpetrators of violence: *Respondents S152/2003* at [21]; *Hovatt*, at 511; and this may necessitate examining how State agents act at a “local level” regardless of the State’s “leaders’ good intention”: see *SZAIK* at [37].

9 (iv) If the State or its agents condone, approve, tolerate: *Khawar*, [31]; or are indifferent to: *Respondents S152/2003* at [119]; the criminal conduct concerned, or are unwilling or unable to afford protection: *Horvath* at 510-511; *Khawar*, at [29] –

... then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state [or its agents]: *Khawar*, at [31].

10 (v) Proof merely of maladministration, incompetence or ineptitude of State agents would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2) of the Refugee Convention: *Khawar* at [26].

11 The issue in this appeal, as it was in *Khawar* and *SZAIK*, relates to proposition (iv) above.

THE APPELLANTS CASE AND THE EVIDENCE BEFORE THE TRIBUNAL

12 It was apparent from when the appellant's visa application was made on 18 January 2008 that her claim was that of a victim of domestic violence who was unable to access State protection from a society that discriminated against women, that discrimination being rooted in traditional cultural norms and practices: see the Migration Agent's Submission of 18 January 2008, at [2], [3.1] and the appellant's statutory declaration of the same date at [8] and [16].

13 By way of illustration it was stated in [7] and [8] of the Statutory Declaration that:

7. ... in Vanuatu dowries are paid for the bride, the woman becomes the husbands property and he has the right to do what he likes with his property!

8. I never tried to tell the police because he would not stop at anything and it would just make him worse. My brothers tried to talk to him and said they would take me back if he continued to abuse me but he was not happy as he had paid the dowry and I was his property. After they spoke to him he went to their house with his family and said to my brothers they had sold me to him and they had no right to stop him beating me as I needed to be straightened out. He threatened my brothers that if they continued to support me he and his family would go and cause damage to them. They did not go to the police but they told the chief. My husband then sent his representative (chief) from the village to go to the other chief and tell him to keep out of it as this was a personal problem and he would deal with it himself. (My husband was from a little island so had a different

chief to our family). The chiefs told us they could not do anything for us.

14 In the submission of a new migration agent to the Tribunal it was in turn asserted that:

The applicant's ex-husband is a church leader. If she had gone to the police for help they would not have helped. Vanuatu is a male dominated society where women have few rights.

15 In her evidence at the Tribunal hearing the following are among the exchanges that occurred relating to "going to the police" (Transcript 15-19):

M Why didn't you tell the police?

A The police can only do what they can. You know the police you know it's a, it's a cultural thing you know, the Policeman have been born and bred under the influence of cultural customs you know. They know when to interfere and when to stop.

M OK and how do you know that?

A How do I know that?

M Well did, as I understand it you never went to the police, how did you know that they would not do anything unless you first asked them?

That's what my uh the other lady friend did and uh besides that .. when the police talk then it is you know it makes my husband more crazy, more angry in him because I don't expect ... (inaudible) going to the police.

M Alright so if you went to the police it would get worse, is that what you mean?

A Yes, yes that's what I meant. And it is believed that you know what he feels about the family, belongs to the family ... (inaudible).

...

M OK umm what I am trying to understand is what the persecution is and the way that the submissions have been put is that the persecution is the State of Vanuatu or the authorities withholding assistance or protection for people in your situation.

A Yes.

M Now your friend went to the police and the police then went and spoke to the husband which made him more aggressive?

- A Yes.
- M The fact that they went to the husband indicates to me that they don't support this type of treatment of women, they do disapprove of it but that they are not very effective in making it stop.
- A No they are not. And one thing is there is no, there is no specific laws that directly ... (inaudible) women against violence.
- M Alright but there are laws about assault which would cover violence against people. In Vanuatu it is illegal to hit people and to hurt them.
- A That's what people think but it's obvious it is happening now as we you know it's happening.
- ...
- M When your husband hit you and broke your tooth and it was obvious that you had been assaulted what would have happened if you had gone to the police and said I want him charged with assault.
- A If and when I had gone and seen the police and then the police would come and see my husband and then my husband would tell them on the spot that "look, this is a family issue, so I don't think you have any business here".
- M Alright and then what would happen?
- A And then a few days, a few weeks down the track and I had been beaten again and I told to the police and they come and see my husband and the husband say the same again.
- M Well then that makes, why would they bother to go and see him if they have no interest in, in protecting you?
- A One thing is uh before they make, they make the laws in Vanuatu they have to consult the President of Custom Chiefs.
- M Yeah
- A And then show them the laws that you know to do with culture or custom and that, is not taken away like a family you know, family issues is one.
- MA What basically what she saying is its not that the police would go to the husband and to arrest her I mean the police would come just to try and keep the peace and add ... (inaudible) and calm her down.
- M Ok.

