JUDGMENT No. 535 / 94

CATCHWORDS

ADMINISTRATIVE LAW - immigration - judicial review - application for refugee status - internal protection principle - well-founded fear of persecution not extending to whole country - relocation in country of nationality - reasonableness of relocation alternative - nature of inquiry decision-maker required to undertake.

Administrative Decisions (Judicial Review) Act 1977 (Cth).

United Nations Convention Relating to the Status of Refugees 1951.

Protocol Relating to the Status of Refugees 1967.

Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1.

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1985) 162 CLR 24.

R v Home Secretary; Ex parte Sivakumaran [1988] AC 958.

R v Immigration Appeal Tribunal Ex parte Jonah [1985] Imm AR 7.

R v Secretary of State for the Home Department ex parte Gunes [1991] Imm AR 278.

R v Secretary of State for the Home Department ex parte Yurekli [1991] Imm AR 153.

Black CJ, Beaumont and Whitlam JJ
11 August 1994
Sydney

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY) No NG994 of 1993
GENERAL DIVISION)

On an appeal from a single judge of the Federal Court of Australia

BETWEEN: HARJIT SINGH RANDHAWA

Applicant

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

Respondent

COURT: Black CJ, Beaumont and Whitlam JJ
DATE: 11 August 1994
PLACE: Sydney

MINUTES OF ORDER

The Court orders that:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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

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COURT: Black CJ, Beaumont and Whitlam JJ
DATE: 11 August 1994
PLACE: Sydney

REASONS FOR JUDGMENT

BLACK CJ:

This is an appeal from an order of a judge of this Court, Davies J, dismissing an application by the appellant, Harjit Singh Randhawa, for an order of review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The appellant sought judicial review of a decision by a delegate of the Minister for Immigration, Local Government and Ethnic Affairs that he was not a refugee within the meaning of the 1951 United Nations Convention Relating to the Status of Refugees ("the Convention") 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 appellant is a Sikh from the Punjab region of India. He arrived in Australia in July 1991 and was refused entry on the basis that his travel to Australia had been on a passport that was not his own. At this time he applied for refugee status. The history of the Department's consideration of the application for refugee status appears to be quite complicated but it is sufficient for present purposes to note that in February 1993 the case was considered by the Refugee Status Review Committee ("RSRC") comprising 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 who was 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 the appellant's application for refugee status should be refused. A draft assessment and material adverse to the appellant's case were then sent to him for comment. After receipt of comments made on the appellant's behalf, a delegate of the Minister, Ms Robyn Seth-Purdie, made the decision that the appellant was not a refugee.

The delegate gave written reasons for her decision. She reviewed the history of the

application for refugee status, summarised the claims made by or on behalf of the appellant and noted the other material submitted by the appellant in support of his claim.

The delegate accepted that the appellant did not wish to avail himself of the protection of India but observed that she had to assess whether this was because the appellant had, for a Convention reason, a well-founded fear of persecution. She considered that the appellant's claims concerning his membership of a particular ethnic group, his religious beliefs, nationality and membership of a particular social group were inextricably linked to claims that he was being persecuted for reasons of his political opinion. Those claims, she noted, related to the profile of the appellant's father as a member of the Akali Party and the killing of his father and brother because of their Sikh faith by a Hindu group. She noted that the appellant argued that he could not return to India because, he claimed, the political opponents of the Akali Party would seek him out and the police could not guarantee him protection. She noted too the appellant's claims concerning the risk of persecution he faced because of his own political activities, undertaken in support of his father. The decision-maker then said:-

> '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 the 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 While I accept that the political profile of 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.

5.6 8 The sources quoted in the recommendation by the DILGEA representative on the RSRC refer to difficulties faced outside the Punjab by suspected armed secessionists and militant students I find that these reports are not relevant to the applicant's circumstances as neither he nor his family fall within either group

5.6 9 In relation to the claim that the applicant's Sikh culture prevents him from relocating (11), I find that it is not unreasonable for the applicant to relocate for the following reasons.

. the DFAT cables advise that there are large communities of Sikhs in several areas outside the Punjab, thereby providing the opportunity for the applicant to live within a Sikh community if he relocated; and the applicant has lived outside the Punjab previously.'

