FEDERAL COURT OF AUSTRALIA

Labara v Minister for Immigration and Multicultural Affairs

[2002] FCAFC 145

MIGRATION – decision of Refugee Review Tribunal refusing a protection visa – decision of primary judge affirming decision of Tribunal – appellants citizens of Ukraine and Jehovah's Witnesses – whether Tribunal erred by not addressing the question of possible future harm that might befall the appellants – whether the Tribunal erred by not considering whether the Ukrainian government was able, in a practical sense, to prevent such harm – where the Tribunal accepted that the first appellant had been assaulted by private citizens and suffered property damage because of his adherence to the Jehovah's Witness religion.

Migration Act 1958 (Cth)

Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14 discussed

Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1 referred to

Yusuf v Minister for Immigration & Multicultural Affairs (2001) 180 ALR 1 followed

GENNADIY LABARA AND MARYNA BILOUSOVA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFIARS

N 437 OF 2001

LEE, MOORE AND MADGWICK JJ

23 MAY 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N473 OF 2001

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

BETWEEN:	GENNADIY LABARA FIRST APPELLANT MARYNA BILOUSOVA SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	LEE, MOORE & MADGWICK JJ
DATE OF ORDER:	23 MAY 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal is allowed.

2. The orders of the primary judge of 9 April 2001 are set aside.

3. The decision of the Refugee Review Tribunal of 19 October 2000 is set aside and the matter is remitted to the said Tribunal for reconsideration according to law.

4. The parties are to pay their own costs.

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	N473 OF 2001

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

BETWEEN:	GENNADIY LABARA FIRST APPELLANT MARYNA BILOUSOVA SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	LEE, MOORE & MADGWICK JJ
DATE:	23 MAY 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

Introduction

1 This is an appeal from a judgment of a single judge dismissing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). On 19 October 2000 the Tribunal affirmed a decision of the Minister for Immigration and Multicultural Affairs ("the Minister") refusing to grant the first appellant, Mr Gennadiy Labara and the second appellant, Marina Bilousova protection visas under the provisions of the *Migration Act* 1958 (Cth) ("the Act"). Whether such a visa is granted depends ultimately on whether the applicant is viewed as having a well founded fear of persecution for reasons of (in this case) religion and otherwise satisfies the definition of refugee in the Convention Relating to the Status of Refugees as amended by the Protocol Relating to the Status of Refugees ("the Convention").

The background

2 The appellants are de facto husband and wife and are nationals of the Ukraine. The claims made by the appellants in support of their application for protection visas were conveniently summarised by the learned primary judge ([2001] FCA 652 at [4] to [8]):

"Mr Labara told the Tribunal his problems commenced in mid 1998 when he became interested in the teachings of the Jehovah's Witnesses. He described in some detail the commencement of his interest in that church and how he began to distribute magazines promoting its teachings. He deposed to three incidents which occurred, he says, because of his involvement with the Jehovah's Witnesses.

The first of these incidents took place on 14 June 1998, immediately following his return to the block of units where he lived with Ms Bilousova and his parents. He was bailed up by a group of young men who abused him, calling him a "stinking sectarian" and the like. They blocked his access to the stairs and then beat and kicked him. After they left, he was assisted to his own apartment. The ambulance was called and he was taken to hospital for an x-ray, where it was found he had sustained light concussion to the brain. He was confined to bed for a week. Mr Labara said his whole body was in pain, his head was spinning and hurting, he had a black eye, a swollen cheek and a lip, with multiple body bruises that made it difficult for him to lie down. Because the incident had been reported by the ambulance officer who had taken him to the hospital, a policeman came to the apartment. He asked Mr Labara about the incident; but when he found that Mr Labara could not identify his assailants, or give any information that might lead to their identification, he indicated it would be impossible to prove anything. Mr Labara, in his own words, then "made a decision not to submit a statement". At the hearing before the Tribunal, Mr Labara gave a different version of the police officer's visit. He claimed the police officer indicated that, if Mr Labara made a statement, "it would make things worse". Accordingly, Mr Labara said he was frightened and did not make a statement.

According to the evidence given by Mr Labara, the second incident occurred about two weeks after the first, when a fire was lit during the night. Apparently the door of the apartment was badly burnt. With the assistance of neighbours, Mr Labara and his family were able to put out the fire. They then found writing on the adjacent wall containing the words, "death to sectarians", "bitch, if you want to live, stop your filthy activities or else". It seems this incident was not reported to the police.

