

FEDERAL COURT OF AUSTRALIA

SGKB v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCAFC 44

MIGRATION – protection visa - review under s 476 *Migration Act 1958* (Cth) – whether the Refugee Review Tribunal erred in law – whether well-founded fear of political persecution – whether well-founded fear of religious persecution – whether subjective and objective fear of religious persecution was well-founded.

Migration Act 1958 (Cth) ss 475(1), 476, 476(1)

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 applied

**SGKB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS**

S 201 OF 2002

SPENDER, DOWSETT & SELWAY JJ

18 MARCH 2003

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY

S 201 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	SGKB APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	SPENDER, DOWSETT & SELWAY JJ
DATE OF ORDER:	18 MARCH 2003
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by Mansfield J on 9 August 2002 be set aside.
3. The decision of the Tribunal be set aside and the matter remitted for further consideration.
4. The Minister pay the appellant's costs of the proceedings at first instance and of this appeal.

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

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BETWEEN: SGKB
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INDIGENOUS AFFAIRS
RESPONDENT

JUDGES: SPENDER, DOWSETT & SELWAY JJ

DATE: 18 MARCH 2003

PLACE: ADELAIDE

REASONS FOR JUDGMENT

THE COURT:

Introduction

¹ The appellant, a citizen of Iran, arrived in Australia on 26 March 2000. On 28 June 2000 he applied for a protection visa pursuant to the *Migration Act 1958* (Cth) (the “Act”). On 13 November 2000 the application was refused by a delegate of the respondent (the “Minister”). That decision was affirmed by the Refugee Review Tribunal (the “Tribunal”) on 23 May 2001. The appellant sought review of that decision pursuant to subs 475(1) of the Act as it then stood. He was unsuccessful and now appeals.

2 It is common ground that the subsequent amendments to the Act (which took effect from 2 October 2001) do not apply for present purposes. The available grounds of appeal are as prescribed in s 476 as it was prior to those amendments. The relevant question for the Tribunal was whether or not the appellant was 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; ... ”

3 The appellant initially claimed that he held such a fear because of his political opinions and because of activities engaged in by him in support of such opinions whilst in Iran. At a relatively late stage in proceedings, he disclosed that he had been converted to Christianity whilst in Australia and claimed that he had a well-founded fear of persecution because of his conversion. He appeals only against that aspect of the judgment below which dealt with his claimed fear of religious persecution. However the Tribunal's view of his earlier claim to fear political persecution may have influenced its decision concerning his fear of religious persecution. It is therefore appropriate to say something about his former claim.

Political opinions, actions AND CONSEQUENCES

4 The appellant gave evidence to the following effect. He was born in Tehran on 23 July 1963 and left that country in February 2000, travelling on a valid passport in his own name. The passport had been renewed in 1999, without difficulty and without bribery. He disposed of it before entering Australia and claimed that if he returned to Iran, he would have no identification or travel document issued by that country, adding to the risk of his suffering persecution for political reasons. His parents and siblings still live in Tehran. His father is a musician and, since 1979, has been persecuted for that reason. In 1981 the appellant, his father and his brother were apprehended and beaten. The appellant became politically active in 1989 and continued to be active until he left Iran. He was a known opponent of the government. His political profile was raised by an incident in 1989 involving a disagreement between his family and a neighbour who worked in the intelligence service. As a result of this incident, the appellant was shot in the right elbow. Thereafter, he and his family were dealt with by the Evin Revolutionary Court. He claimed to have been tortured psychologically and physically. Medical evidence supported his claim to have suffered a gun-shot wound to the right elbow. In 1990 the appellant qualified for admission to university but was not permitted to commence his course, allegedly because of his political activity. He claimed that he was also refused a work permit, but he continued to operate a motorcycle repair business by paying bribes to local authorities.

5 In 1990, the appellant's fiancée was killed in a motor vehicle accident which was allegedly caused by the religious police who objected to the fact that she was wearing makeup. Thereafter, he continued his political activities for almost ten years, although not publicly. During this period he was, from time to time, subjected to routine identity checks. In July 1999 he participated in three days of student demonstrations. These demonstrations are well documented. He was subsequently told that his name was on a list of persons to be arrested. As a result of this he went into hiding for about six months. Shortly thereafter, the internal security police searched his home. However his brother had destroyed relevant documents. The appellant claimed that he had written a number of anti-government letters to a newspaper. They were published without disclosing his identity. He also pasted anti-government posters on walls.

