FEDERAL COURT OF AUSTRALIA

SHKB v Minister for Immigration& Multicultural & Indigenous Affairs [2004] FCA 545

MIGRATION - Protection Visa - Basis of persecution - Whether retribution could be for a Convention reason - Fair hearing - Failure to understand claim made by applicant - Tribunal reasons recording that the applicant had agreed with a particular proposition when applicant had not done so - State protection - Whether adequate in the circumstances

Judiciary Act, 1903 (Cth)

Migration Act 1958 (Cth)

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24

Minister for Immigration & Multicultural Affairs v Singh (2002) 209 CLR 533

Waterford v Commonwealth (1987) 163 CLR 54

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389

SGBB v Minister for Immigration and Multicultural & Indigenous Affairs (2003) 199 ALR 364

Paul v Minister for Immigration & Multicultural Affairs [2001] FCA 1196

Applicant M31 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 533

SLGB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 262

Re Refugee Tribunal Ex parte Aala (2000) 204 CLR 82

Minister for Immigration and Mulicultural Affairs v Respondents S152/2003 [2004] HCA 18 (S152)

SHKB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

S 408 of 2003

SELWAY J

5 MAY 2004

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S408 of 2003

BETWEEN:	SHKB APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	SELWAY J
DATE OF ORDER:	5 MAY 2004
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

The application seeking orders of prohibition, certiorari, mandamus and/or injunctions in relation to an order of the Refugee Review Tribunal made on 28 June 2002 is dismissed.

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	S408 of 2003

BETWEEN:	SHKB APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	SELWAY J
DATE:	5 MAY 2004
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 The applicant has applied to this Court pursuant to the *Judiciary Act, 1903* (Cth) s 39B seeking orders of prohibition, certiorari, mandamus and/or injunctions against the respondent ('the Minister') in relation to an order of the Refugee Review Tribunal ('the Tribunal') made on 28 June, 2002. For the reasons given below that application is dismissed.

2 The applicant is a South African citizen. He is a member of the racial group described in South Africa as coloured. He arrived in Australia on 4 July 2000. He had a visa authorising his entry to Australia. That visa expired in December 2000. On 18 December 2000 the applicant lodged an application for a protection visa. In order to obtain such a visa the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister') had to be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol: s 36(2) of the *Migration Act 1958* (Cth) ('the Act'). In general terms the Minister had to be satisfied that the appellant was a 'refugee' as defined in the Convention being a person who:

'… owing to a well-founded fear of being persecuted for reason 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.'

3 The applicant claimed that he was a refugee. The Tribunal described that claim as follows:

'The applicant's claims were set out in a written attachment to his protection visa application. He claimed that he was a member of the racial group within South Africa known as "coloured". He claimed that he was a supporter of the African National Congress (ANC) whereas the area in which he lived, near Durban, was the traditional land of the Zulus who overwhelmingly supported the Inkatha Freedom Party (IFP).

The applicant had experienced "some problems" with the Zulus from the time he moved to this farm in April 1994. This was antagonism from the local Zulus who were angry because they believed that coloured families, like the applicant's, had taken their land from them. The applicant's cousin and an uncle died because of this sort of land dispute. However, there was no problems of a major sort until October 1999. As he was coming home from work, he saw lights on unexpectedly in his house. He did not enter but waited for the police whom he had called. The police searched the house and found an intruder hiding in the wardrobe. In response to seeing the intruder's rifle, the police shot him dead. The applicant himself was threatened and left his home, coming to Australia in November 1999.

The applicant returned to South Africa in June 2000, after his mother called him and said that she thought it was safe. However, the applicant had only been home for ten days when he received a threatening phone call from a Zulu saying that they were going to kill him. The applicant went and stayed at a friend's house and soon returned to Sydney (July 2000).

The applicant does not feel that he will be able to invoke the assistance of the authorities in South Africa because of his ethnicity. He notes that his cousin had attempted to resolve his land dispute with the local Zulus by asking the local magistrate to arbitrate. However, the magistrate was an IFP supporter and did not help the applicant's cousin. The applicant himself had once asked for the help of the police in turning away some intruders on his farm and the policewoman had said that the land belongs to the black South Africans, not the coloureds.'