The learned primary judge took this reasoning as involving the rejection of the appellant's contention of fact that he and members of his family were especially at risk throughout India because of their political connections. He concluded that in the light of the factual material before the delegate, no error of law in her approach to the case had been disclosed, nor had the ground of unreasonableness been made out. (The DFAT cables to which the decision-maker attached substantial importance and to which Davies J referred are set out in the reasons for judgment of Beaumont J.)

As Davies J observed, the issue in this case arose out of the fact that the country of

which Mr Randhawa is a citizen is not the Punjab but India and the question was whether Mr Randhawa was, owing to a well-founded fear of persecution, unwilling to avail himself of the protection of India. The argument on the appeal centred around this issue.

Counsel for the appellant contended that in considering the application of Article 1A(2) of the Convention to a case such as the present the focus of attention should be on the country of the refugee's nationality as a whole and that it was erroneous to consider the position of an applicant for refugee status in relation to a part or parts only of a country as had been done, he argued, in this case. He contended that if, at least in relation to the part of a country that was an applicant's home, a person has a well-founded fear of being persecuted for a Convention reason, such that he is unwilling to avail himself of the protection of that country, a person would be a refugee within the Convention definition notwithstanding that he might not have that fear in some other part of the country. In other words, what is sometimes referred to as "the internal protection principle" had no place in refugee law. Alternatively, counsel submitted, if it is permissible to consider whether an applicant for refugee status could reasonably relocate in his or her country of nationality, the raising of such an issue fundamentally changed the nature of the inquiry that the decision-maker was obliged to undertake. In particular, he contended, a decision-maker's duty was not discharged by asking whether, in a general way, it was reasonable in the circumstances for an applicant to relocate to another part of a country but that a series of specific matters needed to be addressed, including the area, city or region to which it was

contemplated that an applicant could relocate and also what counsel described as the general lifestyle adjustments that would need to made by a person were he or she to relocate within the country of nationality. It was said that in the present case the decision-maker did not make any proper assessment of the relocation option, that the relevant questions were simply not asked or addressed and that the primary judge should have found that, for these reasons, the decision-maker had erred in law.

The appellant's primary argument must be rejected. Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.

The importance of looking to the protection available from the country of nationality was emphasised by the Supreme Court of Canada in *Attorney-General of Canada v. Ward* (1993) 103 DLR (4th) 1. La Forest J, delivering the judgment of the Court,

said (at 12):

> 'International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged For this reason James C Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection: . *The Law of Refugee Status* (Toronto. Bu. .rworths, 1991), at p. 135.'

Professor Hathaway (ibid at 133) explains why the correct principle is not that contended for by the appellant in this case but is what has become known variously as the internal protection principle, the relocation principle (the description favoured in New Zealand) and the internal flight alternative:

> '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 at one's own state
>
> The surrogate nature of international protection is clear from the text of the Convention definition itself, which limits refugee status to a person who can demonstrate inability or legitimate unwillingness "to avail himself of the protection of [the home] *state*". That is, the focus of analysis is the relationship between the claimant and her national government Where there is no *de facto* freedom from infringement of core human rights in a particular region (for example, due to the actions of an errant regional government or forces which make the exercise of national protection unviable), but the national government provides a secure alternative home to those at risk, the state's duty is met and refugee status is not warranted '
>
> [Emphasis in orginal test]

The relocation principle has been applied in England (see *R v Secretary of State for the Home Department ex parte Yurekli* [1990] Imm AR 334, on appeal [1991] Imm AR 153; *R v. Secretary of State for the Home Department ex parte Gunes* [1991] Imm AR 278), in New Zealand (see the discussion by the Refugee Status Appeals Authority in

Refugee Appeal No. 18/92, 5 August 1992, where the Authority's decisions to that time are collected and discussed), and Canada (see the decisions of the Canadian Immigration Appeal Board referred to by Professor Hathaway op. cit. at 134). It has also been recognised implicitly in the successive editions of the *Handbook on Procedures and Criteria for Determining Refugee Status* published by the United Nations High Commissioner for Refugees. Paragraph 91 of the Handbook is in the following terms:

> "The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so "
>
> [Emphasis in original text]

As Simon Brown J pointed out in *R v Secretary of State for the Home Office ex parte Gunes* at 282, it is implicit in the final clause that if, in all the circumstances, it would be reasonable to expect someone to return to another part of the country of nationality then that is a matter that can properly found an adverse decision on a claim for refugee status.

