FEDERAL COURT OF AUSTRALIA

WAKS v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 32

MIGRATION – appeal – Tribunal not in error in failing to consider whether appellant a member of particular social group of informants to police on drug matters – ground that Tribunal failed to consider position of rogue state agents not necessary to consider and, in any event, unable to be made out

Abebe v Commonwealth (1999) 197 CLR 510

Applicant S v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 242

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

Horvath v Secretary of State for the Home Department [2001] 1 AC 489

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

NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 214 ALR 264

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155

Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891

SZEYH v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 93

WAKS (BY HIS TUTOR, PAUL CHARMAN) v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS and REFUGEE REVIEW TRIBUNAL

WAD 34 of 2005

NICHOLSON, LANDER and SIOPIS JJ

17 MARCH 2006

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	WAD 34 OF 2005

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	WAKS (BY HS TUTOR, PAUL CHARMAN) APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT
JUDGES:	NICHOLSON, LANDER and SIOPIS JJ
DATE OF ORDER:	17 MARCH 2006
WHERE MADE:	PERTH

UPON THE UNDERTAKING OF THE FIRST RESPONDENT TO NOT PURSUE ORDER 2 IN RESPECT OF THE APPELLANT'S TUTOR, THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondents' costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	
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BETWEEN:	WAKS (BY HS TUTOR, PAUL CHARMAN) APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

JUDGES:	NICHOLSON, LANDER and SIOPIS JJ
DATE:	17 MARCH 2006
PLACE:	PERTH

REASONS FOR JUDGMENT

the court:

1 This is an appeal from the judgment of the primary judge (French J) delivered on 8 December 2005 in which challenges to various decisions made in the appellant's applications for bridging visas and for a protection visa were dismissed. Although the amended notice of appeal is expressed to be directed to the whole of the judgment of the primary judge, the grounds of appeal are directed to that part of the primary judge's reasons which upheld the decision of the Refugee Review Tribunal ('the RRT') to affirm the decision of a delegate of the Minister not to grant to the applicant a protection visa.

2 The appellant is a United States citizen who entered Australia on a visitors visa in 2002. He remained in Australia after expiry of that visa. In February 2004 he was apprehended and taken into detention pending his removal from Australia. It was then that he made applications for bridging visas and an application for a protection visa.

3 The factual and procedural history, so far as it is relevant, as found by the primary judge is as follows. The appellant was born on 4 March 1980. Following his detention on 28 February 2004, he applied for a Bridging E visa subclass 050 on 4 March 2004. That was refused on 8 March 2004 by an officer of the Department of Immigration and Multicultural and Indigenous Affairs ('the Department').

4 On 5 April 2004, the appellant made a valid application for a protection visa. The reasons of the primary judge described the case which the appellant brought in support of that application as follows:

'[6] In support of his claim to be a refugee, the applicant said he was seeking protection in Australia so that he did not have to go back to the United States of America. He was asked on the application form 'Why did you leave that country?'. His answer was rambling and disconnected. He referred to an inability to function or stay focussed and said he remained 'on the edge of suicide'. He referred to operations against the Mexican mafia and threats made on his life. He referred to post-traumatic stress syndrome. He claimed to have been victimised, abused, raped, assaulted and taken from his home as a conscientious objector to America's selfish and dishonest way of life. He said he was ashamed of being labelled an American and constantly being oppressed with injury and punishment for adherence to the principles by which he lived. He said his hatred for America showed and that he was many times assaulted and abused because of his beliefs. He said every time he 'would get things going successfully in life' the government would wipe him off his feet and not let him live a normal life. He claimed that the government started drugging him when he was 11 years old by pumping pills through him to do scientific experiments, drastically reducing his physical and mental health and teaching him a need for drugs. For this reason he had become mentally and physically addicted. He said he would never have a life in America and would be cast into a world of selfishness, racism, shame and dishonesty. He claimed he would be murdered by a corrupt government. He said he would be killed or gaoled for his anti-

American beliefs or for being labelled an American by those who have been victimised by America's violent, strong-arm tactics.'

5 The appellant made a further application for a Bridging E visa on 15 April 2004 which was refused on 16 April 2004. The appellant sought a review of the decision by the Migration Review Tribunal ('the MRT') which, on 3 May 2004, remitted the application for reconsideration with certain directions including the payment by him of the costs of his detention. On 10 May 2004, the appellant advised the Department that he would not be able to abide by the conditions of the visa.

