FEDERAL COURT OF AUSTRALIA

Ahmed v Minister for Immigration and Multicultural Affairs [1999] FCA 811

MIGRATION – *Migration Act 1958* (Cth) ("the Act") – whether the Refugee Review Tribunal ("the Tribunal") had material before it upon which it based its findings – whether the Tribunal erred in its decision-making procedure by its failure to take account of material before it – whether Tribunal complied with the requirements of s 430 of the Act

Migration Act 1958 (Cth), ss 55, 430, 476(1)(a)

J C Hathaway, *The Law of Refugee Status*

P Zambelli (ed),*The 1995 Annotated Refugee Convention: 1951 Convention Relating to the Status of Refugees*

Fleming v R (1998) 158 ALR 379, cited

Abebe v The Commonwealth of Australia (1999) 162 ALR 1, cited

Paramananthan v Minister for Immigration and Multicultural Affairs (1999) 160 ALR 24, cited

Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24, cited

Sun Zhan Qui v Minister for Immigration and Ethnic Affairs [1997] FCA 324, cited

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

MISBAL AYDID AHMED v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 3 of 1999

LEE, BRANSON AND MARSHALL JJ

SYDNEY

21 JUNE 1999

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 3 of 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MISBAL AYDID AHMED Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	LEE, BRANSON AND MARSHALL JJ
DATE OF ORDER:	21 JUNE 1999
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.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 3 of 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MISBAL AYDID AHMED Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	LEE, BRANSON AND MARSHALL JJ
DATE:	21 JUNE 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

LEE J:

1 This is an appeal from a decision of a Judge of this Court dismissing an application under the *Migration Act 1958* (Cth) ("the Act") by the appellant, Ms Ahmed, for judicial review of a decision made by the Refugee Review Tribunal ("the Tribunal") that the appellant was not a person to whom Australia had protection obligations under the 1951 Convention relating to the Status of

Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

2 The relevant facts and the issues raised in the appeal are set out in the reasons of Branson J. It is appropriate to deal first with the ground of appeal relating to the finding by the Tribunal that material changes in circumstances in Somalia had removed any basis on which it could be said, objectively, that a fear of being persecuted in that country was well-founded. Unless that ground is made out the appeal cannot succeed.

3 When the Tribunal made its decision on 16 March 1998 it was satisfied that the appellant did not have a well-founded fear of persecution because, in its view, since 31 January 1998 the stage had been set for "permanent and lasting peace" in Somalia. The Tribunal was satisfied that a cease-fire in the civil war that had upset life in that country for many years, announced by the Somalian warlords on 31 January 1998, made it quite unlikely that inter-clan warfare would recur in that country.

4

The appellant submitted that the Tribunal erred in its decision-making procedure by failing to take into account particular material that had been put before the Tribunal, namely, a press report that there had been an exchange of gunfire between armed clan-groups that resulted in some deaths and injuries in or near Mogadishu shortly after the cease-fire was announced. It was submitted that the Tribunal had not observed the procedure set out in s 430 of the Act in connection with the making of the decision and, therefore, a ground for judicial review of the decision arose under s 476(1)(a) of the Act. It was said that the Tribunal had not complied with the requirement in s 430 of the Act that the Tribunal prepare, *inter alia,* a written statement which set out findings on any material questions of fact and referred to the evidence or any other material on which the findings of fact were based.

5 The Tribunal did prepare a written statement which set out its decision and the reasons for the decision. The Tribunal also set out its finding that there had been a significant change in circumstances in Somalia since the appellant had left the country, the degree of change being such that, objectively, the appellant could not hold a well-founded fear of persecution if she returned to Somalia. It was not in issue that before the cease-fire there was good cause for many people in Somalia to fear persecution.

6 The Tribunal set out the evidence on which its finding of changed circumstances was based. It did not refer to the reported violence which occurred after announcement of the cease-fire but did refer to material relating to events in Somalia later in time.