In the present case the delegate correctly asked whether the appellant's fear was well-founded in relation to his country of nationality, not simply the region in which he lived. Given the humanitarian aims of the Convention this question was not to be approached in a narrow way and in her further analysis the delegate correctly went on

to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.

This further question is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.

Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in *R v Immigration Appeal Tribunal Ex parte Jonah* [1985] Imm. A.R. 7. Professor Hathaway, op. cit. at 134, expresses the position thus:

> "The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad It should be restricted in its application for persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights, or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."
>
> [Emphasis in original text]

If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded. I should add that this seems to me to be a better way of looking at the matter than to say, as the first and last sentences of paragraph 91 of the Handbook suggest, that the fear of persecution need not extend to the whole territory of the refugee's country of nationality if under all the circumstances it would not have been reasonable to expect a person to relocate.

In the present case, the delegate recognised the width of the inquiry required by considering whether the appellant's Sikh culture prevented him from relocating in India. Once the question of relocation had been raised for the delegate's consideration she was of course obliged to give that aspect of the matter proper consideration. However, I do not consider that she was obliged to do this with the specificity urged by counsel for the appellant. I agree that it would ordinarily be quite wrong for a decision-maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention, but the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant. In the present case the applicant raised several issues, all of which were dealt with by the decision-maker. If the appellant had raised other impediments to relocation the decision-maker would have needed to consider these but having regard to the issues raised by the appellant

and to the material that was before the decision-maker on the issue of relocation she was entitled to come to the conclusion that the appellant could reasonably be expected to relocate elsewhere in India.

In my view Davies J was correct in rejecting the application for judicial review of the delegate's decision and I would dismiss the appeal, with costs.

I certify that this and the preceding 10 pages are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black.

Associate: Jennifer J. McEvoy

Date: 11 August 1994

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No.NG 994 of 1993
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: HARJIT SINGH RANDHAWA

Appellant

AND: MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

Respondent

CORAM: BLACK C.J., BEAUMONT AND WHITLAM JJ.

DATE: 11 August 1994

REASONS FOR JUDGMENT

BEAUMONT J.

INTRODUCTION

The appellant, an Indian citizen, applied to the Court under the Administrative Decisions (Judicial Review) Act 1977 for an order of review of a decision of a delegate ("the delegate") of the respondent Minister refusing to accept that the appellant 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."

In the application for judicial review, it was contended that the delegate's decision was so unreasonable that no reasonable decision-maker would have arrived at it. Other grounds of judicial review were mentioned in the application for an order of review, but it appears that they were not developed before the learned primary Judge. Davies J. dismissed the application and this is an appeal from that order.

THE EVIDENCE AT THE TRIAL

At the trial two affidavits, sworn by the appellant's solicitor, referring to the history of the matter, were read on behalf of the appellant without objection. The deponent was not cross-examined. This evidence established that the appellant'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; that the members of the RSRC, other than the officer of the Department of Immigration, Local Government and Ethnic Affairs, took the view, for reasons then given, that the application should be refused; and that the delegate

subsequently took the same view, for reasons then given, making an interim decision to that effect on 25 February 1993 and a final decision to the same effect on 17 March 1993. The appellant was not called and there was no other evidence before the Court. The case sought to be made on behalf of the appellant at the trial was thus based upon the material in the process of reasoning of the delegate. In essence, counsel for the appellant pointed to those reasons and sought to extract from it material from which it could be inferred that, in substance, the decision to refuse refugee status was unreasonable to the point of being "perverse" in the sense explained in the authorities.

THE DELEGATE'S PROCESS OF REASONING

The delegate's reasoning process may, relevantly, be summarised as follows:

(1) A summary of the claims and submissions advanced on behalf of the appellant is made (para.3). One of the claims was that:

> "(11) the [appellant] could not move to another part of the Punjab or India as terrorism legislation is manipulated to detain Sikhs for protracted periods. Further, Sikhs are provided no protection by the authorities, and the [appellant's] family has already been subjected to murder and threats. It is contrary to Sikh culture for Sikhs to live by themselves."

