FEDERAL COURT OF AUSTRALIA

Aala v Minister for Immigration & Multicultural Affairs [2002] FCAFC 204

MIGRATION –Refugee Review Tribunal found that appellant faced a real chance of being executed if returned to Iran – Tribunal also found that execution would be pursuant to a law of general application – application for protection visa rejected – application for judicial review dismissed – fresh evidence adduced on appeal from expert in Iranian law – fresh evidence established that if appellant were executed, it would be under an Iranian law stipulating such a penalty for an economic offence committed with "an anti-government intention" – whether Tribunal "based the decision" on the existence of the particular fact that the relevant law was one of general application – whether that finding was a finding of fact – whether appellant had proved that that fact did not exist – no evidence ground made out – appeal allowed.

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

Minister for Immigration and Multicultural Affairs v Indatissa [2001]FCA 181 referred to

Islam v Minister for Immigration and Multicultural Affairs [2001] FCA 1574referred to

Rajanayake v Minister for Immigration and Multicultural Affairs [2002] FCA 143 referred to

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 referred to

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 referred to

Jegatheeswaran v Minister for Immigration and Multicultural Affairs [2001] FCA 865 referred to

Wang v Minister for Immigration and Multicultural Affairs (2001) 108 FCR 167 followed

MANSOUR AALAv MINISTER FOR IMMIGRATION AND

MULTICULTURAL AFFAIRS

N1206 of 2001

GRAY, CARR& GOLDBERG JJ

21 JUNE 2002

MELBOURNE (HEARD IN SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N1206 OF 2001

BETWEEN:	MANSOUR AALA Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	GRAY, CARR & GOLDBERG JJ
DATE OF ORDER:	21 JUNE 2002

WHERE MADE: MELBOURNE (HEARD IN SYDNEY)

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of 31 July 2001 be set aside.

3. In lieu thereof there be the following orders:

   (a) application for an order of review granted;

   (b) the decision of the Refugee Review Tribunal, made on 26 April 2001, be set aside;

   (c) the matter be remitted to the Refugee Review Tribunal, as originally constituted, to be determined in accordance with law; and

   (d) there be no order as to the costs of the application.

4. The respondent pay the appellant's costs of the appeal.

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 N1206 OF 2001

BETWEEN: MANSOUR AALA

Appellant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	GRAY, CARR & GOLDBERG JJ
DATE:	21 JUNE 2002
PLACE:	MELBOURNE (HEARD IN SYDNEY)

REASONS FOR JUDGMENT

The court: introduction

1 This matter has a very long history. The history includes a finding by the Refugee Review Tribunal that if the appellant is returned to Iran there is a real chance that he will be executed. When the appeal was first before us (on 22 February 2002) one member of the Court asked senior counsel for the respondent whether the Minister personally had been informed about that finding. He did not know. On resumption of the hearing the Court was told by senior counsel for the appellant that he had been informed that the Minister did "… not intend to intervene in this case".

2 The appellant arrived in Australia in August 1991. On 20 August 1996 he applied to the Department of Immigration and Multicultural Affairs for a protection visa. On 2 October 1996 a delegate of the respondent refused that application.

3 On 4 October 1996 the appellant applied to the Refugee Review Tribunal for review of that decision. On 20 December 1996 the Refugee Review Tribunal ("the first Tribunal) affirmed the delegate's decision. The appellant then applied to this Court for review of the first Tribunal's decision. He was unsuccessful at first instance, but on 18 December 1997 a Full Court of this Court allowed his appeal, set aside the first Tribunal's decision and remitted the matter to the Tribunal for reconsideration according to law.

4 On 3 April 1998 a differently-constituted Tribunal ("the second Tribunal") affirmed the decision of the respondent's delegate. The appellant again sought judicial review in this Court, but was unsuccessful both at first instance and before the Full Court. He then commenced proceedings in the original jurisdiction of the High Court of Australia. On 16 November 2000 the High Court granted three constitutional writs. The first was an order absolute for a writ of prohibition prohibiting the respondent from taking action on the decision made by the second Tribunal. The second was an order that a writ of certiorari issue to quash that decision. The third was an order absolute for a writ of mandamus requiring the Refugee Review Tribunal to consider and determine the appellant's application for review dated 4 October 1996.

