FEDERAL COURT OF AUSTRALIA

SBBO v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 963

MIGRATION – Application for an order of review of a decision of the Refugee Review Tribunal – whether there was actual bias on the part of the Refugee Review Tribunal – whether the Refugee Review Tribunal correctly applied the “real chance” test in order to determine whether the applicants had a well-founded fear of persecution.

SBBO, SBBP AND SBBQ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

No S 37 of 2002

von DOUSSA J

ADELAIDE

6 AUGUST 2002

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 37 OF 2002

BETWEEN:	SBBO, SBBP & SBBQ APPLICANTS

AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	von DOUSSA J
DATE OF ORDER:	6 AUGUST 2002
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. Application dismissed.

2. The applicants, SBBO and SBBP, to pay the respondent's costs of the application.

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	S 37 OF 2002

BETWEEN:	SBBO, SBBP & SBBQ APPLICANTS
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	von DOUSSA J
DATE:	6 AUGUST 2002
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 This application is brought under s 39B of the *Judiciary Act 1903* by three applicants to review a decision of the Refugee Review Tribunal (the Tribunal) made on 31 January 2002 which affirmed a decision of a delegate of the respondent not to grant them protection visas. The first two applicants are husband and wife (and it is convenient to refer to them as the husband and the wife). They are citizens of Iran who arrived in Australia on 20 April 2001. The third applicant is their daughter, an infant, born a short time after they left Iran.

2 On 26 August 2001 the husband and wife lodged applications for protection visas on the ground that they were *refugees* within the meaning of Article 1A(2) of the *Refugees Convention* as amended by the *Refugees Protocol* as those expressions are defined by s 5(1) of the *Migration Act 1958* (Cth) (the Act) and, as such, were persons to whom Australia owed protection obligations.

3 A delegate of the respondent refused to grant protection visas on 13 September 2001. The applicants then applied to the Tribunal for review of that decision. The function of the Tribunal under s 414 of the Act is to conduct a review of the merits of the application, and in doing so must determine the

entitlement of the applicants to recognition of their claimed status as refugees as at the date of the Tribunal's determination: see *Minister of Immigration & Ethnic Affairs v Singh* (1997) 72 FCR 288 and *Minister of Immigration & Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238 at par 66 and the decisions there cited. By the time the Tribunal conducted the review the Act had been amended by the *Migration Legislation Amendment Act (No 6) 2001* which came into force on 1 October 2001. That Act inserted a number of provisions about protection visas, including s 91R which relevantly provides:

"(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of **serious harm** for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(3) …"

4 The Tribunal accepted that the husband and wife came from Iran, and were members of a minority religious community, the Sabean Mandeans. The Tribunal did not accept the major claims advanced by the applicants upon which their alleged well founded fears of persecution for Convention reasons were based, and concluded:

"… that they did not suffer any personal harm they claimed and that their case rests solely on whether or not they, as general members of the Mandean community face a 'real chance' of persecution for reasons of their religion."

The Tribunal concluded that whilst Sabean Mandeans do face discrimination in employment, education and in the way the legal system operates in Iran, the level of discrimination does not amount to serious harm, such as to constitute persecution within s 91R of the Act. The delegate's decision to refuse protection visas to the husband and wife was therefore affirmed by the Tribunal. It did so on the grounds that neither of them faced a "real chance" of harassment amounting to persecution if they returned to Iran - now or in the reasonably foreseeable future - and that any fears they held in that regard were not well founded. The application of the infant applicant was dependent upon the successful recognition of the husband and wife as refugees. The infant's claim therefore failed along with that of the parents.

5 The decision of the Tribunal which is challenged in these proceedings, being made after 2 October 2002 is a privative clause decision within the meaning of s 474(2) and (3)(b) of the Act: see clause 8(2) of Schedule 1 of the *Migration Legislation Amendment (Judicial Review) Act 2001* (No 134 of 2001).

