# FEDERAL COURT OF AUSTRALIA

Aala v Minister for Immigration & Multicultural Affairs

[2001] FCA 1015

**IMMIGRATION** – where applicant engaged in activities deemed to be illegal under law of country of origin – whether a law of general application or politically motivated – whether no evidence for findings

*Migration Act* 1958 (Cth) ss 476(1)(e), 476(1)(g), 476(4)(b)

*X v Minister for Immigration & Multicultural Affairs* [1997] FCA 1441 referred to

*Wang v Minister for Immigration & Multicultural Affairs* [2001] FCA 448 referred to

*Applicant A v Minister for Immigration & Multicultural Affairs* (1997) 190 CLR 225 referred to

*Minister for Immigration & Multicultural Affairs v Indatissa* [2001] FCA 181 applied

*Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 applied

*Minister for Immigration & Multicultural Affairs v Respondent A& B* (1995) 57 FCR 309 referred to

**MANSOUR AALA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**

**N 846 OF 2001**

**GYLES J**

**SYDNEY**

**31 JULY 2001**

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| NEW SOUTH WALES DISTRICT REGISTRY | N 846 OF 2001 |

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| BETWEEN: | MANSOUR AALA<br><br>APPLICANT |
| AND: | MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS<br><br>RESPONDENT |
| JUDGE: | GYLES J |
| DATE OF ORDER: | 31 JULY 2001 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA

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| DATE: | 31 JULY 2001 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1 This is an application for an order of review of a decision of the Refugee Review Tribunal ("the Tribunal") which confirmed the decision of the delegate of the respondent Minister for Immigration and Multicultural Affairs to refuse the applicant, Mansour Aala, a protection visa pursuant to the *Migration Act* 1958 (Cth) ("the Act").

*2* The applicant is a citizen of Iran. He arrived in Australia as a visitor in August 1991 and applied for a protection visa in August 1996. The decision in issue in this case is the third by the Tribunal, following decisions by this Court (see *X v Minister for Immigration& Multicultural Affairs* [1997] FCA 1441) and the High Court (see *Re Refugee Review Tribunal; ex parte Aala* (2000) 75 ALJR 52; (2000) 176 ALR 219).

# tribunal proceedings

## Claims

3 The applicant's claims to the Tribunal in relation to his fear of persecution fell into four areas relating to political opinion, which are summarised in his counsel's submission as follows:

1. Mr Aala's membership of the Savak, the former Iranian regime's intelligence body;

2. Mr Aala distributed anti-regime propaganda for the Mujahideen on a low-level basis;

3. Mr Aala provided substantial financial support to the Mujahideen, where the largest single donation was approximately US$200,000;

4. Mr Aala ran a real estate business in Iran that directly, and illegally, sold properties belonging to the former Shah, his family and supporters, in association with Mr Ali Tehrani.

4 The applicant's solicitor also raised what was described as a refugee *sur place* issue which is sufficiently summarised as follows:

"In effect, we say that even if you disregard all of Mr Aala's evidence in its entirety, there remains a chance that the Iranian authorities will read the publicly available material relating to Mr Aala's claims and believe in their veracity. … The Tribunal is therefore obliged to determine whether there is a real chance that, if the authorities so read the publicly available material, they will believe in the truth of the claims and impute a political opinion to Mr Aala as a result."

5 That submission is based upon the publication of judgments of this Court and the High Court, which have identified the applicant and set out his claims as to what he had done which would put him at risk, together with the transcript of argument before the High Court which is available on the internet and the publication of an article in the *Australian Financial Review* in February 2001 which referred to the High Court decision and, in doing so, identified the applicant and a short statement of his claims.

# tribunal decision

6 The Tribunal accepted that the applicant had been a member of the Shah's security organisation, Savak, but found that the Iranian authorities had always been aware of that, and that the authorities considered this to be of no significance.

7 So far as the association with the Mudjahideen is concerned, the Tribunal accepted that the association had taken place and considered that the case should be approached on the basis that the authorities were aware of the association but did not regard it as important. The Tribunal described the involvement of the applicant as low-level and a long time ago. The applicant was never a member of the Mudjahideen, nor did he ever attend meetings of the Mudjahideen. The Tribunal accepted that the donations made by the

applicant were substantial, but were made at a time when the organisation was not illegal. The Tribunal relied upon, *inter alia*, country information which indicated that the authorities distinguished between individuals who have a continuing and close involvement in the anti-regime political struggle and those who have had past associations.