6 On 13 May 2004, the appellant's application for a protection visa was refused by a delegate of the Minister. The delegate referred to the claims made in the application, additional claims faxed on 10 May 2004 and claims made at an interview on 12 May 2004. The additional claims made on 10 May 2004 as described by the delegate and adopted by the primary judge comprised the following:

'. A newspaper clipping stating that fear of terrorist attacks within the USA may be justified.

. The statement in the applicant's fax that the article showed a real chance of persecution for reasons of nationality.

. The claim that Americans are primary targets of some terrorists and that the US President says in the news clipping that he can understand that the USA may be hit again.

. The claim that the applicant should not be required to submit himself to that real chance ever again.'

7 The primary judge described as follows the matters emerging at the interview:

'[12] At interview the applicant gave further information to justify his feelings of persecution. These included the statement that he was unable to get a good job without a better education and was trying to get a better education when he was taken from school to serve a three-month gaol sentence. He claimed he was not allowed to live amongst friends on land belonging to native Americans and had to move as he could not register to live there because he was not a native American even though he lived in harmony with the environment. Further details were offered of alleged persecution by police in connection with the applicant's involvement in demonstrations about mining, forestry and other environmental issues. This included information about his activities handing out pamphlets for the Sierra Club when he said he was taken about 20 miles from the area he was in and left by police to find his way home.

[13] The applicant also said at interview that he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at an early age and that the treatment for that helped lead him into further drug abuse.'

Information was also given by the appellant concerning a conviction for a sex offence which he had received as a juvenile and an outstanding three month sentence for leaving the scene of an accident. He said that when he went to gaol to serve the sentence, a member of the Mexican mafia cartel came out of the bushes to attack him so he ran away and has not served the sentence. He stated to the delegate his concern that if he returned to the United States he would be extradited to Colorado to serve the outstanding sentence and the Mexican mafia cartel would soon find out he was there and kill him.

8 On 19 May 2004, the appellant applied to the RRT for review of the refusal of his protection visa. On 20 May 2004, he made a further application for a Bridging E visa, which was refused by a delegate of the Minister on 27 May 2004. On 7 June 2004, the MRT affirmed the delegate's decision that the appellant was not entitled to the grant of a Bridging E visa. After further review by the MRT, it was held that the application made on 20 May 2004 was invalid. On 30 June 2004, the applicant made a further fresh application for a Bridging E visa which in turn was refused on 2 July 2004 by a delegate of the Minister. On 19 July 2004, the MRT affirmed the decision of refusal of the Bridging E visa.

9 It was also on 19 July 2004 that the RRT affirmed the delegate's decision refusing to grant the appellant a protection visa.

10 In its findings and reasons the RRT divided the appellant's claims as follows:

1. those related to the alleged therapeutic treatment he received from authorities in his childhood.

2. those relating to infractions of the law he had committed over a period of years in the US; and

3. those relating to his role as an 'informant' in relation to his wife's drug problems, vis a vis, American authorities and the Mexican mafia cartel.

11 In relation to category 1 of these claims, the RRT found they were not related to any ground under the Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967 ('the Convention'). As to category 2, the RRT found that the sanctions arising from such orders did not constitute Convention persecution as they represented lawful measures for the enforcement of non-discriminatory laws taken by a government to protect the general welfare of society. As to category 3, the RRT said:

‘The evidence on this point is not absolutely clear and the applicant was not consistent in the statements relating to his actual role. At one instance he stated that he simply went to the authorities with information about the drugs, at another point he stated that the police wanted to ‘wire him up’ so he could provide solid evidence; he said at first that he acceded to their wish and later in the hearing he stated that he refused to carry a tape recorder for the police to record the drug transaction; at another point he stated that the Department of Justice asked him to leave the country and he intimated that his uneventful departure out of the US through Los Angeles, even though he had outstanding legal issues may have been facilitated by the Department of Justice.’

