FEDERAL COURT OF AUSTRALIA

SDAQ v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCAFC 120

MIGRATION – Application for refugee status – meaning of "refugee" – "fear of persecution" – subjective and objective elements – alleged failure to consider facts not specifically identified by appellant

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

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

Attorney-General of Canada and Ward, Re; United Nations High Commissioner for Refugees et al., Interveners 103 DLR (4th) 1 applied

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

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 cited

Emmanuels v Minister of Citizenship and Immigration 2002 FCT 865 applied

Horvath v Secretary of State for the Home Department [2000] INLR 15 followed

Horvath v Secretary of State for the Home Department [2001] 1 AC 489 followed

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

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 referred to

Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1 followed

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 325 cited

Osorio v Immigration and Naturalization Service 18 F3d 1017 (2d Cir, 1994) applied

Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 1 referred to

R (Sivakumar) v Secretary of State for the Home Department [2003] 1 WLR 840 followed

Reg v Immigration Appeal Tribunal; ex parte Shah [1999] 2 AC 629 followed

Saliba v Minister for Immigration and Ethnic Affairs (1998) 89 FCR 38 applied

Satheeskumar v Minister for Immigration and Multicultural Affairs [1999] FCA 1285 referred to

Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 applied

Sepet v Secretary of State for the Home Department [2003] 1 WLR 856 followed

JC Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991

SDAQ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

S94 OF 2002

COOPER, CARR AND FINKELSTEIN JJ

MELBOURNE (HEARD IN ADELAIDE)

30 MAY 2003

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S94 OF 2002

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	SDAQ
	APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	COOPER, CARR AND FINKELSTEIN JJ
DATE OF ORDER:	30 MAY 2003
WHERE MADE:	MELBOURNE (HEARD IN ADELAIDE)

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant pay the respondent's costs of the appeal, to be taxed if not agreed.

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

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S94 OF 2002

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	SDAQ APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	COOPER, CARR AND FINKELSTEIN JJ
DATE:	30 MAY 2003
PLACE:	MELBOURNE (HEARD IN ADELAIDE)

REASONS FOR JUDGMENT

cooper j

background

1 The appellant is an Iranian national. He arrived in Australia on or about 16 April 2001 and applied for a protection (Class XA) visa on 23 May 2001. A delegate of the Minister refused the application on 28 June 2001. The Refugee Review Tribunal ('the RRT') affirmed the decision to refuse to grant to him a protection visa on 27 August 2001.

2 The appellant applied to this Court on 21 September 2001 for an order of review of the RRT decision pursuant to s 476(1)(e) of the *Migration Act 1958* (Cth) ('the Act'). That application was dismissed with costs by Hill J. The appellant now seeks a review of this decision.

3 The appellant was represented by Counsel before Hill J. On the hearing of the present appeal, the appellant was unrepresented. However, during the appeal, it appeared that legal assistance may become available to him. Accordingly, after hearing the oral argument, leave was given to the appellant to file further written submissions if legal assistance was forthcoming in fact. Ultimately, written submissions prepared by Senior Counsel were filed on the appellant's behalf and responded to by Counsel on behalf of the respondent.

the case before hill j

4 Justice Hill summarised the case argued before him as follows:

‘[3] By an amended application filed at the time of the hearing the applicant relied upon three grounds of review [under] s 476(1) of the Migration Act 1958 (“the Act”), namely, error of law, want of jurisdiction or failing to take into account relevant factors. Each was, as counsel conceded, but a different way of raising the same issue. In essence, that issue lay in the failure, it was said, of the Tribunal to deal with an alternative way on which [SDAQ] put his case (or it might be said, could have put his case). That failure represented a constructive failure to exercise jurisdiction and involved an error of law in respect of which the Court has jurisdiction to review the decision under s 476(1) of the Act.

[4] The alternative case, upon which it is said that the Tribunal failed to rule and which failure constituted a constructive failure of jurisdiction was that the association between the applicant and his girlfriend (who was of the Baha’i faith) and between the applicant and other friends of the Baha’i faith was such as to give rise to a real chance that the applicant would have imputed to him the Baha’i beliefs and thus would have a real chance of his being persecuted on religious grounds.’

5 After reviewing the proceedings before the RRT, his Honour found that:

‘[22] ... In no way can it be said that the applicant based himself on a case where his fear of persecution on religious grounds arose from the imputation to him of Baha’i beliefs because of his friendship with his girlfriend or other friends who happened to have that faith. The only relevant case upon which the applicant based himself was a fear of persecution because of conversion (or rather, intended conversion) to the Baha’i faith.’

6 It was submitted before Hill J that the material and evidence before the RRT was sufficient to raise the case of persecution for imputed religious beliefs arising out of the appellant’s association with people of the Baha’i faith. It was further submitted that as this case was squarely raised on the materials, the RRT was obliged to determine it on its merits, notwithstanding that the appellant had not based his claim on such a case. In support of these submissions, Counsel for the appellant relied upon the decisions in *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 1; *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287 at 293 - 294; *Satheeskumar v Minister for Immigration and Multicultural Affairs* [1999] FCA 1285 at par [15].