8 The Tribunal was satisfied that the applicant had illegally sold properties belonging to the former Shah, his family and supporters and that, because of the arrest and execution of Mr Ali Tehrani (the accomplice of the applicant), the authorities are likely to know of the applicant's involvement and that the applicant will face a real risk of severe punishment if he returns to Iran on this account including a risk of execution. The Tribunal held that this risk is not for any Convention reason, but rather because he broke the law.

9 The Tribunal dealt with what was called the "refugee *sur place*" argument in a somewhat indirect way. It assumed (not unnaturally) that the argument was linked with what the applicant had done since leaving Iran and, in particular, with his application for a protection visa. The Tribunal found that that circumstance would not lead to any real chance of persecution in itself if he returned to Iran. However, the gist of the argument for the applicant had been not so much that the application for asylum itself would lead to persecution, but that what had been claimed by the applicant to have been his anti-regime activities in the course of the proceedings in Australia would come to the attention of the Iranian authorities and lead to persecution because of imputed anti-regime political opinion. This aspect was not dealt with directly by the Tribunal under this heading.

10 The Tribunal was not satisfied that there was a real chance of persecution for Convention reasons, considering the factors advanced cumulatively as well as separately. The Tribunal further held that the applicant had a subjective fear of returning to Iran but that that fear was engendered by the prospect of his being prosecuted for his illegal real estate dealings rather than by any fear of being persecuted for one or more Convention reasons.

# issues on review

11 The application was amended at the commencement of the hearing and then twice further amended during the course of the hearing, the last time being during the reply by the applicant's counsel. As can be gleaned from the successive versions of the application, and from the written submissions filed on behalf of the applicant, a number of matters were touched upon. Oral argument sharpened and focused the issues.

## Illegal sales

12 The principal complaint of the applicant relates to the manner in which the Tribunal dealt with the accepted risk which would occur if he returned to Iran because of the illegal sales of property by the applicant and the applicant's accepted fear of return on that account. The matter was put in

various ways but, in essence, it was submitted that the illegality of the sales reflected a political prohibition rather than an ordinary law of general application. It was submitted that the Tribunal failed to understand that, or to consider whether, the offences in question were themselves political in nature and creation and existed to further the political platform of the Iranian government. In particular, it was suggested that there was no evidence or other material before the Tribunal as to the normal consequences for defrauding the government generally, as compared to being involved in these particular illegal sales. Counsel for the applicant pointed to the dearth of material before the Tribunal as to the precise nature of the law in question. Counsel for the applicant referred to *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 74 ALJR 775 (at 778-779); (2000) 170 ALR 553 (at 558 and 571); *Wang v Minister for Immigration& Multicultural Affairs* [2001] FCA 448 (at [63] and [70]) ("*Wang*"); *Applicant A v Minister for Immigration & Multicultural Affairs* (1997) 190 CLR 225 (at 258) ("*Applicant A*"); *Okere v Minister for Immigration & Multicultural Affairs* (1998) 87 FCR 112 (at 116); and JC Hathaway, *The Law of Refugee Status* (Butterworths, 1991) (at par 5.6.1 and following). It was submitted that the law was not a law of general application but a politically motivated law, designed to deprive the former regime and its supporters of funds to pursue their political agenda, and constructively imputes an adverse political motivation to offenders. It was submitted that review should be granted pursuant to s 476(1)(g) of the Act.

13 Counsel for the respondent submitted that all questions as to the nature and operation of the law in question were matters of fact as to which there was a body of evidence. The sales, and the method of effecting them, were conceded to be illegal. How the Tribunal assessed the evidence was a matter for it. Thus, the threshold test for the application of s 476(1)(g) was not met. Even if it were, no evidence had been led disproving the facts concerning the law and its operation. In addition to other authorities, counsel for the respondent referred in this connection to the decision (also cited by counsel for the applicant) of *Minister for Immigration & Multicultural Affairs v Indatissa* [2001] FCA 181 ("*Indatissa*").

