FEDERAL COURT OF AUSTRALIA

SVFB v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCA 822

MIGRATION – application for review of Refugee Review Tribunal decision – well-founded fear of persecution – effective State protection – test to be applied in considering State protection.

Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18 applied

Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14 cited

SVFB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

S 58 of 2004

LANDER J

25 JUNE 2004

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY	S 58 OF 2004

BETWEEN:	SVFB APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	LANDER J
DATE OF ORDER:	25 JUNE 2004
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The application 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 S 58 OF 2004

BETWEEN:	SVFB APPLICANT

AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	LANDER J
DATE:	25 JUNE 2004
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 This is an application under s 39B of the *Judiciary Act 1903* (Cth) seeking a review of a decision of the Refugee Review Tribunal (RRT) given on 11 February 2004.

2 The applicant is a woman born on 28 May 1970. She is a citizen of Nigeria. She arrived in Australia on 7 January 2002 and on 5 March 2003 applied for a Protection (Class XA) visa with the Department of Immigration and Multicultural and Indigenous Affairs under the *Migration Act 1958* (Cth). On 1 May 2003 a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refused to grant a protection visa. On 21 May 2003 the applicant applied to the RRT for a review of that decision. On 11 February 2004 the RRT affirmed the decision of the delegate of the Minister not to grant a protection visa.

3 The applicant seeks a review of that decision claiming that the RRT fell into error and:

‘1. That a breach of the rules of natural justice occurred in connection with the making of the Decision.

2. That the Decision involved an error of law, whether or not the error appears on the record of the decision.

3. That procedures that were required by law to be observed in connection with the making of the Decision were not observed.

4. That the making of the Decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made.

5. That there was no evidence or other material to justify the making of the Decision.

6. That the Decision was otherwise contrary to the law.

7. That the Decision involved the making of a jurisdictional error in that the Tribunal identified the wrong issues/applied the wrong test in law.'

4 The applicant's case before the delegate and before the RRT was that she feared that she would suffer serious harm amounting to persecution if she were to return to Nigeria.

5 The applicant comes from Esan North-East Local Government area of Edo State-Nigeria. She is of the Ishan people which is a tribe within Nigeria.

6 The Ishan people have traditionally practised female genital mutilation (FGM). The applicant's sister underwent FGM in the village from which they originated sometime in the 1980s. The Ishan people expect every woman to be initiated into womanhood by being circumcised and every female is expected to choose a time for that initiation sometime between 16 and 33 years of age. No woman should remain uncircumcised after the age of 33.

7 The RRT was prepared to accept that the Ishan people are one of the many tribes within Nigeria which traditionally practice FGM. The Tribunal found that FGM constitutes serious harm amounting to persecution.

8 However, the Tribunal was not prepared to find there was a real risk that the applicant would be subjected to such a procedure. It was of the opinion that the chance of such a procedure being inflicted upon the applicant was remote.

9 It found that FGM was traditionally practised in villages which were run along traditional lines by elders. Women and children who usually live in villages are subject to traditional practices, including FGM and arranged marriages.

10 The RRT found however that the applicant is an urban person who has moved apart from village life. She was born and raised in Benin city in Nigeria. She completed an undergraduate degree in computer science in 1994. The applicant moved out of her home state in 1994 and, between 1995 and when she came to Australia, lived independently in Lagos. She obtained a further certificate in Informatics in 1998. She came to Australia to undertake a one year traineeship within her professional field.

11 The RRT found that she was an independent professional woman who makes her own decisions about her professional and private life.

12 The RRT found that the applicant was able to withstand the pleas of her family and the village elders. She is also able to withstand their admonishments.

13 The RRT was satisfied that there was no attempt to use visible force to place the applicant into a situation where she could be subjected to FGM.

14 It found the only way that the applicant could become vulnerable to an FGM procedure would be if she were kidnapped and taken involuntarily to the village.

15 It found there was no evidence that Ishan people resort to kidnapping in order to ensure compliance with traditional FGM procedures by women of their tribe.

16 The state in which she was born was the first state of Nigeria to pass legislation banning the practice of FGM in October 1999.

