FEDERAL COURT OF AUSTRALIA

Abdul-Halim v Minister for Immigration & Multicultural Affairs [2002] FCA 249

MIGRATION – protection visa – application for review of decision of Refugee Review Tribunal – applicant claimed fear of persecution based on involvement with an officially banned Islamic organisation in Egypt – whether applicant faced a real risk of persecution if returned to Egypt

Migration Act 1958 (Cth) ss 5, 36, 65, 476

Hathaway *The Law of Refugee Status* 1991 at pp. 84-86

MOHAMMAD ABDUL-HALIM v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

W 301 of 2001

LEE J

14 MARCH 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 301 OF 2001

BETWEEN:	MOHAMMAD ABDUL-HALIM APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

	RESPONDENT
JUDGE:	LEE J
DATE OF ORDER:	14 MARCH 2002
WHERE MADE:	PERTH

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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AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	LEE J
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REASONS FOR JUDGMENT

1 This is an application under s 476 of the *Migration Act 1958* (Cth) ("the Act") for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") which "affirmed" a decision of a delegate of the respondent ("the Minister") that the applicant not be granted a "protection visa".

2 The applicant was born in Egypt in 1974. He entered the Australian migration zone without a visa on 28 October 2000. Pursuant to ss 13 and 14 of the Act, the applicant became an "unlawful non-citizen" upon entry. Under ss 189 and 196 of the Act the applicant was placed in "immigration detention" where he has been kept ever since. On 17 April 2001 the applicant lodged an application for a protection visa. Grant of the visa was refused by a delegate of the Minister on 18 May 2001 and the applicant applied to the Tribunal for review of that decision. The Tribunal made its decision on 9 July 2001.

3 Under s 65 of the Act, if the Minister is satisfied that, *inter alia*, the criteria for a visa prescribed by the Act have been satisfied, the Minister is to grant the visa, but if the Minister is not so satisfied, the grant of the visa is to be refused.

4 At material times s 36(2) of the Act provided the following criterion in respect of a protection visa:

"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."

5 In s 5 of the Act, "Refugees Convention" and "Refugees Protocol" (together referred to as "the Convention") are defined respectively as "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and "the Protocol relating to the Status of Refugees done at New York on 31 January 1967". The term "protection obligations" is not defined in the Act and is not a term used in the Convention.

6 The Convention is a treaty pursuant to which the "Contracting States" agree to apply the provisions of the Convention to a "refugee". Sub-Article 1(A) of the Convention defines a refugee as follows:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

…

(2)…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 is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;…"

Exceptions to, or cessations of, the operation of that definition are set out in, *inter alia*, sub-Articles 1(C), 1(D), 1(E) and 1(F). It was not contended that any of the foregoing sub-Articles applied to the applicant.

7 As a Contracting State, Australia has undertaken the obligations imposed on Contracting States by the Convention, save for the obligations set out in Article 32 which, by a statement of reservation, Australia declined to accept when it acceded to the Convention on 22 January 1954.

8 Numerous obligations in respect of refugees are set out in the Convention, including undertakings by a Contracting State not to discriminate against a refugee, and to offer a refugee some of the opportunities available to a national of that State. All obligations undertaken may come within a broad meaning of "protection obligations" but in s 36(2) of the Act that term is limited to the specific obligation imposed on Australia as a Contracting State not to penalize a refugee who has entered Australia without authority having come directly from a territory where the life or freedom of that person was threatened for a Convention reason, and not to expel or return (refoul) a refugee where the life or freedom of the refugee would be so threatened.

9 At the first interview conducted with the applicant by an officer of the Minister's Department, the applicant stated that he had lived in Egypt until about February 1999 when he and a friend, Mr Saleh ("Saleh"), left for Jordan. Each worked in Amman until July 2000, when they left for Australia.

10 The applicant said, in essence, that he had left Egypt because of a feud in his village involving himself and Saleh. He and Saleh had been wrongly accused of improper relations with a young woman of the village and the woman's brothers had raided the home of the applicant's family and issued threats against him. The applicant believed his life was in danger because the woman's family was bent on revenge, so he and Saleh fled to Alexandria before leaving for Jordan. In June 2000 he had been told that the woman's family knew his whereabouts in Jordan and would pursue him. The applicant claimed he had no choice but to leave Jordan and arrangements were made for him, and Saleh, to travel to Australia.

