

FEDERAL COURT OF AUSTRALIA

SBBT v Minister for Immigration & Multicultural & Indigenous Affairs

[2002] FCA 628

No issue of principle

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

S 40 OF 2002

O'LOUGHLIN J

CANBERRA (HEARD IN ADELAIDE)

17 MAY 2002

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY

S 40 OF 2002

BETWEEN: SBBT
 APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 RESPONDENT

JUDGE: O'LOUGHLIN J

DATE OF ORDER: 17 MAY 2002

WHERE MADE: CANBERRA (HEARD IN ADELAIDE)

THE COURT ORDERS THAT:

1. The Application be dismissed.

2. The Applicant pay the Respondent's costs, such costs to be taxed in default of agreement.

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

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JUDGE: O'LOUGHLIN J

DATE: 17 MAY 2002

PLACE: CANBERRA (HEARD IN ADELAIDE)

REASONS FOR JUDGMENT

1 The applicant is a citizen of Iran but he has lived in Indonesia since 1993. He arrived in Australia, by boat from Indonesia on 20 April 2001. Two months later, on 20 June 2001, he lodged an application for a Protection Visa with the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"). On 4 September 2001, a delegate of the Minister refused his application. The applicant applied for a review of that decision by Refugee Review Tribunal ("the Tribunal"). Once again, he was unsuccessful. The Tribunal affirmed the decision of the delegate on 31 January 2002. He accepted the applicant as a witness of truth but concluded that he did not have

an appropriate fear of persecution for a convention reason were he to be returned to Iran. The applicant now seeks the intervention of this Court.

2 When the applicant was first interviewed on 11 May 2001, shortly after his arrival in Australia, he was asked to explain why he left his country of nationality – Iran. His answer to that question addressed three subject matters. In the first place, he said that he had not participated in Islamic religious activities. He had applied for admission to a university but, so he said, the Islamic Council for university admissions rejected him due to his lack of “Islamic moral qualification”. His second reason for leaving Iran dealt with his military service. He was conscripted, but for two years, he avoided service by using a fake student card. Thirdly, he referred to a social party which he had attended and, at which, alcohol was consumed. He said the Islamic disciplinary committee’s representatives raided the party, taking him and others away for investigation. He was released with a bond.

3 Over and above those three reasons, the applicant elsewhere referred to the fact that his father had been a police officer during the regime of the Shah. As a result, he said that his family had been labelled “pro-Shah” and supporters of Shah had been persecuted.

4 Subsequently, the applicant was assisted by Messrs Macpherson and Kelley, registered migration agents. They compiled a lengthy statement on his behalf in support of his application for a Protection Visa. In that statement, the applicant raised concerns which had not previously been mentioned in his answers to the questions that were put to him during his first interview. The Tribunal took a very understanding view about what might otherwise been called discrepancies in his story. It accepted that the applicant may have been under pressure on the occasion of the first interview and, even though he was assisted by an interpreter, that he may have had difficulty in expressing himself. The additional matters that were raised in the statement were as follows:

- After leaving Iran illegally, the applicant had taken up illegal residence in Indonesia. He had there “married” and was now the father of two children. He said in his statement of his children:

“They have no documents showing who their father is and no civil marriage document for my wife and I as we were married religiously only.”

- Having left Iran illegally and having been absent for nine years he said of the authorities:

“... they simply believe that anyone who has lived overseas is involved in something.”

- Finally he made clear that, because of his Indonesian wife, he had changed his religion from Shia to Sunni when they married and, so he said, the Iranian Government is “fanatically Shia”.

The statement to which reference has just been made is dated 18 July 2001. In addition to it, Messrs Macpherson and Kelley presented a written submission in support of his application for a Protection Visa. This submission is not dated however, but its location in the appeal book suggests that it was compiled after the statement of 18 July. The matter of significance in the agent's submission is that it asserts the applicant's reason for not wishing to return to Iran in these terms:

"... the applicant states that he could not go back to Iran as the government would not accept his wife and children. He is afraid of the wellbeing of his children in Indonesia as they have no documents."

In addition the agents advanced a further reason for the applicant's fear in these terms:

"The applicant states that he has been away from Iran for 9 years and if returned would be easily labelled as being in opposition and uncooperative with the current regime and anti government."

The applicant therefore advanced his claims for refugee status upon the basis of him having a well founded fear of persecution for reasons of his religion and his imputed political opinion.

5 The term "persecution" is not defined in the convention but James Hathaway in his text book "The Law of Refugee Status" defines persecution at p 104 in these terms:

"The sustained or systemic violation of basic human rights demonstrative of a failure of state protection."

On the same page the author notes that the concept of persecution should be interpreted and applied liberally. In *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ("*Chan*") Mason CJ said that "persecution" includes:

"Some serious punishment or penalty or some significant detriment or disadvantage." (p 388)

6 As I have earlier noted, the Tribunal accepted the applicant as a witness of credit. It accepted that he had converted to the Sunni Sect of Islam when he courted and married his wife. As to that, the Tribunal said that it was able to find evidence of "localised discrimination towards Sunni Muslims in Iran but no evidence of such discrimination amounting or accumulating into persecution".

7 The Tribunal applied its mind to the difficulties that the applicant had faced about his inability to obtain admission to the university, but it concluded that those difficulties did not appear to be convention related. The Tribunal was clearly correct in coming to that conclusion.

8 The Tribunal also addressed the question of alcohol at the party and the evasion of national service, pointing out (again correctly in my opinion) that

such difficulties as the applicant might have suffered as a result of these activities would have been difficulties of general application and would not have amounted to persecution and certainly not to persecution for a convention reason.

9 Finally the Tribunal addressed the subject of the applicant's "marriage". It concluded that the marriage was not one that would be recognised under Iranian law. On the other hand however, it pointed out that such a finding did not mean that the applicant could not marry his present wife in the future under terms that would be acceptable to Iranian authorities. There was one passage in the Tribunal's reasons which was difficult to understand. Having referred to advice from the Department of Foreign Affairs and Trade which said:

"Sexual relations between unmarried Muslims also carries a sentence (eg imprisonment, lashes or a fine)."

the Tribunal then said:

"It is not clear to the Tribunal that the applicant would face serious punishment for having sired children outside of a marriage recognised under Iranian Law."

One would have thought that it was self evident that the presence of children and the absence of a marriage certificate would have been *prima facie* evidence of sexual relations between unmarried parties. Be that as it may, however, the issue of extra-marital sex was not advanced by the applicant or by his migration agents as a reason for a fear (subjective or objective) of persecution were he to be returned to Iran.

10 In my opinion, the Tribunal had no choice in this matter. It was faced with an applicant who truthfully told his story about leaving his home country illegally and taking up residence, also illegally, in Indonesia. The Tribunal accepted that his inability to obtain official recognition in Indonesia caused difficulties not only for himself personally but, more so, for the future of his two children. No wonder that a person in that position would seek to benefit his family. However, Australia's commitments are based upon a refugee having a fear of persecution for one of the five convention reasons should he be returned to his country of origin. Despite the *bone fides* of the applicant, he was not able to bring himself within any one of those five convention reasons. The Tribunal correctly concluded that the applicant was not a person to whom Australia had protection obligations under the convention. His application to this Court must therefore be dismissed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the

Honourable Justice
O'Loughlin.

Associate:

Dated: 17 May 2002

The Applicant appeared in
person

Counsel for the Respondent: Mr MJ Roder

Solicitor for the Respondent: Sparke Helmore

Date of Hearing: 18 April 2002

Date of Judgment: 17 May 2002