7 Justice Hill found that the materials before the RRT did not raise the claimed alternative case and, accordingly, there was no jurisdictional error on the part of the RRT in failing to determine the said case. His Honour said:

‘[24] Counsel for the Minister submitted that the evidence and other material before the Tribunal did not raise the issue for two reasons. First, it was submitted, the applicant had never indicated that he had a subjective fear of persecution for a

Convention reason based upon imputed religious beliefs derived from his friendship with his girlfriend or other friends of the Baha'i faith. Secondly, it was submitted that the country information before the Tribunal did not raise material which would permit the Tribunal to conclude that any subjective fear which the applicant had of this kind was well founded.

[25] Counsel for the applicant submitted that the country information before the Tribunal was material from which the Tribunal would have been entitled to conclude that there was a real chance of persecution for the applicant if there was imputed to him the religious beliefs of his friends. He submitted, also, that the applicant had claimed fear of persecution, including execution, on religious grounds and that the imputation of religious beliefs was just one of a number of ways this fear of persecution could arise. So, it was submitted, the Tribunal erred in law in failing to deal with an issue, which on the face of the material before the Tribunal was raised, even if not squarely in submissions made by the applicant.

[26] So far as the second of these matter is concerned I think that the country material would suffice to permit the Tribunal to conclude that there was a real chance of the applicant being persecuted on religious grounds should the authorities in Iran input [sic] to him the Baha'i faith as a result of his association with his girlfriend and other friends. Whether it would so conclude would be a question of fact for the Tribunal to decide. The country material indicated that men married to Baha'is have difficulties in employment or promotion because of "unsound background". Baha'is have either to deny their faith or break the law, are at least theoretically denied full citizenship and suffer discrimination in all areas of society. Indeed the Department of Foreign Affairs and Trade considers that all genuine Baha'is have a legitimate case for seeking refugee status whether or not involved in politics.

[27] However, it must be recalled that for a person to fall within the Convention definition of a "refugee" the person must have a well-founded fear of persecution for a convention reason. That is to say, not only must there be, objectively, reasons for a fear of persecution but the person in question must actually have that fear for the particular convention reason. In the present case that means, in my opinion, that for an applicant to succeed, the applicant must not only satisfy the Tribunal on a review, that there would be imputed to the applicant the religious beliefs of those Baha'is with whom he is friendly, but that he has a subjective fear of persecution on religious grounds as a result of the religious beliefs that have been imputed to him. It must also be shown that there is objective evidence to show that that fear of persecution is well-founded.

[28] Absent, therefore, material before the Tribunal which the Tribunal was entitled to accept or reject that the applicant had a subjective fear of persecution because of

the imputation of the religious beliefs of his girlfriend and other Baha'i friends to him (ie on religious grounds) the evidence or other material before the Tribunal would not raise for consideration the alternative case which it is said that the Tribunal did not consider. The only relevant case that was raised before the Tribunal on the evidence and other material before it, which included the testimony of the applicant was a subjective fear of persecution on religious ground coming about from his intended conversion. That was the case which the Tribunal considered and rejected. In the circumstances of this case the evidence or other material simply did not raise the so-called alternative case which it was submitted the Tribunal failed to consider and which failure was submitted to involve reviewable error.'

For those reasons, his Honour dismissed the application with costs.

the case on appeal

8 It was submitted by Senior Counsel for the appellant in his written submission that Hill J erred in holding that it was necessary for the appellant to satisfy the RRT that '*... he has a subjective fear of persecution on religious grounds as a result of the religious beliefs that have been imputed to him*.' The error arose, it was submitted, because:

(a) a subjective fear is not an essential element of the definition of 'refugee' in Art 1A(2) of the *Convention Relating to the Status of Refugees* done at Geneva on 28 July 1951 as modified by the *Protocol Relating to the Status of Refugees* done at New York on 31 January 1967 ('the Convention'); or

(b) if a subjective fear is an essential element of the definition, then it does not need to be a precise subjective fear articulated by reference to the relevant Convention ground.

9 It was submitted that the definition of 'refugee' in the Convention contained two elements to be satisfied. First, that there is an inability or unwillingness to return to one's country of nationality. Second, that the cause of the inability or unwillingness to return result from a '*well founded fear of being persecuted*'. The additional requirements imposed by Hill J, it was submitted, were neither required or authorised by the definition of 'refugee'. It was further submitted that the High Court of Australia has never had occasion to determine that a subjective fear of persecution for a Convention reason was a necessary element in determining whether or not a person was a 'refugee' within the meaning of the Convention.

disposition of the appeal

10 Article 1A(2) of the Convention provides that a person will be a refugee if that person is one who:

'... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

11 The definition contains four key elements as held by the High Court of Australia in a joint judgment (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570, where their Honours said:

'**Elements of the Convention definition of "refugee"**

The definition of "refugee" in Art 1A(2) of the Convention contains four key elements: (1) the applicant must be outside his or her country of nationality; (2) the applicant must fear "persecution"; (3) the applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (4) the applicant must have a "well-founded" fear of persecution for one of the Convention reasons.'