6 Counsel for the applicants sought to impugn the Tribunal's decision on the grounds that first, the making of the decision was not a bona fide attempt to act in the course of the authority given to the Tribunal under the Act and, secondly, because the Tribunal made a jurisdictional error in applying a wrong test in determining whether there was a real chance that the husband and wife would suffer persecution if they were to return to Afghanistan.

7 Counsel contended that the decision was not a bona fide attempt to exercise jurisdiction because the Tribunal did not bring an unbiased mind to the issues of the applicant's credibility, nor to the question whether or not the applicants suffered religious persecution. Actual bias on the part of the Tribunal was also alleged, upon the submission that the Tribunal carried out its task with a state of mind which prevented it being persuaded to a different view than the one upon which the decision was based. Counsel contended that, as the decision was not a bona fide attempt to exercise jurisdiction, it was not one to which the privative clause in s 474(1) could apply to save it from invalidity because it fell within one of the three recognised exceptions to the operation of such a clause: *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616. Counsel also contended that the jurisdictional error upon which the second ground of challenge was based fell outside the operation of s 474, relying on the decision of Wilcox J in *Boakye-Danquah v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 438.

8 Counsel for the respondent acknowledged that a finding of actual bias on the part of the Tribunal would be relevant to establish lack of *bona fides*, although it is a moot point whether actual bias would automatically negate the *bona fides* of the decision so as to fall within the relevant exception of the Hickman principle: see *Sarbjit Singh v Minister for Immigration and Ethnic Affairs* [1996] FCA 902 per Lockhart J and *NAAX v Minister for Immigration*

and Multicultural Affairs [2002] FCA 263 at [36] per Gyles J. Counsel contended however, that a jurisdictional error of the kind alleged by the second challenge to the Tribunal's decision would fall squarely within the scope of the privative clause provisions, so that the alleged error - even if established - would not constitute a ground upon which relief could be granted by this Court.

9 It will become necessary to consider the scope and operation of the privative clause decision provisions only if the errors alleged on the part of the Tribunal are otherwise established. I propose to first consider whether those errors are made out. I do so notwithstanding the observations of Heerey J in *Turcan v Minister for Immigration and Multicultural Affairs* [2002] FCA 397 at [46]. His Honour there suggested that the correct approach is first to consider whether s 474 applies. I propose not to follow that approach in the present case as there is doubt as to the interpretation, scope and operation of s 474 on which there have been a number of differing first instance decisions, some of which are now on appeal to a Full Court of this Court.

First Ground - Actual Bias

10 This is not a case where evidence is adduced to support an allegation that the decision-maker harboured ill will towards the applicants, or exercised power for an improper purpose. The Court is asked to infer actual bias from the transcript of the hearing conducted by the Tribunal, at which the husband and wife gave oral evidence, and from the reasons for decision. It is contended that the transcript of the hearing shows that the Tribunal had listened to the tapes of interviews of the husband and the wife (which had been conducted by an officer of the Department of Immigration and Multicultural Affairs after their arrival in Australia), had read their files before the hearing, and had reached a preliminary view adverse to the applicant's credibility. The reasons for decision are then said to disclose that the Tribunal had a closed mind to the issues raised by the applicants. The Tribunal's closed mind is said to be demonstrated first, by its failure to be persuaded to another view, and secondly, because it generally elevated the probative value of material that was against the applicant's case to unreasonable levels, whilst at the same time ignoring or de-valuing material in favour of the applicant's case in an unreasonable manner. Further, it is contended that the Tribunal's closed mind is evident from its failure to properly assess the credit of the husband and wife.

11 To understand these contentions it is necessary to outline the nature of the claims made by the husband and wife, and to indicate the times at which those claims were made.