4 On 29 December 2000 a delegate of the Minister refused to grant the applicant a visa. On 30 January 2001 the applicant sought a review of that decision from the Refugee Review Tribunal. The Tribunal gave its decision on 28 June 2002. The Tribunal confirmed the decision of the delegate.

5 The Tribunal accepted that the applicant was honest and creditable. It accepted his evidence as to what he said had occurred. Nevertheless, the

Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

6 There were three reasons why the Tribunal did not accept he was a refugee. The first was that the Tribunal found that the reason why persons wished to injure the applicant was to seek retribution for the person who had been killed at the applicant's farm. The Tribunal did not accept that the reason why the applicant would be at risk if he returned to South Africa was a Convention based reason. As the Tribunal expressed it:

'The Tribunal discussed this claim with the applicant and he agreed that the person making the threats was obviously a relative of the intruder who had been killed. He therefore agreed that the caller was seeking retribution for a death which he (unfairly) attributed to the applicant; that is, he agreed that the caller was not seeking to harm the applicant because of his ethnicity, religion or other Convention reason.

… The Tribunal accepts that the applicant received a threatening phone call from one of the deceased's family members or friends when he was staying with his parents in Durban after an absence of some eight months. The specific reference to the deceased intruder strongly indicates that the caller was interested in retribution, rather than seeking to harm the applicant for a more general reason, or a reason grounded in the Convention.'

7 The second reason why the Tribunal was not satisfied that the applicant was a refugee was that the Tribunal was not satisfied that the applicant could not relocate elsewhere in South Africa and that consequently he did not have a well founded fear of persecution:

'The applicant admitted that no harm had befallen him in Johannesburg and that he received no threatening phone calls while there. He agreed that he was well qualified and had a good record of employment with a government department. He agreed that he could relocate to a place away from Durban - a place such as Johannesburg, with the added advantage that it was not in traditional Zulu land and not predominantly IFP in its political persuasion.

…

Additionally, as the harm the applicant fears is confined to his home district, he has the option of relocation. He has, in any case, severed ties with the farm on which he used to live until October 1999. He has not lived there since that date and had signed over his own interest in the property to his father. He has agreed that it is reasonable for him to relocate given his employability and the freedom of movement available within South Africa.

8 The third reason was that the Tribunal was not satisfied that the applicant would not be protected by the South African State:

'… There is no evidence that the State would not be willing or able to protect him to the extent that it protects any of its citizens from crime. Given the crime statistics in South Africa, this may fall short of an optimal level - but there is no evidence that one particular group is particularly disadvantaged for a Convention reason. The Tribunal notes that in South Africa, "The Constitution and Bill of Rights prohibit discrimination on the basis of race, ethnic or social origin, or culture. The Government continued efforts to reorganize and redesign the educational, housing, and health care systems to benefit all racial and ethnic groups in society more equally" (US Department of State 2002, Country Reports on Human Rights Practices in 2001, section 5).'

9 The applicant brings judicial review proceedings against the process and decision of the Tribunal. Both parties acknowledge that in order to succeed the applicant must establish that there is 'jurisdictional error': see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24. The applicant complains that the Tribunal made jurisdictional errors in relation to each of the three reasons it gave for reaching its conclusion. The relevant errors alleged by the applicant are identified in the Amended Application filed herein on 10 March 2004.

REASON FOR PERSECUTION WAS RETRIBUTION

10 Pursuant to the Refugee Convention the 'well founded fear of persecution' must be based upon one of the specified reasons set out in the Convention. The applicant appears to put his case on at least two Convention reasons. The applicant would appear to claim that the invasion of his farm was part of a political campaign by the IFP, and/or that it was because he was not a member of the IFP, and/or because he was a member of the ANC. This would seem to be a claim that his persecution was on the basis of his political beliefs or on the basis that he was not a member of the IFP. There is also mention in his claim that the invasion of his farm was by Zulu persons as part of a campaign by those persons to seize land from non-Zulus. If this was the basis of the claim then it might be said that the persecution was on the basis of his race or ethnicity or, more accurately, on the basis that he was not a Zulu. Obviously disputes about land ownership between different racial or ethnic groups often involve political and racial issues. There may be little point in attempting to distinguish them. For present purposes it is sufficient to say that the applicant's case was that the invasion of the farm was based upon a Convention reason or reasons. The Tribunal has not made any express finding in relation to that aspect of the case, other than its general finding that the applicant was an honest and creditable witness and that it accepted his evidence.

