FEDERAL COURT OF AUSTRALIA

Diatlov v Minister for Immigration & Multicultural Affairs [1999] FCA 468

MIGRATION – application for protection visa – whether stateless applicant must be outside country of former habitual residence as a result of persecution for a *Convention* reason, or whether statelessness alone amounts to refugee status – whether Refugee Review Tribunal failed to make findings on material questions of fact, or to refer to the evidence on which findings of fact were based – *Migration Act* 1958 (Cth), ss 430(1)(c), 430(1)(d)

Migration Act 1958 (Cth), ss 430(1)(c), 430(1)(d)

Federal Court Rules, O 80, r 4

Convention Relating to the Status of Refugees, Art 1A(2)

Vienna Convention on the Law of Treaties, Art 31

Convention Relating to the Status of Stateless Persons, Arts 3, 4, 7, 13, 15-20, 22, 26, 27, 28, 31

De Silva v Minister for Immigration and Multicultural Affairs [1999] FCA 1074, cited

Rishmawi v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 421, followed

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, cited

Haris v Minister for Immigration and Multicultural Affairs, unreported, Federal Court of Australia, 12 February 1998, discussed

Bank of Western Australia Ltd v Federal Commissioner of Taxation (1994) 55 FCR 233, cited

Al-Anezi v Minister for Immigration and Multicultural Affairs [1999] FCA 355, cited

Adan v Secretary of State for the Home Department [1997] 1 WLR 1107, not followed

Adan v Secretary of State for the Home Department [1999] 1 AC 293, considered

Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100, cited

Savvin v Minister for Immigration and Multicultural Affairs [1999] FCA 1265, not followed

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, cited

Singh v Minister for Immigration and Multicultural Affairs [1999] FCA 1126, cited

J C Hathaway, *The Law of Refugee Status* (1991)

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status

ANDREI DIATLOV v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

N 424 OF 1999

JUDGE: **SACKVILLE J**

PLACE: **SYDNEY**

DATE: **25 OCTOBER 1999**

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 424 OF 1999

BETWEEN: ANDREI DIATLOV

Applicant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	SACKVILLE J
DATE OF ORDER:	25 OCTOBER 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs of the proceedings.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 424 OF 1999

BETWEEN:	ANDREI DIATLOV Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	SACKVILLE J
DATE:	25 OCTOBER 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

The Adjourned Proceedings

1 The applicant is an ethnic Russian who has lived virtually all his life in Estonia. He sought review of a decision by the Refugee Review Tribunal ("RRT"), made on 19 April 1999, affirming a decision by the Minister to refuse to grant him a protection visa. His application was heard on 29 July 1999. At that hearing, the applicant represented himself.

2 In a judgment delivered on 3 August 1999 I held that, subject to one possible qualification, the applicant had not established any ground of review of the RRT's decision available under the *Migration Act* 1958 (Cth) ("*Migration Act*"). The qualification related to a paragraph in the RRT's reasons addressing a contention by the applicant that a law enacted in Estonia in 1997 had deprived him of permanent residence in Estonia by reason of his absence from that country for more than 183 days. The passage was as follows:

"The...applicant claims that he cannot go to Russia as he does not have 'propiska' or residency there and he is not able to obtain residency rights in Russia. I accept his claim. The...applicant also has claimed that pursuant to a 1997 amendment to the law, he has lost his residency right as he has been absent from Estonia for more than 183 days. I have found no independent evidence which suggests that the applicant will be harmed on his return to Estonia for being absent from Estonia and I have found no evidence to suggest that he is not able to re-apply for a residency permit. I am not satisfied that as the husband of an Estonian citizen he will not be able to apply for resident status."

The amendment to the Estonian law post-dated the applicant's arrival in Australia which occurred in July 1996.

