FEDERAL COURT OF AUSTRALIA

MIGRATION – *Migration Act* 1958 (Cth) – review of decision of Refugee Review Tribunal – whether fear of persecution for reason of race, religion or membership of a particular social group – whether the Refugees Convention precludes persons who have a well-founded fear of persecution for reason of what they have done as individuals – whether well-founded fear of persecution may be motivated directly or indirectly by reason of religion

STATUTES – *Migration Act* 1958 (Cth) – *Convention Relating to the Status of Refugees – Vienna Convention of the Law of Treaties* – statute incorporating provisions of a treaty - principles to be applied to the interpretation of treaties

Migration Act 1958 (Cth), ss 36, 476(1)(e)

Convention Relating to the Status of Refugees 1951, Art 1A(2)

Vienna Convention on the Law of Treaties, Art 31

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

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

Morato v Minister of Immigration, Local Government and Ethnic Affairs (1992) 39 FCR 401, considered

March v E.& M.H. Stramare Pty Limited (1991) 171 CLR 506, cited

Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165, cited

VITALIS ANANZE OKERE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 154 of 1998

BRANSON J

SYDNEY

21 SEPTEMBER 1998

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG154 of 1998

BETWEEN:	Vitalis Ananze Okere Applicant
AND:	Minister for Immigration and Multicultural Affairs Respondent

JUDGE(S):	BRANSON J
DATE OF ORDER:	21 September 1998
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside.

2. The matter be referred to the Refugee Review Tribunal for further consideration according to law.

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

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PLACE:	SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

This is an application for review of a decision of the Refugee Review Tribunal ("the RRT"), which affirmed the decision of a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a protection visa under the *Migration Act* 1958 (Cth) ("the Act").

To be entitled to a protection visa, an applicant must be a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Refugees Convention").

Australia has protection obligations under the Refugees Convention to any person who

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it." (Art 1A(2) Refugees Convention)

BACKGROUND FACTS

The applicant, Mr Okere, is a national of Nigeria. He is a Roman Catholic, belonging to the Igbo ethnic group. He is a single man in his thirties. He worked as a teacher in Nigeria between 1984 and 1988. From 1988 to July 1995 the applicant resided in the Philippines where he attained a university degree.

Mr Okere arrived in Australia on 9 July 1995. On 30 August 1995 he applied to the Department of Immigration and Ethnic Affairs for a protection visa. On 23 October 1996 the application was refused, and on 12 November 1996 the Mr Okere applied for a review of the delegate's decision by the Refugee Review Tribunal ("the RRT"). On 4 February 1998 the RRT affirmed the decision of the delegate to refuse Mr Okere's application for a protection visa. On 4 March 1998, Mr Okere filed in this Court an application for a review of the decision of the RRT.

The RRT accepted the facts as asserted by the applicant. Those facts are conveniently summarised in the following passages from the reasons for decision of the RRT:

"… the Applicant claimed that he left Nigeria to escape clan violence which had claimed most of his relatives; and also to avoid being forced to head a satanic sect to which he and his family are opposed. He claims that one week after his arrival in Australia by his step father, who had sent him overseas to study in order to avoid the sect, was poisoned by the sect in order to force the Applicant to return home. He claimed that the Nigerian government would not be able to protect him; among other things the government is controlled by Muslims who want to see Christians killing themselves.

At interview he stated that he was approached to lead the cult in 1984 having been selected to do so through local custom by a fortune teller. Between 1984 and 1988 when he left Nigeria he was able to delay complying with his obligations by nominating a de facto leader. He went to the Philippines to avoid the consequences of refusing to lead the group.

The Applicant stated at the hearing that about seventy percent of the population of his village were Christian; thirty percent were ancestor or idol worshippers following the traditional religious beliefs of the kinship group to which the Applicant also belongs. It is the members of his own kinship group or subclan from whom the Applicant fears harm, on the basis that he refuses to take up the leadership of the sect to which he has been elected. He explained that this was what he meant by the claim in his application that he left Nigeria to avoid clan violence.

The Applicant said that he was informed in 1984 that he had been chosen to lead the group after a process in which a fortune teller advises the elders of the wishes of the ancestors. The Applicant said that, as a Christian, he does not believe that his ancestors pass on any such messages. He believes that he was chosen to lead the group because they knew he would refuse, and would therefore be killed, and by getting him out of the way his relatives would gain access to his family's land. It was not clear from the Applicant's evidence, however, whether he believe that the members of the sect were involved in manipulating the process by which he was chosen in order to achieve this result; in fact, he stated that he thought that they genuinely believed that he had been chosen by the ancestors.

The Applicant stated that between 1984 and 1988 he was able to avoid assuming his responsibilities by requesting the oldest man in the clan to be a temporary leader, and paying him sufficient money to make offerings to the ancestors. After the Applicant left Nigeria in 1988, he claims that his step father was slowly poisoned by members of the group; he ultimately died in 1995. The Applicant claims that this was to force him to return to the village. The Applicant said that his mother and sisters, who are his only remaining immediate family members, have not been placed under

any pressure in relation to the Applicant's failure to meet his responsibilities; according to the Applicant, this is because they are women.