(original emphasis)

In respect of the third element (persecution for a Convention reason) their Honours said (at 570):

'An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A(2) of the Convention.'

In respect of the fourth element, 'well-founded' fear of persecution for a Convention reason, their Honours said (at 571 - 572):

'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 433, 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."'

12 The definition of 'refugee' involves both subjective and objective elements. Elements (2) and (3) as identified by the High Court in *Guo* require the existence of a subjective fear of persecution, and it must be shown that this fear is held by the relevant person in fact and that this fear is a fear of

persecution for a Convention reason: see also the judgment of the High Court in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389, 396, 406, 429 and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 658. The objective element is introduced in the fourth element, which requires that the subjective fear objectively be 'well founded'.

13 The third element identified by the High Court in *Guo* requires that the applicant for refugee status makes out the nexus between his or her subjective fear of persecution and one or more of the Convention reasons. It is not sufficient for the purposes of the definition in Art 1A(2) of the Convention that the person has a well founded fear of being persecuted in his or her country of nationality. The feared persecution must be driven by one of the specified grounds in the Convention: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233, 244 - 245, 247 - 248, 257 - 258, 284; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 302 - 303.

14 The approach taken by the High Court in *Guo*, *Applicant A* and *Chen Shi Hai*, is also that taken by the House of Lords in the United Kingdom. In *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, Lord Bingham of Cornhill, with whom Lords Steyn, Hutton and Rodger of Earlsferry agreed, said (at 862 - 863):

'To make good their claim to asylum as refugees it was necessary for the applicants to show, to the standard of reasonable likelihood or real risk, (1) that they feared, if they had remained in or were returned to Turkey, that they would be persecuted (2) for one or more of the Convention reasons, and (3) that such fear was well-founded. Although it is no doubt true, as stated in Sandralingham v Secretary of State of the Home Department; Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97, 109, that the Convention definition raises a single composite question, analysis requires consideration of the constituent elements of the definition. At the heart of the definition lies the concept of persecution. It is when a person, suffering or fearing persecution in country A, flees to country B that it becomes the duty of country B to afford him (by the grant of asylum) the protection denied him by or under the laws of country A. History provides many examples of racial, religious, national, social and political minorities (sometimes even majorities) which have without doubt suffered persecution. But it is a strong word. Its dictionary definitions (save in their emphasis on religious persecution) accord with popular usage: "the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it;" "A particular course or period of systematic infliction of punishment directed against the professors of a (religious) belief": Oxford English Dictionary, 2nd ed (1989). Valuable guidance is given by Professor Hathaway (The Law of Refugee Stats (1991), p112) in a passage relied on by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [2001] 1 AC 489, 495: "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community." In this passage Professor Hathaway draws attention to a second requirement, no less important than that of showing persecution: the requirement to show, as a condition

of entitlement to recognition as a refugee, that the persecution feared will (in reasonable likelihood) be for one or more of the five Convention reasons. ...'.

15 What must the applicant for refugee status show to make the nexus between his or her fear of persecution and one or more of the Convention reasons? It is necessary to show that the persecution he or she fears will, in all reasonable likelihood, be for one or more of the five Convention reasons. Professor Hathaway (*The Law of Refugee Status*, 1991 at 112) describes this requirement as a condition to entitlement to refugee status. The requirement obliges a Tribunal to ask the question "*Why the applicant was, or fears he or she will be, persecuted?*" This was the question posed by McHugh J in *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, where his Honour said (at 33):

'[102] ... In this case, among the questions which the Tribunal should have asked were (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) why will the applicant be subjected to that harm? and (d) if the answer to (c) is "because of his membership of a particular social group", would the harm constitute persecution for the purpose of the Convention?'

16 The approach of McHugh J in *Ibrahim*, which was cited with approval by Lord Bingham of Cornhill in *Sepet* (at 872), requires that the question of nexus be addressed by inquiring as to the real reasons actuating the mind of the persecutor. In *Sepet*, Lord Bingham of Cornhill expressed the test in the following way (at 871 - 872):

'[22] ... In his judgment in Sivakumar v Secretary of State for the Home Department [2002] INLR 310, 317, para 23, Dyson LJ stated: "It is necessary for the person who is considering the claim for asylum to assess carefully the real reason for the persecution." This seems to me to be a clear, simple and workmanlike test which gives effect to the 1951 Convention provided that it is understood that the reason is the reason which operates in the mind of the persecutor and not the reason which the victim believes to be the reason for the persecution, and that there may be more than one real reason. The application of the test calls for the exercise of an objective judgment. Decision-makers are not concerned (subject to a qualification mentioned below) to explore the motives or purposes of those who have committed or may commit acts of persecution, nor the belief of the victim as to those motives or purposes. Having made the best assessment possible of all the facts and circumstances, they must label or categorise the reason for the persecution. The qualification mentioned is that where the reason for the persecution is or may be the imputation by the persecutors of a particular belief or opinion (or, for that matter, the attribution of a racial origin or nationality or membership of a particular social group) one is concerned not with the correctness of the matter imputed or attributed but with the belief of the persecutor: the real reason for the persecution of a victim may be the persecutor's belief that he holds extreme political opinions or adheres to a particular faith even if in truth the victim does not hold those opinions or belong to that faith. ...