3 In the judgment, I expressed the view that it perhaps was a little curious that, if the applicant's entitlement to residency in Estonia was an important issue, the RRT, having apparently accepted his claim that the 1997 law had terminated his right of residence in Estonia, should be prepared to conclude, seemingly without making inquiries of the Estonian authorities, that he would not be precluded from re-applying for a residency permit. With the

consent of Ms McCallum, who appeared for the Minister, I arranged a referral to the Pro Bono Panel for Legal Assistance, pursuant to *Federal Court Rules* ("*FCR*"), O 80 ("*Court Appointed Referral for Legal Assistance*"), r 4, so that the applicant could have the benefit of legal assistance in relation to the issue that had been identified. The issue identified at that stage was whether the RRT had erred in making its findings on the applicant's entitlement to residency in Estonia and, if so, whether the error was material to its conclusion that it was not satisfied that the applicant was a person to whom Australia had protection obligations under the *Convention Relating to the Status of Refugees* ("the *Refugees Convention*").

4 At the adjourned hearing, Mr Braham appeared for the applicant and Ms McCallum again appeared for the Minister. I had the benefit of written submissions from both counsel, which were elaborated in oral argument. I am grateful for the assistance provided to the Court by Mr Braham through the Pro Bono scheme and for Ms McCallum's consent, on behalf of the Minister, to the use of the scheme.

5 The applicant submitted that the RRT's finding, that it was not satisfied that the applicant could not re-apply for a residency permit, involved an error of law because of non-compliance with s 430 of the *Migration Act*. Section 430 provides that:

"**430(1)** Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

...

(3) Where the Tribunal has prepared the written statement, the Tribunal must:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based."

Mr Braham contended that the RRT had failed to set out its findings on a material question of fact (namely as to whether the applicant would be entitled to re-apply for

a residency permit) and had also failed to refer to the evidence or other material on which any finding on that issue might have been based.

The Principles

6 In *De Silva v Minister for Immigration and Multicultural Affairs* [1999] FCA 1074, I stated the principles applicable to the requirement laid down by s 430(1)(c) of the *Migration Act* (at [46]):

"(i) A failure by the RRT to comply with the requirement in s 430(1)(c) activates the ground of review provided for in s 476(1)(a) of the Migration Act*:* Muralidharanv Minister for Immigration and Ethnic Affairs *(1996) 62 FCR 402 (FC), at 414-415, per Sackville J;* Paramananthanv Minister for Immigration and Multicultural Affairs *(1998) 160 ALR 24 (FC), at 37, per Lindgren J; at 63, per Merkel J;* Logenthiran v Minister for Immigration and Multicultural Affairs *(Full Court, 21 December 1998, unreported), at 13.*

(ii) Section 430(1)(c) does not require the RRT to make findings about every factual matter raised by the applicant. Findings need only be stated in relation to questions material to the ultimate decision: that is, in relation to substantial issues on which the application turns: Paramananthan, at 27, per Wilcox J; Muralidharan, at 414.

(iii) The reasoning and findings of the RRT are to be given a beneficial construction and are not to be scrutinised in an overly critical manner: Minister v Wu Shan Liang *(1996), at 271-272. The RRT's reasons, read as a whole, may suggest that, although findings have not been made on a particular issue, they have nevertheless been made implicitly:* A v Minister for Immigration and Multicultural Affairs *(1999) 53 ALD 545 (FC), at 557.*

(iv) The purposes underlying provisions such as s 430(1)(c) include ensuring that the RRT's reasoning process is disclosed and that an unsuccessful applicant understands why he or she failed: Muralidharan*, at 414-415,* Paramananthan*, at 27."*

Materiality

7 The threshold issue is whether the applicant's entitlement to re-apply for a residency permit in Estonia was a material question in the proceedings. Mr Braham submitted that it was, for two reasons:

- first, the inability of a stateless person to return to his country of habitual residence is determinative of his or her status under the *Refugees Convention,* regardless of whether that person has a well-founded fear of persecution in that country; and

- secondly, the denial of a right of re-entry to a non-citizen holding residency status in Estonia, by reason of absence from the country for more than 183 days, was an element that should have been considered by the RRT when determining whether the applicant's treatment in Estonia was such as to engender in him a well-founded fear of persecution.

