



HUMAN TRAFFICKING WORKING GROUP

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CASE REPORT

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Case Name	MIMA v Khawar and others
Reported in	<i>Khawar v Minister for Immigration and Multicultural Affairs</i> (2002) 210 CLR; [2002] HCA 14. <i>Khawar v Minister for Immigration and Multicultural Affairs</i> (1999) 168 ALR 190. <i>Minister for Immigration and Multicultural Affairs v Khawar and Others</i> (2000) 101 FCR 501.
Date(s) of hearing	Arrived in Australia: June 1997, 17 Visa application: September 16, 1997 Primary decision: February 4, 1998 RRT decision: January 11, 1999 High Court decision: April 11, 2002
Court	High Court of Australia
Application	Refugee Protection Visa, s 36 <i>Migration Act 1958</i> (Cth)
Other applicants	Application of Mrs Khawar included her two dependent children.

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The case of *MIMA v Khawar* concerns the question of whether the inaction of a state to protect a citizen from harm caused by non-state actors, when the harm or inaction is attributable to the citizen's membership of a particular social group, can amount to persecution and accordingly activate Australia's refugee protection obligations. This question is relevant to human trafficking as the harm inflicted upon victims of trafficking is frequently perpetrated by non-state actors, i.e. the individual traffickers. Also, some Australian trafficking cases have considered allegations of widespread inability or unwillingness on the part of the victims' countries of origin to prevent such behaviour.¹ The result in this case may thus make it possible for victims of trafficking to apply for refugee protection.

Case Facts

Ms Khawar, a Pakistani national, fled an extremely violent marriage and claimed refugee status in Australia, along with her two children in 1997. The violence inflicted upon her by her husband had required her hospitalisation on several occasions, and on another occasion, her husband and his brother doused her in petrol and threatened to burn her alive. She went to the police at least four times and she claimed that on each occasion her complaints were not taken seriously and no action was taken against her husband.

In Australia, the Refugee Review Tribunal (RRT) later made findings of fact that the violence against Ms Khawar was motivated by her husband's family's dislike of her personally, as she was not the woman they had arranged for her husband to marry, and because she brought no dowry to the marriage. They did not make findings as to whether she was member of any particular social group within the meaning of Article 1A(2) of the *Convention relating to the Status of Refugees*, to which the *Migration Act 1958* (Cth) refers, or whether there was a systemic unwillingness on the part of the police to act, owing to a state sanctioned gender discrimination.

Case History

Ms Khawar was denied a protection visa in February 1998. She then appealed to the RRT, which affirmed the primary decision. This was followed by an appeal to the Federal Court, where Justice Branson found that the RRT had erred in failing to make the findings of fact referred to above, which were critical to any decision on whether Ms Khawar was entitled to a refugee protection visa.² The Immigration Minister appealed this decision to the full court of the Federal Court, where a majority upheld the decision of Justice Branson.³ The Minister then gained special leave to appeal to the High Court.

High Court Appeal

The majority of the High Court (Gleeson CJ, McHugh, Gummow and Kirby JJ, Callinan J dissenting) found that Australia could owe protection obligations to a victim of serious harm perpetrated by non-state actors, where the state had a duty to act but was unwilling to protect the victim from that harm.⁴ It was also held that either the harm or the unwillingness to provide protection must stem from the victim's membership of a group identified in Article 1A(2)⁵, which includes a particular social group such as Pakistani women.⁶

¹ *VXAJ v MIMIA* [2006] FMCA 234, [27].

² *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190.

³ *Minister for Immigration and Multicultural Affairs v Khawar and Others* (2000) 101 FCR 501.

⁴ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *MIMA v Khawar and others* (2002) 210 CLR 1, per Gleeson CJ at 13, per McHugh and Gummow JJ at 29, Kirby J at 40.

⁵ *Convention relating to the Status of Refugees* 1951, Article 1A(2), as amended by the *Protocol Relating to the Status of Refugees* 1967.

The majority found that Pakistani women could constitute a particular social group, and that the size of this group was no obstacle to this finding.⁷ Their Honours also noted that the persecuting conduct cannot be the determining factor in defining that social group.

Both Justice Kirby⁸ and Chief Justice Gleeson⁹ considered a doctrine of surrogacy, where it was the responsibility of the international community to provide protection for an individual where the country of the individual could not.

Justices McHugh and Gummow analysed the use of 'state protection' as a criterion in establishing whether a person is being prosecuted. They noted that historically this has referred to whether the applicant is able to avail themselves of the diplomatic assistance of their country when outside of that country, and that it is a judicial addition¹⁰ to consider the protection afforded by the country to the applicant in the face of serious harm as an indicator of persecution.

In his dissenting judgment, Justice Callinan held that government inaction in the face of non-state actors inflicting serious harm could not amount to persecution.¹¹

Relevance to Human Trafficking

It has been noted in a number of reports and cases that in many source countries of trafficking the practice is condoned at least at a local level by corrupt officials and police.¹² This means that if a victim of trafficking is found in Australia and is unwilling to assist the police in order to be eligible for a Criminal Justice Stay Visa, they could potentially apply for a protection visa on the basis that they were the victims of persecution in their homeland. The difficulty with this claim would be establishing the necessary level of tolerance of trafficking on the part of the government of that country. Also, a victim would need to prove that the trafficking or state inaction could be attributed to a particular social group, for example women from rural northern Thailand.

Subsequent Legislation

In response to the decision in *Khawar*, then Attorney-General, Mr Phillip Ruddock, introduced legislation to restrict the interpretation of 'persecution' within the meaning of s1A(2) of the Convention.¹³ He considered that

over recent years the interpretation of the definition of a refugee by various courts and tribunals has expanded the interpretation of the definition so as to require protection to be provided in circumstances that are clearly outside those originally intended.¹⁴

The amending legislation introduced a new s 91r into the *Migration Act 1958* (Cth). The purpose of this section was to restrict claims of persecution to instances where there was 'serious harm' involved. In addition, the Convention reason for the persecution must be the

⁶ Cf *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629.

⁷ *MIMA v Khawar and ors* (2002) 210 CLR 1, Per Gleeson CJ at 13, per McHugh and Gummow JJ at 28, Kirby J at 42.

⁸ *Ibid* 38.

⁹ *Ibid* 10.

¹⁰ *Ibid* 25.

¹¹ *Ibid* 47, 49.

¹² See, for example the report on trafficking in Myanmar (the former Burma) in the US State Department's *Trafficking in Persons Report 2008*, 79-81. See also *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs and Another* [2006] FMCA 234 at para [33]-[34] for a discussion of state-sanctioned trafficking in Thailand.

¹³ *Migration Legislation Amendment Bill (No 6) 2001* (Cth).

¹⁴ Explanatory Memorandum, *Migration Legislation Amendment Bill (No 6) 2001* (Cth), [3].

essential and significant reasons for the persecution.¹⁵ It has been considered that this section makes it significantly harder (though not impossible) for a female to successfully claim refugee status under the argument outlined above.¹⁶

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¹⁵ *Migration Act 1958* (Cth), s 91R(1)(a)-(b).

¹⁶ Catherine Hunter, 'Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims' (2002) *Australian Journal of Human Rights*, 8.