IMMIGRATION - review - refugee status - real chance of persecution - subjective and objective test - whether harm feared by the applicant was for a Convention reason - whether incorrect application of the law to the facts - whether incorrect application of applicable law - whether no evidence to justify the making of the decision - interpretation of *Migration Act* 1958 (Cth) s 476(4) - appropriateness of allegations of actual bias - whether review court should take into account additional material not before tribunal.

Migration Act 1958 (Cth)

Migration Regulations

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B Frelick: Conscientious Objectors as Refugees in

V Hamilton, ed., World Refugee Survey: 1986 in Review

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Nations High Commissioner for Refugees (Re-edited Geneva,

January 1992)

Habtagiorgis v Minister for Immigration and Multicultural

Affairs (unreported: 22 May 1997)

Javier v Minister for Immigration and Multicultural Affairs

(unreported: 22 May 1997)

Beras v Minister for Immigration and Multicultural Affairs

(unreported: 22 May 1997)

Selvadurai v Minister for Immigration and Ethnic Affairs

(1994) 34 ALD 347

Shu Min Pan v The Minister for Immigration and Multicultural

Affairs (unreported: 6 November 1996)

Hamidi v Minister for Immigration and Ethnic Affairs

(unreported: 26 July 1996)

Chan Yee Kin v The Minister for Immigration and Ethnic Affairs

(1989) 169 CLR 379.

Morato v Minister for Immigration, Local Government and Ethnic

Affairs (1992) 111 ALR 417

Ram v Minister of Immigration (1995) 57 FCR 565

Applicant A v Minister for Immigration and Ethnic Affairs

(1997) 142 ALR 331

Luu v Renevier (1989) 91 ALR 39

Dharam Raj v Minister for Immigration and Ethnic Affairs

(unreported: 18 July 1996)

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 136 ALR 481

Xiang Sheng Li v Refugee Review Tribunal

(unreported: 23 August 1996)

Ali Sabir Malik v The Minister for Immigration and

Ethnic Affairs (unreported: 4 April 1997)

Attorney-General for the Northern Territory v Minister for

Aboriginal Affairs (1989) 23 FCR 536

Mendoza v Minister for Immigration (1991) 31 FCR 405

No SG 54 of 1996

ISTVAN MAGYARI v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

O'Loughlin J

Adelaide

22 May 1997

IN THE FEDERAL COURT OF AUSTRALIA)

)

SOUTH AUSTRALIA DISTRICT REGISTRY) No SG 54 of 1996

)

GENERAL DIVISION)

B E T W E E N:

ISTVAN MAGYARI

Applicant

- AND -

THE MINISTER FOR

IMMIGRATION AND

MULTICULTURAL AFFAIRS

Respondent

Coram: O'Loughlin J

Place: Adelaide

Date: 22 May 1997

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the costs of the respondent of and incidental to the costs of this application and order, which costs are to be taxed in default of agreement.

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

IN THE FEDERAL COURT OF AUSTRALIA)

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SOUTH AUSTRALIA DISTRICT REGISTRY) No SG 54 of 1996

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B E T W E E N:

ISTVAN MAGYARI

Applicant

- AND -

THE MINISTER FOR

IMMIGRATION AND

MULTICULTURAL AFFAIRS

Respondent

Coram: O'Loughlin J

Place: Adelaide

Date: 22 May 1997

REASONS FOR JUDGMENT

The applicant, Istvan Magyari, came to Australia from his native Hungary on 20 September 1994. On 15 June 1995, he applied for a protection visa pursuant to s 36 of the *Migration Act* 1958 (Cth) (*"the Act"*). On 11 September 1995, a delegate of the respondent Minister came to the conclusion that he was not a refugee. The

delegate subsequently decided that the applicant was not entitled to the grant of a protection visa.

The applicant applied to the Refugee Review Tribunal (*"the Tribunal"*) for a review of the delegate's decision. That application was unsuccessful. On 4 June 1996, the Tribunal published its decision and its reasons for affirming the earlier decision of the delegate. The applicant now asks this Court to review the decision of the Tribunal. I state at the outset that I have reached the conclusion that this application must be dismissed, and I now proceed to publish my reasons.

This Court's power to review the Tribunal's decision is found in ss 475 and 476 of the Act. The first of those sections identifies decisions that are judicially-reviewable and a decision of the Refugee Review Tribunal is one such decision. Section 476 provides that an application may be made for review of a Tribunal decision by this Court on one or more of the grounds set out in sub-s (1) of that section. In his amended application for an order of review, the applicant relied upon the provisions of pars 476(1)(e) and (g). Those provisions are as follows:-

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

(c) ...

(d) ...