8 There is no doubt that, if Mr Braham's first submission were correct, the entitlement of the applicant to return to Estonia would have been material in the sense that it would have been a question material to the substantial issues on which the application turned. Given the RRT's finding that the applicant had no residency rights in Russia, his inability to return to Estonia (if such were the case) would mean that he came within the definition of "refugee" in article 1A(2) of the *Refugees Convention,* regardless of whether he had a well-founded fear of persecution in Estonia.

(1) A Stateless Person's Inability to Return to the Country of Residence

9 Mr Braham's first contention rests on what might be described as a literal reading of the latter part of the definition of "refugee" in article 1A(2) of the *Refugees Convention.* Article 1A(2) defines a refugee as any person who

"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, is unable or, owing to such fear, is unwilling to return to it**." (Emphasis added.)

Mr Braham submitted that the latter part of the definition deals with the particular case of a stateless person and that its effect is that a stateless person is a refugee if he or she is outside the country of former habitual residence and unable to return to it, **whether or not either state of affairs is associated with a fear of persecution for a *Refugees Convention* reason.**

10 As Mr Braham properly pointed out in oral argument, that submission was considered and rejected by Cooper J in *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421. In that case, Cooper J explicitly adopted the approach to the construction of treaties required by article 31 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"), as analysed in *Applicant A v Minister for Immigration and Ethnic*

Affairs (1997) 190 CLR 225. According to his Honour (at 422), the relevant principle is that

"[a]lthough primacy [must] be given to the text, the requirement that the terms of the treaty be construed in their context, and in the light of the object and purpose of the treaty precludes the adoption of a literal construction which would defeat the object or purpose or be inconsistent with the context in which they appear."

11 Cooper J said (at 424) that article 31(2) of the *Vienna Convention* permitted reference to the *travaux preparatoires* as part of the context. On this basis, he analysed closely reports of the Ad Hoc Committee on Statelessness and Related Problems and early drafts of the *Refugees Convention.* He concluded (at 427) that it was

"clear from the documents in the Travaux that the [Refugees] Convention was not intended to deal with stateless persons who were not also refugees. Further it is apparent that the object of the Convention was to treat uniformly persons seeking refugee status, so far as was possible, whether or not those persons had a nationality. This equality of treatment is seen in the equation of country of nationality with country of former habitual residence and in the inability or unwillingness to obtain the protection of the country of nationality with the inability or unwillingness to return to the country of former habitual residence."

12 Cooper J took the view that earlier drafts of the definition of "refugee" had plainly intended that the reason for the stateless person's absence from his or her country of former habitual residence should be an element of the definition. That reason, in respect of both a person having a nationality and a stateless person, was to be persecution or fear of persecution of the type identified in the definition. He accepted the view of a contemporary commentator that the final form of article 1A(2) of the *Refugees Convention* was intended merely to embody textual or stylistic changes and not substantive amendments to the earlier drafts. Nor was the 1967 Protocol intended to change the substance of what constituted refugee status.

13 Cooper J expressed the following conclusions (at 428):

"A literal interpretation of Art 1A(2) of the [Refugees] Convention in its original form, or as amended by the Protocol, would mean that a stateless person outside his or her country of former habitual residence for a reason other than a Convention reason and unable to return to it for whatever reason other than a Convention reason would by definition be a refugee. Such a result would be unintended on the part of the framers of the Convention and inconsistent with the object of dealing only with persons who have been or who are being persecuted for a Convention reason or who have a well founded fear of such persecution. It would also treat stateless persons in a substantially more favourable way in respect of obtaining refugee status than persons with a nationality and thus would be inconsistent with the object of equality of treatment to all who claim refugee status.

The approach to the interpretation of Art 1A(2) contended for by the applicant is wrong in principle. It ignores the totality of the words which define a refugee. It is in

breach of the requirements of Art 31 of the Vienna Convention because it divorces the interpretation of the words from the context, object and purpose of the treaty. And, it also seeks to give the [Refugees] Convention a scope of operation beyond its object and purpose." (Citation omitted.)

