FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZONJ [2011] FCAFC 85

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| Citation: | Minister for Immigration and Citizenship v SZONJ [2011] FCAFC 85 |
| Appeal from: | SZONJ v Minister for Immigration and Citizenship [2011] FMCA 1 |
| Parties: | **MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZONJ and REFUGEE REVIEW TRIBUNAL** |
| File number: | NSD 159 of 2011 |
| Judges: | **EMMETT, RARES & PERRAM JJ** |
| Date of judgment: | 12 July 2011 |

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| Catchwords: | **MIGRATION** – where application made for protection visa – where visa applicant had been the victim of sustained domestic violence in her home state – whether visa applicant's claim came within the purview of refugee law according to the definition of 'refugee' in art 1A of the *Convention Relating to the Status of Refugees 1951* – whether state failure to protect the visa applicant from persecution arose for a Convention reason – whether mere inability of the state to protect the visa applicant satisfied the principle in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 that the motivation of the state may satisfy Convention requirements where the persecution complained of is by private citizens – held that inability may be relevant to the existence of well-founded fear but that toleration or condonation is required to make out a nexus with a Convention reason<br><br>**ADMINISTRATIVE LAW** – judicial review – jurisdictional error – whether Refugee Review Tribunal erred in construing the test to be applied in determining whether visa applicant was a person to whom Australia owed protection obligations – held that reasons of Tribunal were unexceptionable |
| Legislation: | *Migration Act 1958* (Cth) ss 36, 91R, 91X<br><br>*Convention Relating to the Status of Refugees 1951* art 1A |
| Cases cited: | *AZAAR v Minister for Immigration and Citizenship* (2009) 111 ALD 390 |

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| | *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472<br><br>*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259<br><br>*Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1<br><br>*Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 |
| Date of hearing: | 24 May 2011 |
| Place: | Sydney |
| Division: | GENERAL DIVISION |
| Category: | Catchwords |

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| Number of paragraphs: | 35 |
| Counsel for the Appellant: | Mr R Beech-Jones SC with Ms S Sirtes |
| Solicitor for the Appellant: | DLA Piper |
| Counsel for the First Respondent: | Mr G Lindsay SC with Mr M Gibian |
| Solicitor for the First Respondent: | Legal Aid NSW |
| Counsel for the Second Respondent: | The second respondent did not appear |

IN THE FEDERAL COURT OF AUSTRALIA

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| NEW SOUTH WALES DISTRICT REGISTRY | |
| GENERAL DIVISION | NSD 159 of 2011 |

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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| BETWEEN: | MINISTER FOR IMMIGRATION AND CITIZENSHIP<br>Appellant |
| AND: | SZONJ<br>First Respondent<br>REFUGEE REVIEW TRIBUNAL<br>Second Respondent |

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| JUDGES: | EMMETT, RARES & PERRAM JJ |
| DATE OF ORDER: | 12 JULY 2011 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 28 January 2011 be set aside and in lieu thereof it be ordered that:

1. The application be dismissed.

2. The applicant pay the first respondent's costs of the proceeding.

3. The first respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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| NEW SOUTH WALES DISTRICT REGISTRY | |
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| BETWEEN: | MINISTER FOR IMMIGRATION AND CITIZENSHIP<br>Appellant |
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| | Second Respondent |
| JUDGES: | EMMETT, RARES & PERRAM JJ |
| DATE: | 12 JULY 2011 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

The Court

INTRODUCTION

1 This appeal by the Minister for Immigration and Citizenship (**the Minister**) concerns the efforts made on behalf of the first respondent (**the Visa Applicant**) to obtain a protection visa in this country on the basis that she is a refugee from Fiji, of which she is an indigenous national. The Visa Applicant's anonymisation is required by s 91X of the *Migration Act 1958* (Cth) (**the Act**), which forbids this Court from publishing her name.

2 It is not disputed by the Minister that, whilst in Fiji, the Visa Applicant was the victim of domestic violence at the hands of her husband and that that violence extended over many years. Between 1997 and 2009 her husband punched her in the face, chest and body, beat her with a cane knife, stomped on her thighs and head and at times choked her. On more than one occasion the attacks were so brutal that she lost consciousness. Some of the violence took place whilst she was pregnant. There is a good deal of material before this Court about this undisputed abuse; it is not necessary to set it all out, as the general tenor is clear. The Visa Applicant fled to this country in November 2009 to escape her husband's violence. She was of the view that she would not be safe from him anywhere in Fiji due to its geographical size and relatively modest population, and her attempts to secure assistance from the Fijian police had been unsuccessful.

