FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v Sarrazola [1999] FCA 1134

MIGRATION – *Migration Act 1958* (Cth) – application for protection visa – whether error of law – more than one motivation for persecution – family as particular social group – whether need to establish link to further Convention reason

Migration Act 1958 (Cth) s 476(1)(e)

Chokov v Minister for Immigration and Multicultural Affairs [1999] FCA 823, applied

Kanagasbai v Minister for Immigration and Multicultural Affairs [1999] FCA 205, applied

Okere v Minister for Immigration and Multicultural Affairs (1998) 157 ALR 678, applied

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565, considered

Perampalam v Minister for Immigration and Multicultural Affairs [1999] FCA 165, applied

Martinez v Secretary of State for the Home Department [1997] Imm. AR 227, not followed

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

Minister for Immigration and Multicultural Affairs v Zamora (1998) 51 ALD 1, approved

Islam v Secretary of State for the Home Department [1999] 2 WLR 1015, considered

James v Eastleigh Borough Council [1990] 2 AC 751, discussed

Commonwealth v Human Rights and Equal Opportunity Commission (1998) 76 FCR 513, applied

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v FENNEY SOFIA REDONDO SARRAZOLA

N 191 of 1999

EINFELD, MOORE and BRANSON JJ

SYDNEY

6 OCTOBER 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 191 of 1999

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	FENNEY SOFIA REDONDO SARRAZOLA Respondent

JUDGES:	EINFELD, MOORE and BRANSON JJ
DATE OF ORDER:	6 OCTOBER 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 191 of 1999

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	FENNEY SOFIA REDONDO SARRAZOLA Respondent

JUDGES:	EINFELD, MOORE and BRANSON JJ

DATE:	6 OCTOBER 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

EINFELD, MOORE and BRANSON JJ

INTRODUCTION

1 This is an appeal from a decision of a judge of this Court (Hely J) whereby his Honour set aside a decision of the Refugee Review Tribunal ("the Tribunal") which affirmed a decision of a delegate of the applicant that the respondent was not entitled to a protection visa. His Honour remitted the matter to the Tribunal for determination according to law.

2 The respondent is, for present purposes, entitled to a protection visa if the Tribunal is satisfied that she is 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 …" (Article 1A(2) of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together hereafter referred to as the "Convention")).

BACKGROUND FACTS

3 The respondent is a citizen of Colombia who is in Australia with her husband and children. The Tribunal found that the respondent and the other members of her immediate family had, while in Colombia, received financial demands from, and been threatened by, criminals who were responsible for the death of her brother. The respondent's brother had a background of criminal involvement. The evidence of the respondent (who was the applicant before the Tribunal) as to the threats against her and her immediate family was summarised by the Tribunal in the following passage from its reasons for decision:

"The Applicant stated that in January 1996 a stranger came to their house, stated that he was from the group responsible for her brother's death, and stated that as his relatives they were now responsible for the money her brother had owed them. The man demanded that they sell their house in order to pay him and threatened to kill their children if they did not comply. …

The Applicant stated that in late February 1996, the same man again came to their house, and repeated his demands and threats."

4 The Tribunal accepted the respondent's evidence, including her evidence which established that the Colombian authorities were either unable or unwilling to provide her with any meaningful protection.

TRIBUNAL'S REASONS FOR DECISION

5 In considering the respondent's claim to be entitled to a protection visa, the Tribunal noted that there was nothing at all in the evidence to suggest that the criminals involved in the respondent's brother's death, and the subsequent threats to the respondent and her immediate family, were in any way motivated against the respondent's brother for a Convention reason (ie for reason of his race, religion, nationality, political opinion or membership of a particular social group). After giving consideration to certain authorities, the Tribunal concluded:

"Although it is well recognised that members of a particular family are capable of constituting a particular social group, the case law tends to support the conclusion that the Convention was not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition, the motivation for the harm feared is essentially a personal matter and the main target of the persecution falls outside the scope of the Convention.

This view accords with common sense. It would make a nonsense of the Convention if in such circumstances an applicant were to be found to be a refugee notwithstanding that the harm feared by the main target (in this instance, her brother) fell outside its scope.

In any event, the Tribunal is not satisfied that in this case the financial demands and accompanying threats directed against the Applicant can be said to be motivated by a purpose or desire to harm the Applicant by reason of her family membership or relationship to her brother as such. Rather, the criminals' concerns were motivated by self-interest to recover the money they believed was owing to them by the Applicant's deceased brother from the obvious target of opportunity, a sister (and her husband) who owned a house. The Tribunal is satisfied that had the deceased brother had a business partner with assets, and a sister with no assets, the criminals

would have pursued the business partner and given no further thought to the Applicant. …

To the extent that the Applicant believes that these criminals will now harm or kill her on return to Colombia because she has ignored their instructions by not paying the money demanded, by informing the authorities and by leaving the country, this harm or danger is not motivated by any Convention reason.