His Honour summarised the effect of his reasoning as follows (at 429):

"Thus a refugee is:

(a) any person who owing to a Convention reason is outside the country of his or her nationality or in the case of a stateless person is outside the country of his or her former habitual residence; and

(b) in respect of a person having a nationality is unable or owing to a well founded fear of persecution for a Convention reason is unwilling to avail himself or herself of the protection of the country of nationality; or

(c) in respect of a stateless person is unable or owing to such fear is unwilling to return to the country of his or her former habitual residence."

14 In *Haris v Minister for Immigration and Multicultural Affairs,* unreported, 12 February 1998, Moore J was invited not to follow the decision in *Rishmawi.* His Honour held that there was no basis for taking that course, since the observations of Cooper J were clearly central to his decision and were not clearly wrong (cf *Bank of Western Australia Ltd v Federal Commissioner of Taxation* (1994) 55 FCR 233 (Lindgren J), at 255). Moore J specifically addressed a contention that Cooper J's analysis of article 1A(2) in *Rishmawi* merely amounted to *obiter dicta* because the decision of the RRT in that case had ultimately been set aside on other grounds. Moore J held that the order made by Cooper J in *Rishmawi,* which remitted the matter to the RRT to be determined "in accordance with these reasons and law", demonstrated that his Honour's reasoning on the stateless person issue was essential to his decision. Moore J also addressed specific criticisms of Cooper J's reasoning in *Rishmawi,* but regarded them as lacking substance.

15 In *Al-Anezi v Minister for Immigration and Multicultural Affairs* [1999] FCA 355, Lehane J (at [20]) expressed his agreement with the conclusion reached by Cooper J and the reasons which led his Honour to that conclusion.

16 At the time *Rishmawi* was decided, there were some judicial observations in England which suggested that the literal construction of the second part of the definition of "refugee" in article 1A(2) of the *Refugees Convention* might be correct. In *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107, Simon Brown LJ, with whom Hutchison LJ agreed, said (at 1117) that

"[s]o far as the stateless are concerned...the latter part of article 1A(2)..., construed literally, requires of those presently unable to return home nothing more, save only that until 1967 [that is, the adoption of the Protocol] they had to show that they were displaced as a result of events prior to 1951".

17 Cooper J referred to these observations, but declined to follow them. Subsequently, the House of Lords allowed an appeal from the Court of Appeal: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293. Lord Lloyd, who delivered the principal judgment, stated (at 304) that it was common ground that the *Refugees Convention* covered four categories of refugee, of which two related to non-nationals. The categories relating to non-nationals were said to be these:

"(3) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason and are unable to return to their country, and (4) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to return to their country."

While this statement does not constitute a considered decision by the House of Lords, it is obviously inconsistent with the dicta of Simon Brown LJ in *Adan* and consistent with Cooper J's reasoning in *Rishmawi*.

18 Cooper J in *Rishmawi,* although analysing the drafting history of article 1A(2) of the *Refugees Convention* in detail, did not refer to academic writings. It is permissible to have regard to such writings in considering the meaning of treaties: *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 (FC), at 117, per Gummow J. In this context, it is of some significance that Professor Hathaway, after considering the position of stateless persons under the *Refugees Convention* (J C Hathaway, *The Law of Refugee Status* (1991)), expressed a strong view on the question of construction addressed in *Rishmawi:* Professor Hathaway said this (at 62):

"Conversely, where the stateless refugee claimant has no right to return to her country of first persecution or to any other state, she cannot qualify as a refugee because she is not at risk of return to persecution. Assessment of the claimant's fear of returning to the country of first persecution is a non-sensical exercise, as she could not be sent back there in any event. Thus, when it is determined that the claimant does not have a right to return to any state, and does not therefore have a country of 'former habitual residence', her needs should be addressed within the context of the conventional regime for stateless persons rather than under refugee law."