Notwithstanding these events, Mr Labara continued to hand out Jehovah's Witnesses magazines. On one occasion in September, that is to say about three months after the first assault, he was proselytising with a friend in a different part of Kiev from his home, an area where he was not known. At an early stage of canvassing in a particular apartment building, he was warned to leave by a man on the second floor of the units. However, Mr Labara and his friend went upstairs and visited other units. As they took the lift downstairs, they were accosted by four people including the man who had previously warned them. That man said, "Looks like you did not get me right, I told you to get out. Now we are going to explain it to you quickly". The four men commenced to beat Mr Labara and his friend. Mr Labara became disoriented, both men were beaten badly and Mr Labara lost consciousness.

This last incident happened on a Saturday, Mr Labara was unable to work on the Monday. He and his friend went to a police station to report the incident, but he says he found the police officer uncooperative. He did not take the matter any further, so far as the authorities were concerned. However, Mr Labara and his wife decided to leave the apartment where they were living and to move to an apartment owned by Ms Bilousova's grandmother. Shortly after that time, they decided to leave the Ukraine and come to Australia."

The Tribunal's findings

3 The Tribunal accepted that the appellant had "suffered some harm - two beatings and an incident involving a fire outside his apartment" and that the term sectarian was used as a term of abuse during the first beating and the property attack, and that the second beating occurred whilst he was proselytising. The Tribunal also accepted that the harm suffered by the applicant "was occasioned by adverse reaction to his religion". It acknowledged that harm suffered for reason of religion often falls within the ambit of the Convention but not every threat of harm or interference with a person's rights for a Convention reason, constituted 'being persecuted'. For example, persecution by private individuals or groups, did not bring a person within the Convention unless the State either encourages that private persecution or is (or appears to be) powerless to prevent it. The Tribunal rejected the appellant's claim that the government in the Ukraine and what the appellant contended was its "tame press", actively encouraged persecution of Jehovah's Witnesses.

4 The Tribunal gave consideration to country information from the United States Department of State, the Immigration and Nationality Directorate for the British Home Office and material supplied by the Department of Foreign Affairs and Trade of the Australian government ("DFAT"). As noted by the learned primary judge, the "gist" of this material was that the government

generally respected the rights of religious practice with the exception of some "non-native religions". The DFAT material indicated that non-native religions such as Baptists, Pentecostals and Jehovah's Witnesses were considered to be traditional religions and were respected almost as native traditional religions. This was compared to new religions, which had appeared in recent years and could not be attributed to Christianity, such as, Scientology, the Bogorodichny Centre and the Great White Brotherhood.

5 The Tribunal also took into account information from the official web-site of the Jehovah's Witnesses organisation which gave membership statistics for various countries. The web-site said that in 1998 (the year of the incidents involving Mr Labara) there was membership in the Ukraine of 101,755 people, meeting in 823 congregations across the country. For the following year, the web-site referred to an increased membership to 107,045, with an additional 100 congregations. The Tribunal considered the increase in numbers to be "a clear indication that the organisation is not being suppressed by the authorities; nor are Ukrainians terrified to join or frightened to continue their membership of the church". The Tribunal also noted, by reference to the web-site, that the Jehovah's Witness organisation had challenged the governments of a number of countries, for allegedly taking actions against the church. In this respect, the web-site referred to Russia, Georgia, Greece and France but there was no mention of the Ukraine. On this basis, the Tribunal was satisfied this indicated that the Jehovah's Witnesses were not experiencing any problems with the Ukrainian authorities.

6 The Tribunal then said:

"This independent evidence does not negate the fact that the applicant was assaulted and that he was assaulted because some individuals were affronted by his religious beliefs. However, these incidents must be seen as individual and random incidents of harm directed at the applicant and not as persecution for a Convention reason."

7 The Tribunal then went on to consider the appellant's evidence concerning his attempts to seek protection from the police. The Tribunal noted a "lack of clarity" about this evidence. Firstly, reference was made to the two different accounts of the police visit to the appellant's apartment after the first assault. The Tribunal preferred the earlier account, made in the appellant's written statement. In his written statement, the appellant noted that the assault was reported to the police by the ambulance officers who had attended to him. A police officer attended and advised that as he could not identify his assailants, it would be difficult to prove anything. The appellant did not submit a statement. At the hearing, the appellant's account was that the police told him that "it would make things worse" if he made a statement. The Tribunal was satisfied that there was no evidence to suggest that the police had acted inappropriately and without any identifying details about the assailants or any witnesses to the assault, the police may have felt there was nothing further they could do.