3 The Visa Applicant arrived in Australia on 13 November 2009. On 20 November 2009 she lodged an application for a Protection (Class XA) Visa under the Act. On 18 February 2010, a delegate of the Minister refused her application, and, on 10 March 2010, the Visa Applicant applied to the second respondent, the Refugee

Review Tribunal (**the Tribunal**), for review of the delegate's decision. On 7 June 2010, the Tribunal decided to affirm the delegate's decision. The Visa Applicant then sought Constitutional writ relief from the Federal Magistrates Court in respect of the Tribunal's decision. On 28 January 2011, the Federal Magistrates Court made an order quashing the Tribunal's decision and an order requiring the Tribunal to redetermine the Visa Applicant's review application according to the law. By notice of appeal filed on 18 February 2011, the Minister has appealed from the orders of the Federal Magistrates Court.

LEGAL PRINCIPLES

4 A protection visa is the kind of visa sought by those claiming to be refugees under the *Convention Relating to the Status of Refugees 1951* done at Geneva on 28 July 1951, as amended by the *Protocol Relating to the Status of Refugees 1967* done at New York on 31 January 1997 (together **the Convention**). The Convention operates in the domain of public international law, which is not directly justiciable before the courts of this country. The Parliament, however, has long provided for the grant of protection visas to those satisfying the requirements of the Convention. Section 36 of the Act establishes the class of protection visas and, in substance, requires their issue whenever the Minister is satisfied that Australia has protection obligations under the Convention.

5 The terms of s 36 necessarily direct attention to the definition of a refugee in the Convention, which is contained in Article 1A(2) thereof. That definition has a number of features which are not pertinent to this appeal, but the core concept is that a person will be a refugee if he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Two elements are critical under this definition: there must be a well-founded fear of persecution; and the persecution must be for one of the five reasons nominated in Article 1A(2). Those five reasons are conveniently referred to as **the Convention reasons**.

6 In Australia, the Parliament has tightened the requirements of Article 1A to some extent. By s 91R of the Act, Article 1A(2) does not apply in relation to persecution for a Convention reason unless:

> that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution;
>
> the persecution involves serious harm to the person; and
>
> the persecution involves systematic and discriminatory conduct.

7 There is no question that persecution can be made out when a state is itself the persecuting party. But it is also accepted that persecution by third parties may satisfy the requirements of Article 1A(2) of the Convention (and s 91R of the Act) in certain circumstances. Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of

the Convention grounds may be satisfied by the motivation of either the criminals or the state (see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [31], [78], [120]-[121] and [155]) (**the *Khawar* Principle**).

8 For the Visa Applicant to succeed, therefore, she needed to persuade the Minister's delegate and, upon review, the Tribunal either that her husband's violence towards her was committed for one of the five Convention reasons or that Fiji's failure to protect her from this abuse could itself be seen as arising from one of those reasons.

THE REVIEW APPLICATION BEFORE THE TRIBUNAL

9 Before the Tribunal, the Visa Applicant claimed that she was a supporter of the women's wing of a political organisation in Fiji and that she feared harm because of her involvement with that organisation if she returned to Fiji. The Tribunal found that the Visa Applicant would not engage in any political activities in the future. The Tribunal found, therefore, that there was no real chance that the Visa Applicant would suffer persecution as a result of her past political involvement. There is no complaint about that conclusion of the Tribunal. The relief sought by the Visa Applicant from the Federal Magistrates Court, and, consequently, the appeal to this Court, concern only her claims before the Tribunal relating to the domestic violence committed by her husband.

10 The Visa Applicant provided the Tribunal with a detailed statutory declaration setting out her claims in relation to the domestic violence. In relation to her account, the Tribunal found her to be a credible witness, and accepted the claims she made about the violence. The Tribunal accepted that, if the Visa Applicant returned to Fiji, there was a real chance that she would be subjected to domestic violence. The Tribunal also accepted that the Visa Applicant is a national of Fiji, and assessed her claims on the basis that Fiji is her country of nationality.

