

CATCHWORDS

ADMINISTRATIVE LAW - immigration - application for review of the decision of the respondent denying the applicant the status of refugee - applicant likely to be persecuted if he returns to the Punjab - whether there was a "real chance" that the applicant would be persecuted if he returned to India elsewhere than in the Punjab - whether decision unreasonable.

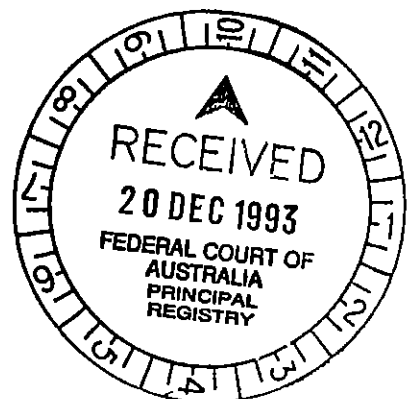
Administrative Decisions (Judicial Review) Act 1977 (Cth)
1951 United Nations Convention Relating to the Status of Refugees

Chan v. Minister for Immigration and Ethnic Affairs (1989) 169 C.L.R. 379
Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 C.L.R. 24
Fuduche v. The Minister for Immigration, Local Government & Ethnic Affairs (1993) 117 A.L.R. 418.

HARJIT SINGH RANDHAWA v. THE MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT & ETHNIC AFFAIRS

No. NG 254 of 1993

Davies J.
8 December 1993
Sydney



IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

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BETWEEN: HARJIT SINGH RANDHAWA

Applicant

AND: THE MINISTER FOR
IMMIGRATION, LOCAL
GOVERNMENT AND ETHNIC
AFFAIRS

Respondent

Coram: Davies J.
Date: 8 December 1993
Place: Sydney

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs.

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

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REASONS FOR JUDGMENT

This application, brought under the Administrative Decisions (Judicial Review) Act 1977 (Cth), seeks orders of review with respect to a decision of a delegate of the Minister for Immigration, Local Government and Ethnic Affairs refusing to accept that the applicant, Harjit Singh Randhawa, was a refugee within the meaning of the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

Article 1A(2) of the Convention, as amended by the Protocol, provides that the term "refugee" applies to a 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."

The meaning of that provision was enunciated for the purposes of Australian law in Chan v. Minister for Immigration and Ethnic Affairs (1989) 169 C.L.R. 379. Mason C.J., Dawson, Toohey, Gaudron and McHugh JJ. all pointed out that this provision contains a subjective and an objective element. The applicant's fear of being persecuted for one or more of the prescribed reasons is a subjective fact. That fear must be "well-founded", thus introducing an objective test. All their Honours, save Gaudron J., concurred in the view that, if an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50% chance of persecution occurring. See Mason C.J. at 389, Dawson J. at 398, Toohey J. at 407 and McHugh J. at 429. Gaudron J. at 413 preferred not to give a judicial exposition to the words of the Convention which, in her opinion, could be applied "by reference to broad principles which are generally accepted within the international community."

This application has been brought on the ground that the decision was so perverse or unreasonable that no reasonable decision-maker would have arrived at it. It is not in dispute that, if the decision is found to be unreasonable in the sense expounded in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation

[1948] 1 KB 223 at 229-233 and Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 C.L.R. 24 at 40-42, it may be set aside. Indeed, migration decisions were set aside on that ground in Chan v. Minister for Immigration & Ethnic Affairs and in Fuduche v. The Minister for Immigration, Local Government & Ethnic Affairs (1993) 117 A.L.R. 418.

Mr Randhawa's application for refugee recognition was first considered by a Refugee Status Review Committee ("RSRC"), which was comprised of an officer of the Department of Immigration, Local Government and Ethnic Affairs, an officer of the Department of Foreign Affairs and Trade, an officer of the Attorney-General's Department and a community representative, a nominee of the Refugee Council of Australia. All the members of the RSRC, other than the officer of the Department of Immigration, Local Government and Ethnic Affairs, took the view that Mr Randhawa's application should be refused.

A delegate of the Minister, Ms Robyn Seth-Purdie, subsequently took the same view and made an interim decision to that effect on 25 February 1993 and a final decision to the same effect on 17 March 1993. These proceedings were instituted on 29 April 1993.

It is not in dispute that Mr Randhawa would have a well-founded fear of persecution were he required to return to his family's home in the Punjab. Mr Randhawa is a Sikh and his father was, until his murder in January 1991, an active and prominent member of one of the political movements seeking recognition of the

Punjab as a separate State. In January 1991, Mr Randhawa's father was murdered and so also was a brother who was visiting from Australia. Another brother has disappeared and is feared dead. Other members of Mr Randhawa's family, including his mother, have moved from their village and are maintaining a low profile in the Punjab.

The issue in the case arises from the fact that the country of which Mr Randhawa was a citizen was not the Punjab itself but India. The question was whether Mr Randhawa was unable or, owing to his fear of persecution, unwilling to avail himself of the protection of India.