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

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

Initially the applicant had also relied upon the ground of review contained in par 476(1)(d), claiming that the decision was an improper exercise of power. However, that and some further grounds of review were withdrawn by the applicant after judgment had been reserved in this matter. I have found it necessary to make some reference in these reasons to certain of those withdrawn grounds, in some cases for the sake of completeness, but in others because of concerns that they have raised.

In particular, an allegation of actual bias had been made against the Tribunal. Such an allegation, if made out, would have been a ground for judicial review: see par 476(1)(f). As a component of that particular ground, the applicant also alleged that the Tribunal had failed to comply with the provisions of s 420 of the Act. That section reads as follows:-

"420.(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

Unfortunately there have been occasions when complaints of perceived bias (and more rarely actual bias) have justifiably been made. In such cases, it is the obligation of the legal profession to pursue and resolve such complaints without regard to personal considerations. However, baseless allegations of bias or partiality can undermine public confidence in any judicial or administrative decision making process. Allegations of bias are not to be lightly made, as I believe has happened in this case. Indeed it is an outrage to make an accusation of actual bias against a judicial or an administrative officer when that accusation does not have a skerrick of evidence to justify it.

There is a particular feature of this case that has intensified my concern. This application is one of four like applications that I heard within a space of two weeks. The other three were SG 57 of 1996, *Habtagiorgis v Minister for Immigration and Multicultural Affairs*, SG 58 of 1996, *Javier v Minister for Immigration and Multicultural Affairs* and SG 59 of 1996 *Beras v Minister for Immigration and Multicultural Affairs*; judgments in each of those three matters have also been delivered this day.

In each case the applicant had unsuccessfully applied for a protection visa and in each case exactly the same allegation of actual bias was made against the same Tribunal

member. In all four cases the same solicitors and counsel represented each applicant. It seems to me that this particular ground of review had been extracted from a precedent and inserted into the application without appropriate thought being given to its applicability to the circumstances of the case. During the course of his submissions, I informed counsel for the applicant that it was not readily apparent to me that there was anything in the papers before the Court pointing to bias on the part of the Tribunal. I invited him to particularise the allegations in detail. His response was to announce that the complaint of actual bias would not be pursued. Upon further inquiry, it transpired that the accusation of actual bias apparently rested only in the fact that the Tribunal's choice of language in dismissing the application, coincided, in some areas, with the language used by the Minister's delegate in the delegate's reasons. In fact, the allegation of bias was also withdrawn in each of the other three matters when they were subsequently called on for hearing. This served to confirm my initial assessment that there was nothing in the papers warranting such a complaint. An accusation of bias should not have been raised unless counsel for the applicant's instructions warranted it. No material was placed before the Court that would have justified the inclusion of such a ground.

The applicant's claims

The basis upon which the applicant sought refugee status was two fold. First, he claimed that he had been in conflict with a gypsy group in Hungary and secondly, he claimed that he was at risk of being enlisted for military service should he return to his country of origin. It was the applicant's claim that each of these matters amounted, in the personal circumstances of his case, to grounds justifying his claim for refugee

status. To appreciate the applicant's case, it is necessary to refer to the various findings of fact that were made by the Tribunal.

The gypsies

The applicant, who is now 33 years of age, was born in Hungary. He has been married and has one child, a son, who continues to live in Hungary with the child's mother. In September 1992, the applicant was a passenger in a motor vehicle that was being driven by his wife. At the time they were separated but on friendly terms. They have since divorced. There was an accident and a young gypsy boy suffered serious injuries.

A large group of gypsies gathered at the scene of the accident where both the applicant and his wife were assaulted. The police exonerated his wife but the gypsies refused to accept this finding. In summarising the applicant's case, the Tribunal said:-

> *"From that time on until his departure for Australia two years later the applicant was harassed and threatened by the gypsies. This happened frequently on the train he took every day to work. There was also an incident at a discotheque where the brothers and sisters of the injured boy picked a fight with him; however, as he was doing body building at the time he was able to fight them off.*

> *Since the applicant's departure, his mother with whom he lived in Hungary has been harassed and threats have been made to her against the applicant and his son. In March this year when there was a gypsy ball across from his mother's house, windows were broken in her home and some of her chickens were stolen. Someone driving past, later told her that he had seen a carload of gypsies there with bags of chickens. The police were called and said they would look into it but nothing has happened.*

In a letter dated 24 March 1996, just after the gypsy ball, the applicant's mother wrote that the gypsies demanded 50,000 forints from her (according to the interpreter this is about $A500 and is a considerable sum in Hungary) and threatened to badly bash the applicant if he returns. They also threatened his son who has therefore been escorted to his bus every day.

Three weeks ago his mother told him in a telephone conversation that her windows have been broken. She said that when she goes shopping she is told by gypsies that when he returns they will have a fight with him. She told him that the police say that they cannot do anything until something significant happens."