Documentation in support of some of the claims is

mentioned (para.4).

(2) The process of assessment of refugee status then proceeded in this way:

(a) It was accepted that the appellant did not wish to avail himself of the protection of India. The issue for assessment was whether this was, in relation to a Convention reason, a well-founded fear of persecution (para.5.1.2).

(b) Reference was made, in the context of the alleged "political opinion" Convention reason (which was linked with the other Convention reasons of race, religion, nationality and social grouping), to the profile of the appellant's father as a member of the Akali Party and the killing of the appellant's father and brother by a Hindu group, allegedly because of their Sikh faith (para.5.6.1). It was noted that the appellant's case was based on the risk of persecution he faced because of his own activities undertaken in support of his father (para.5.6.2).

(c) It was accepted by the delegate that the appellant's father and brother were murdered in the Punjab and that this may have been due to their religious and political beliefs; and that the disappearance of another brother may have been related to the same incident (para.5.6.3.).

(d) The delegate agreed with the majority (3 - 1) vote of the

RSRC on the basis that the appellant could live safely outside of the Punjab and that it would not be unreasonable to expect him to do so, particularly as he had lived outside the Punjab previously (para.5.6.4), particularly in the light of information in cablegrams from the Department of Foreign Affairs and Trade ("DFAT") dated 6 July 1992 and 2 February 1993 stating 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 (para.5.6.5.).

The cablegram dated 6 July 1992, which is important for present purposes since it was much relied on by the delegate, stated (inter alia):

> "C. RELOCATION OF SIKHS FROM PUNJAB
>
> 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, AS WELL AS THE POLITICAL ELITE OF INDIA. THE FINANCE MINISTER SPEARHEADING INDIAN ECONOMIC REFORMS IS A SIKH. SIKHS ALSO CONTROL MANY LARGE PRIVATE SECTOR BUSINESSES AND CONGLOMERATES.
>
> THE INCREASINGLY VIOLENT CAMPAIGNS OF SIKH TERRORISTS, INCLUDING ATTACKS ON POLICE AND SECURITY PERSONNEL, ASSASSINATION OF GOVERNMENT OFFICIALS AND INFORMERS, AND MASS SLAYINGS OF HINDUS, NON-PUNJABIS AND UNTOUCHABLE SIKHS (RAMGARHIA OR MAZHABI SIKHS) HAVE RESULTED IN A TOUGH LAW AND ORDER APPROACH. EXTRAJUDICIAL ACTIONS BY LOCAL POLICE, NOTABLY TORTURE AND 'ENCOUNTER' KILLINGS, HAVE BEEN WELL DOCUMENTED BY HUMAN RIGHTS GROUPS.
>
> 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 ARE NO PARTICULAR AREAS IN INDIA WHICH COULD BE CONSIDERED 'OUT OF BOUNDS' TO SIKHS, ALTHOUGH OBVIOUSLY THEY WOULD NOT THINK OF RELOCATING TO KASHMIR OR THE NORTH-EAST. MAJOR SIKH SHRINES ARE FOUND ALL OVER INDIA AS A RESULT OF THEIR GURUS' PERAMBULATIONS IN TIMES PAST, AND SIKHS OFTEN MOVE TO SUCH PLACES. 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 cablegram dated 2 February 1993, also given much weight by the delegate, the following, inter alia, was stated:

"INTERNAL FLIGHT

7. RELOCATION WITHIN INDIA, AS DESCRIBED IN OUR O.ND84486 OF 6 JULY 1992, REMAINS A VIABLE OPTION AND ONE WHICH HAS BEEN USED, AND CONTINUES TO BE USED, BY MANY. THERE IS LITTLE WHICH CAN BE ADDED TO EARLIER ADVICE, ALTHOUGH BOMBAY WOULD BE AN UNLIKELY DESTINATION IN THE CURRENT CLIMATE FOR THOSE SEEKING TO ESCAPE STRIFE.

