

# **FEDERAL COURT OF AUSTRALIA**

## **STYB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 705**

**MIGRATION** - Protection Visa - Duty of Tribunal to consider claim - Whether broader duty to consider claims that might have been made - Particular social group - Albanian Blood Feud - State Protection

*Migration Act 1958 (Cth)*

*Migration Regulations 1994*

*Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184  
*SDAR v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 27 ALD 129  
*SDAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1102  
*Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28  
*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112  
*SGBB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 199 ALR 364  
*SHKB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 545  
*SCAL v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 301  
*Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25

**STYB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND  
INDIGENOUS AFFAIRS**

**S 36 of 2004**

**SELWAY J  
4 JUNE 2004  
ADELAIDE**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA  
SOUTH AUSTRALIA DISTRICT REGISTRY**

**S 36 OF 2004**

**BETWEEN:           STYB  
                          APPLICANT**

**AND:                MINISTER FOR IMMIGRATION AND MULTICULTURAL  
                          AND INDIGENOUS AFFAIRS  
                          RESPONDENT**

**JUDGE:             SELWAY J**

**DATE OF ORDER:   4 JUNE 2004**

**WHERE MADE:      ADELAIDE**

**THE COURT ORDERS THAT:**

The application is dismissed.

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

**IN THE FEDERAL COURT OF AUSTRALIA  
SOUTH AUSTRALIA DISTRICT REGISTRY**

**S 36 of 2004**

**BETWEEN:            STYB  
                             APPLICANT**

**AND:                 MINISTER FOR IMMIGRATION AND MULTICULTURAL  
                             AND INDIGENOUS AFFAIRS  
                             RESPONDENT**

**JUDGE:              SELWAY J  
DATE:                4 JUNE 2004  
PLACE:               ADELAIDE**

**REASONS FOR JUDGMENT**

1            The applicant claims certiorari, prohibition and mandamus in relation to a decision of the Refugee Review Tribunal ('the Tribunal') made on 15 September 2003 affirming the decision that the applicant not be granted a temporary protection visa. For the reasons given below that application is dismissed.

2            The applicant arrived in Australia on 27 October 2000. On 21 November 2000 he lodged an application for a protection visa. In order to obtain a protection visa the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister') had to be satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol: s 36(2) of the *Migration Act 1958* (Cth) ('the Act').

3            However, that was not the only criterion. It was also necessary for the Minister to be satisfied that the applicant met the criteria specified in Subclass 866 of Sch 2 of the *Migration Regulations 1994*. Those criteria relevantly included that the applicant either held a valid and effective visa at the time that he entered Australia or that the applicant held a temporary protection visa (Subclass 785). Neither of these applied to the applicant. Although he had entered Australia with a visa that visa had been granted on a 'fraudulent' passport (see

Subclass 866.212 (3)(v)) and was ineffective for the purpose of obtaining a protection visa.

4           The application for a protection visa was then treated by the Minister as an application for a temporary protection visa (Subclass 785). No objection has been taken by either party to this course and for present purposes I assume that there was power to treat the application made by the applicant as if it were an application for a temporary protection visa. I do note, however, that some criteria for the grant of a temporary protection visa would seem to be more onerous than for the grant of a protection visa: see for example, the 'national interest' requirement in Subclass 785.227. However, for present purposes it is sufficient to note that one of the criteria for a protection visa, namely that the applicant either have a temporary protection visa or a valid and effective visa, does not apply to a temporary protection visa. On the other hand, the requirement of s 36(2) of the Act that the Minister be satisfied that Australia has protection and obligations towards the applicant is repeated in Subclass 785.221 of the 2nd Schedule of the Migration Regulations.