12 The RRT continued:

‘The Tribunal accepts that the applicant went to the authorities to reveal information about those persons who were supplying drugs to his wife, however it does not accept that he was a fully fledged ‘informer’ working for the police, nor does it accept that he occupied a position sufficiently relevant for the detection and arrest of drug rings else the Department of Justice would have, firstly, briefed him and, secondly, would not have simply allowed him to leave after he went to them. The applicant stated that he told the Department of Justice about the people selling cocaine to his wife and some information about them and their associates; the Tribunal finds it implausible and does not accept that the Department of Justice, presented with this information, would not even take a statement from the applicant.’

13 The RRT described the appellant’s claims in respect of the Mexican mafia cartel as follows:

‘The applicant claims that he was assaulted by the Mexican Mafia cartel and he was threatened by them. He fears he will be killed by them if he returns. The Tribunal finds that the applicant may have been attacked by some people who were supplying drugs to his wife; the applicant has characterised these people as a Mexican Mafia cartel; he has provided no evidence or even description of their number, modus operandi and sphere of influence. The Tribunal notes that the applicant, at this time was, by his own admission, an ‘occasional user’. There is no evidence that the assault on him by these people was motivated by the applicant’s alleged report to the police.’

14 In relation to these claims, the RRT’s reasoning was:

‘Notwithstanding some concerns which the Tribunal has expressed regarding the applicant’s credibility in relation to the claims relating to the Mexican mafia and his status as an informer for the police and the police involvement in harming him, the Tribunal finds that even if it were to accept these claims in their entirety the harm resulting from these issues are not for a Convention reason and the applicant is able to obtain adequate state protection. The Constitution of the United States, the U.S. Commission on Civil Rights, the U.S. Department of Justice (among others) provide a series of mechanisms not only for the protection of citizens but also avenues for complaints by citizens about their treatment at the hands of the system (see their individual websites).’

The RRT therefore found that the appellant would not be of interest to the US Government except under laws of general application and that he did not face a real chance of persecution for a Convention reason now or in the reasonably foreseeable future should he return to the United States with the consequence that his fear of persecution was not 'well-founded'.

15 The concept of 'well-founded' is derived from art 1A(2) of the Convention which defines a 'refugee' to be any person who:

'…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

16 The reasons specified in art 1A(2) are known as Convention reasons. The existence of such reasons threatening the life or freedom of a person in a territory to which it is proposed he or she be expelled or returned, gives rise to a protection obligation prohibiting such expulsion or return as a consequence of art 33(1) of the Convention. That article reads:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

17 In relation to the decision of the RRT affirming the refusal of the grant of the protection visa the primary judge firstly recounted the basis of the challenges to the decision. The appellant contended before him that the RRT had failed to hear out his concerns and made its decision without ensuring all evidence was heard. Further, that it did not apply the criteria 'in a spirit of justice and understanding' but made 'biased reports' and made the decision 'primarily influenced by the personal consideration that the [appellant] was an undeserving case'. Further, the appellant attacked the RRT's findings of inconsistency in his evidence.

18 The primary judge concluded that the appellant's application for a protection visa was hopeless. He had previously characterised it as 'part of a desperate stratagem to remain in Australia' which had 'not shown any basis for the grant of any relief by this Court'. He held that the claims as framed did not identify the appellant as a person who could conceivably qualify for protection under the Convention. He said that the apprehended harm which the appellant asserted related to either laws of general application or to harm from particular criminal elements within the United States in respect of which, as the RRT had found, there were state protection mechanisms available. In relation to other claims about the appellant's attitude towards the United States generally, his hatred of it and the lifestyle there did not give rise to a basis for a fear of persecution relating to any of the Convention grounds. The

consequence was that the challenge to the decision of the RRT in respect of the protection visa failed.

19 There are two grounds in the amended notice of appeal.

20 The first relied upon by the appellant's counsel is that the primary judge erred in not finding error in the RRT for failing in its decision and reasons to identify the 'particular social group' (see Convention art 1A above) relied upon by the appellant for his claim. In written submissions it was contended that group was identified as 'drug users that the justice system would not assist in law enforcement'. However, during the course of oral argument, counsel for the appellant changed this characterisation to 'informants on drug matters who the justice system would not assist in law enforcement'. In support of this contention it was submitted by the appellant that the RRT had erred in failing to make any examination of the existence of that particular social group or whether the appellant belonged to it, contrary to the law as set out by the High Court in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 394-395, at [26]-[28].

