

Khawar v Minister for Immigration & Multicultural Affairs [1999] FCA 1529 (5 November 1999)

Last Updated: 8 November 1999

FEDERAL COURT OF AUSTRALIA

Khawar v Minister for Immigration & Multicultural Affairs [1999] FCA 1529

MIGRATION - Migration Act 1958 (Cth) - review of decision of Refugee Review Tribunal ("the Tribunal") - applicant target of domestic violence in Pakistan - failure of law enforcement officers to provide protection -- whether Tribunal's consideration of the husband's motivation for harming the applicant involved an incorrect interpretation of the applicable law (ie, the phrase "well-founded fear of being persecuted for reasons of membership of a particular social group") - whether Tribunal failed to construe the phrase as a whole, having regard to the purposes of the Refugees Convention - whether failure of state to protect applicant from non-Convention based persecution can amount to persecution

Migration Act 1958 (Cth), s 476(1)(e)

1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees, Art 1A(2)

Islam v Secretary of State for the Home Department [1999] 2 WLR 1015, considered

Minister for Immigration & Multicultural Affairs v Sarrazola [1999] FCA 1134, followed

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, applied

Chan v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379, considered

Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers, Department of Immigration and Multicultural Affairs, 1996

NAIMA KHAWAR & ORS v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 102 of 1999

BRANSON J

SYDNEY

5 NOVEMBER 1999

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 102 of 1999

BETWEEN:

NAIMA KHAWAR and OTHERS

Applicant

AND:

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Respondent

JUDGE:

BRANSON J

DATE OF ORDER:

5 NOVEMBER <<1999>>

WHERE MADE:

SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside.
2. The matter be referred to the Refugee Review Tribunal for further consideration according to law.

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

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 102 of <<1999>>

BETWEEN:

NAIMA KHAWAR and OTHERS

Applicant

AND:

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Respondent

JUDGE:

BRANSON J

DATE:

5 NOVEMBER <<1999>>

PLACE:

SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an application under s 476(1) of the Migration Act 1958 (Cth) ("the Act") for review by the Court of a decision of the Refugee Review Tribunal ("the Tribunal"). By its decision the Tribunal affirmed a decision of a delegate of the respondent not to grant the applicant Naima Khawar ("Ms Khawar") and her three children protection visas (s 36 of the Act).

2 A criterion for a protection visa is that the decision-maker is satisfied that the applicant is a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (hereafter together referred to as "the Convention") (Schedule 2 to the Migration Regulations 1994 cl 866.221). Australia has protection obligations to Ms Khawar under the Convention if she is a person who:

"owing to a 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 [her] nationality and is unable, or owing to such fear, is unwilling to avail [herself] of the protection of that country ...". (Article 1A(2) of the Convention)

3 As it was only Ms Khawar who made specific claims under the Convention, it is convenient to refer to her as "the applicant".

FACTS

4 The applicant is a citizen of Pakistan who arrived in Australia with her three children on 17 June 1997. On 16 September 1997 she lodged an application for protection visas for herself and her children. On 4 February 1998 a delegate of the respondent refused to grant the protection visa sought. The applicant applied to the Tribunal for review of that decision.

5 The applicant's claim to be a person to whom Australia owes protection obligations under the Convention is based on allegations made by her that she was in Pakistan a target of domestic violence at the hands of her husband and, to a more limited extent, her husband's family. It is not necessary to set out in detail the factual claims made by the applicant. The Tribunal, for the purposes of its decision, accepted the applicant's claims concerning the violence that she had suffered at the hands of her husband. That violence included slappings, beatings including beatings which led to her hospitalisation, threats to throw acid on her and threats to kill her by burning.

6 The applicant also claims that on four occasions she went to the police to lodge reports about her husband's violence towards her. Her evidence in this regard was as follows.