5           In general terms in order for the Minister to be satisfied that Australia has protection obligations to the applicant the Minister had to be satisfied that the applicant was a 'refugee' as defined in the Convention being a person who:

*'... owing to a well-founded fear of being persecuted for reason 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, is unable or, owing to such fear, is unwilling to return to it.'*

6           The applicant had two grounds for his claim to be a refugee. The first was a claim of a well founded fear of persecution by reason of his Roman Catholic religion. It is unnecessary to consider that claim for the purpose of these proceedings. The other claim was that he was at risk of being killed if he returned to Albania. He said that his family was involved in a blood feud which had started when his grandfather killed a member of another family as a result of a land dispute. The detail of that claim is set out in the reasons of the Tribunal:

*'The applicant submitted a copy of a declaration from the [a]pplicant's village (village A)] commune dated [a date]. The declaration states that there is a blood feud between the families of [X (the applicant's family)] and [Y]. The feud began in 1939 when a member of the [X] family murdered a member of the [Y] family in a dispute over land in [village B]. The [X] family*

*was required to move to [village A] as part of efforts made to conciliate the dispute. The Communist regime came to power in 1945, and ruled Albania for 45 years. The [Y] family did not pursue the blood feud during this period. Since then, the [Y] family have announced their intention to resume the feud.*

...

*The applicant informed the Tribunal that the blood feud had started in 1939 when his grandfather had killed a member of the [Y] family in a dispute over land. His family had moved away from the area. While the Communists were in power, the blood feud had not been activated. However, after the Communist regime fell the feud had started again. The applicant stated that the [Y] family had formally notified his family in about 1992-1993 that the feud was active. His father had spent the five years before he died locked up in the house. He always carried a gun. The applicant claimed that his brothers had stayed locked up until 1996 and after that time they had gone into hiding and no-one knew where they were. He claimed that members of his family had been unable to leave Albania earlier because they lacked the financial means to do so. He stated that so far the [Y] family had not succeeded in killing any member of his family.'*

7           The applicant's claim was considered by a delegate of the Minister. The delegate rejected that claim on 31 January 2002. There were two primary bases for that rejection: first, doubts by the delegate about the applicant's credibility and second, the effect of s 91S of the Act which the delegate understood had the effect that any harm feared as a result of the blood feud had to be disregarded.

8           The applicant sought a review by the Tribunal of the delegate's decision. The Tribunal delivered its decision on 15 September 2003. It confirmed the decision of the delegate. There is nothing in the Tribunal's reasons to suggest that the Tribunal did not accept the applicant's claims that his family was involved in a blood feud or that the applicant personally was at significant risk as a result of the blood feud or that the Albanian government was unable to protect him from those risks.

9           The Tribunal referred to information from the UK Government in relation to blood feuds in Albania. That information included the following:

*'Blood Feuds*

*Despite efforts by the Albanian government to wipe it out, the 15-century code of customs, the Kanun of Lek Dukajini, has reappeared throughout northern Albania, since the return of democracy. The code has been handed down orally through generations, and lays out a code of "laws" governing*

*marriage, birth, death, hospitality and inheritance, which have traditionally served as the foundation of social behaviour and self-government for the clans of northern Albania. In particular, the Kanun regulates killings in order to stop the total annihilation of families.*

*According to several sources, a range of factors has contributed to the re-emergence of blood feuds, “gjakmarrja”, especially in northern Albania, such as the weakness of state institutions, a law and order vacuum, and a lack of trust in the law. Most ongoing vendettas stem from disputes over land and water rights. Many killings continued to occur throughout the country as the result of individual or clan vigilante actions connected to traditional “blood feuds” or criminal gang conflicts.*

*The Kanun has been used as a system for administering justice in northern Albania, which historically has remained isolated from central government law. Today, revenge killings in the name of the Kanun have taken on threatening proportions. A recent survey on the Kanun by the Independent Social Studies Centre, Eureka, expressed concern that many killers were using the rules of the Kanun as a cover to commit ordinary crime. In one sense it could be argued that northern Albanians are resorting to the Kanun in order to fill the law and order vacuum. In most cases, however, it is not the traditional rules of the Kanun that are being applied but rather a self-selected interpretation. In fact it is a means of settling accounts amongst gangs of traffickers, smugglers, and other criminal elements who, in the absence of official law and order, can use the fear, respect and moral justification associated with the Kanun to terrorise people into a code of silence.*

*In 1996, the Albanian government initiated a series of national and local activities mainly in the country's northern and north-eastern zones where the problem of blood feuds is more acute than elsewhere. The Prime Minister called on all the political forces to engage in the fast elimination of blood feuds, in co-operation with the government. The National Blood Feud Reconciliation Committee was established and the then Prime Minister, Aleksander Meksi, was confident that it had produced positive results as regards blood feud reconciliation.*