14 The difficulty which the applicant confronts on this issue is that it is he who introduced the illegal sales and their consequences as a factor in the case. His explanation of how the sales were effected involves corruption of officials by bribery and various forgeries. The material before the Tribunal shows that the applicant was paid well for his involvement and that his involvement took place over a significant period of time. The Tribunal concluded that the applicant involved himself for financial gain rather than for any political purpose. That was a conclusion open to it. Material concerning the precise content of the law and its history is indeed sparse. A law which confiscates or inhibits the dealing in the property of members and supporters of a previous regime can be viewed in different ways. There may be political aspects to it, but it is notorious that regimes exist in which the leaders and supporters enrich themselves by systematic corruption and misappropriation of assets. A response to this by way of confiscation or other inhibition on dealing with assets may not bear any persecutory aspect. In any event, whatever may be the position of those whose property is confiscated, it does

not follow that the authorities referred to by counsel for the applicant are applicable where a third party knowingly and deliberately breaches the law inhibiting dealings with such property, particularly if it is open to conclude that the dealings were for personal financial gain. No political opinion need be imputed. In my opinion, counsel for the respondent was correct in submitting that there is no room for the application of s 476(1)(g) in these circumstances. The applicant also relied upon s 476(1)(e) of the Act. The Tribunal expressly adverted to the issue as to whether the law was a law of general application. The content and effect of foreign law is a question of fact, as are questions relating to enforcement of it. I can see no room here for a finding that there was any relevant error of law.

15 There is one related aspect of the submissions on this issue which calls for separate consideration. The Tribunal did not consider, on the evidence, that the Iranian authorities will treat the applicant any differently from any other person accused or convicted of involvement in such illegal real estate dealings by reason of his real or imputed political opinion gleaned from his other anti-regime activities. Counsel for the applicant submits that there is no basis at all for that finding and that, on the contrary, commonsense would indicate that a person found guilty of illegal real estate dealings who was implicated in other anti-regime acts might well be punished more harshly than a person who had not. On a factual level, there is much to be said for this submission for the applicant. All that is known is that an accomplice of the applicant was executed. Other possible penalties are not known, nor the procedure by which penalties are meted out, nor penalties which in fact have been meted out in differing circumstances. It is quite conceivable that anti-regime activities, which would not be sufficient in themselves to now provoke any action which could be called persecution, might be seen as aggravating circumstances when considering how to punish for this kind of offence. However, the essence of the Tribunal finding is negative and, even if s 476(1)(g) is satisfied, s 476(4)(b) could not be as the decision does not depend upon a fact in that sense. Even if it did, the applicant has not proved the contrary (see *Indatissa*). It does not appear that the applicant relied upon s 476(1)(e) in relation to this particular aspect of the matter. Even if I be wrong about that, I cannot see any proper basis for finding an error of law.

16 The arguments arising on this issue have attraction because of the risk of execution which is involved in return to Iran. The harshness of that penalty commands attention. However, notwithstanding the statement by Merkel J in *Wang* (at [63]), severity of punishment which would seem disproportionate to most Australians is not, of itself, persecution for a Convention reason, as appears from the judgment of Dawson J in *Applicant A* (at 245), and from the judgment of the Full Court of this Court in that case (*Minister for Immigration & Multicultural Affairs v Respondent A & B* (1995) 57 FCR 309 at 319).

## Lack of subjective fear

17 If the applicant fails in his challenge to the way in which the Tribunal dealt with the illegal land sales, he strikes the difficulty that the Tribunal found

a lack of any subjective fear on other bases. That finding is challenged as follows:

1. There was no evidence to contradict the material before the Tribunal as to the applicant's subjective fears, within the terms of s 476(4)(a) and (b) of the Act.

2. There was ample material to prove the subjective fear of the applicant before the Tribunal and the Tribunal failed to have regard to the whole of the evidence before it.

3. The applicant led evidence that he had subjective fears relating to the membership of the Savak, substantial support for the Mudjahideen and his activities concerning property on the black list of the revolutionary government and the fact that his fear was limited to the one issue did not exist.

18 Counsel for the respondent submits that this is simply an invitation to undertake a merits review of the findings involving credit, contrary to *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (at 272) and *Re Minister for Immigration& Multicultural Affairs and ex parte Durairajasingham* (2000) 74 ALJR 405 (at 417); (2000) 168 ALR 407 (at 423-424). He submits that s 476(1)(g) of the Act has no role to play in relation to findings of that character but that, even if it does, in the present case there was a good deal of evidence before the Tribunal which would justify the conclusion reached by it. Finally, it was submitted that there is a long line of authority which establishes that the Tribunal need not have contradictory or rebutting evidence in order to reject a claim.