HUMAN RIGHTS SITUATION IN THE PUNJAB.

8. MEDIA OBSERVERS OF THE RECENT PANCHAYAT ELECTIONS IN THE PUNJAB HAVE COMMENTED FAVOURABLY ON THE CHANGED MOOD OF THE STATE, ALTHOUGH VARIOUS PROMINENT AKALIS WERE BRIEFLY DETAINED IN THE RUNUP TO THE POLLS. MASSIVE POLICE OPERATIONS HAVE DESTROYED MOST OF THE ACTIVISTS' LEADERSHIP, CURTAILED THEIR EFFECTIVENESS AND RESULTED IN THE COLLAPSE OF NEW RECRUITMENT. FEWER INSURGENTS, AND FEWER POLICE, ARE NOW BEING KILLED. THERE IS A SLOW RETURN TO NORMALCY OF BASIC INSTITUTIONS, MOVEMENT OF THE POPULACE AT NIGHT, EVENING OPERATION OF CINEMAS AND A PROLIFERATION OF MEAT AND LIQUOR STALLS ONCE MORE (A SECTION OF THE MILITANTS HAD LAUNCHED A STRONG ANTI-MEAT, ANTI-LIQUOR DRIVE TWO YEARS AGO).

9. HUMAN RIGHTS ABUSES CERTAINLY PERSIST ON BOTH SIDES, WITH HUMAN RIGHTS GROUPS CONTINUING TO QUESTION CERTAIN 'ENCOUNTER' KILLINGS BY THE POLICE, OR SPORADIC ROUNDUP AND BRIEF DETENTION OF YOUNG SIKH MALES. THE MILITANTS STILL TERRORISE AND DETAIN THEIR OPPONENTS, BUT IN RECENT MONTHS HAVE CHOSEN 'SOFT' TARGETS SUCH AS HINDUS OR LOW-CASTE

SIKHS RATHER THAN THE POLICE. WITH THE DECLINE IN POWER OF THE MILITANTS, THE HUMAN RIGHTS SITUATION IN PUNJAB IS IMPROVING, BUT STATE (AND CENTRAL) GOVERNMENT OFFICIALS' REFUSAL TO ACKNOWLEDGE THAT CONTINUED ABUSES OF OFFICIAL POWER CAN LEAD TO DISAFFECTION INDICATE THAT THERE IS STILL SOME WAY TO GO BEFORE THE PUNJAB TRULY RETURNS TO NORMALCY."

(e) Whilst it was accepted that the political profile of the appellant's family could result in the appellant experiencing adverse treatment if he were returned to the Punjab, the question remained whether his fear was well-founded in relation to his country of nationality, not simply the region in which he lived (para. 5.6.6.).

(f) Accepting the DFAT advice (above), a finding was made that the appellant could reasonably be expected to relocate to another part of India. While the appellant's claims to the contrary were considered, greater weight was given to the DFAT advice as DFAT was "the expert agency of the Commonwealth of Australia with respect to the professional and impartial collection, interpretation and reporting of in-country information" (para.5.6.7.).

(g) In relation to the claim that the appellant's Sikh culture prevented him from relocating (claim 11), it was found that it was not unreasonable for him to relocate for the following reasons:

. the DFAT cables advised that there were large communities of Sikhs in several areas outside the Punjab, thereby providing the opportunity for him to

live within a Sikh community if he relocated; and

. he had lived outside the Punjab previously.

THE REASONING AT FIRST INSTANCE

In explaining the meaning of Article 1A(2) of the Convention, Davies J. observed that in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, Mason C.J., Dawson, Toohey, Gaudron and McHugh JJ. all pointed out that this provision contains a subjective and an objective element. An 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, his Honour noted, 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. His Honour observed that Gaudron J. 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.'"

His Honour noted that it was not in dispute that the appellant -

> "... would have a well-founded fear of persecution were he required to return to his family's home in the Punjab. [He] 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, [his] 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 [his] family, including his mother, have moved from their village and are maintaining a low profile in the Punjab".

The learned primary Judge went on to say:

"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".

Davies J. cited Hathaway on "The Law of Refugee Status" (at 133 and 134) as follows:

"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.

...