*It would be difficult to separate the issue of blood feuds from the larger problem of lawlessness in Albania, especially in the mountainous north of Albania and in remote areas.’*

10           Based on this information, and the information provided by the applicant, the Tribunal understood that the applicant's claim was that he had a well-founded fear of persecution by reason of his membership of a particular social group. The Tribunal also understood that the applicant claimed that the Albanian government was unable to protect him:

*‘Based on the above information, the Tribunal accepts that there is a tradition of blood feuds in Albania, particularly in the north of the country. The Tribunal finds that the Albanian authorities have recognised the problems*

*presented by blood feuds and have shown that they are willing to address them.*

*The Tribunal accepts the applicant's claim that his family is involved in a blood feud with the [Y] family because a member of the applicant's family killed a member of the [Y] family in 1939 during a dispute over land. The information about blood feuds noted above indicates that there has been a resurgence of blood feuds in the north of Albania (where the applicant comes from) and that feuds have been reactivated after many years of being suppressed by the Communist regime.*

*The applicant claims that his fear that he will be killed by a member of the [Y] family if he returns to Albania is covered by the Refugees Convention because it is a Convention ground, namely his membership of a particular social group, his family, which provides the motivation for the [Y] family to harm him.'*

- 11           The Tribunal rejected that claim on the basis that s 91S of the Act precluded a claim based upon a 'family relationship' where the ultimate source of the persecution was not a 'Convention' reason:

*'As noted in the information provided by the UK Home Office, the causes of most blood feuds are disputes over land and water rights or, more recently, criminal activities. The feuds do not originate for a reason which would come under the Refugees Convention. The applicant has stated that the feud in which his family is involved arose because a member of his family killed a member of the other family over a land dispute. Although the Tribunal is satisfied that in the Albanian context the applicant's family can be considered to be a particular social group under the Convention, the Tribunal finds that the motivation of the [Y] family to harm a member of the applicant's family is revenge for a murder committed by a relative of the applicant. Revenge for a criminal act is not a reason for harm which comes under the Convention.*

*The effect of s 91S is that the Tribunal must disregard the fear of persecution of a person such as the applicant whose fear arises because he or she is the relative of a person targeted for a non-Convention reason. The application of s91S in respect of blood feuds was upheld in SDAR v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1102 in which Merkel J. stated at [24]:*

*"It is my view that, properly construed, the fear of persecution and persecution referred to in s 91S is a fear and persecution for the reason that the person is a member of the particular family, another member of which fears persecution or has been or may be targeted for persecution for a non-convention reason. As a consequence of that non-convention fear or persecution, the fear or persecution of other family members by reason of their family membership is to be disregarded.*

Thus, where a family member's fear of persecution has arisen because another family member's criminal debts have not been paid, or because a blood feud has arisen from or been associated with the unlawful act of another family member, that fear of persecution and persecution is to be disregarded."

*In SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 at [24], von Doussa J. agreed with conclusions of Merkel J. Taking into account the above, the Tribunal finds that s.91S prevents the applicant's membership of his family being used as a vehicle to bring him within the scope of the Refugees Convention because the persecution or fear of persecution is motivated by a non-Convention reason.'*

12           The applicant seeks the review of that decision of the Tribunal. The parties accept that it is necessary for the applicant to show that there has been a jurisdictional error by the Tribunal in its process, reasons or decision. The applicant argues that there were two relevant jurisdictional errors. The first was the failure of the Tribunal to consider whether the applicant was a member of a social group comprising persons subject to the traditional laws of the Kanun, or alternatively persons subject to blood feuds. The second was the failure of the Tribunal to consider whether the Albanian authorities deliberately would not protect him because he was involved in a blood feud.