The Tribunal accepted that the accident described by the applicant had occurred and that *"threats have been made against him and his son, and there has been property damage and theft at his mother's place"*.

However, and notwithstanding these findings, the Tribunal stated that it had *"some reservations about the applicant's claimed fear of being killed or seriously harmed"*. In a detailed passage, all of which was originally challenged in the amended application for review, the Tribunal explained why it had those reservations:-

"In the first instance, the gypsy boy's parents have made demands for money to meet the cost of the operation the boy requires; under the circumstances it is difficult to see why the applicant has not attempted to negotiate an arrangement whereby such payment in part of (sic: or) in

full would be traded for an agreement not to harm him or his son. Secondly, it is difficult to accept that the applicant would seek refugee status leaving his son behind to face the threats which have also been made against him if he believed that these threats had foundation. Thirdly, it is difficult to accept why the applicant did not move to Budapest or some other part of Hungary if he believed his life was in danger. At the hearing, he said that his mother did not wish to move from the house she was born in. While this is understandable, it suggests that she does not believe that her son's life is under threat since she did not urge him to leave; and it suggests that the applicant does not believe his life is under threat if he chose not to leave. The fact that the applicant lived with continuing threats for two years but that nothing happened to him during that time, apart from involvement in what appears to have been a spontaneous fight, also suggests that the gypsies do not intend to kill the applicant. This is particularly so when it is considered that his wife, who was the one actually driving the car, has not experienced any similar threats."

The applicant originally attacked each statement in this passage under par 476(1)(g) of the Act, describing each individually as a *"finding"* and alleging that there was *"no evidence to justify the making of <u>this decision</u>"*: (emphasis added). For example sub-pars 1.1 and 1.3 of the amended application read as follows:-

"1.1The Tribunal made a decision (the decision) dated 4 June, 1995 not to grant the Applicant a Protection Visa. The Tribunal erred in finding that under the circumstances it is difficult to see why the Applicant has not attempted to negotiate an arrangement whereby such a payment in part or in full would be traded for an agreement not to harm him or his son (see p.6 of the decision). There was no evidence to justify the making of this decision.

1.2(Withdrawn after judgment was reserved)

1.3The Tribunal erred in finding that it is difficult to accept that the Applicant did not move to Budapest or some other part of Hungary if he believed his life was in danger (see p.6 of the decision). There was not evidence to justify the making of this decision."

Sub-paragraphs 1.4 to 1.10 were couched in the same terms as sub-par 1.1. They dealt with other issues that are referred to in the quoted passage, such as the

applicant's mother not wishing to move house, the gypsies not intending to kill the applicant, the applicant's wife not experiencing similar threats and so on. In each case, the applicant has claimed that there was *"no evidence to justify the making of the decision"*. In my opinion the grounds, as set out in pars 1.1 to 1.10 of the amended application indicate that there has been a failure to appreciate the nature of the Tribunal's reasoning process. It is quite clear that the contents of the above quoted passage were not *"decisions"* in any sense, indeed it is not even appropriate to classify them as findings. They were observations made by the Tribunal in support of its reservations about *"the applicant's claimed fear of being killed or seriously harmed"*. There was no substance in the applicant's complaints in respect of these matters. The applicant gave evidence of his fear but the Tribunal was not prepared to act on it. *"A decision maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion by an applicant is not made out"*. *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 at 348 per Heerey J: see also *Shu Min Pan v The Minister for Immigration and Multicultural Affairs* (unreported: 6 November 1996 R D Nicholson J): see also *Hamidi v Minister for Immigration and Ethnic Affairs* (unreported: 26 July 1996 per Hill J).The prosecution of this application in this Court highlights the need to emphasise that there is only a limited right of review by this Court of the Tribunal's decision in such matters. This Court is not entitled to engage in a fresh assessment of the evidence or other material that was considered by the Tribunal. It cannot substitute its own opinion for that of the Tribunal and can only interfere by way of review if one or more of the grounds set out in sub-s 476(1) is made out.

There was, in addition, a further obstacle in the path of the applicant which was a consequence of his failure to place before this Court material relied upon by the Tribunal in reaching its decision. It is of no assistance to an applicant for judicial review to complain to an appellant court *"that there was no evidence or other material to justify the making of [a] decision"* unless the applicant establishes that proposition by leading the review court through an examination of the relevant material. In this particular case the only evidentiary materials placed before the court were the original application for a protection visa, a statutory declaration from the applicant and a letter from the applicant's mother. No transcript or summary of the material previously before the Tribunal was presented to this Court. In those circumstances, it is not possible for this Court to make any finding on any perceived inadequacies in the Tribunal's reasoning process, having regard to the material that was before it. Furthermore, the applicant did not attempt to specifically identify any material that was before the Tribunal that it either failed to consider or that was contradictory to material upon which it relied.