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 Jainarine Jerome Ramkissoon 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."

His Honour then said:

> "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."

Having analysed the reasons given in the administrative decision-making process, Davies J., concluding that the application should be dismissed, said:

> "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 [the appellant] 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 [the appellant] 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 ... 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."

THE GROUNDS OF APPEAL

On behalf of the appellant, two main contentions are now made. First, it is argued that, on the proper interpretation of the Convention definition, a decision-maker should be required to consider not only whether there is a well-founded fear of persecution, but also whether the applicant can be expected to live in some other part of the country (the so-called "safe haven" or "relocation" or "internal flight alternative" principle). Secondly, it is submitted that even if a "safe haven" doctrine should be recognised, it could only apply where it was reasonable, in all the circumstances, that the appellant be relocated elsewhere in India; and that, in the present case, having regard to family, work and social considerations, it was not reasonable to expect the appellant to relocate himself outside the Punjab.

CONCLUSIONS ON THE APPEAL

(a) THE SCOPE OF JUDICIAL REVIEW

It is trite law that a review of the "merits" of an administrative decision is not within the scope of judicial review; that, in essence, an error of law must be shown to exist before the Court has the power or authority to intervene; and that intervention, even if open, is discretionary. In Minister for Aboriginal Affairs v Peko-Wallsend Ltd. (1985) 162 CLR 24, in a frequently cited passage, Mason J. said (at 41):

"...in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ... I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'. This ground of review was considered by Lord Greene M.R. in Wednesbury Corporation ... in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it."

In Chan's case, Toohey J. said (at 408):

"In Wednesbury ... Lord Greene spoke of a decision being so unreasonable that no reasonable body could have come to it. That is very much the language of the A.D.(J.R.) Act (see Minister for Aboriginal Affairs v Peko-Wallsend Ltd ... and that language is the yardstick when review is sought on that ground under the Act.

The reasons why the appellant has made out grounds for review under s.5(1)(e) read with s.5(2)(g) of the A.D.(J.R.) Act (or s.6(1)(e) read with s.6(2)(g)) are set out in the reasons of McHugh J. In essence the delegate concluded that while the appellant had a fear of persecution, that fear was not well-founded. However, the delegate had accepted that there may have been 'discrimination' against the appellant. Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China."

In Chan, McHugh J. said (at 430-1):

"... persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: Goodwin-Gill, pp. 38 et seq. In Reg. v Immigration Appeal Tribunal: Ex parte Jonah [1985] Imm. AR 7 Nolan J., sitting in the Queen's Bench Division, held as a matter of law that there was a well founded fear of persecution when the adjudicator had found 'that if the appellant on his return to Ghana sought to involve himself once again in union affairs, he could be in some jeopardy, but there is no acceptable evidence to indicate that he would be at any material risk if he was to resume his residence in his remote family village where he spent a year and a half immediately prior to coming to this country' ... His Lordship held that being 'subjected to injurious action and oppression - by reason of his political opinion and membership of a social group opposed to the government' constituted a well-founded fear of being persecuted 'in the ordinary meaning of that word' ..."

In Jonah, Nolan J. said (at 12-13):

"Mr Blake, in my judgment, was right not to embrace the submission made by Mr Drabu before the Immigration Appeal Tribunal to the effect that if a person has to refrain from political activity in order to avoid persecution he should qualify for political asylum. That is going much too far. What appears to be said here however, is that there was no material risk to the applicant if he was to live in the remote village which I have described where he would be, it seems, separated from his wife and unable to pursue the employment as a trade union official which he has carried out for 30 years.