13           In order to understand the first argument it is necessary to refer to s 91S of the Act:

*'For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:*

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and*
- (b) disregard any fear of persecution, or any persecution, that:*
  - (i) the first person has ever experienced; or*
  - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;*

*where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.'*



14           This section prevents a person claiming that he or she has a well founded fear of persecution by reason of membership of a family where the ‘source’ of the persecution of the family is the persecution of another member of the family for a non-Convention reason (compare *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184). In this case, for example, the case presented by the applicant was that the ‘persecution’ of his grandfather was by reason of his grandfather’s personal (in contrast to group) responsibility for killing a neighbour in a property dispute and that that event was the source of the group blood feud involving the whole family. This was the case that was accepted by the Tribunal. In such circumstances s 91S has the effect that the applicant cannot succeed in a claim for refugee status based upon membership of his family as a social group: see *SDAR v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 27 ALD 129; [2002] FCA 1102.

15           The applicant seeks to avoid this result by re-casting the relevant ‘particular social group’ as persons subject to Kanun (being the relevant customary behaviour practiced in northern Albania) or persons subject to a blood feud. There are at least two answers to this submission. The first is that this is not the case put by the applicant before the Tribunal. Mr Ower, who appeared for the applicant, properly accepted that the case that the applicant had put was that discussed by the Tribunal, namely, that the relevant social group was his family. However, he argued that the material before the Tribunal was sufficient for it to have identified for itself that a wider social group and that it should have done so. He relied upon comments by Merkel J in *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 63-64. Whether or not those comments were correct when they were made, they may not now accurately reflect the jurisdiction of this Court. That jurisdiction is limited to the identification of jurisdictional errors. The question in this context is whether the Tribunal has made a jurisdictional error in not considering a claim that has not been made. In my view it does not make a jurisdictional error in such circumstances, providing, of course, that it correctly identifies the legal issues relevant to the claim that is made: contrast the majority and minority reasons in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112.

16           This still leaves considerable ambiguity in identifying what the actual claim made by an applicant was in any particular case. I discussed this issue in *SGBB v Minister for*

*Immigration & Multicultural & Indigenous Affairs* (2003) 199 ALR 364, 368-369 [16]-[18]:

*‘... Dr Churches put his argument on the basis that it was a jurisdictional error if the Tribunal failed to consider a basis for the grant of a protective visa where there is evidence or material before the Tribunal which it accepts, or does not reject, and that evidence or material raises a case on that basis regardless whether the appellant has relied upon that basis. He relied upon the comments of Merkel J in Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 at 248 [13].*

*This may go too far. As Kirby J noted in Dranichnikov 2003 at 405 [78]: ‘[t]he function of the tribunal, as of the delegate, is to respond to the case that the applicant advances.’ And see also von Doussa J in SCAL v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 548 (‘SCAL ’) at [16]: ‘[n]either the delegate nor the Tribunal is obliged to consider claims that have not been made’. But this does not mean that the application is to be treated as an exercise in 19<sup>th</sup> century pleading. As it was put by the Full Court of this Court in Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs [2000] FCA 1801 at [49]:*

*“The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention “label” to describe his or her plight, but the Tribunal can only deal with the claims actually made.”*

*Indeed, that case serves as an example of how the nature of the case as actually put can affect the obligation of the Tribunal in identifying the relevant social group. In that case the majority of the High Court were prepared to identify the relevant social group from the evidence and material put before the Tribunal by the applicant to explain his relevant ‘fear’ by reference to the ‘peculiar circumstances that had impinged on his life’ (see Dranichnikov 2003 at 402 [63]).*

*The question, ultimately, is whether the case put by the appellant before the Tribunal has sufficiently raised the relevant issue that the Tribunal should have dealt with it.’*

(See also *SHKB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 545 at [23] -[24]).

17            In my view the Tribunal is obliged to consider the case as put by the applicant. It is not obliged to attempt to construct a case for him or to consider some case that was not put. Reference may be made in this regard to the Full Court decision in *SCAL v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCAFC 301 which is on all fours with this case. In that case the submission that the Tribunal was obliged to consider whether

a person in the position of the applicant was a member of a particular social group comprising persons subject to the Kanun or persons subject to a blood feud even though that claim had not been made before the Tribunal was expressly rejected (see at [14]-[16]).

18 But even if there were some duty upon the Tribunal to carry out a broader inquiry it has not been suggested that the Tribunal has a duty to search for material upon which to discern for itself whether there might be some ‘particular social group’ of which the applicant might claim membership and in respect of which he might have a well founded fear of persecution. Mr Ower did not put the submission any higher than there was a duty upon the Tribunal to consider whether the evidence and material before the Tribunal identified such a ‘particular social group’. Even accepting that premise, the question then arising is whether there was any evidence before the Tribunal which might have identified that either persons subject to the Kanun or persons subject to a blood feud might constitute a ‘particular social group’.