12 On 20 May 2001 some three weeks after they arrived in Australia, the husband and wife were separately interviewed by an officer of the Department of Immigration & Multicultural Affairs (as it then was). At the beginning of the interviews each of them was informed that they were expected to give true and correct answers to questions asked by the officer, and informed that they should understand that if the information given at any future interview was

different, this could raise doubts about the reliability of what they said. The husband and the wife each stated that they had left Iran because of their religion. Each gave details of general discrimination experienced by Sabean Mandeans, particularly in employment, education and the legal system. In his interview the husband said that in Iran Muslims did not consider Sabean Mandeans as human beings and considered them as "unwashed". He said that there had been no attempt to harm him physically but mentally he was hurt, and wished to live in a society where people of his religion would be treated as humans. He identified difficulties that he had experienced in the workplace. He was then asked whether any other harm had come to him or his family and he answered "nothing in particular but in general there has been discrimination. I want to live free …". He went on to say that Sabean Mandean girls were deceived into conversion and when that happened the Sabean Mandean people were not allowed to check whether it was by choice.

13 The wife told the officer that she had come to Australia for two reasons. First, her husband did not have a job because of discrimination, and secondly because her daughter may have to marry early as she had done because she would not be able to work or study. She said the main problem was because of prejudices at school. She was asked whether any members of her family had been harmed in Iran. She replied:

"Nothing personally except at school they would give us low grades for religious and scripture subjects. I heard that one of my husband's cousins became a Muslim because they deceived her. When my husband, who wasn't married then, told the Islamic authorities …he was her fiancé and wanted her back. He was told he would have to convert to Islam …"

14 The claims of the husband and wife were significantly expanded to advance two new claims in their applications for protection visas made on 26 August 2001. In a detailed statement also dated 26 August 2001 those claims were articulated by the husband. The first related to an event which occurred in about 1996 and 1997 involving a neighbour of the husband's family. The description he gave of that event is as follows:

"7. … We had a neighbour who knew that we were Mendaie people they would not even talk, associate or even pass our home. One day near our new year my sister in law who is here in Woomera was trying to do thorough cleaning of the home, she was washing the courtyard by using the hose the hose had some holes in it and accidently some water went into the neighbour's home as the wall was short, they started to scream why did you splash water in to our courtyard they came to our front door kicking the door and swearing at us you 'dirty people' she opened the door and was surprised and told them that no one did this, they said you made our life dirty doing that.

8. At this time we were out of the home, when my father returned went to the neighbours to see the area that the water had affected. They told him the water had made dishes food dirty, they are not usable any more. My father asked then what had

been damaged we can replace them, splashing the hose was not intentional we are at your service whatever has been damaged can be replaced of if you wish money. What they were saying, why did you use water and destroy our lives and they were insisting that we had to leave this place (or) we are going to kill you. Due to this we were forced to leave somewhere else to live."

15 The details of the second new claim given by the husband are as follows:

"12. … I had a fiancée prior to my current wife one day they informed me that she had been converted to Islam, I went to her home to find this out and while her family was searching where she was a friend of hers told them that she was taken to Monkerat and her family and myself went there. The mother of my fiancée was crying have no news on my daughter. I told them I was told she is here and converted to Islam, gone without any news and do not know what has happened to her. No one has the right to see this person, mother crying asked to see her as her mother and I was telling her I must see her I want to marry her and see what she says. I knew that she had not gone at her own will but under direct pressure. When I was asked that to marry this girl you just become a Muslim.

13. A few months later, the same thing happened to my wife, one day my brother and myself at work and sister in law telephoned at work and informed us that her sister (my wife) was taken by armed persons two men and women from the police department. They had stated to my sister in law that they were aware that my wife had become a Muslim and they were there to take her away. After this news came and came home, and while we were in a car returning he explained to me that my wife was taken and become a Muslim. When I heard the news as I had a memory of this happening to my prior fiancée I felt extremely demoralized and felt that there is no place in the world for us as they are taking our women in this way. I asked my brother that we must rescue her. When we got home, her mother was there alone. My brother knew a person a Basijie who knew people from security forces and Mokerat and introduced us to one of the officers of Monkerat and was a sort of person who took bribes told him about Laleh he accepted and said give me 2 million Tooman to bring her back as well as I will destroy her records to conversion to Islam. We came home and told everyone and obtained the money and Laleh was released.

