

# FEDERAL COURT OF AUSTRALIA

STQB v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCA 882

## **STQB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS**

**No S 18 of 2004**

**FINN J**

**ADELAIDE**

**8 JULY 2004**

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY

S 18 OF 2004

BETWEEN: STQB  
APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AND INDIGENOUS AFFAIRS  
RESPONDENT

JUDGE: FINN J

DATE OF ORDER: 8 JULY 2004

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. The application be dismissed.

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

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DATE: 8 JULY 2004

PLACE: ADELAIDE

**REASONS FOR JUDGMENT**

- 1 This is an unhappy proceeding.

2 At the time of his departure from Afghanistan the applicant, a young Hazara, Shi'a Muslim male, had a well founded fear of persecution by the Taliban. With the overthrow of the Taliban regime the applicant, though outside his home country, has had to adapt his claims to refugee status to accommodate the changed circumstances in Afghanistan. He is now either 17 or 18 years old. He is without family in Australia and is unable to locate his family in Afghanistan.

3 Unsurprisingly his evidence to the Refugee Review Tribunal at the time of hearing leading to the decision under review in this proceeding under s 39B of the *Judiciary Act 1903* (Cth), was unhelpful. His case necessarily was such as his migration adviser could make on his behalf. The short issue raised in this proceeding is: "What was that case?" The applicant claims that the Tribunal misdescribed its basis and in so doing committed a jurisdictional error. That error related to the description of the "particular social group" to which he claims to have belonged and by reason of which he has a well founded fear of persecution.

## The Particular Social Group

4 The Tribunal set out the evolving terms in which the applicant's claims were cast. These were drawn from his own statements and evidence at the hearing and, probably more significantly, from his adviser's submissions. Those various claims were described synoptically in the following terms:

"The applicant's claims for a protection visa are based on his claims that he will be persecuted if he returns to Afghanistan due to his Hazara ethnicity, his Shi'a Moslem religion, his imputed political opinion, and his possible membership of the particular social groups of 'unaccompanied minors', 'young Hazara, Shi'a Moslem men', 'returning refugees' and 'refugees returning from an infidel Western country'."

5 Having rejected the claims based on ethnicity, religion and political opinion in light of the country information on which it relied, the Tribunal dealt with the claims related to membership of a particular social group in the following way:

"The Tribunal has considered whether or not the applicant belongs to a particular social group and if so what social groups should be identified. In this regard it has considered if the applicant belongs to the particular social group 'young, Hazara, Shi'a Moslem males'. It has also considered if the applicant belongs to the particular social group of 'unaccompanied minors', and also to the particular social group of 'returning refugees' identified by his adviser in his submission dated 24 December 2003 and also the particular social group of 'refugees returning from an infidel Western country'. In relation to these four social groups it finds that such individuals are part of mainstream society and do not have a unifying characteristic which makes them cognisable and sets them apart from the rest of Afghan society. In making this finding the Tribunal has taken into account the fact that there is a lack of information to indicate they are perceived as such in Afghan society.

Moreover, even if ‘unaccompanied minors’ or ‘returning refugees’ did constitute a particular social group, the applicant is not a refugee. The evidence does not support the view that ‘unaccompanied minors’ or ‘returning refugees’ or ‘refugees returning from an infidel Western country’ are persecuted in Afghanistan. In making this finding the Tribunal has noted DFAT’s advice that Western returnees are not at risk in Afghanistan and that returnees are not targeted merely for having resided in the West (CX86321).

With regard to whether or not ‘young, Hazara Shi’a Moslem males’ constitute a particular social group, the Tribunal notes that despite its efforts to find such information, the Tribunal has not found any country information to indicate that since the fall of the Taliban Government in Afghanistan, ‘young, Hazara Shi’a Moslem males’ constitute a particular social group. The Tribunal has looked for such information from sources including Department of Foreign Affairs and Trade (DFAT), the US Government, Amnesty International or Human Rights Watch. The Tribunal does not accept that they constitute a particular social group.”

6 The applicant’s complaint was that the Tribunal disaggregated and then dealt separately with the four group descriptors to which it referred rather than dealing with them accumulatively as demonstrating the multiple characteristics of the social group to which the applicant belonged.

