FEDERAL COURT OF AUSTRALIA

Abdi v Minister for Immigration & Multicultural Affairs

[2000] FCA 242

MIGRATION– application for protection visa – Refugee Review Tribunal had found that even if the applicant had a well-founded fear of persecution for a Convention reason in southern Mogadishu, he did not have such a fear in relation to Somalia as a whole because he would have adequate national protection in certain regions in the north-east of Somalia and it was reasonable in the circumstances to expect him to relocate to those regions – independent evidence indicated that those regions would not accept involuntary returnees, including deportees – whether, in these circumstances, an applicant's unwillingness to return to those regions can convert him or her into a refugee when he or she would not otherwise be a refugee

Migration Act 1958 (Cth), Pt 8

Convention relating to the Status of Refugees 1951, Art 1A(2)

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437, applied

YONIS HUSSEIN ABDI v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 1091 OF 1999

WHITLAM, LEHANE AND GYLES JJ

10 MARCH 2000

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY	N 1091 OF 1999

On appeal from a single judge of the Federal Court of Australia

BETWEEN:	YONIS HUSSEIN ABDI APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	WHITLAM, LEHANE AND GYLES JJ
DATE OF ORDER:	10 MARCH 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

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

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DATE:	10 MARCH 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 This is an appeal from a decision of a judge of the Court by which her Honour dismissed with costs an application for review, under Pt 8 of the *Migration Act 1958* (Cth),of a decision of the Refugee Review Tribunal. The Tribunal had decided to affirm a decision of a delegate of the Minister that the appellant was not a person to whom Australia had protection obligations under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, so that his application for a protection visa should be refused. The appeal raises in substance one question only, which relates to the scope and application of what is commonly, though perhaps somewhat misleadingly, known as the relocation principle.

Facts found by the Tribunal; the Tribunal's reasons

2 The Tribunal discussed the facts, and the appellant's claims, in considerable detail. A brief summary will suffice for the purposes of the appeal. The appellant is a citizen of Somalia who arrived in Australia on 16 July 1998. The appellant claimed to fear persecution by the United Somali

Congress militia both because his father had been a police officer in the Siad Barre administration and because the appellant himself, as he claimed, had given information to the United Nations Operation in Somalia (UNOSOM). He feared persecution, he claimed, both because of his membership of particular social groups (associates of the Siad Barre government and associates of UNOSOM) and on account of imputed political opinion, resulting from his family's association with the former government and his own association with UNOSOM. He gave evidence that members of his family had been attacked and some of them killed and that he himself had been wounded before he left Somalia.

3 The Tribunal expressed reservations about the credibility of the appellant's account but, rather than reach a firm conclusion about any particular aspect of it, decided first to "focus … on whether or not he could safely return to Somalia" even if aspects of his account were accepted. The Tribunal found, as a fact, that if the appellant's account of his activities on behalf of UNOSOM were accepted, "any fear he may hold in that regard in a region other than Southern Mogadishu is not well-founded". Additionally, the Tribunal found that the appellant would be protected if he returned to the Galkayo region of the country, north of Mogadishu, a region in which the appellant had been educated and trained as a mechanic. He would equally have adequate national protection in other areas in the north-east of the country. Scheduled air services existed which would enable him to fly directly to either Galkayo or Bossaso, in the north-east. The Tribunal summarised its conclusion on this topic as follows:

"I find the Applicant can return to Somalia by relocating to the North East of the country. The means of 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 lead me to find that it is reasonable in the circumstances to expect the Applicant to relocate and that protection from his claimed harm is available to him."

The Tribunal's reasons continue:

"The Applicant through this application, his solicitor's submissions and by his claims has indicated that he is not willing to return to any area of Somalia including Galkayo. Article 1A(2) [of the Convention] states, in part that a refugee is one who, … owing to such fear, [i.e. a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion] is unwilling to avail himself of the protection of that country. Thus, it is not an Applicant's unwillingness alone which determines that he is a refugee but an unwillingness that results from a well founded fear of persecution for Convention reason. To come within the ambit of the Convention it is necessary for an applicant to satisfy all elements of article 1A(2).

The independent evidence before me indicates that Australia would not be able to return the applicant as an involuntary returnee. However, neither this nor the Applicant's unwillingness to return converts the Applicant's status into that of a refugee."

The Tribunal, in summary, found the following facts. First, it was possible for the appellant to travel to Galkayo or some other part of the north-east of Somalia; secondly, the appellant would receive adequate national protection in either of those areas; thirdly, therefore, if the appellant feared persecution for a Convention reason in those areas, his fear was not well-founded; fourthly, the appellant was not willing to return to any part of Somalia. The Tribunal also found, on the material before it, that if the applicant were to be returned involuntarily (for example, by deportation from Australia) the authorities in Galkayo or the north-east of Somalia would not accept him. The Tribunal concluded, however, that the appellant was not to be treated as a refugee simply because, in the circumstances, he refused voluntarily to resort to the national protection which was available to him.

Application for judicial review; decision of primary judge

4 The application for judicial review relied on three grounds, but the substance of each was that, in the passages which we have quoted, the Tribunal misapplied the "test for relocation" as enunciated in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437. The same argument was repeated on the appeal, and we shall return to it. The trial judge held, however, that the Tribunal had correctly applied the law. Her Honour's reasoning appears at pars 20, 21, 23 and 26 of her reasons for judgment (we shall omit the intervening discussion of authority):

"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.

…

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 [in Galkayo] 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.