11 However, the Tribunal did hold that the applicant's current fears of persecution if he is returned to South Africa, even if well founded, were not based upon Convention reasons, but were the result of persons seeking retribution from the applicant for the death of the person who had invaded the farm. It would seem clear from the Tribunal's reasons that the Tribunal has

drawn a distinction between persecution for Convention based reasons and persecution for reasons of retribution. As the Tribunal put it '... the caller was interested in retribution, rather then seeking to harm the applicant for a more general reason, or a reason grounded in the Convention.'

12 In my view the attempt by the Tribunal to draw a distinction between Convention based reasons and retribution involves a jurisdictional error. In *Minister for Immigration & Multicultural Affairs v Singh* (2002) 209 CLR 533 ('*Singh*') the High Court held, although in a slightly different context, that where an act of revenge or retribution is derived from or arises out of a political act or campaign then the act or revenge or retribution may be a political act: see at 544-545, 550-553 and 577-578. As it was put by Gleeson CJ at 545

'[The Tribunal] was proceeding upon a view that there is a necessary antithesis between violent retribution and political action. That was an error of law'.

The Tribunal in this case would seem to have fallen into the same error. In this case the Tribunal would seem to have proceeded on the view that there was an antithesis between retribution on the one hand and political or racial persecution on the other. At the very least there was a further step that was necessary in the Tribunal's reasoning - the Tribunal was required to determine whether or not it was satisfied that those seeking retribution against the applicant were doing so as an aspect of a broader political or racial campaign to seize farm lands near Durban, or were doing so for reasons unrelated to that campaign. If the Tribunal was satisfied that the retribution formed an aspect of such a broader campaign then it would follow that fear of such an act of retribution was a fear based upon a Convention reason. In my view the Tribunal has fallen into the same error as that identified in *Singh*.

13 As that error of law goes directly to the question of whether or not Australia had protection obligations to the claimant, that being the matter that the Tribunal had jurisdiction to determine, it was an error of law going to the jurisdiction of the Tribunal. Such an error is a jurisdictional error.

14 Given this conclusion it is not strictly necessary for me to deal with an alternative argument which was put by the applicant. However, the alternative argument was fully argued and it is appropriate for me to discuss it. The applicant also argued that the Tribunal did not afford the applicant a proper hearing in relation to its finding that the reason for the threat made to the applicant was retribution rather than a Convention reason. In this regard the applicant pointed to the comments by the Tribunal (quoted in par [6]) that the applicant had 'agreed' that the person making the threats was obviously a relative of the intruder and that the applicant agreed that that person 'was not seeking to harm the applicant because of his ethnicity, religion or other Convention reason'.

15 The applicant put before the Court the transcript of the proceedings before the Tribunal for the purpose of showing that the Tribunal misunderstood the applicant's evidence. The Minister has agreed that the transcript put before the Court is accurate so far as it goes. The applicant contrasted the

comments made by the Tribunal as to what the applicant had agreed with the actual words recorded in the transcript:

'[TRIBUNAL] Well, look I will tell you. .. I can see you are worried and I will be very honest with you. The difficulty with this is that you um, that um, that from the phone conversation that you have had from the man that was threatening you, it would appear that the man that was threatening you is a relative of the dead intruder. Okay? And of course, it is quite illogical to blame you when clearly the man was an intruder and clearly he was shot by the police but this person is illogical and is blaming you. But that is very much in the nature of a personal threat, somebody who wants retribution against you for an illogical reason but nevertheless its personal.

[Applicant] I think they want to get me away from the land because of my race, because traditionally the Zulu... traditionally the land belongs to the Zulus.'