Having regard to all the circumstances, the Tribunal is therefore not satisfied that the harm feared by the Applicant and her husband on return to Colombia arises (even in part) for a Convention reason."

PRIMARY JUDGE'S REASONS FOR JUDGMENT

6 Hely J observed that the Tribunal did not express a conclusion as to whether or not the respondent was relevantly a member of a *particular social group* within the meaning of Article 1A of the Convention. However, with respect to the Tribunal's conclusion that the Convention is not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention, his Honour said:

"Neither the text of the Convention, nor the context object or purpose of the treaty supports the approach adopted by RRT in relation to its first reason. Indeed I did not understand counsel for the respondent to support that approach. Rather, she approached the matter on the basis that RRT's errors in this respect were immaterial, because RRT did not base its ultimate decision on this point."

7 His Honour observed that whether or not any particular family constitutes a particular social group for the purposes of the Convention will depend upon the circumstances of the particular case. Whether there is a particular social group, and if there is, what its composition is, are questions of fact for the Tribunal. Hely J observed that the Tribunal had not made relevant findings of fact as it found that the applicant was not a refugee on another ground.

8 As to the finding by the Tribunal that the reasons for the applicant's well-founded fear of persecution was extortion associated with the attempted recovery of her deceased brother's debt, his Honour said:

"This reason for the applicant's fear of persecution necessarily incorporates three notions:

- A debt is owed to the criminals,

- The debtor is the applicant's deceased brother,

- the attitude of the persecutors … is that his relatives are now responsible for payment of the brother's debt.

These notions are inextricably linked. It is only when regard is had to the combination that the reasons for the applicant's fear of persecution emerges. Once this is accepted, it was not open to RRT to conclude that:

> 'the Tribunal is … not satisfied that the harm feared by the applicant and her husband on return to Colombia arises **(even in part)** for a Convention reason' [DRD p13, emphasis added]."

GROUNDS OF APPEAL

9 The appellant's grounds of appeal as set out in his notice of appeal read as follows:

"1. The appellant appeals from the whole of the judgment of Hely J given on 17 February 1999. …

2. His Honour erred in holding that the operative reason given by the Refugee Review Tribunal revealed an error of law in that:

(a) his Honour held that the fear of persecution was not merely a fear of extortion but recovery of a debt of the respondent's deceased brother;

(b) accordingly, the persecutors would "fix upon [the respondent] for repayment and the reason for doing so is her membership of the same family as the deceased";

(c) the persecution is therefore by reason of her membership of a particular social group, namely her family; and

(d) in the circumstances of the case, the family of the respondent constituted a particular social group.

3. His Honour erred in failing to hold that:

(a) while threats made against the respondent should she fail to pay an alleged debt concerned a debt owed by her deceased brother, the threats were not motivated by her membership of a particular social group, namely her family;

(b) given the purpose of the persecution, namely the recovery of the alleged debt of the deceased brother, the family of the respondent was not a particular social group for the purposes of the Refugees Convention; and

(c) the decision of the Refugee Review Tribunal was not attended by any error of law."

10 It may be observed that these grounds of appeal are confusingly drafted and provide little assistance in identifying the issues of law sought to be raised by the appellant.

CONTENTIONS OF THE APPELLANT

11 Mr Basten QC, counsel for the appellant, relied on two principal contentions. First, that since the identification of the motivation of the persecutors was entirely a matter of fact to be determined by the Tribunal, it was not open to the primary judge to reach his own conclusion as to the motivation of the persecutors and disregard the finding of the Tribunal. Secondly, that although it is not impossible for a family group to constitute a *particular social group* within the meaning of Article 1A of the

Convention, the primary judge ought to have found that the family of the respondent's deceased brother, however delimited, could not relevantly constitute a particular social group within the meaning of the Convention.

CONSIDERATION

12 Section 476(1)(e) of the *Migration Act 1958* (Cth) (the "Act") provides that an application may be made to this Court for review of a decision of the Tribunal on the ground -

"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."