Although the Tribunal fell short of concluding that it did not accept the applicant's evidence, the *"reservations"* it held about his story are clearly discernible from a reading of its reasons as a whole. However, the Tribunal was prepared to put those reservations to one side. It even went so far as to say that it would assume that the applicant had a subjective fear of persecution should he be returned to his country of origin. Thus, contrary to the assertions contained in the amended application, the Tribunal afforded the applicant the benefit of the doubt when determining whether the applicant held a subjective fear of persecution. The Tribunal then correctly noted that the next matter it had to consider was whether the harm feared by the applicant was for a *"Convention Reason"*. It is therefore, not necessary to make any further

investigation into the *"reservations"* of the Tribunal as they did not form part of and did not affect its ultimate decision. This also means that there is no need to give further consideration to sub-pars 1.1 to 1.10 of the grounds for review.

The prescribed criteria for the grant of a protection visa are set out in sub-s 36(2) of the Act and Clause 866 of Schedule 2 to the *Migration Regulations*: see s31(3) and Reg 2.03. Sub-section 36(2) of the Act states that the criterion for the grant of a protection visa is that *"the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"*. The terms *"Refugees Convention"* and *"Refugees Protocol"* are defined in s 5 of the Act as meaning *"the Convention relating to the Status of Refugees done at Geneva on 28 July 1951"* and *"the Protocol relating to the Status of Refugees done at New York on 31 January 1967"*.

A refugee is defined in Art 1A(2) of the Convention as amended by the Protocol as a person who:-

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

Determining whether an applicant for a protection visa holds a well founded fear of persecution is essentially a two stage process which requires a subjective and objective examination of the applicant's circumstances. Subjectively, a decision-maker must determine whether the applicant is actually in fear of persecution, and

objectively, the decision-maker must determine whether the applicant's fear is based in reality: *Chan Yee Kin v The Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. The applicant in this case is, of course, outside his country of nationality and it is implicit in the Tribunal's findings that he is unwilling to avail himself of Hungary's protection. The Tribunal did not address whether that assumed subjective fear was based in reality. Instead it proceeded to consider whether the applicant's fear was for one or more *"Convention Reasons"*: that is, for reasons of either race, religion, nationality, membership of a particular social group or political opinion.

The Tribunal dismissed four of those reasons in one sentence, stating: *"On his evidence, it is clear that the harm feared by the applicant would not be for reasons of his race, religion, nationality or political opinion"*. That conclusion has been challenged by the applicant.

In sub-pars 1.11, 1.12 and 1.15 of his amended grounds for review (sub-pars 1.13 and 1.14 were withdrawn) the applicant addressed the alleged availability to him of *"Convention Reasons"*. For example, in sub-par 1.12 he said:-

> *"The Applicant does fear persecution for reasons of race, nationality, political opinion and membership of a particular social group."*

The applicant claimed the Tribunal's finding that the harm feared by him would not be *"for reasons of his race, religion, nationality or political opinion"*, amounted to error as *"[t]here was no evidence to justify the making of this decision"*. I have already pointed out that the applicant's failure to place any material before the Court explains why this particular ground must fail. Religion was not included as a ground and although

political opinion was included, it was not the subject of specific submissions. I therefore put it to one side when considering the applicant's alleged fear of the gypsies, noting however that the applicant might have been intended to raise it with respect to the subject of potential military service. The applicant also submitted that the Tribunal's findings in this area amounted to an error of law *"being an error involving an incorrect application of the law to the facts and also an incorrect interpretation of the applicable law"*: par 476 (1)(e).

The submissions advanced on behalf of the applicant with respect to issues of race, nationality and membership of a social group may be summarised in these terms:-

- The applicant is a Hungarian national (and as such is a member of a majority group) who fears persecution from the Romany gypsies (who are a minority group)

- Members of a majority group may fear persecution from a minority group

- The Hungarian authorities are unable to control the gypsies

- The fear of the applicant can be, and in this case is, caused either by his nationality, his race or his membership of a social group

It might be possible in the circumstances of a particular case, for a minority group to dominate a subservient majority. But such dominance would have to emanate from some form of overriding power. That power might be political or it might be military but I do not think it a useful exercise to speculate on such matters. It suffices to say that there was nothing in the papers that would even remotely point to a minority regime of gypsies which controls a larger majority of Hungary's population, or is even an integral part of a larger group that controls or dominates that majority. The Tribunal in

determining the applicability of convention reasons to the applicant's circumstances said that the *"only other possibility is membership of a particular social group"*. However, it concluded that there was *"nothing which can support such a case"*. The Tribunal relied upon the remarks of Black CJ (with whom French J agreed) in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 111 ALR 417 at 420. His Honour there said:-

