FEDERAL COURT OF AUSTRALIA

Abdi v Minister for Immigration & Multicultural Affairs [1999] FCA 1253

MIGRATION – application to review decision of Refugee Review Tribunal – whether procedures required by the *Migration Act* 1958 (Cth) – whether decision involved error of law involving an incorrect interpretation of applicable law or incorrect application of law to facts as found – whether Minister had jurisdiction to reject application for protection visa based on satisfaction or non-satisfaction as to refugee status

Migration Act 1958 (Cth), ss 430, 476(1)(a), 476(1)(e), 476(2)

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 124 ALR 265, cited

Minister for Immigration and Multicultural Affairs v Prathapan (1998) 156 ALR 672, cited

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 162 ALR 577, cited

Australian Broadcasting Tribunal v Bond (1990) 17 CLR 321, cited

Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411, cited

YONIS HUSSEIN ABDI v

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 419 of 1999

O'CONNOR J

SYDNEY

10 SEPTEMBER 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 419 of 1999

BETWEEN:	YONIS HUSSEIN ABDI Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	O'CONNOR J
DATE OF ORDER:	10 SEPTEMBER 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

The application be dismissed with costs.

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 419 OF 1999

BETWEEN:	YONIS HUSSEIN ABDI

	Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	O'CONNOR J
DATE:	10 SEPTEMBER 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 This is an application to review the decision of the Refugee Review Tribunal ("the Tribunal") dated 22 April 1999 affirming a decision made by a delegate of the Minister for Immigration and Multicultural Affairs not to grant the applicant a protection visa.

2 At the hearing of this matter the applicant made an application for leave to amend the application which was not opposed by the respondent. The amended grounds of the application are:

1. That procedures required by the *Migration Act* 1958 (Cth) ("the Act") to be observed in connection with the making of the decision were not observed. The applicant claims that the Tribunal failed to provide reasons and findings on material questions of fact in relation to his claim that he was unwilling to return to Somalia and that Australia would therefore not be able to return him as an involuntary returnee.

2. That the decision involved an error of law being an error involving the incorrect interpretation of the applicable law or an error involving the incorrect application of the law to the facts as found by the Tribunal. The applicant claims that the Tribunal incorrectly applied the test for relocation to the facts as found by it, in failing to consider that his relocation would require his involuntary return to an area that does not accept involuntary returnees.

3. That the Minister did not have jurisdiction to reject the application for a protection visa because his state of non-satisfaction as to the refugee status of the applicant was arrived at unreasonably or illogically.

3 The applicant seeks an order setting aside the decision of the Tribunal and an order remitting the matter back to the Tribunal to be determined according to law.

BACKGROUND

4 The applicant is a citizen of Somalia who arrived in Australia on 16 July 1998. The applicant was born in Mogadishu and was educated and learned a skill (as a mechanic) in Galkayo. The applicant has a son. His mother is dead and he has three brothers and sisters all living in Somalia with the exception of one living in the Netherlands. He stated that his clan is the Shekaal.

5 The applicant states that his employment in Somalia had been as a self-employed shopkeeper from 1989 to 1991 and that he worked in a restaurant in Kenya from 1991 to 1992 and again from 1994 to late 1994. He also claimed that he worked for United Nations Operation in Somalia (UNOSOM) as an investigator from 1992 to 1994.

6 The applicant claims that he left Somalia in 1991 as a result of the fact that his father was being hunted because he had been a police officer in the Siad Barre government. He claimed that people who were hunting his father were United Somali Congress (USC) militia. He said that members of the USC militia cam to the family home in early 1991 and raped and killed his sister.

7 He stated that his father, his son and four siblings were in Kenya at the time of this application and he also had another brother in Holland.

8 The applicant claimed he returned to Somalia from Kenya in 1992. Because his wife was a member of the Hawiye clan (the same clan as the USC militia) this offered some protection. The applicant claimed he went back to Somalia and undertook to work for UNOSOM as an informer and tell them where guns were kept.

9 On 3 October 1993 the applicant's wife was killed in fighting in Mogadishu. The applicant was also shot and wounded in the kidney but recovered to some extent.

10 The applicant claims that later when the USC found out that he was giving information to the UNOSOM they came looking for him. They found him at his father in law's home and killed his sister in law and shot him in the shoulder. His father in law, a Hawiye clan member was able to prevent any further killing but later told the applicant he could not protect him any longer and took him to the airport where the applicant flew to Kenya with his son.

11 The applicant remained illegally in Kenya until 1997. Then he left for Zambia and subsequently South Africa where he bought a passport in a different name to his and used it to travel to Australia.

12 The applicant says he fears returning to Somalia because he believes the "Hawiye-composed" USC would kill him. His association with UNOSOM and his father's former role as a police officer would be the motive for such killing.

Tribunal Hearing

13 At the Tribunal hearing the applicant was questioned about his claims in relation to his membership of the Shekaal clan, his situation in Kenya and whether he remained in contact with members of his family in Kenya and his brother in Holland and his work with UNOSOM. The Tribunal also took evidence from witnesses on behalf of the applicant.