14. On my wife's return she indicated to me that whilst at school was very close to a female teacher to whom I mentioned that she would like to go to University, she then brought a letter that I had to sign with 4 lines of written material and it was an introduction to the University, she signed and her mother also to enable her to go to the University. However, the following day the four armed police persons came to our home and showed the same letter signed but the authorities had inserted a further

several paragraphs to confirm that she had converted to Islam and became a Muslim. This was clearly obtained under false pretence.

15. After my wife was released and came home after 15 days we were married. My wife fell pregnant immediately, however, several months later we heard that the officer who had assisted in my wife's situation had been arrested for some reason and was telling of people he had assisted. This was a major concern for us as we were of the opinion that he had destroyed all records relating to my wife. This created a lot of concern. On hearing of this arrest, the friend who had introduced us t[o] this officer suggested that we should leave Iran.

16. My brother asked why should we leave, the friend said the arrested officer is talking and reveals what he has done for you then that will mean that you will be regarded as one promoting your religion and the penalty is death and the penalty for wife is to be stoned."

16 At the hearing conducted by the Tribunal, and in correspondence which passed between the Tribunal and the husband and wife after the hearing, the wife's alleged abduction and forced conversion to Islam, and their fear that they would be exposed to the penalty of death for apostasy should they return to Iran, became the central basis for their claim for recognition of refugee status. Following the hearing, the applicants forwarded to the Tribunal a statement from the husband's brother which gave a similar account of the alleged abduction of the wife and her forced conversion.

17 At the Tribunal hearing, the husband and the wife each gave evidence in the absence of the other. The Tribunal informed each of them that because the two claims made in August 2001 had not been mentioned at the interview in May 2001, the Tribunal had doubts about the veracity of those claims, and invited comment as to why they had not been earlier disclosed. The husband said that during the boat journey to Australia he had been scared by other passengers, and got into arguments (presumably over his religion); he had been told the interview was only an introductory or provisional one and, because the interview was being taped, he didn't dare to talk because he did not know where the tape would go.

18 The wife said that she found the first interview a hard situation as she had not been to an interview before and she did not know what she should say. As she knew the sentence in Iran for apostasy was death, this made her apprehensive and afraid to tell the officer. She also said she had many problems with her baby during the trip to Australia and was therefore confused at the interview.

19 The Tribunal in its reasons for decision concluded that the claim of abduction made by the husband and wife was fabricated, either by the husband's brother - with the husband and wife subsequently adopting it - or as a result of collusion between the three of them. It followed, in the Tribunal's reasoning, that the claimed release of the wife and the intervention of the

husband by bribing an Iranian official did not occur, and neither did the claim to potential exposure of the bribery (which they later asserted was the reason for their departure from Iran). In reaching these conclusions, the Tribunal relied heavily on the fact that the claim of abduction and conversion had not been mentioned by either the husband or the wife in their May 2001 interviews.

20 Counsel for the applicants contends that the Tribunal's statement to the husband and wife during the course of their evidence that the inconsistencies in their statements (arising from the initial non-disclosure of the two claims later made) gave rise to a credibility problem was indicative of a pre-determination of their claims. In my opinion, that submission must be rejected, first, because it reflects a misunderstanding of the role of the Tribunal, and secondly because a reading of the transcript of the hearing does not give rise to any inference of a closed mind on the part of the Tribunal. On the contrary, the Tribunal expressed its doubt in terms which indicated that it remained open to persuasion, and was seeking an explanation.

21 The proceedings before the Tribunal were inquisitorial in nature and the parties were not represented. In *re Refugee Review Tribunal; ex Parte H* (2001) 179 ALR 425 at [30] the High Court said:

"Where, as in the present case, credibility is in issue, the person conducting inquisitorial proceedings will necessarily have to test the evidence presented – often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question. Similar questions by a judge in curial proceedings in which the parties are legally represented may more readily give rise to an apprehension of bias than in the case of inquisitorial proceedings."