7 On the first occasion she informed a police officer that her husband was beating her and the officer responded that "[t]his is happening all over the country in all houses and that if [the police] had to do

something about all the similar complaints it would take all their time." The officer refused to take her complaint.

8 On the second occasion that the applicant approached the police, she went with her brother-in-law (her sister's husband). She told a police officer of her problems with her husband but the police officer did not make an accurate report and did not take her seriously. On the evening of the day of this visit to the police, her husband came home and told her that he knew of her visit to the police but that the police could do nothing. Her husband and his brother said:

"We are standing in front of you what did you think the police could do to us?"

They also said words to the effect that they were kings and they had power over her and the police could do nothing. On this occasion her husband, along with his brother, beat her with the result that she was hospitalised for seven days and diagnosed as having a depressive disorder.

9 The applicant was also accompanied by her brother-in-law on her third visit to a police station. They saw there the same police officer that she had spoken to on the previous occasion. Again the police officer wrote an inaccurate report. He did not offer her any assistance.

10 The final occasion on which the applicant approached the police followed an incident in which her husband and his brother co-operated in pouring petrol on her clothing, but desisted from their attack when neighbours responded to the screaming of the applicant and her children. On this occasion a police officer said to the applicant "that women always tried to blame [their] husbands when [they] were the ones who were the cause of the problem" and that she should "go and do [her] own work." The applicant claims that following this experience she knew that she would never get any help from the police.

11 The Tribunal made no findings of fact concerning the applicant's claim that she was unable to obtain police protection in respect of the violence experienced by her.

REASONS OF THE TRIBUNAL

12 Without giving any consideration to information touching generally on the status of women in Pakistan or on the prevalence of domestic violence against women in that country, and without reference to the applicant's evidence that her husband had said words to the effect that the police could do nothing about his violence towards her, the Tribunal said in its reasons:

"It is clear to the Tribunal that the problems which the applicant faced with her husband were problems peculiar to their relationship. There is nothing in the evidence before the Tribunal to suggest that the applicant was being targeted by her husband or his family for a Convention reason. She was being harmed and harassed because of the particular dynamics of the family into which she was married and the circumstances of her marriage. Her husband treated her well during the first five years of marriage. There is no evidence that he ever tried to harm her in any way during that period. It was only when he re-established contact with his family that he started to resent the applicant for causing him to sever his relationship with his family over the previous five years.

...

The Tribunal finds that the applicant's husband was not motivated to harm her because she was a member of a particular social group. There is no nexus between the harm which the applicant claims to have suffered at the hands of her husband and the Convention ground of particular social group. She was not harmed because she was a member of any of the particular social groups proposed by the applicant's adviser: 'women'; 'married women in Pakistan'; 'married women in Pakistan without the protection of a male relative'; 'married women in Pakistan separated from one's husband and without the protection of a male relative'; 'married women in Pakistan suspected of adultery'; or 'women who have transgressed the mores of Pakistan society'. She was not persecuted because she was a member of a particular family. She was harmed because the applicant's husband's family were angry or shamed by the fact that he married her

for love when he was already engaged to a relative and because she brought no dowry to the family. She was also seen as being responsible for her husband being estranged from his family for five years. Despite the applicant's adviser's submission that the applicant's husband's family did not know the applicant, they appeared to know enough about her to form the view that they did not like her as a person. This is another motivation for the harassment which was inflicted upon the applicant by her husband's family. It is not Convention related.

....

The Convention was not intended to provide protection to people involved in personal disputes."

13 The Tribunal concluded that it was "not satisfied that the applicant has a well-founded fear of persecution in Pakistan for the Convention reason of particular social group or for any other Convention reason."

GROUND OF REVIEW

14 Section 476(1)(e) of the Act relevantly provides as follows:

"... application may be made for review by the Federal Court of a judicially- reviewable decision on any one or more of the following grounds:

...

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision whether or not the error appears on the record of the decision."