5 On 26 April 2001 a differently-constituted Tribunal ("the Tribunal") once again affirmed the decision of the respondent's delegate. The appellant applied to this Court for judicial review of the Tribunal's decision. On 31 July 2001 a judge of this Court dismissed that application with costs. The matter before the Court is an appeal from that decision.

the appellant's claims and the tribunal's decision

6 The appellant's claims, in summary, were as follows:

- He had been a member of the Savak, the intelligence organisation of the former Iranian regime of the Shah for almost six months.

- He had distributed anti (present)-regime propaganda for the Mujahideen.

- He had provided substantial financial support to the Mujahideen, including a donation of approximately US$200,000.

- After the 1979 revolution he conducted a real estate business in Iran which illegally sold properties belonging to the former and exiled Shah, the Shah's family and close supporters, in association with a Mr Ali Tehrani and others.

- Since the appellant had arrived in Australia in 1991, Mr Tehrani had been executed by the Iranian authorities. It was possible that before his execution, Mr Tehrani had provided the Iranian authorities with all of the above details concerning the appellant.

- As a result of the publishing of his identity, claims and admissions, by this Court, the High Court, and the Australian Financial Review, the Iranian authorities may have been informed of all the details concerning his application for asylum in Australia, and would use that information to persecute the appellant if returned to Iran.

- He held a subjective fear of persecution for Convention reasons, being a fear which was well-founded, that he would be regarded as anti-regime for his political opinions and actions, for which he would be persecuted.

7 The Tribunal considered, and it is common ground, that the appellant claimed that he feared persecution by reason of his real or imputed political opinion.

8 At the hearing before the Tribunal the solicitor assisting the appellant conceded that the appellant's six month involvement with the Savak would not be sufficient in itself to raise a fear of any Convention-based persecution if he were to return to Iran. However, he submitted that the Tribunal had to consider the claims cumulatively.

9 The Tribunal accepted the appellant's evidence that for a year prior to July 1981 he had helped his two employees who were members of the Mujahideen to distribute tapes and notices (which may have contained coded messages) to other members of the Mujahideen and had also helped them to paste up notices and write slogans in public places. The Tribunal also accepted that during that period the appellant had made a number of donations to the Mujahideen, the largest of which was a donation of US$200,000. The Tribunal also accepted that between around July 1981 and around 1987 or 1988 the appellant, his friend Mr Tehrani and some of his other friends from the real estate industry continued to write anti-regime and pro-Mujahideen slogans and to paste up notices in public places at night. It accepted that the notices were delivered to the appellant by a person who had some connection with the Mujahideen.

10 The Tribunal also accepted that between 1981 and 1983 the appellant was involved, in the course of his business as a real estate agent, in the illegal sale of properties belonging to the Shah and his family which had been confiscated by the Bonyad Mostazafan (a Government-controlled foundation) after the 1979 revolution. It also accepted that from 1983 until around 1988 or 1989 the appellant continued to facilitate the illegal sale of properties belonging to rich business people and other persons associated with the Shah's regime whose property had been confiscated by the Bonyad Mostazafan.

11 The Tribunal accepted that during the last two years in which the appellant was working as a real estate agent (around 1989 and 1990) the appellant was under pressure from the Komiteh (morals police) and that during

the last year before the appellant left Iran, his office was searched on three occasions and on the last occasion his home and car were searched as well.

12 The Tribunal found on the evidence that the Komiteh's interest in the appellant's real estate office was due to suspicions relating to the nature of his advertisements and his leaning towards Western culture, rather than to information about his illegal sales of properties and his involvement with the Mujahideen as the appellant had claimed.