16 The applicant argued that the transcript does not reveal that he 'agreed' with the proposition put to him by the Tribunal. The applicant has filed an affidavit in which he says that the death threats were racially based. However, he does not say in his affidavit that he did not 'agree' with the propositions being put to him by the Tribunal (contrast par 21 below). In the absence of any direct evidence on the issue, I am not prepared to assume that the transcript is completely accurate. I am also not prepared to assume that the transcript purports to record non-verbal communications, such as nods of the head. For example, the word 'Okay?' recorded in the transcript as being said by the Tribunal member would seem to call for a response. If there was such a response it was either non-verbal (such as a nod of the head) or it was not recorded. In either case the Tribunal may well be correct in recording in its reasons that the applicant had agreed to the proposition being put by the member.

17 Consequently I am not satisfied that the Tribunal was in error in finding that the applicant had agreed to the various matters which the Tribunal put to him. Of course, even if there was such an error, it may not have been a jurisdictional error. This is discussed further below.

18 In my view the real importance of the quotation in par 15 above is not that it evidences some error by the Tribunal in its finding that the applicant had agreed with the propositions being put by the member. Rather, the applicant's answer to the Tribunal member is important because it highlights the point already made above. Even if the threat was personal to the applicant and even if the persons making it were actuated by the desire for retribution, that does not preclude a conclusion that the threat was 'for reason of race'. The applicant claimed that it was for that reason. That was the issue the Tribunal needed to resolve. It did not do so. The failure of the Tribunal to consider that issue involved a jurisdictional error.

RELOCATION

19 The Tribunal found that the applicant could relocate in South Africa away from the Durban area. As quoted in par 7 above, the Tribunal recorded that the applicant 'agreed' that he could do so.

20 The transcript of the Tribunal hearing reveals that there was no express oral acknowledgement by the applicant that he could relocate away from Durban. Indeed, his oral evidence was that he had received a telephone call that those that contacted him 'hold [him] personally responsible for the death of the intruder and that no matter where I go in the country they will track [him] down and they will kill [him].'.

21 On the face of it the transcript does suggest that the Tribunal was in error in reaching the conclusion that the applicant had agreed that he could relocate. The only statement from the applicant recorded in the transcript is to the contrary. Nor is there any discussion by the Tribunal from which it might be inferred that there was some non verbal acknowledgement of the sort discussed above. Further, the affidavit of the applicant expressly denies that he made the statement as alleged by the Tribunal. In these circumstances I am satisfied on the material before me that the Tribunal misunderstood or misinterpreted the evidence given by the applicant. I am satisfied that the applicant did not agree that he could relocate. Indeed, his position was to the contrary. His evidence was that any relocation within South Africa would be ineffective because he would be tracked down and killed.

22 The question then is whether the error by the Tribunal in understanding the evidence of the applicant involved a jurisdictional error. The applicant argues that it involved a failure to afford the applicant a fair hearing. This submission confuses the jurisdictional requirement to afford a fair hearing with the clear jurisdiction of the Tribunal to make factual findings, even factual findings which are erroneous: see *Waterford v Commonwealth* (1987) 163 CLR 54 at 77-78. The Tribunal does not make a jurisdictional error merely because it misunderstands the evidence given by a particular person, including the applicant.

23 On the other hand, the Tribunal will make a jurisdictional error if it fails to understand and address the claim that the applicant has put to it: see *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 394 [24]; *SGBB v Minister for Immigration and Multicultural & Indigenous Affairs* (2003) 199 ALR 364 at 368 [16]-[18].

24 A distinction can be drawn between the claim made by the applicant and the applicant's evidence in support of that claim. However, it is not a 'bright line' distinction. The distinction between evidence supporting a claim, and the claim itself is often difficult to draw even in the context of a judicial proceeding. It is likely to be very difficult in the context of a Tribunal proceeding which is necessarily attended by considerable informality and where applicants rarely have the advantage of legal assistance. Significant aspects of the claim are likely only to be revealed in the evidence or information put before the Tribunal by the applicant. In such circumstances the difference between the claim itself and the evidence supporting it will often

be blurred at least where the relevant factual issue involves an essential step in the applicant satisfying the Tribunal that he or she is a refugee: see *Paul v Minister for Immigration & Multicultural Affairs* [2001] FCA 1196 at [79] per Allsop J (with whom Heerey J agreed) and see discussion of the relevant principles by Weinberg J in *Applicant M31 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 533.