A And that's different from actually doing their job as policemen.

16 I would note in passing that it was during the above exchanges that the migration agent advanced an alternative claim to the Tribunal. This was that the lack of domestic violence laws in Vanuatu was indicative of the withholding of protection. That claim is not in issue in this appeal though it appeared to become the Tribunal's preoccupation in its decision.

17 The country information before the Tribunal indicated that Vanuatu signed and ratified the Convention on the Elimination of Discrimination Against Women in 1995. A 2007 United States Department of State Country Report on Human Rights Practices in Vanuatu observed:

The law prohibits discrimination on the basis of race, place of origin, language, or sex; however, women remained victims of discrimination in the tradition-based society.

Women

Violence against women, particular domestic violence, was common, although no accurate statistics existed. Although rape is a crime, with a maximum penalty of life imprisonment, spousal rape is not cited specifically in the law, and police frequently were reluctant to intervene in what were considered domestic matters.

There are no specific laws against domestic violence; courts occasionally prosecuted offenders using common-law assault as a basis for prosecution. Magistrates have authority to issue domestic violence protection orders, but most cases of violence against women, including rape, went unreported because women, particularly in rural areas, were ignorant of their rights or feared further abuse. There were no government programs to address domestic violence, and media attention to the abuse was limited. Churches and other nongovernmental organizations (NGOs) ran facilities for abused women. NGOs such as the National Council of Women and the Vanuatu Women's Center also played an important role in educating the public about domestic violence but did not have sufficient funding to fully implement their programs.

...

Sexual harassment is not illegal and was a problem.

While women have equal rights under the law, they were only slowly emerging from a traditional culture characterized by male dominance, a general reluctance to educate women, and a widespread belief that women should devote themselves primarily to childbearing. The majority of women entered into marriage through "bride-price payment", a practice that encouraged men to view women as property. Women also were barred by tradition from land ownership. Many female leaders viewed village chiefs as major obstacles to social, political, and economic rights for women. Women interested in running for public office received encouragement and help from the NGO Vanuatu Women in Politics.

18
following:

A 2007 Freedom House Report on Vanuatu contained the

Local traditions are frequently sources of discrimination against women, including in the country's laws and before the courts. Violence against women is common and particularly severe in rural areas. Spousal rape is not a crime, and no law prohibits domestic abuse or sexual harassment. Most cases go unreported because the victims fear reprisal or are discouraged by family pressure, and the police and courts generally hesitate to intervene or impose stronger punishments on offenders. Women's rights leaders consider village chiefs to be major obstacles to improving conditions for women. The traditional practice of "bride payment", or dowry, is still common, and critics charge that it encourages the view of women as property.

19
And a Department of Foreign Affairs and Trade Report prepared for the Tribunal on 18 August 2008 for this matter stated (amongst other things):

Domestic violence against women is an issue throughout Vanuatu. It is largely seen as a family matter. Because of this, other community members or relatives of domestic violence victims are unlikely to intervene to protect a woman.

Culture plays an important part on the lives of niVanuatu. Many niVanuatu are caught in a society which is trying to find harmony between the traditional and modern ways of life. There is pressure to keep the traditions necessary for the continuation of culture but there are the modern ways of thinking and living which can often conflict with culture. As many marriages in Vanuatu involve a "kastom" ceremony where the husband's family pays a "bride price" for the woman, husbands can consider their wife as property.

Many women are subjected to domestic violence in Vanuatu, particularly in rural areas, only consider contacting police as a last resort. This is often because of the fear of inciting greater violence from the husband but also because of the treatment that women can sometimes receive from police. Police can be slow to respond due to lack of police resources. However, it is relevant to note that a high proportion of Vanuatu's current prisoners are serving sentences for sex-related offences.