[23] However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. That reason would, in this case, be the applicants' refusal to serve in the army. But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason. The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason for the persecutory treatment. ...'.

17 The same approach was taken by Lord Rodger of Earlsferry, with whom Lord Hoffman agreed, in *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840 at 854 where his Lordship said:

'[41] In a case like the present the task of the person considering a claim for asylum is therefore to assess carefully the reason or reasons for the persecution in the past and to draw the appropriate inference as to the reason or reasons for any possible persecution in the future. There is no rule that, if an applicant is to succeed, the decision-maker must be satisfied that the Convention reason was, or would be, the only reason for his persecution. In Suarez v Secretary of State for the Home Department [2002] 1 WLR 2663, 2672, para 29 Potter LJ said: 'so long as an applicant can establish that one of the motives of his persecutor is a Convention ground and that the applicant's reasonable fear relates to persecution on that ground, that will be sufficient.' Keene LJ and Sumner J agreed. Potter LJ's guidance is indeed valuable, provided that it is remembered that the law is concerned with the reasons for the persecution and not with the motives of the persecutor. For instance, the law is concerned with whether state officials may persecute someone because he is Jewish, but the motives of those officials for any such persecution - whether a desire to give effect to the theories of racial purity in Hitler's Mein Kampf or simple jealousy of the prosperity of the Jewish community - are irrelevant. So long as the decision-maker is satisfied that one of the reasons why the persecutor ill-treated the applicant was a Convention reason and the applicant's reasonable fear relates to persecution for that reason, that will be sufficient. Ex hypothesi any such reason will be an operative reason for the persecution - but, as in the fields of sex and race discrimination, there is little to be gained from dwelling unduly on the precise adjective to use to describe the reason: Nagarajan v London Regional Transport [2000] 1 AC 501, 512 - 513, per Lord Nicholls of Birkenhead.'

18 The proceedings under Pt 7 of the Act are not adversarial. There is no contradictor who joins issue upon all or any of the facts alleged by a claimant to refugee status. There is an ultimate question expressed in terms of the Convention definition of a refugee for determination by the RRT. That question requires that the RRT be satisfied that each of the elements applicable to the composite definition of a refugee is made out. Ordinarily, a claimant, for the purpose of satisfying the RRT that there should be a favourable resolution of the ultimate question, will give a history of past events and an account and justification of present fears: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 325 per Gleeson CJ at 330. The account and justification of the present fears may include a subjective belief that the feared treatment was, or would be, inflicted for a particular reason or

reasons which are Convention reasons. However, that subjective belief as to the reason for the feared treatment, unless the RRT is satisfied that it is, or there is a real chance that it is, the true reason is beside the point. The RRT will seek the reason, for the feared treatment by posing the questions stated by McHugh J in *Ibrahim*. The answers to those questions may reveal that the fear of persecutory treatment was for the reason the claimant articulated as his or her subjective belief, for a Convention reason unknown to the claimant, or, for a reason which is not a Convention reason, and thus one which would not entitle a claimant to refugee status: *Sepet* at 871 - 872; *Sivakumar* at 854; *Chen Shi Hai* at 302 - 303. The RRT makes its decision as to its satisfaction that the claim for refugee status has been made out on the basis of the history of past events and the account and justification of present fears placed before it by the claimant, and any other materials available to it which it regards as relevant to a determination of the ultimate issue.

19 For the purposes of this appeal, the alternative case of a well founded fear of being persecuted for reasons of religion as a result of having imputed to the appellant the religious beliefs of those Baha'is with whom he associated, had to arise squarely on the materials available to the RRT before it had a statutory duty to consider it. That is, it had to arise squarely on the history of past events and the account and justification of present fears. It required that it was open to the RRT to make all necessary findings of fact to satisfy the definition of refugee referrable to a fear of being persecuted for reasons of religion as a result of having imputed to the appellant the Baha'i religious beliefs of his girlfriend and associates. It required a subjective fear of being persecuted which was well founded and further that the reason for such persecution was, or would be, imputed Baha'i religious beliefs. The question of having a well founded fear of being persecuted did not arise unless the appellant in fact had a subjective fear of being persecuted and that feared persecution was for an imputed Baha'i religious belief. Hill J makes clear in par [26] of his reasons that if the Iranian authorities imputed to the appellant the Baha'i faith as a result of his association with his girlfriend and other friends, and that was a question of fact for the RRT to decide, the country material would have been sufficient to permit the RRT to conclude, if it chose to do so, that there was a real chance of being persecuted on religious grounds. That is, in terms of the four elements of the definition in *Guo*, his Honour was of the view that there was material available to the RRT, if it so chose, to be satisfied of the fourth element, if the appellant otherwise satisfied the second and third elements. The issue on appeal is whether there was material before the RRT which, if accepted by the RRT, would have satisfied those second and third elements, having regard to the test applied by his Honour as to what was necessary as a matter of law to satisfy those elements.