7 The migration agent’s submission on its face refers only to one particular social group of which the applicant was a member although it described the continuing, significant threat to the applicant as being attributable to:

“... his ethnicity and religion, the applicant’s membership of particular social group, this being ‘returning refugees’ and the lack of ‘effective protection’ available to our client due to the applicant’s family’s unknown whereabouts and the Hamid Karzai lead government’s inability to provide protection.”

8 The Tribunal’s identification of four possible social groups would seem, in light of the adviser’s submission, to have embodied its own assessment of the applicant’s circumstances drawn from evidence he gave to the Tribunal. The Tribunal noted, for example, that:

“(i) Asked why he did not want to return to Afghanistan, the applicant stated that his life was in danger because he was Hazara, a Shi’ite Moslem, young and would need to travel through Pashtun areas to get to his village. Also he did not know where his parents were or if they were still alive. He stated also that his religion was in danger.

(ii) In relation to who might harm him and why if he returned to Afghanistan, the applicant stated that he feared Pashtuns. Also he would be perceived as a returnee from an infidel Western country who had studied at a Roman Catholic school.”

9 It clearly was the case that the Tribunal had put to it the causes of the applicant’s vulnerability to persecution were he to return to

Afghanistan. These causes were related to distinguishing characteristics he possessed, i.e. he was a Shi'a Hazara, a young male, etc. It does not appear to be the case, though, that any submission was made that these together were the identifiable characteristics of a particular social group. The characteristics may have described what would have differentiated the applicant in Afghan society. But, in my view, it cannot be said the Tribunal was asked to consider whether they distinguished a social group from the rest of Afghan society: *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 206 ALR 242. For this reason the Tribunal cannot be faulted for failing to consider whether the applicant had a well-founded fear of persecution for reasons of membership of that social group.

10 In the circumstances the Tribunal dealt discretely with the various possible causes of the applicant's alleged vulnerability to persecution. In so doing it responded to the case put to it. And it is fair to say that in so doing it attempted to put the possible bases of the applicant's claims in the best possible light given the evidence and submissions. In so doing it did not misdescribe the particular social groups to which the applicant claimed to belong: cf *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389.

11 A secondary argument was advanced by the applicant that the Tribunal erred in requiring that to be a particular social group, the group had actually to be perceived to be such. It is clear that if the Tribunal imposed such a requirement, it fell into error. As was recently said by Gleeson CJ and Gummow and Kirby JJ in *Applicant S* at [36]:

"... the determination of whether a group falls within the definition of 'particular social group' in Art 1A(2) of the Convention can be summarized as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."

12 As to the third of these requirements, it had earlier been said (at [27]):

"One way in which this may be determined is by examining whether the society in question perceives there to be such a group. Thus, perceptions held by the community may amount to evidence that a social group is a cognizable group within the community. The general principle is not that the group must be recognized or perceived within the society, but rather that the group must be distinguished from the rest of the society."

13 In the present matter the Tribunal found the four social groups relied upon did not individually have a uniting characteristic which made them cognisable and which set them apart from the rest of Afghan society. It went on to say that:

"In making this finding the Tribunal has taken into account the fact that there is a lack of information to indicate they are perceived as such in Afghan society."

14 In my view, the Tribunal was not indicating in this observation that such a perception was a prerequisite to finding that the social groups propounded in fact existed. Rather it was using the lack of evidence of such a perception in a purely evidentiary way consistent with the second of the above quotations from *Applicant S*. In consequence it did not commit the error alleged.

15 I would dismiss the application.

16 I would add that there are aspects of this applicant's circumstances which ought appropriately be brought to the Minister's attention. The Tribunal itself has rightly noted that the applicant's case raises issues of a humanitarian and compassionate nature. It considered these "compelling".

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 8 July 2004

Counsel for the Applicant: G Barrett QC

Solicitor for the Applicant: Refugee Advocacy Service of South Australia

Counsel for the Respondent: K Tredrea

Solicitor for the Respondent: Sparke Helmore

Date of Hearing: 3 June 2004

Date of Judgment: 8 July 2004