13 In relation to the illegal sale of confiscated properties, the Tribunal accepted the appellant's evidence that he had been told that Mr Tehrani had been executed for his involvement in illegal real estate dealings and that a number of the appellant's other real estate colleagues had also been arrested. The Tribunal considered that there was a real chance that any competent investigation of the involvement of Mr Tehrani and the appellant's other real estate friends in the illegal sale of properties which had "in theory" been confiscated by the Bonyad Mostazafan would have uncovered the appellant's involvement as well. It accepted that following the arrests of Mr Tehrani and some of the appellant's other real estate friends, there was a real chance that the authorities would have become aware of the appellant's involvement in such illegal sales. The Tribunal also accepted the appellant's evidence that he was told by his contact in the Iranian passport office that the Iranian authorities were looking for him and that his name was on the blacklist. The Tribunal then said this:

"99. I accept that, if the Applicant returns to Iran now or in the reasonably foreseeable future, there is a real chance that he will be arrested and prosecuted by reason of his involvement in the illegal sale of properties confiscated by the Bonyad Mostazafan and that he will be executed, as was his friend Ali Tehrani. However it is well established that the enforcement of a law of general application is not, without more, persecution for a Convention reason. It does not matter in this context that such laws punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia (see Applicant A, referred to above, per Dawson J at 244-5, approving what was said by Beaumont, Hill and Heerey JJ in the Full Court of the Federal Court in that case, and per McHugh J at 258-9). In order to come within the terms of the Convention the prosecution would have to be selective on one of the Convention grounds or, for example, a person would have to be punished more harshly for a Convention reason than others convicted of the same offence (see Z v Minister for Immigration and Multicultural Affairs, unreported, Federal Court, Katz J, 11 December 1998).

100. There is nothing in the independent evidence available to me to suggest that the Applicant would be singled out, or treated any differently from any other person accused of having defrauded the Iranian Government or one of its branches, by reason of any perception that he is a supporter of the Shah's regime. Indeed, as I put to the Applicant in the course of the hearing before me, the independent evidence suggests that monarchists are no longer perceived by the regime in Iran as a serious threat and even senior figures in the Shah's government have been able to return to Iran with impunity. (DFAT Country Profile – Islamic Republic of Iran, March 1996, paragraph 2.6.11.3). The Applicant's representatives submitted that this evidence

did not go to imputed political opinion but to whether the Applicant would be persecuted, which the Applicant's representative submitted was a separate issue. However, with respect, I consider that if even senior figures in the Shah's government have been able to return to Iran with impunity it means that, even if the Applicant is imputed with a political opinion in favour of the Shah's regime, there is not a real chance that he will be persecuted by reason of this imputed political opinion if he returns to Iran now or in the reasonably foreseeable future. Accordingly, I do not accept that there is a real chance that, if the Applicant returns to Iran now or in the reasonably foreseeable future, he will be singled out for prosecution, or treated differently from any other person accused of having defrauded the Iranian government or one of its branches, by reason of any perception that he is a supporter of the Shah's regime.

101. The Applicant's representative also submitted that the Applicant's involvement in illegal property sales would be perceived as a manifestation of his political opinion because he used the proceeds of those sales to make donations to the Mujahideen. However I note that he only did so while the Mujahideen remained a lawful organisation in Iran. He ceased making donations after July 1981 (see paragraphs 34 and 45 above) but he continued to be involved in illegal property sales up until 1988 or 1989. I consider, therefore, that it can be inferred that he made such property sales for the purposes of his own financial gain rather than out of any desire to support the Mujahideen. I do not accept that there is a real chance that the Iranian authorities will perceive the Applicant's involvement in illegal property sales as a manifestation of his political opinion in support of the Mujahideen. I do not accept that there is a real chance that, if the Applicant returns to Iran now or in the reasonably foreseeable future, he will be singled out for prosecution, or treated differently from any other person accused of having defrauded the Iranian Government or one of its branches, by reason of any perception that he is a supporter of the Mujahideen. I return below to the question whether there is a real chance that the Applicant will be persecuted if he returns to Iran by reason of his involvement with the Mujahideen.

102. I note for the sake of completeness that, to the extent that the Applicant's actions in defrauding a branch of the Government may be seen in themselves as a manifestation of a political opinion opposed to the Government, I consider that the law punishing such actions must be considered as appropriate and adapted to achieving some legitimate object, being an object whose pursuit is required to protect or promote the general welfare of the State and its citizens (see, once again, Applicant A, referred to above, per McHugh J at 258-9). As referred to above the applicant acknowledges that the sales of the properties confiscated by the Bonyad Mostazafan in which he was involved were illegal (see paragraph 50 above) and I consider that what he fears is the enforcement of a criminal law of general application rather than persecution by reason of his real or imputed political opinion."