15 The only ground of review relied upon by the applicant is as follows:

"The Tribunal erred in law within the terms of s 476(1)(e) of the Migration Act 1958

PARTICULARS

Having found that:

(a) the Applicant suffered violence at the hands of her husband (Decision, pp 15.5), but

(b) the violence was not by reason of a Convention ground, namely her membership of a particular social group, (Decision, pp 15.6 and 16.6)

the Tribunal erred in failing to consider whether -

(c) the claims that she reported the violence to the police, but that the police failed to provide any, or any effective protection, (Decision, pp 6.6 - 7.2 and 7.5) were true;

and, if the claims were true, whether -

(d) the violence was inflicted by the husband because the state authorities condoned or tolerated such conduct, and

(e) the state authorities thus failed to provide protection under the law to married women who suffered violence at the hands of their husbands, and

(f) such a failure constituted an absence of effective protection by the state by reason of the Applicant's membership of a particular social group namely, married women in Pakistan, and

(g) the Applicant was, in those circumstances, a person to whom Australia owed protection obligations under the Refugees Convention."

CONSIDERATION

16 The applicant advanced two principal contentions before the Court. First, that persecutory conduct can qualify as Convention based persecution even though the persecutor as an individual has no discriminatory motive, so long as the state withholds effective protection on a Convention ground. Secondly, that a group defined according to gender, such as married women in Pakistan, can qualify as "a particular social group" for the purposes of the Convention.

17 The respondent did not challenge the contention that as a matter of law women in Pakistan could be "a particular social group" within the meaning of the Convention. He submitted that as it is not inevitable that a tribunal of fact would find that women in Pakistan were a particular social group, this would be an issue for the Tribunal to determine if the matter were remitted to the Tribunal.

18 The Court's attention may thus be concentrated on the first of the applicant's principal contentions. Mr Basten QC, appearing on behalf of the applicant, submitted that there are four categories of case in which one might find persecution within the meaning of Article 1A of the Convention:

1. Where the state or its agents are directly responsible for persecuting a claimant on Convention based grounds;
2. Where the state either condones or ignores persecution by individuals for whom it is not responsible, but both the state and the individual share the discriminatory motive;
3. Where a non-state agent persecutes for a Convention reason and, although the state is not in sympathy with the motivation of the persecutor, it cannot protect the victim; and
4. Where a non-state agent persecutes, not for a Convention reason but, for a Convention reason, state protection is not available.

19 Only the fourth of the above categories is, it seems to me, contentious. For reasons which appear below, I have not found it necessary to reach a final view with respect to this category in the precise terms in which it was formulated by Mr Basten.

20 Mr Basten submitted that because the Convention provides a basis for surrogate national protection, where national protection has failed on a Convention ground there is a strong argument that this category of case is within the purview of the Convention even though the individuals responsible for the persecution may engage in the persecution for personal motives. Mr Basten characterised the decision of the House of Lords in *Islam v Secretary of State for the Home Department* [1999] 2 WLR 1015 as authority in support of this submission.

21 In fairness to the Tribunal, it should be noted that both *Islam* and a decision of the Full Court of this Court, *Minister for Immigration & Multicultural Affairs v Sarrazola* [1999] FCA 1134 to which reference is made below, were decided after the date of the Tribunal's decision.

22 Two appeals were before the House of Lords in *Islam*. Lord Steyn described the factual background to the appeals at 1017 as follows:

"Both appeals involve Pakistani women who were forced by their husbands to leave their homes. They are at risk of being falsely accused of adultery in Pakistan. They are presently in England. They seek asylum in this country as refugees. They contend that, if they are forced to return to Pakistan, they would be unprotected by the state and would be subject to a risk of criminal proceedings for sexual immorality. If found guilty the punishment may be flogging or stoning to death."