LEGISLATION

14 The relevant provisions of the Act provide:

"**Refugee Review Tribunal to record its decisions etc. and to notify parties**

430. (1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

…

Application for review

476. (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

…

(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;

…

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

TRIBUNAL DECISION

15 The Tribunal made the following findings:

- The Tribunal had serious reservations as to the veracity of the applicant's accounts of events. The applicant had given inconsistent accounts over a period of time. In addition to the inconsistencies the Tribunal found an attempt

by the applicant to prevent the Tribunal from investigating his case through people who had first had information regarding his situation since 1991. He claimed he did not have details of or the means to contact either his brother in Holland or his family in Kenya. The Tribunal did not accept that he would have failed to carry or remember these details and lose contact with his family.

The Tribunal also found it implausible that UNOSOM would employ someone who had been out of the country for some period of time to locate arms caches in Mogadishu.

- The Tribunal accepted that the applicant's clan (Shekaal) was a minor clan which did not hold any significant power and that they were vulnerable to acts of extortion. However the Tribunal noted that the applicant did not make any claim to have been targeted for reasons of his membership of the clan. Based on independent evidence, the Tribunal found that the applicant would not have been targeted for reasons of his clan membership.

- The Tribunal found that even if it accepted the applicant's role with UNOSOM, the applicant was not attached to any UNOSOM office and his claimed activities were limited to actions against the militia. The Tribunal then concludes that even if his activities were discovered as claimed the number of people who would have been aware of the applicant's activities would have been limited and only be of concern to the USC militia in Mogadishu.

The Tribunal therefore concluded that any chance that the applicant would be of interest to people or militias in other areas of the country would be "remote and insubstantial" and that any fear he may hold in that regard, relating to a region other than southern Mogadishu, was not well-founded.

- The Tribunal did not accept the applicant's claim that he could not return to Galkayo because of the presence of Hawiye people in that area who would be aware of his role in UNOSOM. The Tribunal considered the number (who would be aware) to be small. The Tribunal noted independent evidence on the current situation in Galkayo and concluded that the Shekaal as other clan members are accepted there.

- The Tribunal therefore found that the applicant would have meaningful protection, from any harm that he claims to fear, by relocating to the North East of the country. The means to return to that region, the applicant's potential to reintegrate, the willingness of the authorities in that region to accept members of other clans and the established stability of the region led the Tribunal to find that it is reasonable in the circumstances to expect the applicant to relocate and protection from his claimed harm is available to him.

- The Tribunal noted that independent evidence indicated that Australia would not be able to return the applicant as an involuntary returnee but neither this nor the applicant's unwillingness to return converted the applicant's status into that of refugee.

16 The Tribunal's conclusion was that the applicant's fear of return, albeit genuine, was not well founded and it was reasonable that he could return to and remain in Galkayo without fearing persecution for a Convention reason.

17 It followed that the applicant was not a refugee as defined under the Convention.

DECISION

18 At the hearing of the matter the applicant's Counsel said that the principal submission he wished to make concerned the way the Tribunal dealt with the issue of relocation. He said that the findings or lack thereof and the decision of the Tribunal on this issue amounted to errors of law on three grounds:

1. The Tribunal failed to make findings on a material question of fact ie whether being an involuntary returnee, he could return to an area of Somalia that does not accept involuntary returnees; and

2. The Tribunal wrongly applied the test for relocation as set out in the judgment of Black CJ in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 124 ALR 265 at 269-270; and

3. In dealing with the question of relocation as he did, the Tribunal came to his state of non satisfaction in relation to the applicant's status as a refugee on illogical grounds and, in such circumstances, lacked jurisdiction to refuse the visa sought.

Ground 1

19 The applicant submits correctly that a failure to make findings on a material question of fact will be a breach of a procedural obligation under s 430 and amount to an error of law under s 476(1)(a). He submits, in this case,

that the Tribunal was obliged to come to a conclusion or give an answer to the following question: *How as an involuntary returnee to an area which does not accept involuntary returnees, can the applicant be expected to relocate to North East Somalia?* The applicant correctly asserts that the Tribunal did not address this question and make findings and argues that this failure was, on the basis referred to above, an error of law.

20 In my view the Tribunal did not fail to make a material finding of fact and so breach its obligation under s 430 of the Act. The central material finding in this case is that the applicant did not have a fear of persecution, if he returned to North East Somalia, which was well-founded. Once this finding was made it followed that he was unable to satisfy the provisions of Article 1A(2) of the Convention, and be declared a refugee.

21 As the issue of relocation, in so far as it affects the applicant's status as a refugee as opposed to the question of relocation in fact does not arise after the applicant has left their country of origin, and is concerned with whether he could have, reasonably, relocated prior to departure, the subsequent question of whether the applicant can, at this time because of other circumstances, be returned to North East Somalia, is not in this case, a material question of fact. That conclusion follows from the finding that there was no well-founded fear of persecution.