11 The applicant did not mention any political activity engaged in by him in Egypt. On the contrary, the interviewer recorded that the applicant had not been involved in any activity against the government or with any political group in Egypt.

12 In the application for a protection visa, the applicant made claims about involvement with the Islamic Liberation Party in Egypt. The applicant

said the party was an "officially banned organisation" in Egypt. It aimed to restore Islamic rule in Islamic countries through non-violent activities. In Egypt the party was "embodied in the character of Saleh Sairy" who, the applicant said, had been executed by the Egyptian Government in 1979. Many members were reportedly executed in Egypt, Iraq, Libya, Tunisia and Jordan. He and Saleh had been introduced to the party by a person they knew from their village. They had agreed to distribute pamphlets for the party, although the applicant had concerns for his safety. The applicant and Saleh had distributed pamphlets for about three months. On the last occasion they kept a lookout while their contact distributed leaflets but left the scene when they saw police move in to effect an arrest. They assumed that it was likely that their acquaintance would be tortured and that the police would be told that the applicant and Saleh had provided assistance to him and the party. Subsequently, the applicant's home was raided by police and he believed he would be imprisoned and tortured if found by police. As a result the applicant and Saleh left for Jordan. Later, they received information that government forces were looking for them, in Jordan, so they decided to leave that country. The applicant said that he feared he would be jailed and tortured if he returned to Egypt because the authorities treated harshly any person who co-operated with a banned Islamic party.

13 Prior to the Tribunal hearing, the Tribunal wrote to the applicant and his adviser, giving the applicant an opportunity to provide an explanation for what the Tribunal described as a "major discrepancy" between the content of the first interview and the subsequent claims made the applicant that he feared persecution because of his involvement with an Islamic political group.

14 In response, the applicant said that he had been "seized by fear" before the first interview because an Egyptian, working as an interpreter at the detention centre, had asked him his address in Egypt. He feared that the interpreter had links with Egyptian intelligence and that it would be unsafe to mention any connection with the Islamic Liberation Party because it may lead to "subjecting my family in Egypt to torture". He said that his fear was heightened because the interview was being recorded.

15 A submission to the Tribunal from the applicant's adviser emphasised the applicant's religious background and the "traditional rural atmosphere" in which the applicant had been brought up. The adviser said that the applicant was at risk of being persecuted for reason of imputed political opinion.

16 In its statement of reasons for decision, provided under s 430 of the Act, the Tribunal said as follows under a heading "Findings and Reasons":

"The Tribunal had significant problems with the applicant's credibility, and in particular his failure to mention any kind of political activity at his on arrival interview. This was an aspect of his claims explored at the Tribunal hearing, and the applicant was also invited to provide a written explanation of the discrepancy between his on arrival interview and subsequent claims regarding political activity. The Tribunal is not satisfied by the applicant's explanation, given at the hearing and subsequently in writing, that he was frightened by an Egyptian

interpreter's questions immediately prior to his on arrival interview, thinking that this person might have been from Egyptian Intelligence. The Tribunal considers this explanation to be fanciful.

…

The Tribunal generally accepts the applicant's claims relating to his relationship with a girl in his home town, and his subsequent difficulties arising from the fact that another more powerful man in the town also wished to marry the girl, and accused the applicant and his friend of raping his sister as an act of revenge against them. These claims have been consistent since the applicant's on arrival interview, and the Tribunal is satisfied of their genuineness.

The Tribunal therefore accepts that the applicant and his friend were forced to leave Egypt, hoping that his rival and his rival's associates would stop their harassment if they allowed the situation time to calm down. The Tribunal accepts that the applicant and his friend left Egypt for Jordan around February 1999, and lived and worked legally in Jordan until their departure for Australia in July 2000. Their reason for leaving Jordan for Australia was again, according to the applicant's evidence, to avoid pursuit by the applicant's jealous and vengeful rival. The Tribunal is satisfied that the applicant left Jordan legally on an Egyptian passport, with assistance from a smuggler.