20 To succeed before the RRT in respect of the contended alternative case of imputed religions beliefs, the appellant would have had to satisfy the RRT that he had a subjective fear that he would be persecuted if he were returned to Iran. He would also have to show that the persecution he feared would be for a Convention reason. Relevantly to the circumstances of the appellant, he would have to show that the reason for the persecution he feared would be Baha'i religious beliefs imputed to him by the Iranian

authorities because he had a girlfriend and other friends of the Baha'i faith when he was in Iran. That required that the appellant satisfy the RRT, on the materials before it, that the Iranian authorities had imputed, or would impute, to him Baha'i religious beliefs because of previous association with persons of that faith. There was no evidence before the RRT that the Iranian authorities had imputed, or would impute, to the appellant Baha'i religious beliefs based on his association with persons of that faith. There was also no evidence that the appellant had any fear of persecution because of such imputed religious beliefs.

21 The specific circumstance which the appellant put forward as entitling him to refugee status (the account and justification of his present fear of being persecuted) was a conversion or intended conversion to the Baha'i faith from his family religion of Muslim Shi'a. In particular, he cited as the circumstances on which he based his fear and for which he would be persecuted, statements he made while at university which questioned enforced adherence to the Muslim Shi'a faith and stated his intention to convert to the Baha'i faith, which, led to his exclusion from the university; and the threat of an uncle to report him to the Iranian authorities if he did not abandon his intention to convert to the Baha'i faith. These were the circumstances which caused him to leave Iran. That is, the subjective fear of persecution which the appellant claimed to have was persecution for conversion or intended conversion to the Baha'i faith. The articulated reasons for the fear lay in the circumstances he deposed to in his original claim for refugee status and in his oral testimony before the RRT going to his conversion, or communicated intent to convert, to the Baha'i faith. The RRT was not satisfied that the appellant had a genuine commitment to the Baha'i faith, concluding that he constructed the story of identification with the faith, or of an intention to convert to it, in order to manufacture a false basis for a claim to refugee status.

22 The test which Hill J held the appellant must satisfy if he was to succeed on the alternative case before the RRT was:

'[27] ... the applicant must not only satisfy the Tribunal on a review, that there would be imputed to the applicant the religious beliefs of those Baha'is with whom he is friendly, but that he has a subjective fear of persecution on religious grounds as a result of the religious beliefs that have been imputed to him. It must also be shown that there is objective evidence to show that that fear of persecution is well-founded.'

23 Properly understood, his Honour has said no more than that the appellant was required to satisfy the RRT that :

(a) he would have imputed to him the religious beliefs of those Baha'is with whom he was friendly; and

(b) he had a subjective fear of being persecuted if he returned to Iran;

(c) the reason he would be persecuted if he returned to Iran was the Baha'i religious beliefs which had or would be imputed to him by the authorities;

(d) any subjective fear of being persecuted was 'well founded' on the objective evidence.

24 His Honour found that there was no evidence upon which the RRT could find the matters in (a), (b) and (c). Absent such material the country information and the observations of his Honour in respect of it in par [26] of his reasons, did not overcome such a deficiency. Therefore, his Honour found that the alternative case was not squarely raised on the materials and the RRT was not obliged to consider such a case.

25 The test as formulated by his Honour is in accordance with the Australian and United Kingdom authorities set out above. The test advanced by the appellant as sufficient to attract refugee status is totally inconsistent with those authorities and the language of Art 1A(2) of the Convention.

26 There being no evidence to raise the alternative argument of persecution for imputed religious beliefs before the RRT, there was no statutory obligation under the Act for it to consider such an alternative case when it was neither raised, nor relied upon, by the appellant in the proceedings before it.

27 There was no other ground argued by Senior Counsel in the written submissions. The appellant did not make out any appealable error in his oral submissions. The appeal will be dismissed. In accordance with the general practice, costs will follow the event.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper.

Associate:
Dated: 30 May 2003

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S94 OF 2002

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	SDAQ Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS Respondent

JUDGES:	COOPER, CARR & FINKELSTEIN JJ
DATE:	30 MAY 2003
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

CARR J:

28 I have read, in draft form, the respective reasons for judgment of Cooper and Finkelstein JJ. I am grateful to them for sparing me from having to set out the factual and procedural background of this matter.

29 I do not think that this is a case of an applicant for protection as a refugee advancing a subjective fear of persecution based upon a mistaken belief about the source of such persecution. Nor is the appellant a person who was unaware of the real reason for his persecution. On his own case, the appellant knew that he would be persecuted if the Iranian authorities believed he held Baha'i views, whether that belief was based on his actual religious

views or religious views imputed to him. He knew that by announcing an intention to convert to the Baha'i religion he would risk persecution. That was the fear which he claimed to have.