21 It is important to have in mind what Gleeson CJ, Gummow and Kirby JJ said of the reference to 'particular social group' in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 206 ALR 242at [36], namely:

'[36] Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised 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. Borrowing the language of Dawson J in Applicant A [(1997) 190 CLR 225 at 241; 142 ALR 331 at 341], a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.'

Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 39 FCR 401 is an instance of a failed claim of a particular social group of 'persons who had provided information to the police and who had been prepared to give, and had given, evidence in support of the police', decided on the law prior to the decision in *Applicant S*.

22 Having examined the claims and evidence of the appellant in the present case (referred to both generally and specifically) we do not consider that they did point to the existence of his membership of any 'particular social group' in this relevant sense. His claim was that he feared harm from the Mexican mafia cartel and police because he had given information against them. His claims neither expressly nor impliedly identified persecution by reason of membership of a social group as suggested either in the written submissions or in the course of oral argument. Consequently, there is no basis upon which it can be found that the RRT erred in law by failing to

consider the claim made by the appellant or that it misunderstood or misconstrued a claim he actually made. We note that similarly in *Morato* the Full Court considered the appellant was being targeted because he was an informant, not because he was a member of a particular social group.

23 Moreover, it is well established that it is no part of the decision maker's duty to make out an applicant's case for him or her: see *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170. The procedure is inquisitorial. It is for an applicant to advance whatever evidence or argument he or she wishes to advance in support of the contention of the well founded fear of persecution for a Convention reason: see *Abebe v Commonwealth* (1999) 197 CLR 510 at [187] per Gummow and Hayne JJ. A passage to this effect was recently relied upon also by Jacobson J in *SZEYH v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 93.

24 The other ground of appeal is that the primary judge erred in finding that the apprehended harm feared by the appellant related to either laws of general application or of harm from particular criminal elements in the United States in respect of which there were state protection mechanisms available. This is particularised in the amended notice of appeal in two respects. First, it is said, the primary judge failed to deal with the implicit claim in the appellant's claim that the RRT neglected to deal with the police actions as those of 'rogue state agents'. Further, that the primary judge failed to deal with the findings by the RRT that the appellant would be able to obtain adequate state protection which, it is said, was made contrary to the evidence before the RRT.

25 In this respect, the appellant relies on the reasoning in *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891. There, Sedley LJ referred to persecution by agents of the State in relation to which there was an important distinction between abuse which is authorised or tolerated by the state and rogue officials who from time to time abuse their authority. He said that between these two poles lie cases (like the one before him) where the evidence accepted by the fact finding tribunals depicts a police force which systematically or endemically abuses its power despite the law and the will of the government to stop it. The accepted international approach to such situations was that stated by Professor Hathaway in *The Law of Refugee Status* (1991) at 125-126. He said that while the State can ask to do no more than its best to keep private individuals from persecuting others, it was responsible for what its own agents did unless it acted promptly and effectively to stop them. He relied on what was said by Stuart-Smith LJ in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 to the effect that cogent evidence will be required that the State which is able to afford protection is unwilling to do so, especially in the case of a democracy.

26 In relation to the evidence the appellant contended that the RRT had made no reference to his statement provided in support of his application giving what he described as 'a strong example' of where a police informant had been killed. He stated there that when he had brought the information of the involvement of corrupt police officers to light it ended up being given to an

officer who was also involved with the result that he was abused and attempts were made on his life.

27 He also placed reliance on part of his memorandum entitled 'Where is the love?' sent on 15 April 2004 to the Department. There he described his involvement with the police in some detail in the following passage:

'While in jail, the drug squad came to see me. They asked me what I knew about the movement of drugs in their county, and if I was involved. I told them I was not involved and if I knew anything for sure, I would tell them.

The officer Byron Gray then grabbed my shoulder and squeezed, causing great pain stating that he knows I can help them and we can make this hard on you. I told them I was not into drugs and was strongly against them. I have seen first hand what drugs and alcohol can do to people, as my parents were chronic users.

He again put his hand on my shoulder and took out a syringe. I started to panic but he squeezed my shoulder again and said settle down you f…n hippy. I am going to ask you a few questions, I want you to answer them, and if I do not like your answer, we will inject this under your fingernail and belief [sic] me you do not want this to happen. I stated I told you I would cooperate none of this is necessary. He said we find we get answers that are more honest when we use these methods.