The Tribunal is not satisfied that there is a real chance that the applicant will be harmed by his rival and his associates if he returns to Egypt. Even if there were a risk of revenge against the applicant in his home town, it is clear that this very local risk could be avoided if the applicant resided elsewhere…Furthermore, in the remote event that the applicant were pursued and harassed by his rival, the Tribunal is satisfied that any harm done to the applicant would not be done to him for a Convention reason.

…

The Tribunal has considered the claims put forward by the applicant regarding his political activities. Not only did the applicant not mention these at his on arrival interview, but his account of events at the Tribunal hearing was not convincing. The Tribunal notes that there was a two week interval between the hearing of the applicant's friend…and the applicant. Even with this opportunity to ensure consistency between the two accounts, there were discrepancies in details of their evidence, suggesting that the two were not relating events which actually occurred…**In summary, the Tribunal is satisfied that the applicant's claims in relation to political activities on behalf of an extremist Islamic group have been fabricated in order to support his claims of Convention-related persecution**…"(Emphasis added)

> 17 On the hearing of the application for review, the applicant appeared in person. The court received a written submission, prepared by or on behalf of the applicant.

18 Essentially, the applicant contended that the Tribunal had not adequately considered his explanation for failing to discuss his political activities in Egypt in his first interview and had made incorrect or inadequate findings of fact in respect of the dangers he faced if returned to Egypt.

19 The Tribunal said that the explanation provided by the applicant for failing to claim in his initial interview that he had been engaged in political activity in Egypt was "fanciful". That amounted to a positive finding by the Tribunal that the applicant did not fear that he would suffer persecution for political opinion if returned to Egypt, the "political" events described by the applicant not having occurred.

20 In assessing the credit of an applicant who claims to be a refugee, the Tribunal must caution itself against a precipitous finding adverse to the applicant where that finding is based on a failure to disclose promptly, facts on which the fear of persecution is said to be grounded. In particular, in having regard to the content of an initial interview, necessarily a brief record, the Tribunal must keep in mind also that an applicant under arbitrary detention and authoritarian control may perceive the authority conducting the interview to be hostile to a person who has entered Australia without authority.

21 The following comments by Professor Hathaway in *The Law of Refugee Status* 1991 at pp. 84-86 are pertinent:

"First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state. The past practice of the Board of assessing credibility on the basis of the timeliness of the claim to refugee status, compliance with immigration laws, or the consistency of statements made on arrival with the testimony given at the hearing is thus highly suspect, and should be constrained in the contextually sensitive manner discussed previously in Chapter 2.

Second, it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true." (Footnotes omitted.)

22 In the instant case, however, the Tribunal gave the applicant appropriate opportunity to deal with an aspect of the applicant's case that the Tribunal considered cast grave doubt on the applicant's credibility. The Tribunal did not make a bare assertion that the applicant's account was incredible without probative material or reasonable grounds to support that conclusion. The Tribunal was entitled to reject the applicant's claims after

deciding that the explanation for failing to disclose those claims stretched credulity. It was obvious to the Tribunal that if facts had occurred as now claimed by the applicant, those facts would have been in the forefront of his mind when asked why he had left Egypt and could not return. No real reason had been provided by the applicant as to why he could not have described such events if, indeed, they had occurred. The Egyptian interpreter, who had spoken to him before the interview, was not the interpreter at the interview and nothing untoward about the conduct of the interview was raised by the applicant before the Tribunal.

23 Accordingly, the core of the applicant's claims fell away once the Tribunal formed the positive view that the acts of a political nature described by the applicant had not occurred.

24 It followed necessarily that whatever arguments may have been put in respect of other parts of the reasons of the Tribunal, the ultimate decision of the Tribunal followed a chain of reasoning that reflected no error of law in the decision-making process. It was not contended by the applicant that the Tribunal erred in concluding that the applicant's fear that he would suffer extreme harm if returned to Egypt by reason of the prosecution of a private feud against him, was not a fear of persecution for a reason recognised by the Convention.

25 It follows that the application for review must be dismissed.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 14 March 2002

	The Applicant appeared in person
Counsel for the Respondent:	A A Jenshel; T C Ling
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14, 20 December 2001
Date of Judgment:	14 March 2002