22 In *Minister for Immigration and Multicultural Affairs v Prathapan* (1998) 156 ALR 672 at 677 Lindgren J said:

"According to the terms of the definition [of a refugee], the person's well founded fear of persecution for a Convention reason has two roles to play: it must be the cause of the person's being outside his or her country of nationality and it must be the cause of any unwillingness on the part of that person to resort to that country's protection. If protection is available from the country of nationality, fear of persecution is not well founded. **In those circumstances, the person would be unwilling to take advantage of the protection of the country of nationality 'owing to' some other cause other than a well founded fear of persecution**". (**emphasis added**)

23 The Tribunal did not, in my view, wrongly apply the test for relocation. It considered the practical realities of relocation. It referred in particular to the time the applicant had spent there where he had been educated and learned a skill. The Tribunal then concluded he had a potential to reintegrate into that part of the country and concluded that the fact that he was unwilling to do so could not overcome those conclusions.

24 As the respondent submits, the underlying rationale behind the "relocation test" is that an applicant for refugee status must first invoke the

protection of their country of nationality. In *Randhawa* (supra at 441) Black CJ cited with approval the following statement by Professor Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at 133:

"A person cannot be said to be at risk of persecution if she can access effective protection in some other part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative in seeking internal protection, primary recourse should always be at one's own state."

25 Black CJ also cited with approval (supra at 442) the statement of Simon Brown J in *R v Secretary of State v Home Department; ex parte Gunes* [1991] Imm AR 278 that if, in all the circumstances, it would be reasonable to expect someone to return to another part of their country of nationality then that is something that can found an adverse decision on a claim for refugee status.

26 In this case, the Tribunal found that protection was, and is, available in another part of the country of origin of the applicant. He did not seek to avail himself of it as a matter of choice and does not seek it now. I agree with the conclusion of the Tribunal that this decision by the applicant is not something that can convert an otherwise effective protection that is meaningfully available to that which is not meaningfully available. It cannot excuse the applicant's failure to seek primary recourse from his country of origin.

27 This ground is not made out.

Ground 2

28 The applicant submits that the relocation principle enunciated in *Randhawa* (supra) by Black CJ was wrongly applied by the Tribunal. The error made was to fail to consider the applicant's unwillingness to return to North East Somalia in two ways:

1. In consideration of whether the applicant had a well-founded fear; and

2. In considering the relocation issue.

29 The applicant said the test involved two stages:

(i) The decision maker must ask whether the applicant's fear is well-founded in relation to the country of nationality as a whole

(ii) The decision maker must then ask whether the applicant could *reasonably be expected* to relocate to another part of the country;

and the latter question must take into account the *practical realities* facing the person.

30 As I said in relation to the first ground of appeal having come to the conclusion that the applicant's fear was not well-founded, findings as to how the applicant's genuine unwillingness, for whatever reason, would affect the practicalities of relocation did not have to be considered by the Tribunal.

31 I consider that the test was properly applied by the Tribunal and there is no error of law demonstrated.

Ground 3

32 The applicant, relying on parts of the judgment of Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at 608-9, submits that the requirement of satisfaction (or lack of satisfaction) is a jurisdictional fact that must be met before a visa of the kind sought here can be granted or refused, and the failure to come to that state of satisfaction (or lack of satisfaction) reasonably, is an error of law. Gummow J said that when the state of non-satisfaction, as is argued in this case, is based on findings or inferences of fact which are not supported by some probative material or logical grounds the respondent will lack jurisdiction to refuse to grant the visa.

33 To find that the applicant is an involuntary returnee and that he should be expected to return to an area which does not accept involuntary returnees, making this a basis for determining that the applicant was not a person to whom Australia owes protection obligations, is such an illogicality and the principle stated by Gummow J applies.

34 To the extent that Gummow J suggested in his reasons for judgment in *Eshetu* (supra) findings of fact may be reviewed on a wider basis than stated in *Australian Broadcasting Tribunal v Bond* (1990) 17 CLR 321 at 355-6 (per Mason CJ) I note that the issue was not expressly addressed by the other members of the Court. This Court remains bound, in my view, by the decision of the Full Court in *Minister for Immigration and Multicultural Affairs v*

Epeabaka (1999) 84 FCR 411 which adopted the *Bond* approach and I would follow this decision if it were necessary.

35 The Court does not, however, have to examine any potential conflict of legal principle which his Honour's remarks may have created because the applicant in this case is not challenging findings of fact but is attacking a process of reasoning used by the Tribunal in coming to a conclusion as to the status of the applicant. As I have concluded above, the approach taken by the Tribunal in dealing with relocation was legally correct and there is no jurisdictional impediment to making the decision that it did.

36 The application is dismissed with costs.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Connor.

Associate:

Dated: 10 September 1999

Counsel for the Applicant:	N Poynder
Solicitor for the Applicant:	West Heidelberg Community Legal Centre
Counsel for the Respondent:	R Beech-Jones
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	3 September 1999
Date of Judgment:	10 September 1999