6 Whilst in hiding he learned that his name was not on the blacklist at the national airport. He was therefore able to leave the country on 16 February 2000. Since leaving Iran, he has been told that on 5 February 2000, a summons was issued against him in the Revolutionary Court. He also claimed to have received a letter from his family, reporting the arrest of a friend with whom he had been politically active. That person attributed certain material found in his home to the appellant. The appellant has also learnt that his father was arrested and detained for one week before being released on bail.

7 Medical evidence indicated that the appellant had suffered a bullet-wound to his right elbow and had a slash scar on his left thigh. In his initial interview for immigration purposes, he did not mention these wounds. When asked to explain this omission, he said that he had been under the influence of medication and not fully alert. Further, a female interpreter had been present.

Religion

8 Some time after the Tribunal hearing, he was converted to Christianity. He was baptized at the Roman Catholic Church in Woomera on 29 March 2001. He now claims to fear persecution for religious reasons, should he return to Iran. There was substantial evidence concerning the treatment of Christians in Iran, which evidence we will outline at a later stage.

Tribunal's reasons

Fear of Political persecution

9 The Tribunal's rejection of the appellant's claimed fear of political persecution was largely dependent upon its rejection of him as a reliable witness. There were cogent reasons for such rejection. Firstly, his alleged involvement in the 1999 demonstrations was a key aspect of his claim. However he had not mentioned such involvement when first asked to identify the key factors which caused him to fear returning to Iran. Secondly,

he gave inconsistent answers concerning his motor cycle repair business. At one stage he said that he had ceased to conduct such business in January 1999. Later, he said that he had done so in July or August of that year. On another occasion he identified the relevant time as June 1999. As this event presumably coincided with his claimed participation in the 1999 demonstrations and his subsequently going into hiding, such inconsistency could legitimately be given substantial weight. Thirdly, the Tribunal was concerned by the fact that the appellant had left Iran on his own passport and in his own name, notwithstanding his assertion that he was wanted for participating in the demonstrations. He said that he had been identified at the demonstrations by appearance rather than name. The Tribunal considered that this was inconsistent with an earlier statement that he had been identified by name. When this inconsistency was put to him, he said that he was listed on the airport blacklist under a former family name. He had previously said that he was not on the airport blacklist. Various explanations were given for these apparent inconsistencies, but the Tribunal considered them to be unsatisfactory. That view cannot be criticized in these proceedings.

10 Fourthly, there was an inconsistency in his evidence as to the way in which he had obtained information concerning the airport blacklist. At one stage he said that he had used a friend to obtain relevant information; at another, that his brother had obtained it through a friend. Although such inconsistency might be explained, particularly having regard to the fact that English is presumably not the appellant's first language, the matter was significant for present purposes. The Tribunal was entitled to attach weight to such inconsistency.

11 Fifthly, the appellant had made inconsistent statements concerning use of his family name. In the end, the Tribunal was not satisfied that he had been active in distributing political material in 1998 and 1999.

12 Although the medical evidence was consistent with one of the appellant's claims, it did not prove that claim. The only evidence explaining his injuries came from the appellant. In the end the Tribunal was not willing to accept such evidence. It also rejected a document produced by him at a relatively late stage in proceedings, which document was said to be the summons issued on 5 February 2000. It was first produced to the Tribunal in January 2001. The identification of the document depended upon the appellant's evidence. The Tribunal was not willing to accept that evidence. To some extent it seems to have been influenced in reaching this conclusion by the late production of the document. Again, there can be no criticism of the Tribunal for taking this approach. The rejection of the appellant's evidence led inevitably to the conclusion that there was no basis for his claim that he had a well-founded fear of persecution on account of his political opinions or activities.

Fear of Religious persecution

13 The Tribunal accepted that the appellant had been converted to Christianity and that he feared persecution for such conversion, should he

return to Iran. However it concluded that he would not be at risk of persecution and that his fear was not well-founded. The basis for this conclusion appears to have been the view that only a convert who discloses his or her conversion is likely to encounter difficulty, and that the appellant was unlikely to do so.

14 The evidence concerning religious persecution is summarized below. The summary is based on the Tribunal's reasons and those of Mansfield J. His Honour appears to have had access to the country information which was before the Tribunal. The evidence showed that:

- There is some persecution of dissident clerics (presumably Islamic) and of some religious activities.
- Christians are subject to harassment.
- Some "ethnic" Christians are treated better than Iranian Christians.
- Whilst the penalty for apostasy from Islam may be death, it is only rarely imposed. Such a sentence was last passed in early 1992 . The offender was granted a reprieve but subsequently murdered.
- Those converts from Islam "*... who go about their devotions quietly are generally not disturbed ...*".
- Harassment by the local mosque is more likely than harassment by the authorities.
- Converts, "*... in almost all cases ...*" do not experience problems unless they declare their new religious affiliation upon return to Iran.
- Converts to Christianity are generally tolerated so long as they maintain very low profiles.
- Converts working in government and revolutionary organizations face harassment and even dismissal if it becomes known that they have converted.