Motivation for Persecution

13 In its reasons for decision the Tribunal failed to recognise that one person may be motivated to persecute another for more than one reason. It appears to have acted on the basis that a finding that the criminals *were motivated by self-interest to recover the money they believed was owing to them by the Applicant's deceased brother* was necessarily inconsistent with a finding that they were motivated by a *purpose or desire to harm the Applicant by reason of her family membership or relationship to her brother as such.*

14 As Einfeld J pointed out in *Chokov v Minister for Immigration and Multicultural Affairs* [1999] FCA 823 at para 30 in the context of extortion by the Chechen mafia:

"… the Chechen mafia may have chosen to extort Mr Chokov as opposed to another person because of his association with his Chechen wife and the attacks may also have been motivated by the criminal procurement of money. The existence of a criminal motive does not mean that the crimes were not also related to Mrs Chokova's [sic] national origins."

15 In *Kanagasbai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205 at para 20 Branson J said:

"I further consider it appropriate to note that, for the reasons discussed by me in Okere v Minister for Immigration and Multicultural Affairs (1998) 157 ALR 678, the Tribunal's finding that the motivation of those who harassed the applicant was to obtain money is not necessarily inconsistent with a finding that the applicant was harassed for reasons of her race or political opinion. It is, of course, the case that extortion based on a perception of the victim's personal wealth, or otherwise aimed at the victim as an individual, will not amount to persecution for a Refugees Convention reason (Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 at 568-9). However, in this case there was material before the Tribunal capable of supporting a finding that the applicant was selected as a target for extortion by reason of her race or political opinion. That is, it was open to the Tribunal to find that whilst the aim of the harassers was to obtain money from the applicant, the true reason why she was selected for harassment was her race or political opinion."

16 The position was perhaps put more succinctly by the Full Court in *Perampalam v Minister for Immigration and Multicultural Affairs* [1999] FCA 165 in para 16 where their Honours said:

"Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and Ram does not suggest it can."

17 In adopting the approach that a finding that the criminals were motivated by a desire to recover the money that they believed was owing to them by the respondent's brother was inconsistent with a finding that the criminals were motivated by a desire to harm the respondent by reason of her relationship to her brother, the Tribunal, in our view, made an error of law of the kind referred to in s 476(1)(e) of the Act.

Particular Social Group

18 However, the finding of the Tribunal that the harm feared by the respondent and her family should they return to Colombia does not arise, even in part, for a Convention reason, was only one of two alternative bases upon which the Tribunal concluded that the respondent is not entitled to a protection visa. The other basis for its finding was that a family can only be a particular social group if it is linked to a broader group identified by one of the other Convention criteria. It was in this context that the Tribunal observed, in effect, that it would be absurd if the family members of a person who was the main target of persecutors could be found to be refugees although the target person himself or herself could not.

19 It may be that in expressing this view the Tribunal was influenced by the decision of the Court of Appeal (UK) in *Martinez v Secretary of State for the Home Department* [1997] Imm. AR 227, although no express reference to

the decision is contained in the Tribunal's reasons for decision. In the *Martinez* case, at 229 Thorpe LJ said:

"… in this case the Martinez family is not being persecuted because of being the Martinez family. The persecution is directly linked to the actions of the stepfather and his refusal to join the Mafia. The only interest in any of the Martinez family is because of that act. That being so we agree with Mrs Sargent that it would be absurd that a member of a family of a person threatened would be within the ambit of the Convention when the person threatened would fall outside the Convention. Where a claim is made therefore as a member of the family it is critical to identify the root of the threat and to decide whether that root is the family itself or a particular member of the family. In the later case any Convention foundation for the claim must be ancillary to and dependent on that of the person threatened. The fact that a member of the family cannot leave that family does not of itself create a social group – the inability to change a characteristic may be an essential element of a social group but it does not of itself create one."

20 Having regard to the Australian authorities (see particularly *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 and *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 51 ALD 1) the approach to be adopted by an Australian decision-maker when considering a claim that an applicant has a well-founded fear of persecution for reason of membership of a particular social group is, in our view, different from that adopted by Thorpe LJ.

21 Where an applicant for a protection visa bases his or her claim on a fear of persecution for reason of membership of the relevant social group the first issue to be determined by an Australian decision-maker is that of the identification of the relevant social group.

22 In *Zamora* at pp6-7 the Full Court expressed the view that *Applicant A* is authority for the following proposition:

"To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the group. Second, that characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community."

23 It is only after the relevant particular social group, if any, has been identified that a decision maker can sensibly give consideration to the question whether the applicant has a well-founded fear of persecution *for reason of* his

or her membership of that particular social group. As was pointed out by Dawson J in *Applicant A* at p240:

"The words 'for reasons of' require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution".

24 In the context of family members being persecuted for reason of one family member having refused to join the mafia (the factual circumstances considered in *Martinez*), the first question for an Australian decision-maker would be whether, independently of the persecution being experienced by the family members, the family was recognised within society as a group, or as part of a group, set apart from the rest of society.