Even so, says Mr Pulman, the courts must remember that the test of persecution is and must be kept at a high and demanding level. The textbook of Macdonald on immigration law and practice ... at page 240 records that decisions of the United Kingdom appellate authorities, upon the paragraph in question, indicate that persecution must be of a very serious kind. At its lower level, says Mr Pulman, really it becomes a question of fact and

> degree whether what is the subject of a well-founded fear, amounts to a fear of being persecuted within the meaning of the Article. That, broadly, is common ground, but what is meant by persecuted? The dictionary definition, according to the Shorter Oxford English Dictionary, has under 'persecute' the meanings: 'To pursue, hunt, drive' firstly, and secondly: 'To pursue with malignancy or injurious action; esp. to oppress for holding a heretical opinion or belief'.
>
> I find this by no means an easy matter to judge, but to my mind the proper approach must be to apply to the word 'persecution' its ordinary meaning as found in the dictionary. I accept, of course, that considerations of policy may require a stringent test to be adopted if this country is not to be flooded with those claiming political asylum, but I can do nothing other than go by the language used in paragraph 134 and I see no reason for giving that language anything but its ordinary meaning.
>
> To my mind, accepting what was recognised by the adjudicator in this case as the likely consequence of the applicant's return to Ghana, it follows as a matter of law that there was a well-founded fear of the applicant being persecuted in the ordinary meaning of that word - that is to say, subjected to injurious action and oppression - by reason of his political opinion and membership of a social group opposed to the government. On that narrow ground, therefore, I would grant the applicant the relief sought."

It appears that in Chan, McHugh J. approved the reasoning of Nolan J. and, in any event, I would respectfully agree with it. It follows, in my opinion, that although, as the appellant's argument indicated, one will not find in the language of the Convention any reference to a doctrine of "safe haven" or "internal flight", yet these are, in truth, no more than convenient short hand expressions describing what is really a question of fact of the kind considered by Nolan J. As Hathaway, op. cit. went on to say (at 134) after the passage cited by Davies J.:

> "The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."

Hathaway cites the following from the UNHCR handbook (para.91):

> "The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

I agree. That is to say, if relocation is, in the particular circumstances, an unreasonable option, it should not be taken into account as an answer to a claim of persecution. In my view, as a matter of law, the delegate correctly identified this as the real issue in the present matter. It follows, in my view, that the question for the delegate was one of fact in that context. In turn, this became a question of proof; that is, had the appellant demonstrated, on the facts, that relocation was unreasonable?

(b) PROOF OF PERSECUTION

Proof of persecution in the context of an application for refugee status is a matter of some complexity. As Grahl-Madsen has noted (The Status of Refugees in International Law at 145-6), in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for, since it is a well-known fact that a person who claims to be a refugee may have difficulties in proving his allegations (cf. Gaudron J. in Chan at 413); and it would go counter to the principle of good faith in the interpretation and application of treaties if a contracting state "should place on a suppliant a burden of proof which he, in the nature of things, could not possibly cope with". This should not, however, lead to "an uncritical acceptance of any and all allegations made by suppliants".

In discussing the burden of proof, the Handbook on Procedures and Criteria for Determining Refugee Status (1979) published by the Office of the United Nations High Commissioner for Refugees takes a similar position (at pp.47-9). Although limits on the use of the handbook in the interpretation of the treaty were indicated by Mason C.J. in Chan (at 392), the Chief Justice went on to say (at 392) that he regarded the handbook "more as a practical guide for the use of those who are required to determine whether or not a person is a refugee".

In that context, the handbook states:

> "(2) Benefit of the doubt
>
> 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
>
> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."

Reference was made by the Supreme Court of Canada (La Forest J.) in Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1 at 23 to the existence of a presumption of a state's ability to protect and of objective unreasonability in a claimant's failure to avail himself of this protection. But in the present case, any such presumption was, for all practical purposes, displaced once the delegate accepted that the murder of the appellant's father and brother may have been for religious and political reasons.

(c) WAS A LEGAL ERROR ESTABLISHED HERE?

Whilst one can appreciate the practical sense in an administrative decision-maker adopting this kind of approach, it is another question whether it has been shown that the trial Judge erred in concluding that no error of law,

specifically Wednesbury irrationality on the part of the decision-maker, had been established here.

In my view, no such error on the part of his Honour has been shown. As Davies J. said, the real question for the decision-maker was one of fact, albeit secondary fact, involving a degree of judgment. In this regard, it may be thought, as the Chief Justice pointed out in argument, that the material submitted to the delegate on behalf of the appellant really lacked detail and thus cogency in seeking to explain why it was unreasonable for the appellant to relocate. For instance, no specific facts were sought to be established in terms of his health or otherwise to warrant the conclusion that relocation was an unreasonable option.