15 Mansfield J considered that the Tribunal had accepted "*... that, if the applicant's conversion ... might become known to the authorities in Iran, he would have a well-founded fear of persecution if he returned there.*" Although such a finding is not express, it is probably implicit in the Tribunal's reasons. However it also found that the appellant would not draw his conversion to the authorities' attention, and that he would therefore not suffer harm. Thus, his fears were not well-founded.

16 In some ways the evidence concerning religious persecution posed more questions than it answered. The evidence indicated that a returnee to Iran who declared his or her conversion to the authorities might incur adverse consequences. This may imply that the consequences for a convert will be

different, depending upon whether he or she declares the conversion to authorities upon return or the authorities find out about it by other means and at a later time. However the fact that “low profile” converts are unlikely to “... *run into difficulties* ...” with the authorities or with the local mosque, suggests that it is not so much the formal declaration as the extent to which such conversion is publicized which will determine the likelihood of harassment.

17 The focus upon the death penalty and the relative infrequency with which it has been imposed tends to mask the possibility of lesser forms of harassment which might amount to persecution. His Honour’s finding at [51] that “... *converts ... working in Government and revolutionary organisations face harassment and even dismissal if it becomes known that they have converted*” demonstrates this possibility. It cannot be suggested that because the appellant focussed upon the death penalty in his letter to the Tribunal, he was not also fearful of lesser levels of harassment, motivated by his conversion. It is also of importance that the evidence disclosed the risk of harassment by the “local mosque” as well as by government authorities. Finally, whilst it may be possible for a person to practise his or her religion quietly and to refrain from informing the authorities of his or her conversion, that does not mean that the authorities will not find out about it.

18 The Tribunal was required to determine whether or not the appellant’s subjective fear of persecution was well-founded. This question was to be considered in light of the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-2, where six members of the Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) said:

“An applicant for refugee status must also establish that his or her fear of persecution for a Convention reason is a ‘well-founded’ fear. This element adds an objective requirement to the requirement that an applicant must in fact hold such a fear. In *Chan* [(1989) 169 CLR 379 at 389], Mason CJ said:

‘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 per cent chance of persecution occurring.’

In the same case, McHugh J said ... that a real chance of persecution excluded a far-fetched possibility of persecution but that as little as a 10 per cent chance of persecution may constitute a well-founded fear of persecution.

Chan is an important decision of this Court because it establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent. But to use the real chance test as a substitute for the Convention term ‘well-founded fear’ is to invite error.

No doubt in most, perhaps all, cases ... the application of the real chance test, properly understood as the clarification of the phrase ‘well-founded’, leads to

the same result as a direct application of that phrase. ... Nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. ... A fear is 'well-founded' when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the Tribunal and the Federal Court have used the term 'real chance' not as epexegetic of 'well-founded', but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

19 In the present case the Tribunal disposed of the appellant's fear of religious persecution as follows:

"In respect of the Applicant's claim to fear persecution for having converted to Christianity, the Tribunal acknowledges that he has been baptised and has become a faithful member of the Christian group in the Seirra Compound. Having had the opportunity to make an assessment of the Applicant and his likely conduct on return to Iran, the Tribunal does not consider that the Applicant will bring his conversion to the attention of the Iranian authorities on return or subsequently. The Tribunal has closely examined the country information available, which indicates little prospect of problems with the authorities unless a returnee declares on return his new affiliation. The Tribunal has concluded that the Applicant would not suffer harm because of his conversion, if returned to Iran. The Tribunal finds that the Applicant has no basis to fear return to Iran on this ground."

20 This passage causes some concern. Firstly, the Tribunal appears to have focussed upon the question of whether the appellant might "... *bring his conversion to the attention of the Iranian authorities on return or subsequently*" rather than upon the possibility that the authorities might discover such conversion. It may be that this was merely a shorthand way of saying that he would practise his religion in a way which would be unlikely to bring him to the attention of the authorities. However the subsequent observation that there was "... *little prospect of problems with the authorities unless a returnee declares on return his new affiliation*" suggests otherwise. Further, the evidence referred to by Mansfield J concerning government employees demonstrates that the risk of harassment may arise if the authorities find out about a conversion. The Tribunal appears to have considered only the consequences of a declaration of conversion by the appellant and not the consequences to him, should the authorities become aware of his conversion in some other way. The possibility of action by the local mosque was also not addressed.