14 The Tribunal reviewed independent country information before rejecting the submission that there was a real chance that if the appellant returned to Iran now or in the reasonably foreseeable future, he would be persecuted by reason of his involvement with the Mujahideen-e-Khalq Organisation.

15 The Tribunal accepted that there was a real chance that the Iranian authorities were aware that the appellant had applied for asylum in Australia. It referred to independent country information that, at worst, knowledge by the Iranian authorities that an individual had sought political asylum would not result in much more than verbal harassment, unless the asylum seeker had a high opposition political profile. The Tribunal found that the appellant did not have a high opposition political profile at the time when he left Iran and that anything which he had done since he came to Australia in 1991 would not give him such a profile. On the basis of independent country information the Tribunal said that it did not accept that there was a real chance that if the appellant returned to Iran now or in the reasonably foreseeable future, he would be persecuted by reason of any political opinion imputed to him as a result of his having made an application for a protection visa in Australia.

16 The Tribunal accepted that the appellant had a subjective fear of returning to Iran but considered that this fear was engendered by the prospect of being prosecuted for his illegal real estate dealings rather than by any fear of being persecuted for one of the five Convention reasons. The Tribunal stated that it had considered the cumulative effect of all of the matters put forward by the appellant, but said that even taking into account the totality of the appellant's circumstances, it was not satisfied that he had a well-founded fear of being persecuted for a Convention reason if he returns to Iran.

17 The Tribunal said that it recognised that the appellant's fear of being persecuted need not be solely attributable to the relevant Convention reason. But it concluded:

"Nevertheless I do not consider on the evidence before me that the Iranian authorities will be motivated by the Applicant's political opinion, real or imputed, in prosecuting him for his involvement in illegal real estate dealings, nor 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."

the judgment at first instance

18 The learned primary judge found that it was open to the Tribunal to conclude that the appellant involved himself in the illegal sales for financial gain rather than for any political purpose. In the circumstances of the appellant being a third party knowingly and deliberately breaching a law inhibiting dealings with confiscated property, no political opinion had to be imputed. His Honour expressed the view that there was no room for the application of s 476(1)(g) (the "no evidence ground") of the *Migration Act 1958* (Cth) ("the Act"). Nor, so his Honour found, was there any room for a finding that there had been any relevant error of law. The Tribunal had, so his Honour stated, expressly adverted to the issue whether the law, whose enforcement the appellant feared, was a law of general application.

19 His Honour referred to the harshness of the penalty which the appellant might face, but held that this was not of itself persecution for a Convention reason.

20 On the question of the Tribunal's finding that the appellant did not have a subjective fear of persecution for a Convention reason, his Honour held that there was material before the Tribunal which enabled it properly to come to the finding which it did. As to the *"sur place"* claims, his Honour observed that weighing of the competing arguments was a matter for the Tribunal and it was quite entitled to reject the significance of the recent publications. His Honour dismissed the application with costs.

the appeal

21 There were two grounds of appeal. Ground 1 asserted that the primary judge erred in dismissing the application by not finding that the Tribunal's decision involved an error of law within the meaning of s 476(1)(e) by the incorrect interpretation of the applicable law or an incorrect application of the law to the facts. The particulars of Ground 1 ran to some 15 paragraphs.

22 In Ground 2 the appellant contended, in essence, that there was no evidence or other material to justify the making of the decision by the Tribunal i.e. the appellant again relied on s 476(1)(g) of the Act. The particulars of this ground were as follows:

"(a) The Tribunal based its decision that the Appellant did not have a real fear of persecution for an imputed or real political opinion on the fact that the law under which he will be executed, or under which there is a real chance that he will be executed, is a law of general application, and that fact did not exist in the evidence."

admission of new evidence in the appeal

23 At the adjourned hearing of the appeal the appellant tendered an affidavit sworn by Dr Hossein Esmaeili. Dr Esmaeili is an expert on Iranian law. He annexed to his affidavit a report commissioned by the solicitors for the appellant. The respondent objected to the tender of this affidavit on the basis of relevance. He also objected to two paragraphs of Dr Esmaeili's report.