11 A perusal of the Tribunal's reasons reveals a certain lack of precision in its identification of the Convention group to which the Visa Applicant claimed to belong. The very thorough and careful submission to the Tribunal prepared on her behalf by Ms Chartres of the Refugee Advice and Casework Service (**the Advice Service)** asserted that the Visa Applicant feared that, if she was forced to return to Fiji, she would be at real risk of being seriously harmed because of her membership of one of three social groups:

> women in Fiji;
>
> women who have left their husbands in Fiji; or
>
> women who refuse to conform to the social norms of Fijian Indo Society.

The last reference is slightly puzzling, as the Visa Applicant was an indigenous Fijian and not a member of the Indian community, but nothing turns on this.

12 Assuming, as it appears likely the Tribunal did, that the above groups were social groups within the meaning of Article 1A(2), and that the Visa Applicant was a member of each of them, it is obvious enough that her case could not have been that her husband was assaulting her by reason of her membership of these groups. It was necessary, in that circumstance, for her to demonstrate that the failure of Fiji to protect her from her husband's assaults arose from her membership of the three social groups.

13 The Advice Service referred the Tribunal to information said to support the Visa Applicant's claims that she would very likely be physically and psychologically harmed by her family, including her husband, if she returned to Fiji, and that the police and other Fijian state authorities were unwilling to protect her from that harm because of her membership of one or more of the groups described above. The Advice Service asserted that there was a distinct absence of country evidence to demonstrate that, even when a matter proceeds to court in Fiji, the courts are effective in protecting female victims of violence from future abuse. The Advice Service referred to the following material (**the Reports**):

AusAid Country Report on Violence against Women in Melanesia and East Timor in 2008;

Report of the Canadian Immigration and Refugee Board of August 2006;

Report of the US Department of State of 2010; and

United Nations Population Fund Reports on Violence against Women in Fiji.

14 The Advice Service submitted that the Reports demonstrated that entrenched discriminatory attitudes within the Fijian courts meant that there was ultimately a failure to prosecute perpetrators and protect victims, that prioritising reconciliation over proper sentencing remained the norm in Fiji, that in many instances sentences handed down for domestic violence tended to be suspended sentences, even in cases of repeat offenders, and that, in 2006, the proportion of sexual assault cases reversed on appeal was very high compared with the proportion for murder, robbery and other crimes. The Advice Service asserted that the application of the law was discriminatory and represented inadequate protection by the judiciary for women in Fiji.

15 The submission prepared by the Advice Service squarely faced up to the requirements of the *Khawar* Principle; that is to say, to the necessity of demonstrating that the failure by Fiji to protect the Visa Applicant from her husband's violence arose from a Convention reason. The submission contended that the information it had set out led to the conclusion that the Fijian military government has a discriminatory policy towards women's rights, and specifically tolerates or condones the practice of violence against women. In that submission one discerns a correct approach to the issue thrown up by the case; that is, the need to show a failure of Fiji to protect the Visa Applicant from her husband's abuse **together with** the superadded necessity of demonstrating that its shortcomings in that regard could be seen as deriving from her membership of the nominated groups.

16 The Tribunal was mindful of, and set out, the *Khawar* Principle in its approach to the Visa Applicant's review application. It accepted that a relevant Convention nexus may be found in the failure of an asylum seeker's state of nationality to protect that asylum seeker from persecution by her spouse, where the failure is for a Convention reason. The Tribunal also said, however, that the Convention nexus would not be made out simply by showing police maladministration, incompetence or ineptitude, or showing that the state's failure was due to a shortage of resources. What was required, the Tribunal said, was state toleration or condonation of the persecution in question and systematic discriminatory implementation of the law. It further said that, while an absolute guarantee of protection was not required, the state is obliged to take reasonable measures to protect the lives and safety of its citizens. Those measures would include an appropriate criminal law and the provision of a reasonably effective and impartial police force and judicial system. No complaint is made by either the Minister or the Visa Applicant concerning those propositions.