Rishmawi is Not Followed

19 In this state of the authorities it might perhaps have been expected that a single Judge of this Court would follow Cooper J's decision in *Rishmawi,* even though a plausible argument to the contrary can be mounted by reference to the literal language of the second part of article 1A(2) of the

Refugees Convention. Such an approach would leave any challenge to Cooper J's reasoning to be addressed by a Full Court.

20 However, in *Savvin v Minister for Immigration and Multicultural Affairs* [1999] FCA 1265, Dowsett J refused to follow *Rishmawi.* His Honour appears to have taken the view (at [29]), that Cooper J's reasoning was not strictly part of the *ratio* in *Rishmawi,* although he did not advert to Moore J's analysis in *Haris* for reaching a contrary conclusion on this question. For this reason, Dowsett J did not consider it necessary to determine whether Cooper J's reasoning was "clearly wrong", the standard usually applied in this Court in determining whether a single Judge should refuse to follow an earlier determination of a single Judge: see the authorities cited by Lindgren J in *Bank of Western Australia,* at 255.

21 The essential difference between the reasoning of Dowsett J and that of Cooper J is that the former (at [35]) took the view that a "certain conservatism" should attach to the use of extrinsic aids in construing language as clear as the second part of article 1A(2) of the *Refugees Convention.* Dowsett J thought that Cooper J's approach failed to give priority to the text, as required by the judgments of the High Court in *Applicant A.* His Honour did not dispute that a conscious decision may have been made by the framers of the *Refugees Convention* to deal only with the problems of "refugees" and not with that of statelessness (at [72]). Nonetheless, it was clear, in his view, that the question of statelessness had been addressed for some purposes and that the literal construction of article 1A(2) still meant that stateless persons could suffer problems not addressed by the *Refugee Convention.*

22 It must be said, with respect, that there is nothing inherently implausible in Dowsett J's approach to the construction issue. Questions of construction often involve judicial choice between two (or perhaps more) plausible views as to the meaning of a provision. The range of choice may be widened when dealing with treaties which, as McHugh J observed in *Applicant A,* at 255-256, often fail to exhibit the precision of domestic legislation, this being the "necessary price paid for multinational political comity". While the language of the law tends to encourage particular decisions or reasoning being characterised as "correct" or "erroneous", in truth it is often a question of choosing between arguable alternatives, each of which has merits and drawbacks. The doctrine of precedent ultimately produces an answer which earns the label of being the "correct" construction of a particular enactment or treaty.

Choosing Between Inconsistent Decisions

23 Since there are now two inconsistent decisions on the meaning of article 1A(2) of the *Refugee Convention* as applied to stateless persons, it is necessary for me to choose between them. My preference is for the approach

taken in *Rishmawi*. I can state my reasons briefly, without unnecessarily traversing the ground already covered by Cooper J in that case.

24 The judgments in *Applicant A* make it clear that, although the text of the treaty is to be given primacy, the context, object and purpose of the treaty **must** also be considered: *Applicant A,* at 240, per Dawson J; 254-255, per McHugh J; 277, per Gummow J. As McHugh J said (at 254), an "ordered yet holistic approach" is appropriate. If attention is directed to the context of the *Refugees Convention* (what in domestic terms would be described as its legislative history), the ambiguity inherent in the latter part of article 1A(2) is in my opinion exposed.

25 Article 1A(2), as adopted in 1951, took the following form:

"**As a result of events occurring before 1 January 1951** and 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."

The bolded words were removed by the 1967 Protocol.