The Vanuatu Police Force (VPF) has a Family Protection Unit. The Unit deals with sexual offences, child abuse and domestic violence. However, as domestic violence is considered a family matter, only very serious cases are reported to police. Generally, the first step in dealing with cases of domestic violence cases is for the police to counsel the parties. Often the next step is for a local chief or chiefs to resolve the problem.

There are a number of organisations that provide services for victims of family violence. The Vanuatu Women's Centre is an independent community service organisation that provides counselling and legal services for victims of violence as well as community awareness and legal advocacy interventions throughout Vanuatu. The Centre has a network of island-based Committees Against Violence Against Women which undertake community awareness activities. Safe house

services can be provided for women and a court fees fund is used to assist women with domestic violence court orders.

Women can obtain a Domestic Violence Protection Order (DVPO). These are processed by the Public Solicitor's Office and the Vanuatu Women's Centre can facilitate the process. DVPOs provide relatively quick and effective legal protection against domestic violence for a short period – generally around 14 days.

In many cases, domestic violence appears to be dealt with by village chiefs. Traditional courts, led by local chiefs, are empowered to hear cases dealing with a variety of issues including domestic violence cases. The traditional court case is resolved by the exchange of goods on both sides of the dispute. A chief will rarely find fault on only one side of the dispute and, we understand, will rarely, if ever, support the separation of a couple.

Some women seek support from Christian pastors. Like the chiefs, the pastors have a strong orientation towards reconciliation so the likely outcome can often be counselling to "forgive and forget".

Vanuatu's Constitution prohibits the discrimination against women. Article 5(a) states: "The Constitution prohibits discrimination on the basis of race, place of origin, religious or traditional beliefs, political opinions, language or sex". It appears that women remain victims of discrimination, particularly in rural areas where cultural traditions play a stronger role. The Vanuatu Government has a Gender Equity Policy which is explicit in identifying violence against women and discriminatory laws as a hindrance to the advancement of women.

Parliament passed a Family Protection Bill in June 2008 but it has not been implemented as the President of Vanuatu has referred the Bill to the Supreme Court over concerns that four of its provisions are unconstitutional. The Bill, which provides for the protection of women and children from domestic violence, creates a specific domestic violence offence, allows police to intervene in instances of domestic violence and excludes bride price payments as grounds for defence in domestic violence cases. The Bill also allows for people other than a complainant to apply for protection orders and for applications to be made orally and by telephone if necessary.

20

The Tribunal in its reasons referred to all of the above reports.

THE TRIBUNAL'S FINDINGS ON STATE PROTECTION

21

Having regard to what was said by members of the High Court in *Khawar* and in *Respondents S152/2003* the Tribunal perceived its task to be that (Reasons [85]):

I am required to consider whether the applicant has shown State Tolerance or condonation of domestic violence in Vanuatu. Further to that, or as part of that

analysis, I am required to consider whether Vanuatu provides its citizens, or the members of the particular social group more specifically, with a reasonable level of protection from persecutory conduct. In assessing the level of protection offered, and assessing whether it is reasonable, I am required to assess that in accordance with international standards.

22 The Tribunal's reasons for its conclusions are stated in the following six paragraphs which it is necessary to set out in full:

- 86 On the evidence before me, I am not satisfied that there would be a real chance of the applicant being denied protection by the authorities in Vanuatu should she require it upon her return there. In reaching this conclusion, I am mindful that the applicant has not produced evidence that the authorities of Vanuatu have been asked by her, and will not, provide her with a reasonable level of protection. She has asserted that it will not do so. She has provided some information which suggests that the police are, in some circumstances, reluctant to intervene in domestic matters. The country information provides some support for this. However, not once has she sought the protection of the police to test this presumption. She has explained this as being due to her assumption that this would only make matters worse.
- 87 However, the availability of "Domestic Violence Protection Orders" suggests that the State does provide mechanisms to protect women. The DFAT report, which I consider balanced and reliably researched, notes that these are processed by the Public Solicitor's Office and that the Vanuatu Women's Centre can facilitate the process. Moreover, there is evidence in the US Department of State's 2008 report, which I accept, that there are laws of general application against assault under which the perpetrators of domestic violence have been prosecuted. In the light of this evidence, I find it difficult to see how I could find that Vanuatu tolerates or condones domestic violence, or that there is a real chance that the State would withhold protection from the applicant for reasons of discrimination because of her membership of the particular social group.
- 88 Furthermore, I do not accept that the claimed lack of specific domestic violence laws is indicative of persecution. If assault is illegal, I do not see how it matters whether or not assault is committed against a family member as compared to a stranger. Protection against assault, whether it be assault within a domestic context or otherwise, is nevertheless protection against assault. In any event, the country information shows that domestic violence legislation has been passed by the legislature, even if it has yet to pass into law. This does not indicate to me that the Vanuatu State is tolerant of domestic violence. Indeed, it suggests a degree of proactiveness against domestic violence which, in my opinion, makes it difficult to accept the applicant's claims in this respect.

- 89 I consider that the country information shows that Vanuatu is attempting to grapple with domestic violence. The laws specifically directed to domestic violence show this to be the case. In assessing whether the protection offered by Vanuatu is reasonable according to international standards, I have considered Australian experience in this field. It is to be recognised that many of the claims made by the applicant in relation to the reluctance of the police to intervene in family matters, which I accept finds some support in the country information, describe the situation that existed in Australia until relatively recently.
- 90 It is common knowledge that, in the last two decades, there have been significant reforms in Australia aimed at improving the protection of women from domestic violence. To the extent that these reforms were necessary, that was so since, like traditional Vanuatu culture, in nineteenth century Australian (or European) society, women were seen as the property of the husband. Children were regarded as chattels of the father. Much has changed since then, but even in Australia work remains to be done and authorities continue to pursue reforms aimed at improving the effectiveness of protection of women from domestic violence. Given these continued efforts to improve protection, it could be argued that this should be taken as an acknowledgment that the level of protection currently afforded in Australia is inadequate. However, I do not accept this argument in the case of Australia; nor do I accept it in the case of Vanuatu.
- 91 In my opinion, the country information reveals that Vanuatu has moved more slowly than Australia in the pursuit of such reforms. In some ways, given that it is a lesser developed country than Australia, this is to be expected. However, I accept that it is pursuing such reforms and that the protection of woman from domestic violence is improving. The DFAT report refers to the Vanuatu Police Force's Family Protection Unit. Courts issue Domestic Violence Protection Orders and prosecute the perpetrators of domestic violence under the laws of common assault. The Vanuatu Government has a Gender Equity Policy "which is explicit in identifying violence against women and discriminatory laws as a hindrance to the advancement of women". This policy appears to have found legislative recognition by the Parliament's passing of the Family Protection Bill.

CONSIDERATION

- 23 The appellant's case is that, on a fair reading of the Tribunal's reasons, the Tribunal based its conclusion on the mere existence of mechanisms which were capable of protecting the appellant if the State or its agents (the police) were willing to invoke them: ie proposition (i) above. There was material before the Tribunal both from the appellant and the independent country information capable of supporting a conclusion that there was a lack of willingness on the part of the Vanuatu police to protect

her: ie proposition (iv) above. It should be inferred from its reasons that the Tribunal failed to appreciate the significance of this evidence, to analyse what might have informed such lack of police willingness, and hence its bearing upon the issues of reasonably effective State protection and of persecution.

24 I should at the outset deal with one factual circumstance in this matter which differs from the circumstances in *Khawar* (which also was a domestic violence case). In *Khawar* the abused woman went to the police on four occasions to report the violence and no action was taken by them. In the present matter the appellant, to quote the Tribunal, “not once has ... sought the protection of the police to test [her] presumption” (ie that the authorities would not provide her with a reasonable level of protection). Some significant, though unstated, importance appears to have been given to this failure: see Reasons [86].

25 If the Tribunal was suggesting that actually seeking the protection of the authorities was a prerequisite for a finding of absence of adequate State protection, then it clearly was in error. If cultural norms, practices or widely held assumptions in a particular society engender a reasonable apprehension that such an approach would only exaggerate a victim’s predicament, I can see no conceivable reason why the law would require a victim to expose herself to likely future harm to substantiate that she was being persecuted for Convention purposes.