17 The Tribunal went on to say that it had considered country information concerning Fiji, as well as the information to which the Visa Applicant had referred it. The Tribunal found that the military government in Fiji had promulgated the Domestic Violence Decree in 2009, which sought to address issues relating to domestic violence. The Tribunal also found that there is an active women's rights movement raising awareness of domestic violence claims, and that domestic violence claims are investigated by the police. The Tribunal then **acknowledged the Visa Applicant's submissions** that the law had little effect, that Fijian society is patriarchal and that the police would favour men over women complaining of domestic violence. The Tribunal also said that it had considered the Visa Applicant's claims that, when she brought her complaints to the attention of the police, little or no effective action was taken against her husband. The Tribunal specifically **acknowledged the country information**, which indicated that the Fijian government lacks resources to implement the relevant laws, and that a culture of domestic violence remains in Fiji.

18 The Tribunal then noted that, against those considerations, the state was taking reasonable measures to stamp out domestic violence, that such violence was criminalised, and that Fiji has a police force and judicial system to implement its policies. The Tribunal observed that the country information did not suggest that Fiji tolerates or condones domestic violence or, importantly, that there is a systematic and discriminatory withholding of State protection for a Convention reason.

19 There is no doubt that the Tribunal understood the Visa Applicant to have made a claim in terms of the requirements of *Khawar*, and that the Tribunal took that claim into account. Despite that, the Tribunal concluded, after having considered the evidence and country information it set out, together with the information put forward by the Visa Applicant, that there was no evidence that there would be a selective and discriminatory withholding of state protection from the Visa Applicant, or that such withholding would occur for a Convention reason. Put another way, the Tribunal understood the case that was put but rejected it on the facts.

20 In light of that factual finding, the application of the *Khawar* Principle necessarily implied that the Visa Applicant was not being persecuted for a Convention reason. Inevitably this required the Tribunal to refuse to issue a protection visa, which it did.

THE DECISION OF THE PRIMARY JUDGE

21 The Visa Applicant then appealed to the Federal Magistrates Court for writs to set aside the Tribunal's decision. In her application, the Visa Applicant complained that the Tribunal had misconstrued the test for determining whether she was a person to whom Australia has protection obligations under the Convention, in that:

the Tribunal failed to consider the efficacy of measures introduced to address domestic violence in Fiji when assessing whether the Visa Applicant would be afforded a reasonable level of state protection from acts of domestic violence;

the Tribunal was satisfied that the mere existence of measures designed to stamp out domestic violence was sufficient to provide the Visa Applicant with reasonably effective state protection without considering the willingness or ability of the police, the courts and other agents of the state to enforce those measures;

the Tribunal asked itself whether Fiji tolerates or condones domestic violence, and whether there was a systematic and discriminatory withholding of state protection from the Visa Applicant, without considering the action or inaction of agents of the state or whether the reasons for the action or inaction of agents of the state were Convention-related.

The Visa Applicant also complained that, by reason of those matters, the Tribunal had failed to exercise its jurisdiction by failing to determine all of the essential integers of her claim and by failing to take into account a relevant consideration. She said that the Tribunal thereby committed jurisdictional error.

22 The Visa Applicant argued that the Tribunal had only considered the information provided by her in the Advice Service's submissions on a formal level. She contended that it had concluded merely that there were now laws against domestic violence in Fiji, and that that state had a police force and judiciary to give effect to those laws. The Visa Applicant had submitted to the Tribunal, and before the primary judge and on appeal, that these were inadequate to deal with domestic violence in Fiji and that this signified a tolerance on behalf of the authorities for the continuation of violence against women. She argued that that conclusion was supported by the information which she had provided to the Tribunal that suggested she had a well-founded fear of harm because of traditional cultural barriers and the unwillingness of the police to take reasonable measures to protect women from domestic violence.

23 The primary judge found that the only reasonable inference to be drawn from the Tribunal's reasoning was that the Tribunal considered institutional and organisational measures, laws, policies and administrative mechanisms to be a complete answer to the Visa Applicant's claim of denial of effective state protection. His Honour said that, upon such reasoning, it was sufficient answer to her claim that domestic violence is criminalised in Fiji and that Fiji has a police force and judiciary to enforce its laws. His Honour discerned error in the Tribunal's approach, and said that the Tribunal's reasoning lacked any explicit evaluation of the **efficacy** of the relevant measures in actually providing protection to a person in the position of the Visa Applicant, in light of the claims made in relation to police attitudes and cultural approaches to resolving domestic violence by reconciliation. His Honour noted the Visa Applicant's claim

before the Tribunal that she would not be afforded reasonable protection from her husband as a result of the inadequacy of legal mechanisms in place in Fiji to protect women victims of domestic violence, and the unwillingness or reluctance of police, the courts and other officials to enforce such laws as do exist.