30 In oral evidence before the Tribunal, in response to questions from the Tribunal member, the appellant said he knew that it was illegal, in terms of the Islamic religion, to associate socially with Baha'i people. His evidence was that he had a Baha'i girlfriend and some other Baha'i friends, and that Baha'i friends sometimes visited him at home. I shall refer to this as "his Baha'i association". If there was a risk of being imputed (by the Iranian authorities) with Baha'i religious beliefs due to his Baha'i association, the appellant knew about that. If his Baha'i association had caused him any problems, it is inconceivable that he would not have mentioned this. But he did not tell the Tribunal that he feared persecution by reason of the Baha'i association. That was not the basis for his asserted subjective fear of persecution.

31 In my opinion, there was a very significant difference (and a vital missing link) between the objective evidence, i.e. the country material, referred to by the learned primary judge, and the evidence which the appellant put before the Tribunal about his subjective fear of persecution. The country material, so his Honour held, would suffice to permit the Tribunal to conclude that there was a real chance of the appellant being persecuted on religious grounds *should the Iranian authorities impute to him the Baha'i faith as a result of his association with his girlfriend and other friends* (my emphasis). As I have said, the appellant was well aware that if his Baha'i association was sufficient for the authorities to impute to him the Baha'i faith then he was at risk of persecution. He did not claim to have any such fear of imputation. As Cooper J has stated in his draft reasons, there was no evidence that the appellant ever held that fear.

32 Applying the principles explained in cases such as *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287 at 293-295, the evidence and material before the Tribunal in this matter did not raise a case of possible imputation of religious or political opinion or membership of a particular social group arising out of the appellant's Baha'i association.

33 I agree that it may not be essential for a refugee claimant to be able to identify a particular Convention ground as being the basis for his or her fear. As Finkelstein J has pointed out, there may be cases where a person does not know why the authorities have persecuted him, or are likely to do so. In those circumstances, all that person can do (and all he or she needs to do) is to place the facts which give rise to his or her fear before the decision-maker.

34 In the present matter the appellant failed to place before the Tribunal what the authorities establish is a fact essential to refugee status and (one peculiarly within his knowledge) i.e. that he had a subjective fear of being imputed with Baha'i beliefs, or for that matter political beliefs or membership of a particular social group, due to his Baha'i association. In those circumstances, in my view, the Tribunal did not err in its decision and the

primary judge did not fall into any legal error. The appeal should be dismissed with costs.

I certify that the preceding seven (7) numbered paragraph is a true copy of the Reasons for Judgment herein of Justice Carr.

Associate:

Dated: 30 May 2003

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S94 of 2002

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	SDAQ Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS Respondent

JUDGES:	COOPER, CARR & FINKELSTEIN JJ
DATE:	30 MAY 2003
PLACE:	MELBOURNE (HEARD IN ADELAIDE)

REASONS FOR JUDGMENT

FINKELSTEIN J:

35 This appeal raises a short but important point regarding the interpretation of Article 1A(2) of the Refugees' Convention. The appellant is from Iran. He seeks asylum in Australia claiming that he has a well-founded fear of persecution if he were required to return to Iran. The basis of his claim for refugee status is that he was brought up a Muslim but met a girl of the Baha'i faith whom he has announced he wishes to marry and adopt her religion. He fears that if he returns to Iran he will be persecuted on account of his religious views. A delegate of the Minister was not satisfied that the appellant was a Convention refugee and refused to grant him a protection visa. The tribunal affirmed the delegate's decision. It did so principally for the reason that it did not accept that the appellant has a genuine commitment to the Baha'i faith. However, in a finding which was not challenged on appeal, the judge said that there was evidence before the tribunal from which it could conclude that there was a real chance that the appellant might be persecuted on religious grounds because of his association with his girlfriend and other people of the Baha'i faith. The tribunal had not considered this evidence. The judge found that the tribunal did not err in that regard. He said that for a person to fall within the Convention definition of "refugee" the person must actually "have a well-founded fear of persecution for a [particular] convention reason…..In the present case that means.….the applicant must not only satisfy the Tribunal on a review, that there would be imputed to the applicant the religious beliefs of those Baha'i with whom he is friendly, but that he has a subjective fear of persecution on religious grounds as a result of the religious beliefs that have been imputed to him." As I read his reasons, the judge seems to have based his decision on two related propositions, namely that: (1) the Convention definition requires there be a well-founded fear of persecution based on a Convention reason which the applicant must correctly specify; and (2) the Convention definition also requires the applicant to correctly identify the facts before the decision-maker which will establish that reason.