> *"The convention definition does not extend to all persons who have a well-founded fear of being persecuted in their country of nationality; it requires that there be a fear of being persecuted for one of the specified reasons. Those reasons may of course overlap, but a recognition that this is so should not obscure the fact that a well-founded fear of persecution for a specified reason must be shown.*
>
> *Each element of the definition must be considered. A critical element in the present case is that the fear of persecution relied upon must be a fear for reasons of membership of a particular social group. It is not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. The primary focus of this part of the definition is upon an aspect of what a person is - a member of a particular social group - rather than upon what a person has done or does."*

In my opinion, this passage from the judgment of the learned Chief Justice applies with full force to the circumstances of the applicant in this case. He has been hounded by the gypsies because of what he, in their perception, has done. They see him as the party, or one of the parties, responsible for the injuries that the child has suffered. The applicant's alleged fear derives from these circumstances which have nothing whatsoever to do with any of the five convention reasons. The gypsies are not concerned with his race, religion or nationality, or with his membership of any social group or with his political opinion. Rather they are concerned to exact some form of retribution from him for what has happened to the child. In *Ram v Minister of*

Immigration (1995) 57 FCR 565 Burchett J (with whom O'Loughlin and R D Nicholson JJ agreed) said at 568:-

> *"If harmful acts are done purely on an individual basis, because of what the individual has done or may do or possesses, the application of the Convention is not attracted, so far as it depends upon "membership of a particular social group".*

Thus it is clear that private or individual persecution that does not implicate the controlling authorities of the country in question does not constitute persecution for the purpose of the Convention and the Act. This is a conclusion recently confirmed by the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331. In that case Brennan CJ stated at 334 that:-

> *"... the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality (Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1 at 16-17)."*

Similarly McHugh J stated at 354:-

> *"The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the de jure or de facto protection of their governments, are unwilling to return to the countries of their nationality."*

In my opinion the Tribunal was correct in its conclusion and in its reasoning. If the applicant has a well founded fear of being persecuted by the gypsies, (as to which I

need not express any opinion) the Tribunal was correct in concluding that the fear has no connection with any one of the convention reasons. Indeed this conclusion accords with the applicant's own case. In his application for a protection visa dated 15 June 1995, the applicant gave the following information:-

Q. *"Why did you leave the country?"*

A. *"I took the opportunity to travel to Australia to get away from the continual harassment of the gypsy ethnic groups and gangs in my region who are constantly seeking us out and threatening our lives and because the local police are powerless to help us."*

Q. *"What do you fear may happen to you if you go back to that country?"*

A. *"If I return I expect to be sought out by the gypsy ethnic gangs and beaten and thus fearful of my life [sic]."*

Q. *"Who do you think may harm/mistreat you if you go back?"*

A. *"The gypsy gangs that chased me wherever I go [sic]."*

Q. *"Why do you think they will harm/mistreat you if you go back?"*

A. *"My friend and I have been singled out by groups and gangs of ethnic gypsy gangs due to some past skirmishes/fighting they have vowed to kill us if we return [sic].*

The authorities say they cannot help us until they do something.

We are scared and suffer mentally because of this"

Q. *"Do you think the authorities of that country can and will protect you if you go back? If no, why not?"*

A. *"The authorities say they cannot help until the gypsy gang do something to us [sic]. As they have threatened our lives we are too scared to go back"*

Nine months later, the applicant still presented the same claim.

In a statutory declaration that he signed on 26 March 1996 and which was read as part of these proceedings, the applicant said:-

"1. I suffer from the fear of being continually harassed and persecuted by ethnic gypsies in Hungary, as a result of a previous altercation.

2. These gypsies work to a belief of not forgetting until they themselves have revenged the incident."

I cannot agree that the Tribunal fell into error in its treatment of the applicant's claimed fear of the gypsies. I see no reason for interfering with the Tribunal's decision.

Military Service

I turn now to the subject of military service.

The applicant fears that by virtue of the current and ongoing conflict in the Balkans, (which, for the purposes of the applicant's case, I take to be the countries that were once part of Yugoslavia) Hungary will be drawn into the conflict and that as a consequence, he, a conscientious objector, will be called up for military service. *The*

Handbook on Procedures and Criteria for Determining Refugee Status published by the Office of the United Nations High Commissioner for Refugees (Re-edited Geneva, January 1992) addresses the status of a deserter and draft-evader in par 168:-

> *"A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution."*

The latter part of that passage would, in my opinion, have equal application to a conscientious objector. Professor Hathaway in his work *"The Law of Refugee Status"; Butterworths Canada Ltd. 1991:* refers (at p 182-183) to a paper by B. Frelick *"Conscientious Objectors as Refugees"*, V. Hamilton, ed., *World Refugee Survey*: 1986 in Review, p 31 (1987), which states that:-