…

26. In this case, the Tribunal found that protection was, and is, available in another part of the country of origin of the applicant. … I agree with the conclusion of the Tribunal that this decision by the applicant [that is, his own unwillingness to return] 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."

Submissions on the appeal; consideration; conclusion

5 Although failure to comply with s 430 of the *Migration Act* was taken as a ground of appeal, counsel for the appellant agreed at the hearing that if he could not establish that the Tribunal, and the judge below, had erred in applying what was called the relocation test, then he could not show breach of s 430. We shall therefore not deal with this as an independent issue.

6 Counsel for the appellant submitted that the primary judge erred in two ways. First, it was said, she erroneously proceeded on the basis that the question of relocation is one to be considered having regard to an applicant's situation before departing from his or her country of nationality, rather than the circumstances existing at the time when the application for a protection visa is considered. Secondly, it was submitted that her Honour incorrectly held that, in considering the possibility of the appellant's return to Galkayo or north-east Somalia, the Tribunal adequately took account of the practical realities of the appellant's situation.

7 The first submission gains some credence because of the wording of paragraph 21 of the reasons for judgment, but does not, in our opinion, stand analysis. Paragraph 21 is to be read in the light of paragraph 20, and also bearing in mind that her Honour was addressing an argument based upon breach of s 430 of the Act at that point. What we read her Honour as saying in these two paragraphs is that once the Tribunal made the central and material finding that the appellant did not have a well-founded fear of persecution if he returned to north-east Somalia, then other questions of relocation became academic and so were not material within the meaning of s 430. This is plainly correct.

8 In our view, her Honour did not mistake the well-established principle that an application for a protection visa is to be judged by measuring against the Convention definition the applicant's circumstances at the time the application is determined: *Minister for Immigration & Ethnic Affairs v Singh*

(1997) 72 FCR 288 at 291-292; *Minister for Immigration & Ethnic Affairs v Singh* (1997) 74 FCR 553 at 556-557. Her Honour said (paragraph 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**." (emphasis added)

Her Honour rejected the ground now pressed in these terms (paragraph 30):

"… 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."

9 Furthermore, we do not agree that the question of internal relocation before departure from the state of origin is necessarily irrelevant. Whilst it is a fallacy to say "once a refugee, always a refugee" (*Minister for Immigration & Multicultural Affairs v Thiyagarajah* [2000] HCA 9 paragraph 29), it will often not be irrelevant to consider whether a person had ever been a refugee after leaving the country of origin, including at the time of first arrival from the country of origin. The possibility of internal relocation prior to departure might well be relevant to this question. This is not such a case.

10 Finally on this point, even if her Honour had misdirected herself in the manner suggested, we can find no basis for finding that the Tribunal erred in that respect.

11 In considering the second submission, it is necessary to bear in mind that the issue is whether, in terms of the Convention definition, the applicant "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and …, owing to such fear, is unwilling to avail himself of the protection of that country". The effect of the Tribunal's findings of fact (which, of course, are not challenged) is that, even if the appellant genuinely fears persecution, his fear, in relation to a substantial part of his country of nationality which would accept him if he went there voluntarily, is not well-founded. Additionally, the Tribunal found that he could return there, would be accepted there and would be "reintegrated" there. In *Randhawa* Black CJ, with whom Whitlam J agreed, said at 442, 443:

"In the present case the delegate correctly asked whether the appellant's fear was well-founded in relation to his country of nationality, not simply the region in which he lived. Given the humanitarian aims of the Convention this question was not to be approached in a narrow way and in her further analysis the delegate correctly went on to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.

This further question is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in

which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.

Moreover, the range of the realities that may need to be considered on the issue of the reasonableness of relocation extends beyond physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in R v Immigration Appeal Tribunal Ex parte Jonah [1985] Imm. A.R. 7. Professor Hathaway, op. cit. at 134, expresses the position thus:

'The logic of the internal protection principle must, however, be recognised to flow from the absence of a need for asylum abroad. It should be restricted in its application for persons who can genuinely access *domestic protection, and for whom the reality of protection is* meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.'*

If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded. I should add that this seems to me to be a better way of looking at the matter than to say, as the first and last sentences of par 91 of the Handbook suggest, that the fear of persecution need not extend to the whole territory of the refugee's country of nationality if under all the circumstances it would not have been reasonable to expect a person to relocate."

> 12 Beaumont J (with whom Whitlam J agreed also) expressed similar views at 450, 451. The appellant fastened upon the "practical realities" facing a person who is unwilling to return and who is deported in circumstances where those parts of his country of nationality in which he would be safe do not accept "involuntary returnees". But it is important to see the Chief Justice's statement of principle in its context. In addition to the passage which we have quoted, that context includes the following observations, at 440, 441:

"Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection

outside the borders of the country of nationality even though real protection could be found within those borders."

13 It follows, in our view, from what was said in *Randhawa*, and from a proper understanding of the terms of the Convention definition, that unwillingness to return (not based on well-founded fear of persecution for a Convention reason) cannot of itself (nor can consequences that follow entirely from that unwillingness) convert into a refugee an applicant who would not otherwise be entitled to international protection. That is simply an application of the well established principle that third countries are obliged to give international protection only in circumstances where national protection is not available. That is what the Tribunal correctly decided. Accordingly the appeal is dismissed with costs.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Whitlam, Lehane and Gyles .

Associate:

Dated: 10 March 2000

Counsel for the Appellant:	N Poynder
Solicitor for the Appellant:	West Heidelberg Community Legal Service
Counsel for the Respondent:	A Beech-Jones
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	22 February 2000
Date of Judgment:	10 March 2000