19 It is sufficient to say that, in my opinion, there was material before the Tribunal which enabled it to properly come to the finding it did. It took account of the fact that the applicant had been able to leave Iran without difficulty, in circumstances where it concluded that the anti-regime activities of the applicant were known to the authorities, but where there would have been problems in leaving if the regime took his activities seriously. Those circumstances would provide a basis for finding that the applicant knows that he is not at risk for anti-regime activities as such. Whether that process of reasoning is correct or logical is not an issue in these proceedings.

## Miscellaneous matters

20 That conclusion disposes of the points raised on behalf of the applicant save, perhaps, for the argument advanced as to publication of the facts. I should, however, mention some of these points.

21 It was submitted that the Tribunal failed to properly distinguish between, firstly, whether a political opinion would be imputed to the applicant and, secondly, if such an opinion would be imputed, whether the applicant would be persecuted as a result. In particular, it was said that this was done in relation to the use of independent material to make the finding that the applicant would not be treated any differently from any other person accused

of having defrauded the Iranian government by reason of any perception that he is a supported of the Shah's regime. In my view, the relevant part of the Tribunal's decision recognises the difference (see par 100 of the decision) and the conclusion relates to the second question isolated above, on the assumption that the first would be satisfied. In any event it seems to me that, even if established, the complaint would show poor or illogical reasoning. This is not a basis for review.

22 Complaint is also made about the way in which the Tribunal dealt with the substantial donations to the Mudjahideen. In my view, the Tribunal made it quite clear (see par 101 of the decision) that they took into account the donations when coming to their view that there would be, in effect, no adverse imputation of political opinion. It expressly separated that finding from consideration of whether there would be persecution.

23 It was also argued that the Tribunal had not applied the gloss on the statute now called the "real chance" test. The Tribunal referred to the test, and used the language of it on various occasions. This ground is not established.

## Publication of facts

24 As I have said, the Tribunal did not, in terms, deal with the effect that publication of the applicant's claims of persecution would or might have upon the Iranian authorities. The Tribunal proceeded upon the basis that the authorities were aware of the facts (apart from the illegal sales) before the applicant left Iran and upon the basis that the applicant's involvement in illegal land sales would have come out during the investigation relating to and the dealing with the applicant's accomplice. It can therefore be argued that what has been published about the applicant's claims as to his activities is already known to the authorities and that rejection of this basis for fear of persecution for imputed political opinion was implicit in the finding of the Tribunal.

25 On the other hand, it might be said that the effect of having all of the cumulative information as to past activities of the applicant available contemporaneously and publicly was a new and different situation from that which had previously existed. Some may take the view that knowledge in some officials gleaned at different times and places over many years is different to information contemporaneously available in one public narrative. It is arguable that the very fact that the information is public may motivate action which may not have followed otherwise because of the precedent created.

26 Weighing of these competing arguments was a matter for the Tribunal. The Tribunal was quite entitled to reject the significance of the recent publications. The question is whether it did so rather than failing to consider the issue. Whilst the answer to that question is not free from doubt, I have come to the conclusion that the better view is that the Tribunal did not forget the issue it had outlined, but rather decided that the recent publications do not give rise to any well-founded fear of persecution which it had not considered. The Tribunal clearly set out the gist of the argument advanced on behalf of the applicant on this point. The Tribunal dealt with an aspect of the

argument not expressly relied upon by the applicant, namely, the consequences of making an application for refugee protection. The Tribunal expressly found that the authorities already had knowledge of the activities of the applicant before the publications. The Tribunal expressly found that the only subjective fear held by the applicant related to the fear of punishment because of illegal activities. In that setting, the proper conclusion is that the Tribunal took the view that the recent publications added nothing of significance to the relevant circumstances. That was a view open to the Tribunal. This conclusion is consistent with the manner in which the High Court dealt with a similar issue in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1, particularly per McHugh, Gummow and Hayne JJ (with whom Gleeson CJ agreed) at [90]-[92] and Callinan J at [27].

27 This conclusion relieves me from considering whether a failure to deal with the particular matter in question would reveal error of law within s 476(1)(e) as contended on behalf of the applicant.

28 The application is dismissed with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 31 July 2001

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| Counsel for the Applicant: | PE King and J Gillespie |
| Solicitor for the Applicant: | Christopher Levingston & Associates |
| Counsel for the Respondent: | SB Lloyd |
| Solicitor for the Respondent: | Australian Government Solicitor |
| Date of Hearing: | 24 July 2001 |
| Date of Judgment: | 31 July 2001 |