> *"The right to conscientious objection is an emerging part of international human rights law, based on the notion that "[f]reedom of belief cannot be truly recognized as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs". Drawing on this right to freedom of thought, conscience, and religion contained in both the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, the United Nations Commission on Human Rights has expressly recognized the right to conscientious objection as "a legitimate exercise of the right of freedom of thought, conscience and religion", and appealed to states to provide for alternative service of a civilian and non-combatant nature. This view is shared within the Council of Europe, where the right to an alternative to military service is recognized for persons who express compelling reasons of conscience against bearing arms. Thus, insofar as a state fails to make provision for the accommodation of conscientious objectors, a principled claim to refugee status may be established."*

I see no reason why the passage just quoted should not be accepted as a statement of principle - that there may be cases in which conscientious objection to military

service will be the basis of a well founded fear of persecution for a convention reason. For example, the refusal to perform military service may derive from one's religious beliefs, or it may be by virtue of one's political opinions.

In the subject case, it is not possible to ascertain from the papers why the applicant is opposed to military service. In his application for a protection visa, he stated as his reason for claiming refugee status his need *"to get away from the continual harassment of the gypsy ethnic groups ..."*. He made no mention of his fear of military service. Indeed, the applicant gave an unqualified answer in the negative when asked to state in his application for a protection visa whether he still had military service obligations in his home country. Furthermore, no mention was made of his desire to avoid military service in his statutory declaration on 23 May 1996. However, the applicant obviously referred to the subject when interviewed by the Minister's delegate and when he was before the Tribunal. In his reasons, the delegate said:-

> *"The applicant further claimed at interview that he was opposed to military service which was likely to occur as a consequence of his prior military training, and the proximity of Hungary to the current conflict in the Balkans."*

The Tribunal said of the subject of military service:-

> *"The only other claim made by the applicant is that he is opposed to military service which was likely to occur as a consequence of his prior military training and the proximity of Hungary to the current conflict in the Balkans. I am unaware of any information which suggests that there is a possibility of Hungary's being drawn into the Balkan conflict - which has, in any case, quietened down considerably since the applicant applied for refugee status - and the applicant has not supplied any such information. Accordingly, I consider such a possibility as only remotely possible and give this claim no further consideration."*

An applicant for refugee status does not bear the conventional onus of proof. Indeed, in appropriate circumstances, the delegate or Tribunal may be required to investigate the existence of evidence in support of an application: *U N H C R Handbook*: pars 196, 203 and 204. See also s 426 which provides as follows:-

> *"426.(1) Where section 424 does not apply, the Tribunal must notify the applicant:*
>
> *(a) that he or she is entitled to appear before the Tribunal to give evidence; and*
>
> *(b) of the effect of subsection (2) of this section.*
>
> *(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.*
>
> *(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice."*

However, this issue was not addressed in argument and I prefer to express no concluded view on the role of the Tribunal in the collation of such evidence. There are views suggesting that a decision-maker is not obliged to make the case for an applicant: *Luu v Renevier* (1989) 91 ALR 39 and that a Tribunal has no duty to make enquiries of people who are not before it: *Dharam Raj v Minister for Immigration and Ethnic Affairs* (unreported: 18 July 1996 Davies J).

There is, in my opinion, an obligation on the applicant for a protection visa to not only identify that he or she is conscientiously opposed to military service, but also to state the reason for that objection. It is not enough to make a bold assertion. An applicant must have a conscientious objection and that conscientious objection must be the basis of the well founded fear of persecution for a convention reason. It would seem from the papers before the Court that neither the delegate nor the Tribunal made any inquiries about Hungary's policy on military service or its international standing in the Balkans. But in my opinion, the applicant did not put any information before the delegate or the Tribunal sufficient to warrant such investigations, if the Tribunal may indeed be obliged to investigate.

Even if it be accepted that the applicant is a conscientious objector and even if it be assumed that Hungary treats such persons harshly (to the point of persecution in the legal sense) one is left wondering whether the reason for the persecution is a convention reason. The applicant could have given evidence before the Tribunal on that subject; he could have explained the grounds for his objection to military service, but he failed to do so.

In an affidavit sworn on 27 September 1996 and tendered by the applicant in these proceedings, the applicant attempted to place further information and material before the Court. The receipt of that affidavit was opposed and I reserved consideration as to whether it should be received, stating that I would publish my decision when delivering judgment. I do so later in these reasons.