It is true that the delegate placed considerable weight on the views offered by DFAT on the matter and that one commentator has criticised the use of DFAT "information" in this connection (Savhri Taylor, "Australia's Interpretation of some elements of Article 1A(2) of the Refugee Convention" (1994) 16 Syd. Law Rev. 32 at 70). On the other hand, whilst specific matters of fact are always for the court to decide, it is usual for the courts, without taking judicial notice, to give considerable weight to rulings of the executive arm of Government in some international areas (see P.B. Carter, "Judicial Notice: Related and Unrelated Matters" in "Well and Truly Tried", Essays on evidence in honour of Sir Richard

Eggleston (edited by Campbell and Waller) at 91-2; Phipson on Evidence, 14th ed. at 35-6). I can see nothing wrong, in principle, in the delegate relying on the opinions of DFAT in the present matter provided the delegate, as decision-maker, is not merely acting at the dictate of DFAT (cf. The Queen v Anderson; Ex parte Ipec-Air Pty Limited (1965) 113 CLR 177 per Kitto J. at 192-3). No such abdication of responsibility could be seriously suggested there.

As Lord Templeman has pointed out (Reg. v Home Secretary; Ex parte Sivakumaran [1988] AC 958 at 996):

> "Danger from persecution is obviously a matter of degree and judgment."

The nature of such an inquiry must be taken into account in any application for judicial review. Whilst there is some force in the appellant's criticism of the generality and consequent lack of specificity in the delegate's reasoning on the critical question whether it was unreasonable for the appellant to relocate, the context, that is, the generalised character of the appellant's own material itself, must be taken into account. Although this is a difficult case and a finely balanced one, I am not persuaded that Davies J. erred in refusing to set aside the delegate's decision.

ORDERS PROPOSED

In the result, I would propose that the appeal be dismissed, with costs.

I certify that this and the preceding nineteen (19) pages are a true copy of the Reasons for Judgment herein of his Honour Mr. Justice Beaumont.

Associate

Dated: 11 August 1994

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) NG 994 of 1993
)
GENERAL DIVISION)

On an appeal from a single judge of the Federal Court of Australia

HARJIT SINGH RANDHAWA
Appellant

THE MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS
Respondent

Coram: Black CJ, Beaumont and Whitlam JJ
Place: Sydney
Date: 11 August 1994

WHITLAM J.

REASONS FOR JUDGMENT

I have had the advantage of reading in draft the judgments of Black CJ and Beaumont J. I agree that for the reasons they give the appeal should be dismissed, and I wish to add only a few comments.

Each of my colleagues refers with approval to the restriction on the application of the so-called "internal protection principle" identified by Professor Hathaway. To the extent that they may differ in endorsing the statement in paragraph 91 of the UNHCR Handbook, I respectfully agree with the way in which Black CJ suggests that the question of relocation should be approached. It is important, in my view, that a decision-maker

should focus on the Convention definition and not be distracted by unnecessary glosses. After all, as Beaumont J points out, references to so-called doctrines or principles of "safe haven" or "internal flight" are no more than convenient shorthand expressions. In R v. Immigration Appeal Tribunal Ex parte Jonah [1985] ImmAR 7 there was no discussion of any such "principles". Yet, by fixing on the very words of the statutory instrument, the court took what I would respectfully regard as a sensible "whole country" view of the facts.

Proof of persecution will often be difficult. The UNHCR Handbook acknowledges this problem and sets out procedures for the determination of refugee status. Beaumont J has referred particularly to paragraphs 203 and 204. His Honour notes that in the present case the delegate accepted the appellant's "story" of the reasons for the deaths of his father and his brother. Nonetheless, I think that it is worth emphasizing that what Black CJ says about a decision-maker's task being largely determined by the case sought to be made out by an applicant applies to all aspects of such a case, both personal circumstances and what might be called "country conditions."

I certify that this and the preceding one page is a true copy of the Reasons for Judgment herein of the Honourable Mr Justice A P Whitlam

Associate

Date 11 August 1994

Appearances

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Counsel for the respondent: instructed by	Paul Roberts and Ms S.J. Welsman Australian Government Solicitors
Date of hearing:	19 May 1994