24 The primary judge considered that the drawing of the above inference was the only way to reconcile the Tribunal's **acknowledgment** that the law had little effect, that Fijian society is patriarchal and that the police would favour men over women complaining of domestic violence, with its subsequent observation that the country information did not suggest that Fiji tolerates or condones domestic violence. However, that indicates that his Honour, on a fair reading of the Tribunal's reasons, misconstrued its reasons. The Tribunal did no more than acknowledge the Visa Applicant's submissions. It did not, on a reasonable reading, accept those submissions. Thus, the Tribunal did not acknowledge that the law had little effect, that Fijian society was patriarchal and that the police would favour men over women. It simply recognised and then dealt with those submissions made on behalf of the Visa Applicant. Accordingly, there was no question of reconciling any acknowledgment with the Tribunal's conclusion that the country information does not suggest that Fiji tolerates or condones domestic violence.

25 Further, the question for the Tribunal was not whether Fiji's laws were being effectively enforced. To the contrary, since this was not a case involving the adequacy of state protection from a third party persecutor motivated by a Convention reason, the only permissible inquiry was whether the state's failure to protect the Visa Applicant was itself actuated by a Convention reason. Unless someone was motivated by a Convention reason – either the Visa Applicant's husband or Fiji – the case presented nothing which would bring it within the purview of refugee law. By itself, within the framework of the Convention, domestic violence does not provide a basis for a refugee claim. Necessarily, therefore, the correct inquiry was not into the adequacy or otherwise of the protection afforded to women who were victims of domestic violence in Fiji but, in contradistinction, into the motives of the state and whether the failure by Fiji to protect such victims was itself a manifestation of a persecutory policy directed towards them.

26 The Tribunal concluded that it had found no evidence that there would be a selective and discriminatory withholding of state protection. Before this Court, the Visa Applicant submitted that this conclusion was wrong and that, to the contrary, there was such evidence. That argument should be rejected because, properly construed, the reasons of the Tribunal meant only that there was no adequate evidence or, to put the matter slightly differently, that there was no evidence satisfying it. Reference has already been made to the Tribunal's acknowledgment of the Visa Applicant's submissions on this issue, which occurred in the same paragraph as its 'no evidence' statement. The Tribunal was plainly aware of the material, and the ordinary meaning of its reasons is only that the Tribunal was not satisfied on the evidence. That conclusion is consistent with authority which counsels against reading the reasons of administrative tribunals with an 'eye keenly attuned to the perception of error': *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. The statement by the Tribunal that there was 'no evidence' should not, in the circumstances of this matter, be treated as a statement

that there was no evidence in the technical sense (see *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472 at 479).

27 In those circumstances, the conclusion reached by the Tribunal means that the primary judge erred in his conclusion that the Tribunal had engaged in no consideration of whether agents of the state, including the police and judiciary, were willing or able to utilise any laws in existence to provide protection and, if not, whether the unwillingness or inability arose for a Convention reason.

*AZAAR*'s Case

28 The Tribunal's finding – that the country information does not suggest that Fiji tolerates or condones domestic violence or, importantly, that there is a systematic and discriminatory withholding of state protection for a Convention reason – made it apparent, the primary judge observed, that the Tribunal had not had regard to the decision of Finn J in *AZAAR v Minister for Immigration and Citizenship* (2009) 111 ALD 390. The primary judge went on to say that the Tribunal regarded the relevant question as being whether Fiji, as a nation state, tolerates or condones domestic violence. His Honour said that the Tribunal engaged in no consideration of whether agents of the state, including the police and the judiciary, were willing **or able** to utilise any laws in existence to provide protection and, if not, whether the unwillingness **or inability** arose from a Convention reason. His Honour said that that was an issue of substance raised by the Visa Applicant's case.