If the affidavit is admitted the only additional material advanced by the applicant is as follows:-

> *"I completed compulsory military service with the Hungarian Army in 1985-1986 for eighteen months. In June 1995 when I lodged my Application for refugee status there was a big risk that Hungary would be dragged into the Balkans conflict. Hungary is right next door to Yugoslavia. In 1994 before I came to Australia the Hungarian authorities had already called me up for further military service but because my father had passed away I managed to get compassionate leave. I am philosophically and politically opposed to compulsory military service and military conscription and I am a conscientious objector. I am fearful that if I am forced to return to Hungary that because of my beliefs concerning compulsory military conscription that I will be imprisoned by the Hungarian Government for refusing to do military service. I am also politically opposed to Hungary intervening in the Balkans conflict. In June 1995 there was a very real possibility that Hungary would be drawn into the Balkans conflict."*

I infer from the filing note that this document was prepared by solicitors on instructions from the applicant. It is significant that this is the only passage in the affidavit dealing with military service, yet it fails to identify, in any meaningful way, why he is opposed to military service. To say that he is *"philosophically and politically opposed"* is wholly inadequate.

But if I am wrong and if further consideration should be given to this issue, I still consider that this application must fail. If, for example, it be assumed that the applicant has, in subjective terms, a well-founded fear of being persecuted for reasons of (say) political opinion, it remains necessary for both a Tribunal and a review court to objectively assess

the nature of that fear. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (supra) is authority for the proposition that a person is entitled to refugee status if he or she can show genuine fear, founded on a real chance that there would be persecution for a convention reason, if the person were to return to his or her country of origin. In determining what constitutes a real chance, one *"discounts what is remote or insubstantial"* (Toohey J at 407). Further, a *"far fetched possibility of persecution must be excluded"* (McHugh J at 429). The *"real chance"* test is inherently speculative. It is a significant departure from the conventional situation of an applicant proving his or her case on the balance of probabilities: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481 at 494-498 per Brennan CJ, Toohey McHugh and Gummow JJ. But even the exercise of speculation is not, in my opinion, sufficient to assist the applicant.

If he returns to Hungary the applicant will only be persecuted if:-

- Hungary is engaged militarily in the Balkan conflict
- the applicant is called up for compulsory military service
- the applicant objects to such service for a convention reason
- the appropriate authorities react to his objection in such a harsh way that the reaction will amount to persecution

To the extent to which (if at all) there was any obligation on the Tribunal to inquire into any of these issues, its failure to do so was not the subject of complaint by the applicant. It was not listed as a ground of review and therefore need not be considered

further. However, I should make it clear that I do not consider that the applicant placed sufficient information before the Tribunal to warrant it making any such inquiries. The applicant is now 33, he is single and a carpenter by trade. If there is a call-up in Hungary, would a person of that age be included? What is his state of health? What are his political, religious, social or moral beliefs that found his conscious objection? Does he know anything of the official (or unofficial) attitude of the Hungarian authorities towards conscientious objectors? This is the sort of information that the Tribunal would need to enable it to make an informed decision.

There may be cases where although no express error of law is apparent from a reading of the Tribunal's reasons, a review court may nevertheless feel compelled to impugn a tribunal's decision on the basis that its reasons must have been somehow affected by error. That could not be said in this case. The reasons of the Tribunal were clear and, in my opinion, correct.

Paragraphs 476(4)(a) and 476(4)(b)

These sections of the Act provide that the *"no evidence ground"* is not to be taken to have been made out unless:-

> *"(a)the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or*
>
> *(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."*

I will deal first with the contents of par 476(4)(a). The effect of that provision is that the *"no evidence ground"* is not to be taken to have been made out unless the Tribunal was required in law to reach its decision (ie the decision to affirm the earlier decision that the applicant was not entitled to a protection visa) only if a particular matter was established and there was no evidence or other material from which the Tribunal could reasonably be satisfied that the particular matter was established. What then was the particular matter that had to be established before the Tribunal could properly make its decision? In my opinion the answer is that there was no such matter. I note that in *Xiang Sheng Li v Refugee Review Tribunal* (unreported: judgment delivered 23 August 1996) Sackville J preferred to describe the end result of the Tribunal's consideration of an application for a protection visa (when it was adverse to the applicant's interests) as the *"ultimate conclusion"* that was reached by the Tribunal. He did not regard it as a *"decision"*. Putting this issue to one side, I would respectfully agree with his Honour's further proposition that a conclusion that an applicant did not face a real chance of persecution for a convention reason if he or she were returned to his or her country of origin was *"not a particular fact the existence of which provided the basis for the RRT's decision. It was a conclusion as to future possibilities based on a series of factual findings..."*. Alternatively, if one were to reverse the court's inquiries and review the position of the Minister challenging a decision of the Tribunal, a different picture would emerge. It could be said that the Tribunal could only have reached a decision that the applicant was entitled to a protection visa if it was satisfied that (*inter alia*) the applicant was a non-citizen in Australia to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol. They would be particular matters that had to be established. If there was no evidence or other material from which the Tribunal could reasonably have been

satisfied that those particular matters existed then the ground of appeal in par 476(1)(g) would be available to the Minister.