26 This in turn leads to a larger issue which reveals what is a major silence in the Reasons. While the Tribunal was aware that Vanuatu was “attempting to grapple with domestic violence” and has pursued reforms in its laws and has instituted new mechanisms, the Reasons themselves engage in no explicit evaluation of the efficacy of those mechanisms or of the traditional cultural norms and practices which, both on the appellant’s case and in light of the country information, might bear on the police’s willingness or ability “to take reasonable measures to protect the ... safety” of victims of domestic violence. I would emphasise in this, for example, the evidence of the role of chiefs in settling family and domestic violence disputes and of the police’s utilisation of the chiefs. The absence of evaluation I have noted seems the more surprising given the Tribunal’s treatment of country information – a treatment which simply diluted the potential significance of what the reports clearly were intending to convey. So the State Department report that “courts *occasionally* prosecuted offenders using common-law assault” is expressed as “there are laws of general application against assault under which the perpetrators of domestic violence have been prosecuted”. Likewise the Tribunal’s observation that the country information “provides some support” for the appellants information suggesting “that the police are, in some circumstances, reluctant to intervene in domestic matters”, rather mutes, for example, the State Department’s comment that “police *frequently* were reluctant to intervene” or Freedom House’s comments to like effect.

27 I am not suggesting that the Tribunal was intending to contrive the evidence. Rather, I consider what the Reasons convey is the clear impression that the Tribunal, in all likelihood, failed to understand the potential

significance of such evidence to the issue of whether the agents of the State were unwilling or unable to afford protection and, if so, why.

28 That impression becomes the more compelling when one considers the manner in which the Tribunal approached the State's attempts "to grapple with domestic violence". Its concern was with institutional and organisational measures – with the laws, policies and mechanisms now in place – having or capable of having a domestic violence focus. What the Reasons do not reveal, as I have noted, is any explicit evaluation of the efficacy of those measures particularly having regard to the possible traditional cultural barriers to their effectiveness – barriers writ large in the country evidence.

29 I make the above comments, not because I consider that, as a matter of merits review, a different conclusion would have been preferable. Merits review, as is well accepted, is no part of the Federal Magistrates Court function in judicial review proceedings under s 476 of the *Migration Act 1958*. Rather, when one has regard (i) to the material before the Tribunal; (ii) to the issues raised by the appellant's case as to whether the police would be unwilling or unable to provide her with effective protection; and (iii) to the content and emphases of the Tribunal's reasons, I consider the only proper inference to be drawn: cf *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; is that, howsoever the Tribunal may have formulated its task, it did not appreciate the actual nature of, nor did it undertake, the legal inquiry it was required to undertake as to whether the protective measures which it considered were available in Vanuatu, were ones the State's agents were willing or able to utilise in providing protection. The reasons do not suggest any adequate or reasonable consideration of that issue at all and that was *the* issue before it on the appellant's case.

30 I am in the circumstances satisfied that the Tribunal's failure properly to consider whether the police were unwilling or unable to afford State protection constituted jurisdictional error: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]. I likewise am satisfied that the decision of the Federal Magistrate disclosed an appellable error.

31 Accordingly, I will order that:

1. The appeal be allowed.
2. The orders of Lindsay FM made on 3 March 2009 be set aside and in lieu thereof:

2.1 An order in the nature of certiorari to quash the decision of the Second Respondent signed on 4 October 2008 and sent on 15 October 2008 in RRT Case Number 0802686.

2.2 An order in the nature of mandamus requiring the Second Respondent to review the decision made by a delegate of the Minister for Immigration and Multicultural Affairs on 17 April 2008 according to law.

2.3 An order that the First Respondent pay the Appellant's costs of the application.

3. The First Respondent pay the Appellant's costs of the appeal.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 19 August 2009

Counsel for the Appellant:	Mr S Ower	
Solicitor for the Appellant:	Bourne Lawyers	
Counsel for the First and Second Respondent:	Mr K Tredrea	
Solicitor for the First and Second Respondent:	Australian Government Solicitor	
Date of Hearing:	13 August 2009	

Date of Judgment:

19 August 2009