The Applicant said that if he returned to his village and failed to assume the leadership he would be killed – this is the traditional punishment. He said that if he reported the matter to the authorities they would not care and would take no action. He drew my attention to the poor human rights record of the Nigerian government, which he argued, demonstrates their lack of concern. He said that he would not be able to avoid the problem by relocating to another part of Nigeria. He said that people travel around and word of his whereabouts would get back to his village. In addition he would have difficulty obtaining work as a teacher in other parts of Nigeria because he speaks his local dialect and would face discrimination."

THE REASONS OF THE RRT

The RRT identified the issue for its determination as whether the harm faced by the applicant should he return to Nigeria would be harm "directed at the Applicant for reason of one of the grounds enumerated in the [Refugees] Convention".

In considering whether the harm feared by the applicant was on the basis of race or religion the RRT concluded that the applicant faces harm "because of what he has done as an individual … not for reason of his race or religion". The RRT stated that:

"While the Applicant may not have been in a position where the sect members would wish to harm him were it not for his own religious beliefs which preclude his involvement with idol worship, this is a bare causal connection not sufficient to establish that the persecution feared by the Applicant would be for reason of his religion"

The RRT also considered whether Mr Okere's application could succeed on the basis of his membership of a particular social group, within the meaning of the Refugees Convention. The RRT concluded that:

"In this case, on the basis of the available evidence, I am unable to identify any group to which the Applicant could be said to belong, which is united by its common non-belief in traditional religion, which is set apart from society by this common element, and which faces persecution as a group. There is no evidence before the Tribunal of any commonality between people who may not accept traditional beliefs, or who may refuse to be involved in traditional religious practices for any number of reasons. There is no evidence that such a group stands apart in Nigerian society; nor does the evidence support a finding that such a group faces persecution of itself; rather the evidence suggests that any such group could only be identified once an individual member was singled out for persecution. In these circumstances, the group could only be identified by the fact that its members face persecution. Moreover, I am satisfied that it is not because of what the Applicant is or believes, but because of what he, as an individual, has done, that he is at risk of harm. Accordingly, the Convention does not provide protection against that harm …"

CONSIDERATION

It was contended on behalf of the applicant that the RRT erred in construing the Refugees Convention as precluding from the protection obligations thereby created, an applicant who has a well-founded fear of persecution "because of what he [or she], as an individual, has done". Mr Game SC, who appeared for the applicant, argued that the RRT misunderstood the principles referred to in *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 and in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. He submitted that the RRT had incorrectly applied principles intended to assist in the identification of "a particular social group" for the different purpose of determining whether an applicant faces a risk of persecution for reasons of race or religion.

In *Ram's* case Burchett J, with whom O'Loughlin and R.D. Nicholson JJ agreed, at 569 stated:

"A crowd is not a social group … certainly not one of a kind that is properly described as having a membership. There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is "for reasons of" his membership of that group".

In *Applicant A's* case, Dawson J, who together with McHugh and Gummow JJ constituted the majority on the issue of whether the applicants in that case were members of a particular social group, said at 242-243:

"The requirement that the feared persecution be by reason of "membership" of a particular social group was taken by Black CJ (with whom French J agreed) in Morato v Minister for Immigration to require that the persecution be on account of "what a person is – a member of a particular social group – rather than upon what a person has done or does". But as Black CJ himself recognised, that statement should not be taken too far. The distinction between what a person is and what a person does may sometimes be an unreal one. For example, the pursuit of an occupation may equally be regarded as what one is and what one does. At other times, the distinction may be appreciable but not illuminating. For example, the acts of conceiving and bearing a child may be what people do, but the result of those acts – that the persons involved are parents – is quite central to what they are.

However, I think that Black CJ's remarks were directed more to the situation of a generally applicable law or practice which persecutes persons who merely engage in certain behaviour or place themselves in a particular situation. For example, a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms. Viewed in that way, Black CJ's distinction between what a person is and what a person does is merely another way of expressing the proposition which I have already stated".

McHugh J observed at 264:

"Only in the "particular social group" category is the notion of "membership" expressly mentioned. The use of that term in conjunction with "particular social group" connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group".

In *Applicant A's* case, Gummow J at 285 expressly approved the passage set out above from the reasons for judgment of Burchett J in *Ram's* case (although without quoting the first sentence thereof).

As the above passages from the judgments in *Ram's* case and *Applicant A's* case make clear, "membership of a particular social group" is to be distinguished from the other four Convention reasons: the notion of "membership" is a crucial aspect of "membership of a particular social group", but that notion has no part to play in the other four reasons. As Burchett J explained in the passage from his reasons for judgment in *Ram's* case set out above, persons are persecuted for reasons of their membership of a group when they are seen as "jointly condemned [with other members of the group] in the eyes of their persecutors". It is in this sense that they are persecuted for reason of their membership of the group rather than for reason of what they as individuals have done (see the reference by Dawson J in *Applicant A's* case to *Morato v Minister of Immigration* (1992) 39 FCR 401 per Black CJ, with whom French J agreed, at 404-405).