24 We admitted Dr Esmaeili's affidavit into evidence, subject to relevance. The objections to the two paragraphs of Dr Esmaeili's report were resolved by the appellant withdrawing reliance on the portions objected to (i.e. ten words in lines 2 and 3 of par 5.6 and the whole of par 5.11).

25 The appellant submitted that Dr Esmaeili's report was relevant to both grounds of the appeal.

26 In our view, Dr Esmaeili's report can have no relevance to Ground 1. We accept the submission, made on behalf of the respondent, that Dr Esmaeili's evidence cannot bear on the question whether the Tribunal incorrectly interpreted the applicable law (i.e. Australian law) or incorrectly applied that law to the facts as found by it.

27 However, in our opinion, Dr Esmaeili's report is clearly relevant to Ground 2 in that it bears on the question whether the fact particularised in that ground did not exist. For that reason we would admit the affidavit into evidence.

28 The appellant also tendered affidavits directed to the question of whether Dr Esmaeili's evidence was "fresh evidence". As matters turned out, the respondent conceded that it was.

29 We also admitted into evidence another affidavit to which was annexed a translation of some of the Iranian laws to which Dr Esmaeili referred in his affidavit.

30 We now turn to the grounds of appeal. We shall deal first with Ground 2.

ground 2

31 Section 476(1)(g) of the Act relevantly provides as a ground of judicial review:

"(g) that there was no evidence or other material to justify the making of the decision."

32 Section 476(4) relevantly provides as follows:

"(4) The ground specified in paragraph 1(g) is not to be taken to have been made out unless:

(a) . . .; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

33 There is authority that the approach to the application of these two provisions is as follows:

1. A person relying on s 476(1)(g) must first show that there was no evidence or other material to justify the decision. If there is such evidence or other material, the ground cannot be made out.

2. Secondly (so far as is relevant in this matter) the decision under review must be shown to have been based on the existence of a particular fact.

3. Thirdly, a person relying upon this ground must adduce evidence to show that that fact did not exist.

34 The above propositions can be found in *Minister for Immigration and Multicultural Affairs v Indatissa* [2001] FCA 181 (a decision of a Full Court of this Court) at pars [26] to [28]. *Indatissa* has been followed and cited with approval in many subsequent cases. See, for example, *Islam v Minister for Immigration and Multicultural Affairs* [2001] FCA 1574; *Rajanayake v Minister for Immigration and Multicultural Affairs* [2002] FCA 143.

35 There may be cases, and we think that this is one such case, where it is inappropriate to focus on part of the decision (that part being the Tribunal's satisfaction or lack of satisfaction that the asylum seeker is a person to whom Australia has protection obligations under the Refugees Convention) to the exclusion of the fundamental reason for the decision as a whole. In this case, as we see it, the fundamental reason for the decision was that the appellant would not face persecution for a Convention reason if returned to Iran. That fundamental reason was, in our view, so inextricably intertwined with the decision of non-satisfaction as to constitute part of the decision in this case – cf *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-360. We do not see anything in the reasoning of the main judgment in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (and in particular at 272-277) which would preclude such a view. The statutory provisions presently relevant to characterising the nature and extent of the "decision" are s 65(1) when read with s 36(2) of the Act. Section 65(1) obliges the respondent to grant a visa if he is satisfied that the criteria for it have been satisfied and not to grant it if he is not so satisfied. There is no discretion to be exercised. Section 36(2) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. In this case the Tribunal decided that the appellant would not be persecuted for a Convention reason if returned to Iran and, accordingly, was not satisfied that Australia had protection obligations to him.

was there any evidence or other material to justify the decision?

36 At this stage, we shall assume that the decision as described above, i.e. no persecution for a Convention reason and no protection obligations, was based on a finding that the law under which the appellant faced a real chance of being executed was a law of general application, the enforcement of which was not persecution for a Convention reason.

37 As the primary judge observed (at par [14] of his reasons):

"Material concerning the precise content of the law and its history is indeed sparse."