23 His Lordship, after concluding on the evidence and findings of fact in the case before him that women in Pakistan are a particular social group within the meaning of Article 1A(2) of the Convention, turned to give consideration to whether the appellants had a well-founded fear of being persecuted "for reasons of" their membership of the group. He noted that a "question of causation is involved" and observed at 1028:

"Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic. And that is so irrespective whether a 'but for' test, or an effective cause test, is adopted."

24 Lord Hoffmann in *Islam* addressed the issue of causation at 1034-1035 in the following way:

"What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention.

...

Answers to questions about causation will often differ according to the context in which the question is asked Suppose oneself in Germany in 1935. ... suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do so again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? ... in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question 'Why was he attacked?' would be 'because a competitor wanted to drive him out of business'. But another answer, and in my view the right answer in the context of the Convention, would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew.'"

25 Lord Hope of Craighead, at 1037, expressed his agreement with the reasons of Lord Steyn and Lord Hoffmann on the question of causation. Lord Hutton agreed with an approach taken by Lord Steyn which each of their Lordships described as the "narrower" approach. It is to be inferred that this agreement extended to Lord Steyn's consideration of the question of causation.

26 Lord Millett, in dissent, concluded that the appellants had not established that they were persecuted because they were women in Pakistan; his Lordship found that they were persecuted because they had transgressed social norms. His Lordship, at 1044, observed that there was no evidence that men who transgress the different social norms that apply to them are treated more favourably.

27 It is necessary to consider whether the approach of the majority of their Lordships in *Islam* is consistent with Australian jurisprudence.

28 In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 256, McHugh J said:

"The phrase 'a well-founded fear of being persecuted for reasons of ... membership of a particular social group' is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual

interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole."

It seems to me that his Honour is, in the above passage, to be understood as cautioning against a mechanical, as opposed to a contextual, consideration of the words that define a refugee for the purposes of the Convention. That is, I consider that his Honour is to be understood as saying, although not only saying, that in determining whether a person has a well-founded fear of persecution for reason of his or her membership of a particular social group a decision-maker should have regard to the context provided by the Convention and

s 36 of the Act.

29 In *Sarrazola* at paras 13-17, the Full Court of this Court said:

"In its reasons for decision the Tribunal failed to recognise that one person may be motivated to persecute another for more than one reason. It appears to have acted on the basis that a finding that the criminals were motivated by self-interest to recover the money they believed was owing to them by the Applicant's deceased brother was necessarily inconsistent with a finding that they were motivated by a purpose or desire to harm the Applicant by reason of her family membership or relationship to her brother as such.

As Einfeld J pointed out in *Chokov v Minister for Immigration and Multicultural Affairs* [1999] FCA 823 at para 30 in the context of extortion by the Chechen mafia:

"... the Chechen mafia may have chosen to extort Mr Chokov as opposed to another person because of his association with his Chechen wife and the attacks may also have been motivated by the criminal procurement of money. The existence of a criminal motive does not mean that the crimes were not also related to Mrs Chokova's [sic] national origins."

In *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205 at para 20 Branson J said:

"I further consider it appropriate to note that, for the reasons discussed by me in *Okere v Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 678, the Tribunal's finding that the motivation of those who harassed the applicant was to obtain money is not necessarily inconsistent with a finding that the applicant was harassed for reasons of her race or political opinion. It is, of course, the case that extortion based on a perception of the victim's personal wealth, or otherwise aimed at the victim as an individual, will not amount to persecution for a Refugees Convention reason (*Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568-9). However, in this case there was material before the Tribunal capable of supporting a finding that the applicant was selected as a target for extortion by reason of her race or political opinion. That is, it was open to the Tribunal to find that whilst the aim of the harassers was to obtain money from the applicant, the true reason why she was selected for harassment was her race or political opinion."

The position was perhaps put more succinctly by the Full Court in *Perampalam v Minister for Immigration and Multicultural Affairs* [1999] FCA 165 in para 16 where their Honours said:

"Extortion directed at those members of a particular race from whom something might be extorted cannot be excluded from the concept of persecution within the Convention, and Ram does not suggest it can."