26 The words "as a result of such events" in the second part of article 1A(2) made it clear that a stateless person qualified as a refugee only if he or she were outside the country of former habitual residence as a result of events occurring before 1 January 1951. This language immediately presents the question "What kind of events?". On one view, it would be enough for a stateless person to have left his or her country of former habitual residence for any reason at all, so long as the reason involved events occurring before 1951. On another view, a stateless person would qualify if displaced by general war-time or post-war conditions, without the need to show that he or she suffered or feared persecutory conduct. A third view is that the required pre-1951 events were intended to be confined to persecutory conduct of the kind identified in the rest of article 1A(2). It is difficult to see how an answer to the question of construction could have been obtained without reference to the *travaux preparatoires* in the manner undertaken by Cooper J.

27 Nor can it be said that the form of the *Refugees Convention,* after the 1967 *Protocol,* eliminated the ambiguity inherent in the original version of article 1A(2). It must be remembered that, in 1954, the international community addressed the question of statelessness by means of the *Convention Relating to the Status of Stateless Persons,* done at New York on 28 September 1954 (the "*Stateless Persons Convention"*). The *Stateless Persons Convention* came into force on 6 June 1960, although Australia did not ratify it until 13 March 1974. The *Stateless Persons Convention* includes the following recitals:

"**CONSIDERING** that only those stateless persons who are also refugees are covered by the [Refugees Convention], and that there are many stateless persons who are not covered by that Convention,

CONSIDERING that it is desirable to regulate and improve the status of stateless persons by an international agreement".

28 Thus, by the time the 1967 Protocol was done, the *Stateless Persons Convention* had come into force. It represented an attempt, as the recitals indicate, to regulate and improve the status of stateless persons. The *Stateless Persons Convention* proceeds on the basis that only those stateless persons who are "refugees" are covered by the *Refugees Convention,* and that many stateless persons are not so covered. It provides, *inter alia,* that the contracting States cannot expel stateless persons lawfully in their territory, save on grounds of national security or public order (art 31(1)) and that such persons are to be given the right to choose their place of residence and to move freely within their territory (art 26). It seems clear enough that the *Stateless Persons Convention* forms part of the context for the purposes of construing the *Refugees Convention:* see *Vienna Convention,* article 31(3)(a),(c).

29 Having regard to this context, it seems to me difficult to construe the *Refugees Convention,* as amended by the 1967 *Protocol,* as protecting a stateless person who is outside the country of his or her former habitual residence and unable to return, regardless of whether the person's inability to return is associated with a fear of persecution for a *Refugees Convention* reason. To do so would be to render superfluous much of the *Stateless Persons Convention.*

30 The existence of the *Stateless Persons Convention* also overcomes a difficulty that troubled Dowsett J in *Savvin*. His Honour pointed out that a stateless person might face many problems for which no solution is offered by the *Refugees Convention.* He gave as examples discrimination against stateless people falling short of persecutory conduct and the denial of travel documents to such people. There is no doubt that these problems might be very serious indeed, and that they are not addressed by the *Refugees Convention* (if Cooper J's construction of article 1A(2) is correct). But the very point of the *Stateless Persons Convention* was to address these problems (see, for example, articles 3, 4, 7, 13, 15, 16, 17, 18, 19, 20, 22, 27, 28). It is simply not the case that, unless stateless persons are covered by the *Refugees Convention* in the manner suggested in *Savvin* they will be denied protection under international law. They have the protection afforded by the *Stateless Persons Convention.*

31 Furthermore, in my respectful opinion, Cooper J's analysis in *Rishmawi* supports the conclusion that article 1A(2) is not intended to confer refugee status on all stateless persons who are outside their country of habitual residence and unable to return thereto for reasons unconnected with

those specified in the *Refugee Convention.* I have not overlooked the criticisms made by Dowsett J in *Savvin* of Cooper J's reliance on extrinsic materials. Whatever limitations there may be on the use of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ("the *UNHCR Handbook*") for the purposes of construing treaties, (see *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, at 392, per Mason CJ; cf *Somaghi,* at 117, per Gummow J), the other extrinsic materials cited by Cooper J seem to me to support the more limited construction of article 1A(2).