In the present case, the Tribunal fairly put to the husband and to the wife the apparent inconsistencies arising from their interviews, and disclosed to them that it considered the identified inconsistencies raised a credibility issue. This was not done in a vigorous or confrontational way that may have impeded the ability of either of them to offer explanation. Each gave an explanation which the Tribunal later recorded in its reasons for decision. However, at the end of the day, the Tribunal did not accept that explanation.

22 Counsel for the applicants contends that in finding that the claim of abduction and conversion was fabricated the Tribunal failed to properly consider the issue of the credit of the husband and the wife, and this failure is said to provide further evidence of a mind pre-determined to reject the applicant's claims. Counsel contends that the assessment of credit was not properly carried out because the Tribunal failed to give due recognition to the difficulties which the applicants, as illegal immigrants, recently arrived in a foreign country after a dangerous and fearful flight, would experience upon interview by an immigration official. Counsel referred to the oft quoted passage from Professor J C Hathaway's *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 84 - 85:

“First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which gave them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in the asylum state. The past practice of the [immigration appeal] Board of assessing credibility on the basis of the timeliness of the claim to refugee status, compliance with immigration laws, or the consistency of statements made on arrival with testimony given at the hearing is thus highly suspect, and should be constrained in [a] contextually sensitive manner ...” [citations omitted]

See also *SAAK v Minister for Immigration & Multicultural Affairs* [2002] FCA 367 at [21] – [31].

23 In its reasons for decision the Tribunal does not make express reference to the need to exercise special care in deciding credibility issues arising from inconsistency between statements made on arrival, and later statements. However, it does not follow that the Tribunal did not exercise appropriate caution. It will be remembered that the first interview was conducted almost three weeks after the applicants’ arrival in Australia. As the Tribunal itself noted, both the husband and the wife were educated to upper secondary level education. At the May 2001 interviews they were each informed of the need to give correct answers, and they were specifically asked to give the reasons for their claims. Each of them spoke generally about Sabean Mandean girls being deceived into conversion. Each of them appears to have had ample opportunity, if it were the case, to inform the officer that the wife had herself been the subject of an abduction and conversion. As Hely J said in *W70/2001 v Minister for Immigration & Multicultural Affairs* [2001] FCA 1159 at [34], it is a matter for the Tribunal to decide whether to attach any, and if so what, significance to the non-disclosure of matters at the first interview, and to decide whether explanations offered by the applicants are to be accepted. In the circumstances of this case, particularly having regard to the interval of time between the applicants’ arrival in Australia and the first interview, the conclusion of the Tribunal that the failure to make the claim based on the wife’s alleged abduction and deception into conversion at the first interviews, justified a finding that it was a story made up at a later stage to support otherwise weak claims. I therefore reject the submission that there was error in the Tribunal’s approach to the assessment of the credit of the husband and the wife.

24 A reading of the transcript of the hearing does not suggest a pre-determination on the part of the Tribunal. The husband and the wife were asked about aspects of their statements, and their experiences in Iran. The hearings were not conducted in a confrontational way. The Tribunal, as I have noted, fairly put to each of them its concerns about inconsistencies in their statements, and informed them that it had not reached a concluded view on their claims. They were informed that the Tribunal would give them a further opportunity to put forward information in support of their claims, and that occurred. Notifications under s 424(A) were given inviting further comment on the inconsistencies, and comment on country information.

25 In *SCAA v Minister for Immigration & Multicultural & Ethnic Affairs* [2002] FCA 668 at [36] – [43] I discussed issues which arise where it is alleged that actual bias or lack of good faith should be inferred from the procedures followed by the Tribunal and from the reasoning of the Tribunal disclosed in its reasons for decision. It will be a rare and exceptional case that bias can be established in this way. As Gyles J said in *NADO of 2002 v Minister for Immigration & Multicultural& Indigenous* Affairs [2002] FCA 797 at [18], such a contention:

"… is tantamount to saying that because the Judge concerned does not agree with the reasoning and processes of the Tribunal, they must be the product of a bias mind. This would open the door to merits review …"

26 In the present case, the balance of the arguments addressed by counsel for the applicants in support of the allegation of actual bias, in reality constitute no more than an attack on the merits of the decision. The weight to be given to the material before the Tribunal is a matter for the Tribunal as the body empowered to decide the facts. Whilst counsel for the applicants contended that the Tribunal elevated the probative value of material against the applicant's case to unreasonable levels, and de-valued material in favour of their case in an unreasonable manner, I am satisfied that there was material capable of supporting the findings which the applicants seek to impugn, and that the weight which the Tribunal gave to that material was a matter for the Tribunal.

27 One of counsel's complaints is that the Tribunal has drawn a conclusion adverse to the applicants from the fact that the US State Department *2000 Annual Report on International Religious Freedom: Iran*, whilst describing in detail religious persecution of the Baha'is and discriminatory conduct against Jews and Christians, makes no reference to the Sabean Mandean community. Whilst I think the conclusion drawn by the Tribunal from that report is open, it is possibly a mistaken conclusion because there is evidence that the Sabean Mandean community is so small and geographically confined that it may have been overlooked by the authors of the report. However, even if that is the case, it is a mistake of fact which cannot be corrected on judicial review, and it is a mistake of a kind which is not suggestive of any bias or predisposition on the part of the decision-maker.

28 In my opinion, the allegation of actual bias on the part of the Tribunal must fail.

Second Ground – The 'Real Chance' Test

29 The second ground of challenge is that the Tribunal did not properly apply the "real chance" test to determine whether the applicants had a well founded fear of persecution in Iran.

30 The Tribunal in its reasons referred to *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and to a number of other High Court decisions. It is not suggested that the Tribunal mis-stated the law about the

‘real chance’ test. Rather, the contention is that having regard to the evidence, the conclusion that there was not an objective basis to render “well founded” the fear deposed to by the husband and wife, is perverse, and that therefore, in some undisclosed way, the Tribunal must have applied the wrong test.

31 The Tribunal accepted that the Sabean Mandean community generally suffered discrimination in regard to employment, tertiary education, inequality under the law in regard to the payment of blood money, the embarrassment of not handling food to be eaten by Muslims, and limited social contact with Muslims. Discrimination in these respects would confront the applicants if they were to return to Iran.

32 The Tribunal also considered the evidence of the husband and wife as to the ways in which they personally had experienced discrimination, recognising that the past provides an indication of what is likely in the future. The Tribunal accepted that the incident with the husband’s neighbour alleged to have happened in 1996 or 1997 may have occurred. Moreover, it appears to have attributed the husband’s failure to refer to that incident at the first interview to a realisation by the husband at the time of that interview, that it was a singular incident between his family and an unreasonable neighbour which had been resolved some five years previously by his family selling and moving from the area. Whilst the husband claimed the family had been threatened with death, no action had been taken to cause physical harm to them and the Tribunal concluded that the altercation was limited to one between the neighbour and the husband’s family, and that the chance of a similar situation occurring again because of their religion was remote and insubstantial. On that ground the Tribunal concluded that any fears they held in that regard were not well founded. That finding was plainly open on the facts, and does not suggest any misapprehension or application as to the appropriate test to be applied in accordance with *Chan v Minister for Immigration& Ethnic Affairs*.

33 In relation to the other allegations of discrimination which the applicants claimed amounted to persecution, the Tribunal engaged in a qualitative assessment of the degree of harm which the husband and wife, and the Sabean Mandean community generally experienced in Iran. Such a qualitative assessment is a question of fact: see *Minister for Immigration& Multicultural & Indigenous Affairs v Kord* [2002] FCA 334 at [3] per Heerey J and at [53] – [58] per Marshall and Dowsett JJ.

34 Having found the applicants not to be credible witnesses, the Tribunal made the further finding that their claims about discrimination as members of their religious minority were exaggerated. The Tribunal found that the husband and wife had not experienced serious discrimination problems that would amount to persecution.