In adopting the approach that a finding that the criminals were motivated by a desire to recover the money that they believed was owing to them by the respondent's brother was inconsistent with a finding that the criminals were motivated by a desire to harm the respondent by reason of her relationship to her brother, the Tribunal, in our view, made an error of law of the kind referred to in s 476(1)(e) of the Act."

30 I conclude that the approach to the question of causation adopted by the majority of their Lordships in Islam, illustrated perhaps most clearly by Lord Hoffmann's example concerning the Jewish shopkeeper, is entirely consistent with Australian jurisprudence.

31 The Full Court of this Court also observed in *Sarrazola* at para 23 that:

"[i]t is only after the relevant particular social group, if any, has been identified that a decision maker can sensibly give consideration to the question whether the applicant has a well-founded fear of persecution for reason of his or her membership of that particular social group."

32 The Tribunal in the present case did not explicitly refer to the context provided by the Convention when considering the issue of the motivation of the applicant's husband in acting violently towards her. It did not determine whether the applicant is a member of a particular social group in Pakistan within the meaning of the Convention. The Tribunal's belief that it was unnecessary in the circumstances to determine whether the applicant is a member of a social group may explain why it did not give consideration to information concerning the status of women, and the prevalence of domestic violence against women in Pakistan or to the applicant's evidence that her husband had said, in effect, that the police could do nothing about his violence towards her. Had the Tribunal made a finding that the applicant was a member of a social group in Pakistan which was comprised of Pakistan women, or alternatively married Pakistani women, it may well have concluded, as Lord Steyn did on the evidence in *Islam* at 1028, that:

"Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of their membership of a social group but because of the hostility of their husbands is unrealistic."

33 I conclude that in considering the question of the motivation of the applicant's husband in harming her, the Tribunal made an error of law involving an incorrect interpretation of the applicable law (ie. the phrase "a well-founded fear of being persecuted for reasons of ... membership of a particular social group"). First, the Tribunal failed to construe the phrase as a whole having regard to the purposes of the Convention and s 36 of the Act. Concomitantly, the Tribunal reached a conclusion on the question of whether the applicant's fear of persecution was for reason of her membership of a particular social group without first identifying the relevant social group, if any, of which the applicant was a member. The matter will be remitted to the Tribunal for further consideration to law.

34 As the applicant's claim to be entitled to a protection visa is, subject to the result of any appeal against this decision, to be subject to further consideration by the Tribunal, I consider it appropriate to add the following remarks.

35 In *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 at 429-431, McHugh J said:

"The term "persecuted" is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes "being persecuted". The notion of persecution involves selective harassment. ... As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention. ... Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution ... persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason"

36 In Applicant A, at 258, McHugh J said:

"Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group."

See also Ram per Burchett J, with whom O'Loughlin and RD Nicholson JJ agreed, at 568.

37 The statement of McHugh J in Applicant A that whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct was not, it seems to me, intended to derogate from earlier authorities which make it plain that "the type of harm which can constitute persecution cannot be trivial or insignificant harm but rather must be harm of significance" (see *Kanagasabai v Minister for Immigration & Multicultural Affairs* [1999] FCA 205 at paras 27-30). However, I am aware of no authority which suggests that only direct physical harm can constitute persecution within the meaning of the Convention. Indeed, in the passages quoted above, McHugh J seems to have been at pains to suggest otherwise. It seems to me, for example, that state refusal to recognise marriage within a particular racial group, or state refusal to allow adherents of a particular religion to transfer property by testamentary dispositions could amount to persecution within the meaning of the Convention. For similar reasons, it seems to me to be entirely consistent with High Court authority to accept that the refusal or failure of state law-enforcement officers to take steps to protect members of a particular social group from violence is itself capable of amounting to persecution within the meaning of the Convention. That is, it was, in my view, open to the Tribunal in the present case, if it accepted the evidence of the applicant, and if it found that women, or married women, constitute a particular social group in Pakistan, to find that the applicant has a well-founded fear of persecution by the Pakistani police for reason of her membership of a particular social group. The motivation of the applicant's husband in subjecting her to violence would have no relevance in the case of such a finding. What would be relevant would be whether she had a well-founded fear of being discriminated against in a significant way by law-enforcement officers because of her membership of a particular social group.