25 In my view it was a relevant and integral aspect of the claim made by the applicant in this case that the applicant was at risk wherever he was living in South Africa. There is nothing in the Tribunal's reasons which suggests that the Tribunal understood that this was the claim being put by the applicant. On the contrary the Tribunal understood that the applicant agreed that he could safely relocate within South Africa. In the result the Tribunal failed either to understand or to determine the claim as made by the applicant. In my view this involved a jurisdictional error.

26 The Minister has submitted that this Court should reach the conclusion as a matter of fact that relocation within South Africa was reasonably open to the applicant, no matter what conclusion the Tribunal has reached. It is true that the Tribunal has reached such a conclusion in similar matters. In *SLGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 262 at [22] I expressed the view that the Tribunal's conclusion in that case that a coloured person facing the threat of alleged persecution by the IFP in Durban could relocate elsewhere in South Africa was 'self evidently correct'. However in this case the relevant threat, even if it is based on race or political belief, also contains an element of retribution. This might be sufficient to satisfy the Tribunal that it was not reasonable for the applicant to relocate within South Africa. Where there is a jurisdictional error that affected the result of the determination by the Tribunal, or which could have done so (see *Re Refugee Tribunal Ex parte Aala* (2000) 204 CLR 82 at 122), the appropriate course will usually be to remit the matter to the Tribunal for it to determine the relevant facts. As discussed below, where the relevant factual finding is so clear and obvious that to remit the matter back to the Tribunal would simply be to delay the inevitable then the Court can, in the exercise of its discretion, decline to do so, notwithstanding that there is a jurisdictional error that could have affected the result. That is not the case at least on this ground of alleged error.

STATE PROTECTION

27 As discussed in par [8] above, the Tribunal was not satisfied that the applicant would not be protected by the police and other authorities in South Africa. The applicant complains that the Tribunal applied the wrong test in reaching that conclusion. The applicant says that the Tribunal should have asked itself whether the relevant protection was effective or meaningful.

28 The persecution alleged by the applicant was not persecution directly by the State or by State authorities. It was either by a political party (the IFP) or by a racial or ethnic group (the Zulus). For relevant purposes the persecution was by private groups, not the State. There is no suggestion in

this case that the South African government has 'encouraged' the persecution by such groups. Indeed the evidence before the Tribunal was that the applicant had only requested State protection on two occasions. The first occasion was when he sought police support when his farm was invaded. On that occasion the support was provided and one of the invaders was killed in the course of doing so. On the second occasion he sought police support to remove those now living on the farm from it. The police did not assist because (it was said) the Zulus own the land. There was no evidence that he sought police support outside of the Durban area.

29 The question is whether persecution by these private individuals or groups could give rise to a well founded fear of persecution under the Convention. This requires some explanation of the relationship under the Convention between persecution by private individuals and the role of the State. In the recent decision of the High Court in *Minister for Immigration and Mulicultural Affairs v Respondents S152/2003* [2004] HCA 18 (S152) the majority of Gleeson CJ, Hayne and Heydon JJ identified the relevant relationship as arising from the use of the word 'protection' in the definition of 'refugee' in the Convention (see par 2 above). They held that that word 'refers to the diplomatic or consular protection extended abroad by a country to its nationals'. For this purpose (at [19]) an applicant:

'… must show that he is unable or, owing to his fear of persecution in Ukraine, unwilling to avail himself of the diplomatic or consular protection extended abroad by the state of Ukraine to its nationals. Availing himself of that protection might result in his being returned to Ukraine. Where diplomatic or consular protection is available, a person such as the first respondent must show, not merely that he is unwilling to avail himself of such protection, but that his unwillingness is owing to his fear of persecution. He must justify, not merely assert, his unwillingness. As the Supreme Court of Canada put it in Canada (Attorney General) v Ward [1993] 2 SCR 689 at 724,a claimant's unreasonable refusal to seek the protection of his home authorities would not satisfy the requirements of Art 1A(2). In Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 233, Brennan CJ referred to Art 1C(5), which refers to the possibility that circumstances may change in such a way that a refugee can no longer refuse to avail himself of the protection of the country of his nationality. This indicated, he said, that the definition of "refugee" must be speaking of a fear of "persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality" (1997) 190 CLR 225 at 233.'