17 The RRT said:

'There are no claims, nor does the evidence suggest, that any harm (let alone harm amounting to persecution) befell the applicant in the past for a Convention reason. The Tribunal is satisfied that the chance that such harm will befall the applicant in the reasonably foreseeable future is remote. It follows that the Tribunal is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason. She is not a refugee.'

18 For those reasons, the RRT found that the applicant did not have a well-founded fear of persecution because there was no real chance that she would be subjected to FGM.

19 Moreover, the RRT found there was no evidence before it to indicate that the Nigerian authorities would not be willing and able to protect the applicant in the event that an attempt was made to force the applicant to undergo FGM.

20 The RRT found:

'Any attempt to force the applicant to undergo FGM would bring the perpetrators into serious trouble with the law. Not only is the procedure itself illegal within Edo state where the village is located, but the forcible abduction of a person is illegal anywhere in Nigeria. There is nothing before the Tribunal to indicate that the Nigerian authorities would not be willing and able to protect the applicant from the threat of abduction. Equally, within Edo state, the authorities have the power to fine and imprison those who perform FGM. The attitude of the authorities to FGM is widely publicised, as the independent evidence on pages 7-8 above makes clear.'

21 Whilst the grounds which supported the application for a review were extensive, in the end result the applicant limited her challenge to the finding mentioned above.

22 She argued:

'The correct test in law is not whether the Nigerian authorities would be willing to protect the Applicant from a threat of abduction; and not whether the authorities within Edo State have the power to fine and imprison those who perform female genital mutilation; and not whether the attitude of the authorities to female genital mutilation in Nigeria is well-publicised; but whether the state protection offered by the state of Nigeria is effective or not. The Tribunal has asked the wrong questions and has therefore applied the wrong test in law. The Tribunal has asked itself whether the state of Nigeria is willing to protect the applicant and has also asked itself what the attitude of the Nigerian authorities is. The real question that the Tribunal should have asked itself is whether the state protection offered by the state of Nigeria is effective or not. Willingness and attitudes are different questions and different concepts to whether a state can provide effective protection. The real question to be decided whether the state of Nigeria could effectively protect the applicant or not.'

23 The applicant argued that the finding by the RRT that the applicant did not have a well-founded fear of persecution did not mean that a complaint of the finding that the state was able to or prepared to offer protection was irrelevant.

24 The applicant argued that in some cases a finding that there is not a well-founded fear of persecution is dependent in part on the ability of the state to provide protection to the person claiming the fear of persecution: *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18; *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14.

25 Whether or not a State can and will provide protection to a person claiming fear of persecution may be relevant to a determination whether the person subjectively holds that fear, or whether objectively the fear is well-founded.

26 Whether the question of State protection was relevant to the RRT's decision that the applicant does not have a well-founded fear of persecution will depend upon the reasons for finding that the applicant did not have such a fear or, if the applicant did have such a fear, that it was not well-founded. In this case, the RRT did not make it clear whether it found that the applicant had a subjective fear. It only found that it was not satisfied that the applicant has a well-founded fear of persecution. That finding may have been made because it was not satisfied that the applicant did have a fear of persecution or because it was not satisfied that if the applicant did have a fear of persecution it was well-founded.

27 Because it is unclear how the RRT came to its conclusion that it was not satisfied that the applicant had a well-founded fear of persecution, it would

be appropriate to assume, to the benefit of the applicant, that the RRT had regard to the State's ability and willingness to afford the application protection in that aspect of its reasons.

28 I am therefore prepared to accept, for the purpose of considering the applicant's argument, that an attack on the finding, to which I have referred, is also relevant to the first two questions which must be decided, that is whether the applicant had a well-founded fear of persecution.

29 As I have already said, the RRT concluded that the only way the applicant could be at risk of FGM would be if she were kidnapped and taken involuntarily to the village from which she came. The applicant has not complained of that finding.

30 The question then was whether it was established that the Nigerian authorities were unable or unwilling to afford her protection in those circumstances.

31 The RRT said that there was nothing before it to indicate that the authorities would not be willing and able to protect the applicant from the fear of abduction.