It does not logically follow that individuals are not persecuted for reason of their race or religion, to take two of the other four Convention reasons, if they are persecuted for reason of what they as individuals have done. To determine whether this consequence nonetheless follows from the proper construction of Article 1A(2) of the Refugees Convention, it is necessary to give consideration to the principles which govern the construction of Article 1A(2).

Article 1A(2) of the Refugees Convention has been transposed into Australian domestic law by s 36 of the Act. Section 36 of the Act provides:

"36(1)There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

For the purposes of s 36 of the Act, Article 1A(2) of the Refugees Convention is to be construed according to the rules applicable to the interpretation of treaties, rather than according to common law rules of construction.

McHugh J gave detailed consideration to the rules applicable to the interpretation of treaties in *Applicant A's* case at 251-256. Brennan CJ in that case agreed with the principles of interpretation identified by McHugh J. Such principles derive from Article 31 of the *Vienna Convention on the Law of Treaties* ("the Vienna Convention"). As McHugh J pointed out in *Applicant A's* case at 254, Article 31 of the Vienna Convention calls for an holistic approach in which "[p]rimacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered".

Adopting such an approach to the construction of Article 1A(2) of the Refugees Convention, and giving primacy to the ordinary meaning of the text of the article, I do not consider that the protection of the Convention is intended to be denied to all persons who have a well-founded fear of persecution for reason of what they have done as individuals. Persons who seek to invoke the protection afforded by the Refugees Convention by placing reliance on their membership of a particular social group, necessarily face the hurdle, discussed above, of showing that the persecution that they fear is persecution for reason of their membership of that social group. However, I find nothing in the ordinary meaning of Article 1A(2), considered in the light of the context, object and purpose of the Refugees Convention, which suggests against the question of whether an individual has a well-founded fear of persecution for reason ofhis or her race or religion being answered by "applying common sense to the facts of each case" (cf. *March v E. & M.H. Stramare Pty Limited* (1991) 171 CLR 506 per Mason CJ at 515). I appreciate that the *March v Stramare* test is a common law test of causation, but having regard to the principles of interpretation of treaties referred to above, it reflects, in my view, an appropriate approach to the construction of this aspect of Article 1A(2) of the Refugees Convention. It is, in my view, only to put the same test in different words to invite the identification of the true reason for the persecution which is feared (cf. *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 per Deane and Gaudron JJ at 176-177 and Dawson J at 184).

In this case the RRT did not, in my view, seek to apply common sense to the facts of the case when it concluded:

"In the present case it is clear, in my view, that it is because of what he has done as an individual, in refusing to lead the followers of traditional religion in his village, that the Applicant faces harm; it is not for reason of his race or his religion."

The above conclusion of the RRT was, I consider, based on a false dichotomy: that is, that within the meaning of Article 1A(2) of the Refugees Convention the applicant either faces harm for reason of his religion or he faces harm by reason of what he has done as an individual. The Refugees Convention does not, in my view, require the imposition of such a dichotomy upon the facts of any particular case. The RRT was required in this case, in my view, to ask itself whether, applying common sense to the facts which it accepted, the applicant has a well-founded fear of persecution the true reason for which is his religion.

It follows from the above analysis that I reject the contention made on behalf of the respondent that Article 1A(2) of the Refugees Convention is to be construed as excluding from the protection afforded by the Refugees Convention persons who have a well-founded fear of persecution which is motivated not directly for reason, for example, of their religion, but only "indirectly" for reason of their religion. According to this contention, for example, persons who have a well-founded fear of persecution for reason of their refusal to work on the Sabbath could not be found to have a well-founded fear of persecution for reason of their religion; the persecution feared by them would be related to their refusal to work and not to their religion.

Professor Hathaway in his book *The Law of Refugee Status* at p.148 expresses the view that "indirect prevention of religious practice is sufficient to establish a claim to refugee status". He refers to the decision of the Immigration Appeal Board (Canada) in *Tomasz v Gozdalski* (decision M87-1027X, 23 April, 1987) in which it was held that the compulsory scheduling by organs of the State of meetings for communist propaganda on Sunday mornings when good Roman Catholics would attend mass, could amount to religious persecution of a deeply religious person.

History supports the view that religious persecution often takes “indirect” forms. To take only one well known example, few would question that Sir Thomas More was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.

CONCLUSION

I conclude that the decision of the RRT involved an error of law, being an error involving an incorrect interpretation of the applicable law (s 476(1)(e) of the Act). The decision of the RRT will be set aside and the matter referred to the RRT for further consideration, according to law.

I certify that this and the preceding eight (8) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson

Associate:

Dated: 21 September 1998

Counsel for the Applicant: Mr T A Game SC

Solicitor for the Applicant:	Kessels & Associates
Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	29 June 1998
Date of Judgment:	21 September 1998