38 As to the appropriate approach to be adopted by a decision-maker assessing a gender-based claim for a protection visa, reference may usefully be made to a document published by the Department entitled "Guidelines on Gender Issues for Decision Makers" dated July 1996 ("the Guidelines Document"). The Guidelines Document was developed to help officers of the Department in assessing gender-based claims by, amongst others, applicants for protection visas. The Guidelines Document identifies international instruments in which obligations to protect the human rights of women may be found. It notes that these instruments include:

- * "Universal Declaration of Human Rights (UDHR)
- * International Covenant on Civil and Political Rights (ICCPR)
- * International Covenant on Economic, Social and Cultural Rights (ICESCR)
- * Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- * Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- * Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- * Convention on the Rights of the Child (CRC)
- * Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
- * Convention on the Nationality of Married Women

* 1949 Geneva Conventions on the Laws of War and the two Additional Protocols of 1977

* Declaration on the Protection of Women and Children in Emergency and Armed Conflict

* Declaration on the Elimination of Violence against Women."

39 The Guidelines Document observes:

"2.5 ... due to social and cultural mores [women] may not necessarily have the same remedies for state protection as men, or the same opportunities for flight. ...

2.6 The issue of gender persecution and problems facing women asylum seekers have received attention from the Executive Committee of the United Nations High Commissioner for Refugees' Programme (EXCOM), UNHCR and some governments. UNHCR adopted Guidelines on the Protection of Refugee Women in 1991. A number of EXCOM conclusions have been adopted recommending the development of appropriate guidelines, culminating in 1995 with EXCOM's recommendation that:

In accordance with the principle that women's rights are human rights, these guidelines should recognise as refugees women whose claim to refugee status is based on well-founded fear of persecution for reasons enumerated in the 1951 Convention and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution.

...

3.5 The types of information which may be relevant in assessing gender-related claims are often similar to that relevant to other types of claims. However, research should also focus on the following areas:

* legal, economic and civil status of women in the country of origin

* the incidence of violence against women in the country of origin, including both sexual and domestic, and the adequacy of state protection afforded to women

* cultural and social mores of the country with respect to such issues as the role and status of women, the family, nature of family relationships, attitude towards same-sex relationships, attitudes to 'foreign' influences, etc

* respect for and adherence to fundamental human rights

* the differential application of human rights for women

* issues directly related to claims raised in the application.

3.6 It should be noted that violence against women, particularly sexual or domestic violence, tends to be largely under-reported or ignored in many countries.

3.7 Identifying these issues will enable an officer to become aware of the cultural sensitivities and differences in a particular country before considering the applicant's claims.

3.8 When assessing a woman's claims of well-founded fear of persecution ... the evidence must show that what the woman genuinely fears is persecution for a Convention reason as distinguished from random violence or criminal activity perpetrated against her as an individual. The general human rights record of the country of origin, and the experiences of other women in a similar situation, may indicate the existence of systematic persecution for a Convention reason" (emphasis added).

CONCLUSION

40 The decision of the Tribunal is set aside and the matter remitted to the Tribunal for further consideration according to law.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 5 November <<1999>>

Counsel for the Applicant:

Mr J Basten QC with Mr P Segal

Solicitor for the Applicant:

Coelho & Coelho Solicitors

Counsel for the Respondent:

Mr A Robertson SC with Mr J Smith

Solicitor for the Respondent:

Australian Government Solicitor

Date of Hearing:

25 June <<1999>>, 12 August 1999

Date of Judgment:

5 November <<1999>>