25 It may be that such a case might be found in a society in which the recruitment activities of the mafia were publicly known, and in which the retaliatory actions of the mafia against persons who rebuffed invitations to join it were so notorious, that the families of those persons had become recognised in the society as together constituting a particular social group (see the hypothetical consideration by McHugh J in *Applicant A* at p264 of persecuted "left-handed men"). If an applicant in such circumstances had a well-founded fear of persecution for reason of being a member of the particular social group constituted by the families of persons who had rebuffed invitations to join the mafia, it would be illogical and wrong, in our view, to engage in the further refinement of asking whether the applicant was fearful of being persecuted by reason of a personal link with an individual who had rebuffed the mafia or by reason of his or her membership of the social group. So much was, it seems to us, recognised by Lord Steyn in *Islam v Secretary of State for the Home Department* [1999] 2 WLR 1015 at 1028 where his Lordship said:

"Having concluded on a twofold basis that the appellants are within the scope of the words 'particular social group', it is necessary to consider whether they have a well-founded fear of being persecuted 'for reasons of' their membership of the group in question. A question of causation is involved. Here a further legal issue arose. Counsel for the appellants argued that a 'but for' test is applicable. He relied on the adoption of such a test in the sex discrimination field: see James v Eastleigh Borough Council [1990] 2 AC 751; and compare Hathaway, The Law of Refugee Status, at p140. Counsel for the Secretary of State challenged this submission. He argued that in the different context of issues of refugee status the test of effective cause – and there may be more than one effective cause – is the correct one. In the present case it makes no difference which test is applied. It matters not whether causation is approached from the vantage point of the wider or narrower social group I have identified. In either event it is plain that the admitted well founded fear of the two women is 'for reasons' of their membership of the social group. Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but

because of the hostility of their husbands is unrealistic. And that is so irrespective whether a 'but for' test, or an effective cause test, is adopted. In these circumstances the legal issue regarding the test of causation, which did not loom large on this appeal, need not be decided."

26 To the extent that Morritt and Roch LJJ in *Martinez* adopt the same approach as that adopted by Thorpe LJ in the same case, their Lordships' reasons for judgment, in our view, similarly provide inappropriate guidance in the context of the Australian law in this area.

27 We agree with Hely J that the conclusion of the Tribunal, referred to in para 5 above, that "the Convention was not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition" is entirely unsupported by authority. We do not read even the judgment of Thorpe LJ in *Martinez* as providing support for this view. The point which we understand to have been advanced at the end of the passage set out in para 19 is that a member of the family of a person threatened for a Convention reason, who is himself or herself at risk because of the family relationship, may have a claim under the Convention, which is ancillary to and dependent on that of the person threatened, on the same ground as the person threatened.

28 In acting on the basis that the Refugees Convention is "not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition" the Tribunal, in our view, made a further error of law of the kind referred to in s 476(1)(e) of the Act.

Should the matter be remitted to the Tribunal?

29 It follows that, in our view, the decision of the Tribunal on each of the bases to which it gave consideration "involved an error of law, being an error involving an incorrect interpretation of the applicable law" (s 476(1)(e)).

30 The appellant contended that, should the Court come to the above conclusion, it should nonetheless not remit the matter to the Tribunal for reconsideration. This contention was based on the submission that the Tribunal on such remitter would not be entitled to make a finding that the family of the respondent's deceased brother, however delimited, constitutes a particular social group within the meaning of Article 1A of the Convention.

31 As the discussion above indicates, the way in which a social group is defined can be of crucial importance, not only to the issue of whether it is a *particular social group* within the meaning of Article 1A of the Convention, but

also to the issue of whether the feared persecution is persecution motivated *for reason of* the applicant's membership of the particular social group. In our view, in the absence of consideration by the Tribunal of the question of whether the respondent is a member of a particular social group, and if she is, of the definition of that social group, it cannot be said by this Court that there is no basis upon which the Tribunal could find that the respondent is a member of particular social group. That is, we are not satisfied that it has been shown that the errors of law made by the Tribunal could not have affected the outcome of this matter (*Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 per Burchett J at 519).

CONCLUSION

32 In our view the appeal should be dismissed with costs.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Einfeld, Moore and Branson.

Associate:

Dated: 6 October 1999

Counsel for the Applicant:	Mr J. Basten QC
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr R.T. Beech-Jones
Solicitor for the Respondent:	McDonells, Solicitors
Date of Hearing:	9 August 1999

Date of Judgment:	6 October 1999