30 The joint judgment also refers to a wider understanding of the word 'protection', referring in particular to Art 33 of the Refugee Convention. In the result their Honours conclude (at [21]):

'… the willingness and ability of the state to discharge its obligation to protect its citizens may be relevant at three stages of the enquiry raised by Art 1A(2). It may be relevant to whether the fear is well-founded; and to whether the conduct giving rise to the fear is persecution; and to whether a person such as the first respondent in this case is unable, or, owing to fear of persecution, is unwilling, to avail himself of the protection of his home state. Lord Hope of Craighead quoted with approval a

passage from the judgment of Hale LJ in the Court of Appeal in Horvath[2001] 1 AC 489 at 497.where she said, in relation to the sufficiency of state protection against the acts of non-state agents:

"[I]f it is sufficient, the applicant's fear of persecution by others will not be 'well founded'; if it is insufficient, it may turn the acts of others into persecution for a Convention reason; in particular it may supply the discriminatory element in the persecution meted out by others; again if it is insufficient, it may be the reason why the applicant is unable, or if it amounts to persecution unwilling, to avail himself of the protection of his home state".'

(See also at [23])

> 31 In cases where the failure of the State to protect its citizens is not discriminatory, and, in particular, is not discriminatory for a Convention reason, the primary importance of the issue of inadequate State protection will be in showing both that the applicant's fear of persecution is well-founded and that that fear is the reason why the applicant does not rely upon the State of his nationality for protection: see R Germov & F Motta *Refugee Law in Australia* (2003) (Germov & Motta) at 369. One possible approach to the question of the adequacy of the State protection in a particular case would be to treat it as forming part of the factual matrix for consideration by the Minister in determining whether or not he is satisfied whether the applicant had a well founded fear of persecution. On this approach it would not be necessary to determine any particular standard of State protection that would be required - the relevant level would vary depending upon the facts of the case including issues such as the gravity of the harm feared. This would seem to be the approach adopted by Kirby J in S152 at [100]-[101]; see also *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 38-40; see also Germov & Motta at 373.
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> 32 However, this was not the approach taken by the majority in S152. Instead their Honours indicated that a particular and discernable level of State protection was required by the refugee Convention. They noted that no country could guarantee the safety of its citizens (at [26]) and that there it was not necessary that the State 'be able to provide an assurance of safety' (at [28]). The level of protection that was required was explained at [26]-[28]:

'The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the Tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.

… It is hardly surprising that there was no evidence of the failure of Ukraine to provide a reasonably effective police and justice system. That was not the case that the first respondent was seeking to make. The country information available to the Tribunal extended beyond the case that was put by the first respondent. Even so, it gave no cause to conclude that there was any failure of state protection in the sense

of a failure to meet the standards of protection required by international standards, such as those considered by the European Court of Human Rights in Osman v United Kingdom (1998) 29 EHRR 245.

… [Having rejected the claim that the State were parties to the persecution] [t]he only other basis upon which the first respondent's unwillingness to seek the protection of the Ukranian government could be justified, and treated as satisfying that element of Art 1A(2), would be that Ukraine did not provide its citizens with the level of state protection required by international standards. It is not necessary in this case to consider what those standards might require or how that would be ascertained. There was no evidence before the Tribunal to support a conclusion that Ukraine did not provide its citizens with the level of state protection required by such standards.'

In my view their Honours have concluded that the relevant State is required to provide a 'reasonably effective police force and a reasonably impartial system of justice' (at [28]). 'Reasonably effective' in this context is to be determined by 'international standards'. Their Honours have not specified what those international standards are, but have made it clear that the Tribunal could not be satisfied that those standards had not been met unless there was evidence to that effect.