29 The primary judge went on to say that the Tribunal's summary of the country information demonstrated that it did not regard **the efficacy** of enforcement of laws relating to domestic violence as relevant to its inquiry. His Honour observed that the Tribunal did not refer to the evidence in relation to the incidence of domestic violence in Fiji and cultural barriers to women accessing **effective** protection. His Honour said that the Tribunal did not refer to the evidence as to the attitudes of police and the judiciary put forward by the Visa Applicant, including the Reports. His Honour considered that the approach of the Tribunal revealed that it failed to understand the potential significance of that evidence to the issue of whether the agents of the state were unwilling **or unable** to provide protection for a Convention reason. His Honour concluded, therefore, that the Tribunal committed jurisdictional error, in that it misconstrued the test to be applied in assessing whether the Visa Applicant is a person to whom Australia owes protection obligations within the meaning of the Act.

30 The primary judge erred in his analysis. It appears that his Honour was led into error by the observations made in *AZAAR*'s case. In *AZAAR*'s case, Finn J endeavoured to draw a number of propositions as to when conduct giving rise to a well-founded fear of serious harm at the hands of a non-state actor may constitute persecution because of the unwillingness or inability of the state, or state agents, to discharge its obligations to protect its citizens ([5]). Finn J said in *AZAAR*'s case ([9]) that, if the state or its agents condone approve, tolerate or are indifferent to the criminal conduct concerned or are unwilling **or unable** to afford protection, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state, or its agents. Finn J based that proposition on the *Khawar* Principle and on another decision of the High

Court in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1.

31 However, insofar as Finn J referred to the state or its agents being **unable** to afford protection, his Honour appears to have misread the observations of Gleeson CJ in *Khawar*. The Chief Justice cautioned that an Australian court or tribunal would need to be well informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals ([26]). Gleeson CJ observed that, if there is a non-state persecutor of a person or group of people, then the failure of the state to intervene to protect the victim may be relevant to whether the victim's fear of continuing persecution is well-founded. That would be so whether the failure resulted from a state policy of tolerance or condonation of the persecution, or whether it resulted from **inability** of the state to do anything about it ([29]). Gleeson CJ then went on to observe ([31]) that, where persecution consists of two elements, being the criminal conduct of private citizens, together with the tolerance or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection that the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

32 Finn J appears to have conflated the two propositions, which are directed to different questions. The first observation is directed to the question of whether or not there is a well-founded fear. The second is concerned with criminal conduct by private citizens that is tolerated or condoned by the state or agents of the state. When the question is whether there is a well-founded fear, it is relevant that the failure of the state to do anything about the relevant conduct is the result of inability, as well as tolerance or condonation. However, when the question concerns whether a Convention nexus has been established, there is no suggestion by Gleeson CJ that mere inability on the part of the state to prevent persecution is sufficient. Rather, it must be shown that the failure on the part of the state or state agents to prevent the relevant conduct is the result of toleration or condonation, not simply inability to prevent the conduct.

33 Thus, where there is persecution by a non-state agent for a reason that has no Convention nexus, and that conduct is condoned or tolerated by the state for a Convention reason, the victim may be a refugee within the meaning of the Convention. However, where there is persecution by a non-state agent for a reason that has no Convention nexus and that conduct is not prevented by the state by reason only of the inability of the state to prevent it, such that there is no Convention reason that motivates the state or prevents the state from intervening, the test will not be satisfied. To the extent that *AZAAR*'s case suggests otherwise, it was not correctly decided.

CONCLUSIONS

34 Properly understood and given a fair reading, the reasons of the Tribunal are unexceptionable in the light of the above principles. That is to say, it was never suggested that the Visa Applicant's husband was motivated by a Convention reason

in perpetrating violence on the Visa Applicant. Further, there was an express finding by the Tribunal that the state of Fiji does not condone or tolerate such violence. Accordingly, it is irrelevant if, in the absence of such tolerance or condonation, the state or state agents in Fiji are unable, for reasons unconnected with the Convention, to prevent such violence. That is the Tribunal's reasoning. There is no jurisdictional error in that reasoning. It follows that the Federal Magistrates Court was in error in concluding that there was jurisdictional error on the part of the Tribunal.

35 The appeal should be upheld and the orders of the Federal Magistrates Court should be set aside. In lieu of those orders there should be orders that the application to the Federal Magistrates Court be dismissed and that the Visa Applicant pay the Minister's costs. The Visa Applicant should pay the Minister's costs of the appeal.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Emmett, Rares & Perram.

Associate:

Dated: 12 July 2011