21 Secondly, the Tribunal appears not to have considered the seriousness of the consequences to the appellant of his conversion becoming known to the authorities. The Tribunal accepted that the penalty for apostasy might be death. The evidence demonstrated other quite serious consequences, including loss of government employment. It ought to have considered whether or not the mere possibility of a death sentence, regardless of how remote that possibility might be, could itself constitute persecution. In our view, to live under the shadow of such a threat might well do so. Further, the Tribunal ought to have considered whether or not the risk of losing the opportunity of government employment was itself sufficient to constitute persecution. We say nothing about the possibility of mere harassment which appears to be an incident of practising the Christian faith rather than of conversion from Islam. His Honour considered that the appellant had not relied upon discriminatory conduct against Christians, as opposed to converts from Islam, as a justification for his fear.

22 Thirdly, the last two sentences of the paragraph quoted above suggest strongly that the Tribunal considered, not whether the appellant had a well-founded fear of persecution, but whether or not it was likely that he would suffer persecution. The two questions, although distinct, are closely related. Perhaps the Tribunal meant that its view as to the improbability of persecution led it to infer that the appellant's fear was not well-founded. However the Tribunal's apparent failure to consider the seriousness of the possible consequences of exposure suggests strongly that the Tribunal did not consider whether the appellant's fear was well-founded.

23 We accept that it is inappropriate to read the reasons with an unduly critical eye. At pages 3 and 4 of the reasons, the Tribunal directed itself correctly as to the appropriate test prescribed in *Guo*. Nonetheless the evidence disclosed at least a theoretical possibility of the death penalty and the more than theoretical chance of discrimination in government employment. The Tribunal could not determine whether the appellant's fear was well-founded without considering those matters, balancing their gravity against the relative improbability of their occurrence. These matters and the absence of any explanation as to how the Tribunal proceeded from its finding that the appellant would not suffer harm to the conclusion that his fear was not well-founded lead us to conclude that the Tribunal failed to evaluate the objective basis of his fear. The failure to deal with the distinction between the disclosure by the appellant of his conversion and discovery of it by other means also suggests that the Tribunal has not fully appreciated the difficulties posed by the evidence.

Decision of Mansfield J

24 This is an appeal from the decision of Mansfield J and not an appeal from the decision of the Tribunal. His Honour commenced his consideration of the religious aspect of the matter by observing that the Tribunal had apparently “... *accepted that, if the applicant's conversion to Christianity might become known to the authorities in Iran, he would have a well-founded fear of*

persecution if he returned there.” His Honour then referred to some of the evidence, concluding with this sentence:

“(The Tribunal) noted that converts are generally tolerated so long as they maintain a very low profile, but converts working in Government and revolutionary organisations face harassment and even dismissal if it becomes known that they have converted.”

He then noted that the appellant might have a well-founded fear of persecution by reason of his Christianity, as opposed to his conversion. The evidence certainly demonstrated discrimination against Christians, particularly non-ethnic Christians, but as we have said, his Honour took the view that the appellant had not suggested that his fear was of such discrimination. That rather narrow approach to the problem may well be correct.

25 However Mansfield J then noted that the Tribunal had found that the appellant would not bring his conversion to the attention of the Iranian authorities and that he would not suffer harm on account of his conversion. His Honour recognized that this finding was not “... *in the precise terms of the Convention* ...” but concluded that this approach did not demonstrate error. It is at this point that we disagree with his Honour. For reasons which we have previously given, we consider that the Tribunal failed to appreciate the distinction between the likelihood of the appellant suffering persecution and the objective justification of the appellant’s fear. In particular, we consider that the Tribunal failed to take into account the potential seriousness of the consequences to the appellant of exposure of his conversion or to consider his fear in that context. In so doing the Tribunal erred in law, applying the wrong test. The decision was therefore open to review pursuant to s 476(1).

Orders

26 The appeal must be allowed and the orders below set aside. The decision of the Tribunal should also be set aside and the matter remitted to it for further consideration. The Minister should pay the appellant’s costs of the proceedings below and of the appeal.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of The Court.

Associate:

Dated: 18 March 2003

Counsel for the Appellant: Mr S D Ower

Solicitor for the Appellant: Refugee Advocacy Service of South Australia, Inc

Counsel for the Respondent:	Ms M Maharaj
Solicitor for the Respondent:	Sparke Helmore
Dates of Hearing:	10 & 11 February 2003
Date of Judgment:	18 March 2003