19 The issues relevant to the composition of a ‘particular social group’ have been recently considered by the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25 (*‘Applicant S’*). In that case the applicant had specifically identified the relevant social group (young males of military age in Afghanistan) in his claim (see at [56]). Consequently, the issue discussed above as to whether the Tribunal was obliged to consider a claim that could have been, but was not made, did not need to be considered. The issue in that case was whether or not the Tribunal had discharged its duty of considering the claim as made. The High Court held that the Tribunal had not done so because it had misunderstood the meaning of ‘particular social group’ in the Convention. In the joint judgment of Gleeson CJ with Gummow and Kirby JJ the correct test is discussed at [36] (see also McHugh J at [68]-[69], Callinan J at [97]-[98])

*“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, 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.*' (citations omitted)

20 In this case there was no evidence to suggest, much less establish, that persons subject to the Kanun or people subject to blood feuds met the three criteria specified by the High Court. If a claim had been expressly made that people with these characteristics formed a particular social group then the Tribunal would have been required to consider that claim even if, on the evidence before it, it may have rejected it: see *Applicant A*. But even assuming that Mr Ower's formulation of the jurisdiction of the Tribunal is correct, where a claim is not made and the material before the Tribunal does not identify a particular social group there can be no jurisdictional error in the Tribunal failing to consider whether a particular social group might exist and then whether the applicant might fall within it.

21 In my view the Tribunal did not fall into jurisdictional error in failing to consider whether the applicant was a member of a social group comprising persons subject to the traditional laws of the Kanun, or persons subject to blood feuds. In my view the claim made by the applicant did not require the Tribunal to consider whether the applicant was a member of these social groups; nor (if it matters) did the evidence before the Tribunal show that the applicant was a member of these 'particular social groups'.

22 The other jurisdictional error alleged by the applicant was that the Tribunal failed to consider whether the Albanian authorities deliberately did not provide protection to persons subject to the Kanun or persons subject to a blood feud. The purpose of this argument was to seek to establish as a separate ground of persecution the deliberate and wilful failure of the Albanian government to protect the applicant, in contrast to its mere incapacity to do so. If, for example, the Albanian government deliberately allowed blood feuds to continue because, as a matter of policy, it supported the Kanun in general or blood feuds in particular, then this might constitute a very different claim of persecution from the claim considered by the Tribunal in this case.

23 There are a number of problems with this argument at least in relation to this case. Two can be shortly mentioned. First, the Tribunal was not obliged to consider such a claim because it was not the claim made by the applicant. The claim made by the applicant plainly was that the applicant feared persecution by private individuals and the Albanian government was unable to protect him. That was the claim considered by the Tribunal. The factual basis

of that claim was largely accepted by the Tribunal. This leads to the second problem with this argument. The Tribunal's findings at least infer that the Albanian authorities were attempting to prevent blood feuds. The problems that the authorities may have had in that regard were the result of general lawlessness, particularly in Northern Albania. There was no suggestion in the reasons of the Tribunal, or in the material before it, that any failure of the Albanian authorities to protect people in the position of the applicant was 'deliberate'.

24           In my view the Tribunal did not fall into any error in failing to consider whether the Albanian authorities deliberately would not protect the applicant because he was involved in a blood feud.

25           Undoubtedly, it would be inappropriate for any State to force a person to return to another State when there was a real prospect that the person would be murdered when he or she got there. However, it is not the function of this Court to determine whether the applicant should be forced to return to Albania or what might happen to him if he does. The jurisdiction of this Court is subject to the identification of a jurisdictional error in the process, reasons or decision of the Tribunal. No such jurisdictional error has been identified. The application must be dismissed.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Selway.

Associate:

Dated:           4 June 2004

Counsel for the Applicant:   S Ower

Solicitor for the Applicant:   Winters

Counsel for the Respondent:   S Roder

Solicitor for the Respondent:   Sparke Helmore

Date of Hearing:               24 May 2004

Date of Judgment:             4 June 2004