8 In relation to the second assault, the Tribunal accepted that the police did not take a statement, but noted that the appellant and his friend had not persevered with making their complaints nor attempted to seek assistance from other agencies. The Tribunal observed that there were two other police stations at which they could have made their statement. One was near the scene of the assault, the other near the appellant's home. Other available options suggested by the Tribunal included seeking assistance from the Office of the Procurator General or enlisting the help of the Jehovah's Witness church itself, to make representations at a higher level about the lack of cooperation from the particular police officer. The Tribunal noted that when the appellant was questioned as to why he had not taken the matter of his assault to the Jehovah's Witnesses' leadership, he said he was not thinking about such things: "We discuss it among ourselves and know that such things happen.". The Tribunal also noted that there was no suggestion in the evidence of any complaint concerning the property attack, when the door of the apartment was fired.

9 In relation to this evidence, the Tribunal said:

"On the basis of the above information, the Tribunal is not satisfied that the authorities can be said to be unwilling or unable to protect their citizens. The fact that the applicant experienced incidents about which he either did not make a statement, or did not persevere in any way if discouraged from making a statement, cannot be taken as evidence that the authorities condoned such incidents. On the occasion on which the police were alerted to an assault by the ambulance officers, they responded appropriately."

10 In conclusion , the Tribunal said:

"In short, the Tribunal accepts the independent evidence of the US State Department, the British Home Office and DFAT, but more particularly of the official Jehovah's Witness website itself, that Jehovah's Witnesses in the Ukraine do not face State-sanctioned persecution. It accepts that harm may sometimes befall individual church members, probably more frequently when they go out and proselytise – putting themselves deliberately into an interaction with members of the general public – but that this harm befalls them on a one-off, individual basis.

In the case of the applicant he has suffered two assaults and some property damage that can almost certainly be attributed to adverse reaction to his new-found religious beliefs. However, the Tribunal finds that they were individual attacks with different perpetrators being involved. The Tribunal further rejects his claims that the State is implicated through its manipulation of the media and that it is unwilling or unable to protect its citizens."

The issues before the learned primary judge

11 The appellants were not legally represented before the primary judge. His Honour understood the appellants' submissions as challenging the

finding of the Tribunal that, effectively, the Ukrainian authorities were neither unable nor unwilling to protect their citizens from persecution on religious grounds. The appellants had challenged the use the Tribunal made of the Jehovah's Witness Church web site which had recorded a significant number of followers in the Ukraine and that the number of congregations were rapidly rising. The appellants pointed out that while, on the one hand, the Tribunal had relied on the information on the web site as inconsistent with widespread and significant persecution, the Tribunal had also accepted that the first appellant had been severely mistreated. His Honour noted that evidence of mistreatment for religious reasons of particular individuals was not inconsistent with a finding there was no general attitude of condonation or unwillingness to act on the part of the government. His Honour then discussed the particular circumstances of the way in which complaints by the first appellant had been dealt with by the authorities but his Honour made clear that ultimately these were matters of fact for the Tribunal to decide.

12 His Honour dealt with a specific submission that there was no evidence or other material to justify the decision of the Tribunal not to be satisfied about the unwillingness or inability of the government of the Ukraine to grant protection. In this respect the appellants had expressly relied on s 476(1)(g) of the Act. His Honour referred to sub-s(4) of s 476 and indicated that this was not a case of the Tribunal reaching a positive conclusion which could only be reached if a particular matter was established. This was a case, in his Honour's view, of the Tribunal failing to be satisfied of something that needed to be established by the appellants if the case was to succeed. For these reasons his Honour dismissed be appellants' application.

The issues in the appeal and their resolution

13 In the appeal, the appellants continued to represent themselves, although leave was given for a Mr Chilman, a friend of the appellants, to make additional submissions on their behalf.

14 During the hearing of the appeal, one issue of substance emerged, that the appellants had not raised before the primary judge. It related to the Tribunal’s rejection of the appellants’ claim that the Ukrainian authorities were either unable or unwilling to provide protection to their citizens.

15 The significance of whether protection can be provided by the country of nationality of a person claiming to be a refugee was recently considered by the High Court in *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14. That case concerned the circumstances of a woman who was a citizen of Pakistan who claimed to have been the victim of domestic violence at the hands of her husband and his family. An issue was raised whether the State afforded effective protection to a person in those circumstances. The facts of that case are somewhat removed from the facts of the present. However the High Court discussed the more general question of the relevance of State protection in circumstances where a person was at risk of harm at the hands of actors other than the State or State agencies. While their reasoning differed, it is clear that the majority, comprising Gleeson CJ (at

[29]), McHugh and Gummow JJ (at [84]), Kirby J (at [115]), accepted that if a person has been exposed to harm by non-State actors and the State has not been able or willing to prevent the harmful conduct it can be relevant to the question of whether the person has a well-founded fear of persecution.