I do not even know what I know and what I do know you would not believe me. They asked me questions I gave them answers and stated a few more names of people they did not know. I talked about what I thought to be their methods and how to tell when something was going down and where to watch. We went back and forth exchanging information. I talked about and described some people, which were then found to work for the police. He grabbed my shoulder and neck pressed his knee into my back and said I better be careful what I say, accidents can happen, and pushed me down ending the meeting.'

Additionally, he described an escape from pursuing police which he had achieved by jumping over a fence.

28 These issues were the subject of questioning to him in the course of his interview on 8 July 2004 before the RRT. Attention was directed by the appellant's counsel in particular to the following passage:

'A - OK, why do I fear persecution? Um, if I return? Um, I fear persecution because, um, the, because the, um, there are certain members of the Mexican mafia that have, that have, that have, that have, that have been trying to kill me and they have made several threats on my life prior to me leaving the country. And there's a few law enforcement officials that were also involved in actually trying (inaudible). They attempted to kidnap me on more than one occasion. Um, I escaped with injury. At one point when the officers were involved I was shot at and um, at another point when it was just the Mexicans I was also shot at. Um …

M - OK, can I just stop you there for a minute. Just from my own understanding, when you say a Mexican mafia you mean citizens of Mexico in the criminal underworld who are in the States. Is that correct?

A - Yes, yes.

M - Right, and …

A - That were involved in drug trafficking.

M - OK, and, why did you come into this circle?

A - Um, I came into this circle because, um, I had a fiancé at the time who had a cocaine addiction and um, and I was trying to get that out of my life so I went to the police to inform them of a few individuals that were involved in the trafficking of drugs, cocaine being specific, and when I first started helping the police, everything was going smoothly and, um, and then all of a sudden I found out that, um, that they were specifically targeting people that were not like, part of their group. Um, and, I came across somebody, a cocaine dealer that was like, that was part of the group and I was trying to take him down but then all of a sudden while I was sitting with the police officer he was like, you've said too much, you're done here. And he ended our conversation and told me not to involve myself anymore so I did not involve myself and then there was an incident a few months down the road where um, where …'

29 This second ground of appeal advanced by the appellant is one which can have effect only in the event of the Court having found that he was a member of the particular social group addressed in the previous ground of appeal. This follows because the RRT concluded that even if it accepted the claims relating to the Mexican mafia cartel and the appellant's status as an informer and the police involvement in harming him in their entirety, any harm resulting from those issues was not for a Convention reason and the appellant was able to obtain adequate state protection. Therefore the other ground having failed, the point is not reached where it is necessary to consider the arguments concerning rogue state agents. In any event, we do not consider that if the ground did require to be considered that the appellant has provided to the primary judge cogent evidence that the state was unwilling to afford him protection. That is, we do not think that the appellant's case is capable of being construed as having displaced in the particular circumstances the presumptive feature of the democracy in the United States.

30 There is a suggestion in one paragraph of the appellant's written submissions that the RRT so conducted itself as to lead to the inference of an apprehension of bias: *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264 at [115] per Allsop J. In that authority it is made clear that what is necessary is that it is shown that the conclusions of the RRT have been reached with a mind not open to persuasion and unable or unwilling to evaluate all the material fairly. There is,

however, nothing before us or in the decision of the RRT to attract the application of those criteria. Although the primary judge found the first claims by the appellant 'rambling and disconnected' and referred to lack of focus in written submissions by the appellant, it is apparent from the RRT's reasons that it tried to distill the claims made by the appellant and consider them against the requirements of the *Migration Act 1958* (Cth) and the Convention. In any event, this submission was not pressed during oral argument.

31 In our opinion the appellant's contentions fail and the appeal must be dismissed.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Nicholson, Lander and Siopis.

Associate:

Dated: 17 March 2006

Pro Bono Counsel for the Appellant:	S Churches
Solicitor for the Appellant:	Camatta Lempens Pty Limited
Counsel for the First Respondent:	JD Allanson
Solicitor for the First Respondent:	Australian Government Solicitor
Date of Hearing:	10 March 2006
Date of Judgment:	17 March 2006