Hathaway on the Law of Refugee Status puts the matter in this way at 133:-

"A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state."

At 134, Hathaway states:-

"The primacy of domestic protection has been recognized in Canadian jurisprudence as well. In *Karnail Singh*, the claim of a Sikh from the Punjab region of India was denied because of his admission that he could avoid police harassment by moving to a different region of the country. The Immigration Appeal Board enunciated the principle that '[i]f the applicant is able to live in security in some other area of his own country, he is not a refugee from that country.' In both *Jamarine Jerome Ramkassoon* and *Bento Rodrigues da Silva*, the Board applied the internal protection principle to situations where uncontrollable private violence was limited in scope to certain regions of the state of origin, with safety available elsewhere in the country."

In Australia, the issue must be considered in the light of the enunciation in Chan's case of the "real chance" test. Accordingly, the question for the delegate was whether, owing to a well-founded fear of being persecuted for one or more of the

prescribed reasons, Mr Randhawa was outside India and was unable or, owing to such fear, unwilling to avail himself of the protection of India. Thus, the crucial question was whether, if Mr Randhawa were required to return to India, there would be a real chance of his persecution in that country.

Mr G. Drake, counsel for Mr Randhawa, submitted that the officers constituting the RSRC and the delegate of the Minister placed too much weight on their own view of affairs in India and not enough weight on the claims made by Mr Randhawa. However, a decision-maker is not bound to accept an applicant's contentions, unless the applicant's statements and the material supplied in support thereof have such cogency that to put them aside leads to the making of a decision that is so unreasonable that no reasonable decision-maker would have come to it.

Mr Drake submitted that the members of the RSRC and the delegate misapprehended the question before them, for they had regard to the position generally of Sikhs in the Punjab and elsewhere in India but failed to have regard, or sufficient regard, to the particular circumstances of Mr Randhawa's case and to the probability that Mr Randhawa's father and other members of his family were killed because of the involvement which the father had in political activities in the Punjab. Mr Drake submitted that the members of the RSRC and the delegate failed to take account of the fact that the political activities of Mr Randhawa's father ran contrary to the interests and views of the main political party in India, Congress I. Therefore, Mr Drake said, no member of the family could rely on protection from the governing authority in India, for Mr Randhawa's father had been a part of a movement which

Congress I opposed. Mr Drake referred to material which showed that the Indian authorities had sent troops and police to the Punjab to quell the separatist movements in the Punjab, of one of which Mr Randhawa's father had been a prominent member.

In his reasons, the member of the RSRC from the Department of Foreign Affairs and Trade noted that:-

" the dramatic portrayal of events and circumstances related by Mr Randhawa's lawyer as well as Mr Randhawa's story appear to over dramatise and exaggerate the actual situation there. ...

The applicant's claims that sikhs are no longer safe anywhere in India is absolutely preposterous and incorrect. Sikhs live and work in harmony with the general community throughout the length and breadth of India. There are no limitations on their movement and they are in no way discriminated against. They are free to relocate to any village, city or State if and whenever they want as many have and continue to do. . "

The member also noted inconsistencies in Mr Randhawa's story. The member noted that, in an original interview, Mr Randhawa claimed that his father and brother had been killed by family enemies trying to extort money. The member noted that the story was subsequently changed so that the killings became the work of political activists. The member noted that the story was changed again so that there was a demand for a donation and political support which, when refused, ended up as a death warrant. The member concluded that "the application has in my view the appearance of a deliberate attempt to construct a case to circumvent a rejected application under the Australian Immigration Act." The reference to the rejected application was a reference to an earlier application made on behalf of members of the family including Mr Randhawa, who wished to join other members of the family who had migrated to Australia.

The member of the RSRC from the Department of Immigration, Local Government & Ethnic Affairs referred to the fact that Mr Randhawa's father was a member of the faction of the Akali Dal Party headed by Simranjit Singh Mann, whose political profile was a national one. That member went on to note that:-

"During January 1991, tension between Hindus and Sikhs resulted in widespread violence and killings, and Reuters reported a the death of a militant at a Punjabi village (92/65838 f.159) and massacres of Hindu militants. It would be unreasonable to suggest that if the applicant's father had the profile claimed that he could not plausibly have been the victim of anti-Sikh separatist violence at that time."

The member from the Attorney-General's Department gave lengthy reasons which noted, inter alia, that:-

"It is consistent which [sic] the history of the Punjab at the time [1991] that extortionists existed in considerable numbers, seeking funds from persons who were perceived to be able to afford them, and killing them if they refused. The extortionists were generally supporters of various factions and sought funds for the purchase of arms "

That member concluded:-

"It seems to me that the true explanation is that the killers were extortionists, probably militants, and not persons interested in the father for his alleged political affiliation or in exterminating his family for the same reason "

The member also noted that there were inconsistencies between the accounts of what happened on 18 January between that given by the applicant and that given by a brother, Sukhdev. The member concluded:-

" that the Applicant has not been able credibly to establish two matters which are central to his claim for refugee status' first, that his father was killed because of his political affiliation and, secondly that his assassins were intent on eradicating the rest of the family, starting with the brother "

The reasons of the community representative stated, inter alia:-

"I accept the claims of the applicant relating to the deaths of his father and brother at the hands of Hindus, possibly with a political motive. In the current situation in the Punjab, ethnic, political, religious and economic issues are intertwined

...