For those reasons, I am of the opinion that par 476(4)(a) deprives the applicant in this case from using the *"no evidence ground"* in par 476(1)(g).

The next question to consider is the effect that par 476(4)(b) may have upon the applicant in these proceedings. Applying that sub-section to the circumstances of this case, it essentially provides that the *"no evidence ground"* will be available to the applicant if the Tribunal based its decision that the applicant was not entitled to a protection visa on the existence of a particular fact, and that fact did not exist.

The applicant has identified several subject matters which he has variously called *"findings"* or *"decisions"* and has claimed that there was no evidence justifying them. I have set out two of them (sub-pars 1.1 and 1.3 of the amended application) as examples. Let it be assumed that the Tribunal was in error in each of those examples. In other words, let it be assumed that there was no relevant evidence upon which the Tribunal's particular finding or decision may be based. How would that assist this applicant? It could not be said that the Tribunal based its decision on the existence of those *"facts"*. The Tribunal's decision (that the applicant was not entitled to a protection visa) was based on the absence or the insufficiency of evidence or other material. The Tribunal was not required to, and did not base its *"negative"* decision on the positive existence of some particular fact or facts. It concluded that there was no (or no sufficient) evidence or other material supporting the proposition that the applicant had a *"well founded fear of being persecuted"* for a convention reason.

For the reasons that I have set out, I have come to the conclusion that, by virtue of the provisions of pars 476(4)(a) and (b), the *"no evidence ground"* in par 476(1)(g) is not available to the applicant. After judgment had been reserved in this matter, Mansfield J published his judgment in *Ali Sabir Malik v The Minister for Immigration and Ethnic Affairs* (unreported: judgment delivered 4 April 1997). His Honour likewise concluded that the provisions of pars 476(4)(a) and (b) deprived the applicant in that case of the benefit of the *"no evidence ground"*.

Use of affidavits

There remains the final question of the several affidavits that were tendered by the applicant during the course of the hearing. The admissibility of further evidence at an appellate level that was not before a decision-maker depends upon the grounds of review upon which the applicant relies. But generally, where the ground relied upon is error of law, the trend of judicial opinion is that evidence before the Court should be confined to the material that was before the decision-maker: *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 539-540 per Lockhart J: but see also *Mendoza v Minister for Immigration* (1991) 31 FCR 405 where a contrary view was expressed by Einfeld J.

There were five affidavits in all, the most significant of which was the affidavit of the applicant dated 27 September 1996. There was an earlier, shorter affidavit of the applicant but its contents were reproduced in his later affidavit. Two of the remaining affidavits were from an interpreter, a Mr Romkay, verifying that he had translated the applicant's two affidavits to him. The final affidavit was from a Mr Palaga, a cousin of

the applicant. Mr Palaga deposed that he had visited the applicant's mother in Hungary in mid 1995 and that she had told him of the trouble that she was experiencing with the gypsies. But a letter in similar terms from the applicant's mother had already been placed before the Tribunal in any event, and the Tribunal was prepared to accept the evidence about the gypsies' conduct. There was no useful purpose in tendering Mr Palaga's affidavit and I reject its tender.

I return then to the applicant's later and longer affidavit. I reject its tender. The greater part of it deals, in expanded form, with the gypsies. It does add two new dimensions. It challenges a passage in the Tribunal's reasons by claiming that his ex-wife has experienced threats from the gypsies. He further states his belief that *"the reason why the Romany Gypsies are persecuting me is also because I am a white Hungarian National"*. The first issue is not important as the Tribunal was prepared to assume that the conduct of the gypsies was as claimed by the applicant. The second matter was material to his claim that he would be persecuted for a convention reason. However, the bland assertion of his belief to this effect could not advance his cause beyond the submissions that were made by counsel on his behalf. The tribunal was correct in finding that neither the applicant's nationality nor his race, nor his membership of a particular social group was the cause of the gypsies' conduct. Finally, there was additional information in the applicant's affidavit in the form of evidence relating to his objection to military service. Arguably, this section of the affidavit might have been admissible even though its vagueness was such that little or no weight could be attached to it. However, I am of the opinion that the applicant's affidavit of 27 September 1996 refers to matters of fact that were peculiarly within the knowledge of the applicant and that as such, it was incumbent upon him to place that material before

the Tribunal. He failed to so and should not now be permitted to introduce such factual material.

For the reasons that I have given the application is dismissed with costs.

I certify that this and the preceding pages are a true copy of the Reasons for Judgment of the Honourable Justice O'Loughlin.

Associate:

Dated:

Counsel for the Applicant : Mr M W Clisby

Solicitor for the Applicant : Paul Kirk Roberts & Co

Counsel for the Respondent : Mr W Mosley

Solicitor for the Applicant : Australian Government Solicitor

Date of Hearing : 4 February 1997