36 If this reasoning is correct the problems that will arise are manifest. I can explain what I mean by referring to Lord Hoffman's example of the Jewish shopkeeper living in Nazi Germany in 1935. It will be remembered that this shopkeeper was attacked by a gang organised by an Ayran competitor who smashed his shop, beat him up and threatened to do it again if he remained in business. The competitor was motivated by business rivalry. The authorities allowed the competitor to act as he did because the victim was a Jew. For the purposes of this case I wish to add to the story. The Jewish shopkeeper is also an active member of the bund. He regularly publishes pamphlets advocating the establishment in Germany of a socialist state. The Jewish shopkeeper knows that his competitor can with impunity organise the gang because the authorities will not intervene. But because the events are set in 1935, the shopkeeper does not yet know what is motivating the

> authorities. He thinks that they will not act because he is a communist. In fact, the competitor is allowed to victimise the shopkeeper because he is a Jew. Is he a Convention refugee? In substance, the issue boils down to this. A putative refugee who seeks asylum will necessarily claim that he fears persecution for a Convention reason. He knows that unless he can establish a causal connection between his fear of persecution and a Convention ground, his application for refugee status must fail. What happens in a case where the putative refugee, who will be persecuted for a Convention reason if he returns to his country of nationality, is not aware of the real reason for his persecution? Does Australia owe protection obligations to such a person?
>
> 37 It is convenient to begin by looking at cases which, in general terms, have defined what is meant by the term "refugee". In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ gives breaks down the definition of "refugee" into the following four elements: "(1) The applicant must be outside his or her country of nationality; (2) The applicant must fear "persecution"; (3) The applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (4) The applicant must have a "well-founded" fear of persecution for one of the Convention reasons." The third element was amplified. The justices said (at 570):

"An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A (2) of the Convention."

In *Reg v Immigration Appeal Tribunal; ex parte Shah* [1999] 2 AC 629 Lord Steyn said (at 638):

"In order to qualify as a refugee the asylum seeker (assumed to be a woman) must therefore prove (1) that she has a well founded fear of persecution; (2) that the persecution would be for reasons of race, religion, nationality, membership of a particular social group, or political opinion; (3) that she is outside the country of her nationality; (4) that she is unable, or owing to fear, unwilling to avail herself of the protection of that country."

In *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 504 Lord Lloyd said that he agrees with every word in the following passage from the judgment of Stuart-Smith LJ when the case was in the Court of Appeal (*Horvath v Secretary of State for the Home Department* [2000] INLR 15):

"It is apparent that there are five conditions that the applicant must satisfy to establish his status as a refugee, namely that: (1) He is out of the country of his nationality because he has a fear of ill-treatment. (2) The ill-treatment that he fears is of a sufficiently grave nature as to amount to persecution. (3) His fear of persecution is well founded. (4) The persecution is for a Convention reason. (5) He is unable, or owing to fear of the persecution, is unwilling to avail himself of the protection of that country."

38 There is a clear thread that runs through each of these passages. A refugee must of course have a well-founded fear of persecution. That aspect has two elements. (1) The refugee must subjectively fear persecution; and (2) His fear must be well-founded in an objective sense. It is only when consideration is given to the latter condition that it becomes necessary to determine whether the persecution is for a Convention reason. What must be established is an objective connection between the feared persecution and a Convention reason. In the absence of that nexus refugee status will not be made out. There is nothing in the definition, when read in isolation, or read in the context of the Convention as a whole, which requires the refugee to accurately pinpoint which Convention reason governs his case. All he must show is that there is a connection between his fear and one or other of those reasons.

39 So much for general statements. I now turn to cases which have specifically dealt with the issue presently under consideration. What follows is a selection of some of the authorities. In *Saliba v Minister for Immigration and Ethnic Affairs* (1998) 89 FCR 38, 49-50 Sackville J said:

"[Counsel for the Minister] submitted, if all else failed, that the applicant could not rely on the imputed political opinion point, because he had not explicitly drawn it to the attention of the RRT. I must confess that I found this a rather surprising submission. If correct, it would mean that an unrepresented claimant, who established facts entitling him or her to the protection of the Convention, and who might be at risk of death if returned to the country of origin, would fail on an application for review simply because he did not specifically alert the RRT to a legal issue it should in any event have appreciated. This would be so even if (as is commonly the case) the applicant spoke little or no English.

…

The general principle is that a tribunal is not obliged to make out an applicant's case. However, there are circumstances where the tribunal may be obliged to undertake further factual inquiries, even though the applicant has not specifically requested that course: Prasad v Minister for Immigration and Ethnic Affairs(1985) 6 FCR 155 at 170 per Wilcox J; Luu v Renevier(1989) 91 ALR 39 (FC) at 49-50. It seems to me that, where an unrepresented applicant presents evidence to the RRT which, if accepted, is capable of making out the applicant's claim that he or she satisfies the Convention on a particular basis, the RRT may be required to consider the issue. Particularly is this so where the RRT accepts the substance of the applicant's account. I agree with the comments recently made by Branson J in Bouianov v Minister for Immigration and Multicultural Affairs (unreported, Federal Court, No 134 of 1998, 26 October 1998), at 2:

'The respondent contends that the applicant did not articulate before the RRT a conscientious objection to military training and service. It is true that he did not expressly do so, and a decision-maker is not obliged to make a case for an applicant (Luu v Renevier). However, in

> my view, in appropriate cases, a decision-maker such as the RRT may be required to give consideration to whether evidence in fact given by an applicant might support an application on a basis not articulated by an applicant. This will more likely be found to be the case where an applicant is unrepresented, as the present applicant was before the RRT.'