32 The applicant challenges that finding. She says that there was overwhelming evidence, including her own, given before the RRT contrary to that finding.

33 The delegate's decision record was before the RRT. The delegate, in his decision, had regard to the latest United States Country Report which contained the following:

'Discrimination against women remained a problem. Female genital mutilation (FGM) remained widely practiced [sic] in some parts of the country … The Federal Government publicly opposed FGM; however, it took no legal action to curb the practice. There were no federal laws banning FGM … The Women's Center [sic] for Peace and Development (WOPED) estimated that at least 50 per cent of women undergo FGM. Studies conducted by the UN development systems and the World Health Organization estimated the FGM rate at approximately 60 per cent among the nation's female population. However, according to local experts, the prevalence may be as high as 100 per cent in some ethnic enclaves in the south.'

34 The delegate also referred to the UK Country Assessment for Nigeria, which stated:

'The Nigerian Government does not approve of FGM, but there are no federal laws banning it, and the authorities have taken no legal action to curb it … The Women's Centre for Peace and Development (WOPED) estimated that at least 50% of women are mutilated. Studies conducted by the United Nations and the World Health Organisation estimated the FGM rate at approximately 60% among the nation's

female population. However, according to local experts, the actual prevalence may be as high as 100% in some ethnic enclaves in the South.'

35 The delegate also referred to DFAT document CX50034, which stated:

'The prevalence of FGM was calculated at 41% and is practised in 33% of all households in Nigeria. The age at which girls and women are circumcised vary from infancy to puberty or young adulthood, sometimes even after birth of the first born. It is however pertinent to comment here that Delta State fortunately is amongst the four States in Nigeria that has made Laws against FGM since the restoration of civilian rule in May 1999. Other States includes Cross River, Edo and Ogun. But like most State legislations, there is no adequate machinery in place to enforce the Laws, or to give redress to a child or woman who feels injured by the practitioners of FGM.'

36 The applicant also pointed to other information of the like kind which she submitted to the RRT. She argued that, in those circumstances, there was a body of evidence before the RRT which established that the Nigerian authorities would be unable to protect her from a threat of abduction.

37 In my opinion, the evidence to which the applicant refers does not support the concluding submission.

38 There is a body of evidence which establishes that FGM is still widely practised throughout Nigeria and, in particular, in southern and eastern areas of Nigeria. The evidence is that there are no federal laws banning the practice, although the federal government does not approve of FGM. Some States, including the State from which the applicant comes, have banned the practice but the penalties which may be imposed are not substantial. Nor have those States put in place the appropriate machinery to enforce those laws.

39 However, that is only part of the question which had to be addressed.

40 Whilst the evidence supports the findings to which I have referred, the evidence does not address circumstances where a woman is of the age of the applicant; has become urbanised; has been educated to a tertiary level; and would not succumb to any social or family pressure to allow the practice to be performed on her. In other words, the evidence does not address the real question in this case: whether or not the Nigerian authorities would be unable or unwilling to protect her against a forcible removal to her village for the purpose of FGM.

41 There was no evidence before the RRT to support a finding that the authorities in Nigeria would not be willing and able to protect the applicant from a threat of abduction. The RRT did not have to be satisfied that the Nigerian authorities could guarantee the safety of the applicant or that the authorities could provide an assurance of safety: *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* at [26]-[28]. The RRT was obliged to consider whether the Nigerian authorities had a reasonably effective police force and a reasonably impartial system of justice: [28]. It needed to

consider whether the protection offered by the Nigerian authorities to its citizens was so inadequate that it falls below international standards. There was, however, no evidence to support such a finding. In those circumstances there was no evidence to establish that if the applicant returned to Nigeria and lived in Lagos she could not be effectively protected from abduction and therefore FGM.

42 In my opinion the application must fail.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 25 June 2004

Counsel for the Applicant:	M W Clisby
Solicitor for the Applicant:	Mark W Clisby
Counsel for the Respondent:	Kym Tredrea
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	22 June 2004
Date of Judgment:	25 June 2004