32 I should add that I think there is substance in Dowsett J's criticisms of the view expressed by Cooper J, that it is sufficient that the reason a person is outside his or her country of nationality or former habitual residence is a past, as opposed to a present, well-founded fear of persecution: *Savvin,* at [60]-[62]. Cooper J's analysis of this issue was based in part on the decision of the Court of Appeal in *Adan v Home Secretary,* which was overturned by the House of Lords and, in any event, is difficult to reconcile with the High Court's decision in *Chan.* But I do not think that the requirement that a stateless person seeking refugee status be outside the country of his or former habitual residence for a *Refugees Convention* reason renders otiose the requirement that the stateless person be unwilling to return to that country for a *Refugees Convention* reason. Dowsett J acknowledged that, although the requirements cover similar ground, there is no "absolute" overlap. It is possible, for example, that a person may be living outside his or her country of former habitual residence by reason of a continuing fear of persecution for a *Refugees Convention* reason, yet be willing to return to that country if asked to do so by the country of refuge.

(2) Denial of Re-Entry as an Element of Persecution

33 As I have noted, Mr Braham put forward an alternative contention on the issue of materiality. He submitted that the RRT, when considering whether the applicant's treatment in Estonia was such as to engender a well-founded fear of persecution, the RRT should have resolved the applicant's claim that any non-national resident of Estonia who left the country for more than 183 days could be denied re-entry. Mr Braham cited passages from the *UNHCR Handbook* to support the proposition that what constitutes a refusal of protection by the home country (in this case, Estonia, as the country of former habitual residence) must be determined according to the particular circumstances and that an arbitrary denial of benefits available to citizens, including the right of re-entry, is capable of amounting to persecution.

34 If *Rishmawi* is correct, it follows that a stateless person who claims to be within the definition in article 1A(2) of the *Refugees Convention* must satisfy two cumulative conditions. The applicant must be outside his or her country of former habitual residence owing to a well-founded fear of being persecuted **and** he or she must either be unable to return to that country or, owing to such fear, be unwilling to return to it: *Rishmawi,* at 429. It seems clear enough that the RRT approached the applicant's case on the basis that

the applicant had to satisfy both conditions. Certainly no argument of the kind considered (and rejected) in *Rishmawi* was put to the RRT.

35 As I understood Mr Braham's alternative argument, the doubt as to whether the applicant could re-apply for a residency permit was relevant to the first of the two cumulative conditions. That is, the inability of the applicant to re-enter Estonia (assuming he was unable to do so) was an element in the discrimination visited upon ethnic Russians in Estonia, including the applicant, by reason of their inability to gain citizenship. It was therefore (so the argument ran) a material issue on which the RRT should have made a specific finding.

36 It must be said that the applicant's solicitors, although suggesting in their submissions to the RRT that "it may be difficult for him to obtain a visa" did not explain why the possible difficulty was significant to the applicant's case. The RRT, understandably enough, seems to have interpreted the solicitors' comments as relevant only to the second of the two cumulative conditions, namely whether the applicant was able to return to Estonia. In my opinion, the RRT's interpretation of the solicitors' comments was entirely reasonable.

37 On the RRT's interpretation of the applicant's contentions, it was unnecessary for it to decide whether the applicant satisfied the second of the two cumulative conditions. The RRT had formed the view that the applicant could not satisfy the first condition (that is, that he was outside Estonia because of a well-founded fear of being persecuted in that country). Doubtless it was for this reason that the RRT dealt relatively briefly with the applicant's claim in that he could not secure a visa to resume residence in Estonia.

38 In my view, in the absence of an explanation by the applicant's solicitors that the applicant's claimed inability to resume residence in Estonia was relevant to the first of the two conditions he had to satisfy, the validity of that claim cannot be said to be material to the issues the RRT had to resolve. On the way in which the case was put by the applicant's representatives, the RRT simply did not need to determine whether the applicant's claim was soundly based.