…

In my view, the fact that the applicant did not draw the doctrine of imputed political opinion to the attention of the RRT is not a basis for denying him relief."

In *Re Attorney-General of Canada and Ward; United Nations High Commissioner for Refugees et al., Interveners* 103 DLR (4th) 1, 38 La Forest J, who delivered the judgment of the Supreme Court, said:

"Political opinion was not raised as a ground for fear of persecution either before the board or the Court of Appeal. It was raised for the first time in this court by the intervener, the United Nations High Commissioner for Refugees, who, in his factum, expressed the view that the Court of Appeal had 'erred in considering that the claimant's fear of persecution was based on membership in an organization'. The additional ground was ultimately accepted by the appellant during oral argument. I note that the UNHCR Handbook, at p. 17, para. 66, states that it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground (idem, para. 67). While political opinion was raised at a very late stage of the proceedings, the court has decided to deal with it because this case is one involving human rights and the issue is critical to the case."

In *Emmanuels v Minister of Citizenship and Immigration* 2002 FCT 865, [14]-[16] a decision of the Federal Court of Canada, Dawson J said:

"I am not persuaded that this principle can be extended to a failure on the part of the [Convention Refugee Determination Division of the Immigration an Refugee Board] to consider all of the grounds for making a claim to status as a Convention refugee, even where the grounds were not raised by a claimant. The UNHCR Handbook ('Handbook'), at page 17, paragraphs 66 and 67 states:

> 'In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not,

> however, his duty to analyse his case to such an extent as to identify the reasons in detail.
>
> It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.'

In Canada (Attorney-General) v Ward [1933] 2 SCR 689 at paragraph 80, the Supreme Court considered political opinion as a ground for fear of persecution notwithstanding that the issue was first raised in the Supreme Court by the United Nations High Commissioner for Refugees.

To summarize, Mrs Emmanuels raised the issue of racism as a ground for fear of persecution. Even if she did not, the Handbook and Ward suggest that it is for the examiner, in this case the CRDD, to ascertain the reasons for the persecution feared and whether the definition of Convention refugee is met. There was some evidence in Mrs Emmanuels' PIF and in the country condition documentation which ought to have been evaluated by the CRDD."

In *Osorio v Immigration and Naturalization Service* 18 F3d 1017 (2d Cir, 1994) Oakes J, who delivered the opinion of the United States Court of Appeals, said:

"Congress has set forth five grounds of persecution: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, and (5) political opinion. As the United Nations' Handbook on Procedures and Criteria for Determining Refugee Status (the 'U.N. Handbook') notes, 'it is immaterial whether the persecution arises from any single one of [these] reasons or from a combination of two or more of them.' U.N. Handbook, PP 66-67. The U.N. Handbook also states that it is not necessary for the application to identify the correct ground; the fact finder should consider all or any combination of them. See id. Thus, the BIA must have considered all grounds for asylum when it concluded that Osorio 'has not demonstrated that his fear of persecution is premised upon political opinion or any of the other enumerated grounds.' BIA Opinion, at 4."

> 40 In my opinion, the judge adopted an approach different to that which I draw from these cases and he was, consequently, in error. A fortiori when one considers the situation where an applicant fails to point to the particular facts before the decision-maker which ground his case. It follows that the tribunal was in error in failing to consider the appellant's case on the basis of the evidence before it. It was for the tribunal to decide whether the Convention definition was met having regard to the evidence before it. Not uncommonly, the evidence will raise the possibility that more than one ground is available to a putative refugee. The tribunal does not discharge its statutory duty by only considering the facts specifically identified by the person claiming to be a

refugee as establishing his claim, especially when there are, as in the present case, facts before the tribunal which can make out his case. While the facts may not support the conclusion that the appellant is susceptible to persecution because he is a genuine adherent to the Baha'i faith, as the judge found, the facts leave open the possibility that he may face persecution because of his close association with people of the Baha'i faith. The tribunal ought to have considered this possibility.

41 Since preparing these reasons Cooper J has brought to my attention two recent House of Lords decisions: *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 and *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840. These cases deal directly with the point under consideration and confirm the view that I have taken as regards the proper construction of Article 1A(2).

42 I note in passing that the Minister submitted that the point now raised by the appellant should not be considered by the Full Court because it was raised at a very late stage of the proceeding. I reject this submission out of hand. This case involves a fundamental aspect of human rights. The consequences of refouling a person who is in fact a refugee are too grave to contemplate. It would take an extraordinary set of circumstances for the court to shut out a legitimate argument.

43 In my view this case should go back to the tribunal for reconsideration.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 30 May 2003

Appellant appeared in person.	
Solicitor for the Appellant:	Mallesons Stephen Jaques
Counsel for the Respondent:	Ms S Maharaj
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	22 August 2002
Date of Judgment:	30 May 2003