38 The only evidence or other material on this point to which the respondent referred us was, first, the following extract from one of the appellant's statements:

"According the revolutionary law the punishment of this crime is execution. That is why I left the country befor the iranian authorities become aware of my past activities (sic)."

39 In our opinion, this statement says nothing about whether the relevant law is one of general application.

40 Secondly, the respondent referred us to portion of a US State Department Report which was in the following terms:

"According to the official **Iranian Gazette** the 1979 Decree as amended in 1983 defines the jurisdiction of the revolutionary courts as encompassing, 'any offence … suppressing the struggles of the Iranian people by giving orders or acting as agent, plundering the public treasury, profiteering …'.

Over the past 16 years the revolutionary court has issued thousands of death sentences and tens of thousands of prison terms."

41 Again, when read carefully, this extract says nothing about whether the law under which the appellant may face execution is one of general application. The first paragraph describes the *jurisdiction* of the revolutionary courts. The second paragraph describes and quantifies the sentences handed down by those courts over a period of 16 years.

42 In the respondent's written submissions, this material was said to be by way of example. However, as we have mentioned above, we were not taken to any other examples.

43 In our view, these materials do not amount to evidence or other material which would justify the making of the decision by the Tribunal, namely, that the law under which the appellant might face execution was one of general application, the enforcement of which was not persecution for a Convention reason, with the consequence that Australia did not owe him protection obligations under the Convention. In our opinion that finding could not properly or reasonably have been made on those materials.

did the Tribunal base its decision on "a particular fact"?

44 In our view, it is quite clear from the Tribunal's reasons that the only basis for the Tribunal reaching its state of dissatisfaction that the appellant satisfied the criterion expressed in s 36(2) of the Act was its finding of fact (foreign law being involved) that if the appellant is executed upon return to Iran this would only be the enforcement of a law of general application. In our opinion, there is no difference between the fact, as we have just described it, and as it was particularised in Ground 2 of the notice of appeal.

45 The respondent expressly disclaimed (in the course of oral submissions) any contention that a failure to be satisfied was not a decision which could be challenged under this ground.

46 The respondent contended that the fact particularised in Ground 2 was not a fact. But in his written submissions the respondent acknowledged that the Tribunal had made factual findings "… on the premise that the law was one of general application".

47 In our view, the relevant definition of a "premise" is "a basis stated or assumed from which a conclusion is drawn" – see the Macquarie Dictionary 2nd ed. 1992 at p. 1341. So viewed, the Tribunal's finding about the content and nature of the law under which the appellant might be executed was a finding of fact.

48 The respondent further submitted that the Tribunal's characterisation of the Iranian law was "… an inference drawn by the Tribunal". Senior counsel for the respondent referred us to the observations of Finkelstein J in *Jegatheeswaran v Minister for Immigration and Multicultural Affairs* [2001] FCA 865 in particular at pars [51] to [59].

49 In those paragraphs Finkelstein J discusses the various meanings given to the word "fact". We do not think that anything in that discussion assists the respondent in this matter. We think that when the Tribunal found that there was an Iranian law under which the appellant will be executed or under which there was a real chance that he will be executed and that that law was one of general application, it was making a finding about "a state of affairs" and thus a finding of fact – see par [52] of Finkelstein's reasons and the authorities there cited.

DID THE particular FACT EXIST?

50 The next question is whether the appellant, through the medium of Dr Esmaeili's affidavit has proved, on the balance of probabilities, that that fact did not exist.

51 The respondent did not challenge Dr Esmaeili's evidence, whether by cross-examination or otherwise.

52 In essence, Dr Esmaeili's evidence included the following:

1. He was not aware of any Iranian law under which the punishment for illegal property sales is execution.

2. Generally, the death penalty will not be imposed in Iran on a person who has illegally facilitated the sale of properties which the person does not own, or who has committed any “economic crime”.

3. The crimes which the Tribunal accepts that the appellant has committed would normally be tried in the “Common Courts” where the death penalty would not be imposed.

4. But if the crimes are “attributed with an anti-Government intention” the trial for these crimes would fall within the jurisdiction of the Revolutionary Courts and “under certain conditions” may be considered as offences which can be punished by execution.