39 Even if this is not correct, I do not think that the RRT was obliged, having regard to its findings on the language requirement for Estonian citizenship, to make a specific finding as to whether the applicant could re-apply for an Estonian visa. It had found that the language requirement for Estonian citizenship was not sufficiently serious to amount to persecutory conduct and was in accordance with international norms. In the light of the finding, it was hardly central to a resolution of the applicant's case that the disabilities to which he was subjected (or to which he might become subjected while out of the country) included a possible inability to return after 183 days' absence. That limitation or possible limitation on his right to re-enter Estonia was merely one of a number of disadvantages that doubtless would apply to

non-citizen residents of Estonia compared with the position of Estonian citizens. It was not a substantial issue on which the case turned.

40 The real significance of the 1997 Estonian law and the possible inability of the applicant to re-apply for renewed Estonian residency is that he may be unable to return to that country. But on the authorities, whatever significance the applicant's possible inability to return to Estonia may have for the application of the *Stateless Persons Convention,* it does not enable him to satisfy the definition of "refugee" in article 1A(2) of the *Refugees Convention.*

Did the RRT Fail to Set Out its Findings?

41 In view of the conclusions I have reached, it is not necessary to consider whether, assuming that the applicant's entitlement to return to Estonia was material to his case, the RRT failed to comply with the requirements of s 430(1)(c) of the *Migration Act.* Even so, if (contrary to my view) the applicant's entitlement to return to Estonia was material to his case, I do not accept that the RRT contravened the obligations imposed on it by s 430(1)(c) of the *Migration Act.*

42 Although, as I have explained, it was not necessary for the RRT to address the question of whether the applicant had lost his residency rights in Estonia, it did so, albeit briefly. The RRT stated that it had found no evidence to suggest that the applicant was unable to apply for a residency permit. It also said that it was not satisfied that the applicant, as the husband of an Estonian citizen, would be unable to apply for resident status.

43 The RRT's finding is expressed negatively and in somewhat cryptic language. However, its reasoning and findings are to be given a beneficial construction. On this basis, it is clear enough that the RRT intended to find that the applicant could re-apply for resident status and that it was likely that such an application would succeed. It is true that the RRT merely referred to the applicant's entitlement to **apply** for resident status, as distinct from the likelihood that an application would succeed. But there would hardly have been any point to making a finding confined to the applicant's entitlement to **apply** for permanent residency since presumably anyone can apply for residency. The finding makes sense only as one directed to the likelihood that an application for residency would be successful.

44 Construed in this way, it seems to me that the RRT did set out its finding on the issue. It may be that the finding was made without the RRT having made an inquiry of the obvious source, namely the Estonian embassy. It may also be that further inquiries would have cast doubt on the factual assumption made by the RRT. But this does not detract from the fact that the applicant, or any reviewing Court, is able to understand the reasoning which led the RRT, correctly or otherwise, to conclude that the applicant was not debarred from returning to Estonia.

45 Nor do I think that the RRT failed to comply with s 430(1)(d) of the *Migration Act* which requires the RRT to refer to the evidence or any other material on which its findings were based. Had the RRT's finding been contrary to material submitted on behalf of the applicant or referred to by him or his advisers, the RRT may well have been obliged to refer to that material: *Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1126 (Drummond J), at [32]. But the applicant's advisers went no further than asserting that, in view of the loss of the applicant's residency rights, "it may be difficult for him to obtain a visa". They did not submit or refer to any material which suggested that the applicant, despite being married to an Estonian citizen, would not be granted a further residency permit or visa. Nor has it been shown that any such material was before the RRT. In these circumstances, the RRT reached a negative conclusion, namely that it had found no evidence to suggest that the applicant would not be able to apply for (and obtain) a fresh residency permit. I do not think it was obliged by s 430(1)(d) to specify the materials it had consulted and found unhelpful on the particular issue.

Conclusion

46 The application must be dismissed. The applicant must pay the Minister's costs.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sackville.

Associate:

Dated: 25 October 1999

Counsel for the Applicant:	Mr P Braham
Counsel for the Respondent:	Ms L McCallum
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	10 September 1999
Date of Judgment:	25 October 1999