35 In support of its conclusion the Tribunal noted that the Sabean Mandean relatives and members of the husband’s and the wife’s family remained in Iran without the need to seek protection. The husband’s father

owned a goldsmith business and exercised his right to buy and sell property. Other family members exercised their rights to freedom of movement and have travelled out of the country legally. The Tribunal noted that both the husband and wife received education to upper secondary level. The husband acquired skills as a tradesperson and, although he and his wife have claimed that he could not work continuously, the Tribunal found that he had been employed on a regular basis. That finding was open on the evidence. The Tribunal accepted country information that although Sabean Mandeans were prohibited from working in the public sector, they have traditionally worked as smiths and tradespeople. The Tribunal accepted the husband's claim that he could not have been able to work in women's fashions as this would contravene Islamic codes. However, the Tribunal observed that this would not preclude him from working in any of the traditional areas that Sabean Mandeans are employed in.

36 The Tribunal accepted that the applicants were able to leave Iran legally on a passport bearing their actual details and their own names. That finding was also open on the evidence. The Tribunal noted that, whilst the husband claimed to have arranged for their passport through a smuggler who facilitated their departure through Mehrabad airport, as the Tribunal did not accept the claim of abduction, false conversion and bribery to obtain the wife's release, there would have been no reason why they could not have left the country legitimately and openly as the Tribunal found they did.

37 The Tribunal, having considered other country information, accepted the conclusion of a DIMA Country Information Report No 165/01 dated 4 June 2001 that:

"The information provided suggests that as a religious minority, the Sobbis experience discrimination in employment and education and in the way the legal system operates. However the sources did not say anything to suggest that the Iranian Government actively harasses or routinely persecutes the Sobbis as a community."

38 The Tribunal added that the country information did not suggest that discrimination precluded members of the Sabean Mandean community from employment (other than in the public sector), from owning property, practising their religion, operating a business or exercising their right to freedom of religion. The Tribunal also accepted advice in the DIMA country information report that "economic conditions for Sobbis … are generally good". In light of these findings, which I consider were open on the material before the Tribunal, it is unsurprising that a conclusion was reached that the husband and wife did not face "a real chance" of harassment amounting to persecution if they were to return to Iran now or in the reasonably foreseeable future. In my opinion the finding that any fears they held in that regard were not well founded does not demonstrate any error in the application of the "real chance" test.

39 The Tribunal made a finding that statements had been made by minority religious leaders who, in the case of Jews, Armenians and Sabean Mandeans have stated there is no basis for their followers to leave, solely

based on their religion. Counsel for the applicants contended that this finding is not warranted by the country information to which the Tribunal made reference. Part of that information is a *Financial Times* article dated 16 November 2000 which refers merely to "minority group leaders" who are reported to be expressing alarm at their members leaving Iran despite the increase in official tolerance. The article refers expressly to statements to this effect from a Jewish leader and from an Armenian leader, but does not refer expressly to any like statement by a Sabean Mandean leader. If that article were the only country information on which the finding was based it would be open to question whether the information supported the finding. However, there is additional information in a DIMA report of 11 June 2000 entitled *Background Information on the Sobbis (Mandeans) and Their Situation in Iran* which says the community leaders (i.e. Sabean Mandean community leaders) are strongly opposed to illegal migration as this has the potential to further deplete their small community, and says that leaders have advised the community members not to take the option of leaving Iran. The finding is therefore justified by the information before the Tribunal.

40 For these reasons I consider the grounds on which the Tribunal's decision is challenged are not made out. The application must therefore fail, and it is not necessary to consider the application of s 474(1) of the Act.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice von Doussa.

Associate:

Dated: 6 August 2002

Counsel for the Applicant: Mr B Harradine

Solicitors for the Applicant:	Harradine & Associates
Counsel for the Respondent:	Dr M Perry
Solicitors for the Respondent:	Sparke Helmore
Date of Hearing:	13 May 2002