16 The Tribunal's first finding was that there was no evidence indicating that the Ukrainian authorities "actively encouraged" persecution of Jehovah's Witnesses. The Tribunal was entitled, on the material before it, to reach this conclusion. The Tribunal then went on to address several related matters, as discussed above at [9] and [10], relying on the relevant country information provided and information from the Jehovah's Witnesses' official web-site. The Tribunal's conclusions about the Ukrainian government, summarised as follows, included that:

- It did not discriminate against non-native religions [which included Jehovah's Witnesses];
- It did not persecute or get involved in the mistreatment of traditional religions [including non-native religions such as the Jehovah's Witnesses];
- It did not suppress the organisation [Jehovah's Witnesses]; and
- The Jehovah's Witnesses were not experiencing any problems with the authorities.

On this basis, the Tribunal concluded that there was no evidence of general condonation or active participation in persecution to support the claim that the government was unable or unwilling to protect its citizens. However, the Tribunal did not address the question of possible future harm befalling the appellants or whether the Ukrainian government was able, in a practical sense, to prevent such harm, given the history of violence towards Mr Labara on account of his religious beliefs. These matters were relevant in determining whether the appellants' fear of persecution was well-founded.

17 The evidence, as accepted by the Tribunal, was that the appellant, over a period of months had been assaulted on two occasions, suffered property damage which may have led to personal harm, and had been dismissed from his employment because of his religious beliefs. These findings clearly raised an issue about whether there was a risk of harm for a Convention reason that the authorities could not provide protection against.

18 The Tribunal did not address this issue because it had earlier made a finding that the harm suffered by the first appellant "must be seen as individual and random incidents of harm and not persecution". The Tribunal accepted that the harm inflicted on the first appellant was carried out by Ukrainian citizens for reasons of religion, namely, "his new-found religious beliefs". The acts of harm were such that they could have been accepted, severally or in combination, as acts of persecution (see *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 per Gaudron J at [16]). Therefore, the harm suffered could have been regarded by the Tribunal as past acts of persecution inflicted for a Convention reason, and highly relevant to the issue before the Tribunal, namely, was there a real chance - in the sense of some degree of probability which might be less than a chance on

the balance of probabilities - that the first appellant may suffer acts of persecution in the future, thereby making his fear of such persecution a well-founded fear.

19 The Tribunal erred in law if it understood that harm inflicted for a Convention reason could not constitute persecution within the meaning of the Convention unless inflicted regularly in a coordinated pattern.

20 The first appellant's case was that he feared the continuation of acts of harm for reasons of religion committed by Ukrainian citizens from time to time. That is, such acts reflected an attitude within the Ukrainian populace that a person such as the first appellant should be so treated because of profession of adherence to the Jehovah's Witness religion. The first appellant feared such assaults would continue because of the degree of hostility in the community to his religion and the apparent belief that proselytisers for the Jehovah's Witness' religion should be so dealt with. Contrary to the statement of the Tribunal, such events as suffered, or feared, by the first appellant did not fail to constitute persecution if they were "individual attacks with different perpetrators".

21 Counsel for the respondent submitted that the Tribunal did make a finding that the State had the ability to protect its citizens, particularly having regard to the passage set out at [9] above. However, examination of the Tribunal's reasons indicates it only went so far as considering whether the appellant sought and failed to obtain protection from the Ukrainian authorities. There was no specific consideration of the State's ability, in a practical sense, to provide protection. It is not an answer, in our opinion, simply to assert that the harm suffered by the first appellant "must be seen as individual and random incidents of harm and not persecution".

22 In *Yusuf v Minister for Immigration & Multicultural Affairs* (2001) 180 ALR 1, McHugh, Gummow and Hayne JJ observed (at [82] to [84]) that a jurisdictional error may be revealed in circumstances where a Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as to affect the exercise of its powers, relevantly breaching s 476(1)(b), (c) or (e) of the Act. In this case, such jurisdictional error is, in our view, revealed. The Tribunal failed to consider the right question, namely, whether, in a practical sense, the State was able to provide protection particularly in light of the pervasive pattern of harm. That question related directly to whether the appellants' fear of persecution was well-founded and ultimately relevant to their application for a protection visa. Thereby the Tribunal failed to interpret or apply correctly the relevant law.

23 The appeal should be allowed.

I certify that the preceding twenty-three (23) numbered

paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Lee, Moore and Madgwick.

Associate:

Dated: 23 May 2002

Counsel for the Applicant:	Appeared in person
Counsel for the Respondent:	Mr J Smith
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	9 November 2001
Date of Judgment:	22 May 2002