Given the level of violence by and against Sikhs in the Punjab, it would be unreasonable also to expect him to re-locate within the Punjab.

The key issue therefore is whether he can be safe in other parts of India and whether he is able to expect that his country's institutions will protect him.

.

There are substantial parts of the sub-continent where there has been no such violence. I do not believe he is at risk from those who murdered his father and brother unless he ventures back into the Punjab "

In the reasons given for her final decision, the delegate said, inter alia:-

- "5.6.3 I accept that the applicant's father and brother Tanjit, (or Gurdeep), were murdered in the Punjab and that this may have been due to their religious and political beliefs. I also accept that the disappearance of another brother may have been related to the same incident
- 5.6.4 The RSRC Committee considered the applicant's claims on 18 February 1993 and voted by a majority of 3-1 against recommending refugee status to the applicant, on the basis that the applicant could live safely outside of the Punjab and that it would not be unreasonable to expect him to do so, particularly as he has lived outside the Punjab previously.
- 5.6.5 I agree with the majority view, particularly in the light of information contained in DFAT cables O.ND 84486 0853 of 6/7/92 and O.ND86328 0902 of 2/2/93, which states that although Punjabis have reason to fear violence in their state, they can and do move elsewhere in India and there is no need to flee the country
- 5.6.6 Whilst I accept that the political profile for the applicant's family could result in the applicant experiencing adverse treatment if he were returned to the Punjab, my task is to assess whether his fear is well-founded in relation to his country of nationality, not simply the region in which he lived
- 5.6.7 On the basis of advice in the above DFAT cables, I find that the applicant could reasonably be expected to relocate to another area of India. While I have considered the applicant's claims that he could not relocate (11, 28 and 35), I give greater weight to the DFAT advice as DFAT is the expert agency of the Commonwealth of Australia with respect to the professional and impartial collection, interpretation and reporting of in-country information "

I take this reasoning to reject Mr Randhawa's contention of fact that he and members of his family were especially at risk throughout India because of their political connections. I read the delegate's reasons as expressing a finding of fact that Mr Randhawa could live safely in India free of persecution.

The matters of fact set out in the reasons of the members of the RSRC adequately found the findings of fact of the delegate. And so also did other material before the delegate, such as the DFAT cablegram which stated, inter alia:-

"Large numbers of Sikhs reside throughout India, not just in Punjab. Sikh shopkeepers and taxidrivers are ubiquitous in most Indian cities. Sikhs are also well represented in the Police, Military, Civil and Diplomatic Services.

The disturbing number of civilian killings - 3,300 in 1991 alone -- indicates that average Punjabis have reason to fear violence in their state. To avoid it, however, they can and do - move elsewhere in India. There is no need to flee the country.

There have been no recent reports (that is, since 1984/85) of any desecration of Gurudwaras and no reports of significant human rights abuses anywhere outside the Punjab."

In the light of the factual material which was before the delegate, I cannot find that there was any error of law in her approach or that she came to a decision which could be regarded as so unreasonable that the reasonable decision-maker could not have arrived at it. It is clear that the delegate concluded that the deaths in January 1991 were due in part to the turmoil that occurred in the Punjab at that time. The cablegram referred to 3,300 civilian deaths and the DILGEA member of the RSRC had referred to "widespread violence and killings" including "massacres of Hindu militants". Accordingly, it was open to the delegate to find that the deaths of the father and brother did not indicate a personal vendetta against Mr Randhawa's


which would follow the members of the family wherever they were in India. In this event, the fact that Sikhs live in safety generally throughout India was a sufficient ground for the delegate to find that, although Mr Randhawa may fear persecution if he returned to the Punjab, there was no real chance of such persecution if he went to live in another part of India.

Although courts scrutinise decisions on refugee status closely, having regard to the rejection of what appeared to be clear claims for refugee status in cases such as Chan's case and Thavarajasingham's case (unreported, 16 February 1990), I cannot see in the present case any ground which would justify a court in interfering with the delegate's decision. The delegate was the decision-maker of fact and the facts were for her. Her decision was open on the material before her. See Australian Broadcasting Tribunal v. Bond (1990) 170 C.L.R. 321 at 355-360.

In the circumstances, I shall dismiss the application with costs.

I certify that this and the 9 preceding pages
are a true copy of the reasons for judgment herein
of the Honourable Mr Justice Davies.

Associate:



Date: 8 December 1993

Counsel for the applicant:	Mr G. Drake
Solicitors for the applicant:	Adrian Joel & Co.
Counsel for the respondent:	Mr P. Roberts and Ms S. Welsman
Solicitor for the respondent:	Australian Government Solicitor
Date of hearing:	25 November 1993
Date of judgment:	8 December 1993