53 A recurrent theme of those “certain conditions” under which the death penalty could be imposed was that the offences be committed “with intent to weaken the Islamic Republic System” or “to confront the Islamic Republic of Iran”.

54 Senior counsel for the respondent referred us to pars 5.2, 5.5(c) and 5.9 of Dr Esmaeili’s report as showing that there exist in Iran laws of general application under which the appellant might be executed.

55 Paragraph 5.2 simply indicates the general circumstances under which the offences found to have been committed by the appellant might fall for trial before the Revolutionary Courts. Paragraph 5.5(c) merely sets out the provisions of Article 49 of the Iranian Constitution relating to the confiscation by the State of property illegally obtained. In our view, it says nothing about an offence punishable by execution, but confirms that the Revolutionary Courts would have jurisdiction to confiscate property belonging to the Bonyad Mostazafan which had been illegally sold.

56 Paragraph 5.9 lists various crimes dealt with by the Revolutionary Courts which, depending on the scale of money involved and the intention attributed to the perpetrator, might include the crimes which the Tribunal accepted the appellant had committed. The first was Article 10 of the “Law of Forming the Extra Ordinary Court for Investigation of Anti-revolutionary Offences”. That article is not relevant because the maximum penalty provided for offending under Article 10 is life imprisonment, not death.

57 There is then reference to Article 1 of the “Law for Punishment of Intrigants in the Economic System of Iran”. It is clear from Article 2 of that law that such crimes are only punishable by execution if they are committed “in order to confront the Islamic Republic of Iran with knowledge of the impact (of) the activities”. Finally, Dr Esmaeili indicates that the Iranian authorities might

view the appellant's offences as "Muhariba" if they were of a very large scale which could cause disarray in the Iran economy. There was nothing in the evidence before the Tribunal to suggest that these property sales were of such a very large scale. Dr Esmaeili's evidence is that in practice the punishment for Muhariba is death.

58 Notwithstanding the reference to "Muhariba", in our view, Dr Esmaeili's evidence establishes, on the balance of probabilities, that if the appellant is executed upon return to Iran that will not be the enforcement of a law of general application. Normally, as Dr Esmaeili's evidence shows, these offences would be tried in the "Common Courts" where the death penalty would not be imposed. In our opinion, Dr Esmaeili's evidence also shows that if the appellant were executed it would be under an Iranian law stipulating such a penalty for an economic offence committed with "an anti-government intention". Otherwise, the case would not be tried in the Revolutionary Courts. That is not a law of general application. It is targeted at those whose actions are perceived to be politically motivated. The Tribunal's finding that the appellant has a real chance of being executed, resting as it does on the fact that Ali Tehrani has already been executed for his involvement in the very activities that the Tribunal has found the appellant to have engaged in, leads to the conclusion that the appellant's fear of execution is founded on his political opinion.

59 We consider that this ground has been made out. In the light of the fresh evidence of Dr Esmaeili, his Honour's finding or conclusion that there was no room for the application of s 476(1)(g) of the Act cannot stand.

ground 1

60 In view of our conclusion in relation to Ground 2 it is not necessary for us to deal with Ground 1.

conclusion

61 For the foregoing reasons, we would allow the appeal, and the application at first instance, set aside the decision of the Refugee Review Tribunal and remit the matter to it for further consideration. The appellant has the advantage of important factual findings by the Tribunal in his favour. Furthermore, as we have mentioned earlier, this matter has a very long history. Accordingly, we think that it is appropriate to order that the matter be remitted to the Tribunal as originally constituted: *Wang v Minister for Immigration and Multicultural Affairs* (2001) 108 FCR 167. In our view justice would be served if there were no order as to costs at first instance, but that there be an order that the respondent pay the costs of the appeal.

I certify that the preceding sixty-one (61) numbered paragraphs

are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 21 June 2002

Counsel for the Appellant:	Mr J A McCarthy QC with Mr J J Gillespie
Solicitor for the Appellant:	Allens Arthur Robinson
Counsel for the Respondent:	Mr J Basten QC with Mr S Lloyd
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	22 February 2002, 16 May 2002
Date of Judgment:	21 June 2002