> 33 It is unnecessary in this case to attempt any definition of what the international standards might be. Nevertheless, it may be useful to note that the case of *Osman* referred to in the joint judgment at [27], involved various alleged breaches of the European Convention on Human Rights in the failure of the UK government and its authorities to protect the life and safety of some of its citizens. The Convention imposed an obligation upon member States to protect life. The European Court of Human Rights (at [115]-[116]) concluded that the duty included concepts of proportionality and was to be ascertained and measured in the particular circumstances of the particular case:

'The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be

interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, mutatis mutandis, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

Of course, many countries are not parties to that Convention. It may not necessarily provide a guide as to what 'international standards' might be. However, the comments to the European Court of Human Rights do identify some of the issues that are likely to be relevant to any discussion of international standards. Reference might also be made to the comments of Gleeson CJ in *Kharwar* at 9-10 [19] in that regard.

> 34 The Tribunal's reasons can be considered against this background. The applicant's case was that he faced a threat from private parties and that the police would not protect him because he was coloured. However, the Tribunal found that there was no evidence that State protection was discriminatory for a Convention reason. Further, the Tribunal noted that the South African Constitution and Bill of Rights prohibited such discrimination. On this basis it would seem that the Tribunal concluded that State protection was not selective or otherwise discriminatory.

35 The question that then arose was whether the State protection was so inadequate that it fell below international standards. The Tribunal commented that 'There is no evidence that the State would not be willing or able to protect him to the extent that it protects any of its citizens from crime.' The Tribunal noted that this protection 'may fall short of an optimal level'. The Tribunal had before it, and referred to, a report prepared in 2002 by the US Department of State entitled *Country Reports on Human Rights Practices in 2001*. That report identifies a number of human rights abuses committed by police and others in South Africa. It would support the Tribunal's conclusion that State protection in South Australia is not optimal. However, it is not required to be. The report does not contain evidence that the protection offered by the South African government to its citizens is so inadequate that it falls below international standards. What it does suggest is that where significant problems do exist they are localised and that they are being or have been addressed.

36 In the absence of any evidence before the Tribunal that the protection available from the South African police and authorities was below international standards or even that it was so inadequate that a person could not be blamed for not relying on them for protection then the Tribunal was correct to conclude that it was not satisfied that South Africa lacks the capacity and willingness to provide reasonably effective protection to its citizens including the applicant.

37 In my view there was no error in the Tribunal's analysis of whether the South African State had the capacity and willingness to protect the applicant.

38 The result of the above is that I agree with the applicant that the Tribunal made a jurisdictional error in treating retribution against the applicant as being antithetical to persecution for a Convention reason. I also agree with the applicant that the Tribunal made a jurisdictional error in failing to appreciate or consider the applicant's claim that he was at risk from those threatening him wherever he was living in South Africa. On the other hand, I do not accept that the Tribunal made any jurisdictional error in reaching the conclusion that the South African State was willing and capable of protecting the applicant. Consequently the Tribunal's conclusion that the individuals or groups who threatened the applicant did not do so for a Convention reason and that he could relocate within South Africa cannot stand. However, the other finding reached by the Tribunal that it was not satisfied that the South African State was unwilling or unable to protect the applicant still remains. That finding is sufficient by itself to support the ultimate conclusion reached by the Tribunal that it was not satisfied that Australia owed protection obligations to the applicant. Even if the applicant's case had otherwise been entirely accepted, the finding by the Tribunal in relation to the State protection argument would have the effect that the application for a protection visa was properly refused. The ultimate decision reached by the Tribunal is not invalid or ineffective. In any event the orders sought by the applicant are discretionary. There is no utility in making any orders to set aside the Tribunal's decision or to return the matter to it and the orders sought must be rejected in the proper exercise of the discretion.

39 For these reasons the application is dismissed. I will hear the parties as to costs.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Selway.

Associate:

Dated: 4 May 2004

Counsel for the Applicant:	M Clisby
Solicitor for the Applicant:	M Clisby
Counsel for the Respondent:	K Tredrea
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	7 April 2004
Date of Judgment:	5 May 2004