7 Given the well-known history of the civil war in Somalia, it might be thought that a conclusion that a truly effective and durable elimination of inter-clan warfare took root in Somalia upon the announcement of the cease-fire was either premature or unduly optimistic. Be that as it may, the Tribunal had before it some material on which such a finding could be made and it proceeded to make it. (See: J C Hathaway, **The Law of Refugee Status** (Toronto: Butterworths, 1991), at 199 – 203; **The 1995 Annotated Refugee Convention: 1951 Convention Relating to the Status of Refugees**,Ed: P Zambelli, (Scarborough, Ontario: Carswell, 1994), at 93 – 102.)

8

In making that finding the Tribunal was not required under s 430 of the Act to set out how it had dealt with an item such as the press report of a clan disturbance occurring in the period after the cease-fire agreement. Obviously it was a matter to be assessed and weighed with other material but if the Tribunal did not conclude that it gave cause for some other finding, it was not required by s 430 to make specific reference to it in its written statement prepared under that section.

9 It was a finding of fact open to the Tribunal and though it may not have been an obvious finding on the material before the Tribunal, reaching that finding did not involve a departure from the decision-making procedures of the Act to attract an entitlement to judicial review as provided by the Act.

10 If the other ground of appeal relied upon by the appellant had become relevant, it would have been necessary to consider whether the finding by the Tribunal that the appellant was not a member of the Ogaden/Darod clan abandoned the application of the principles of logic. The material referred to by the Tribunal as that on which the finding was based could not provide a logical foundation for the finding and for the reasons explained by Branson J, it may have been said that the decision-making procedure required to be followed under the Act was not observed.

11 However, for the reasons already stated the appeal must fail and it is unnecessary to consider that ground.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 21 June 1999

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 3 of 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MISBAL AYDID AHMED Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	LEE, BRANSON AND MARSHALL JJ
DATE:	21 JUNE 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BRANSON J:

Introduction

12 This is an appeal by an applicant for a protection visa ("Ms Ahmed") against a decision of a judge of this Court dismissing her application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal").

13 Ms Ahmed is a citizen of Somalia. She left Somalia in 1990 and from 1991 lived in India where she was recognised as a refugee by the United Nations High Commissioner for Refugees ("the UNHCR"). Ms Ahmed came to Australia in August 1997 and shortly thereafter she applied for a protection visa. Her application was refused by a delegate of the respondent and subsequently the Tribunal, following a hearing on 11 February 1998, affirmed the decision to refuse to grant her a protection visa. It was that decision of the Tribunal which was the subject of the application for judicial review heard and determined by a judge of this Court.

14

A criterion for the grant of a protection visa is that at the time of the decision the decision-maker is satisfied that the applicant is a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together hereafter described as "the Refugees Convention"). For present purposes, Australia will have protection obligations to Ms Ahmed if she is a person who:

"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 [her] nationality and is unable or, owing to such fear, is unwilling to avail [herself] of the protection of that country..."

Reasoning of the Tribunal

15 The Tribunal considered the claims made by Ms Ahmed in her application for a protection visa and her supporting statutory declaration, in a later statutory declaration made by her, in an interview with an officer of the Department of Immigration and Multicultural Affairs ("the Department") and in oral evidence to the Tribunal. The Tribunal also considered a letter from the regional representative of UNHCR, which outlined claims made by Ms Ahmed to the UNHCR in India. The Tribunal's reasons show that, having considered the above material, it concluded that there were *"flagrant and unsatisfactorily explained contradictions of a material and substantial nature"* in Ms Ahmed's claims. The Tribunal concluded that it could -

"only come to the conclusion that the applicant's testimony is not plausible, credible or trustworthy and therefore finds that she is not a credible witness and that her claims are lacking in credibility."

The Tribunal's reasons go on:

"Accordingly, since the Tribunal finds that the applicant's claims are not credible, trustworthy or plausible, there is nothing on which it can be satisfied that the applicant has a well-founded fear of persecution due to race, membership of a particular social group or for any other Convention reason."

16 Notwithstanding the above conclusion, the Tribunal by its reasons gave more detailed consideration to particular aspects of Ms Ahmed's claims. The only aspect of present relevance is Ms Ahmed's claim that as a member of the Ogaden/Darod clan (the clan associated with the deposed Ethiopian leader Siad Barre) she would be vulnerable to attack by rival clan militias who currently control Mogadishu should she return to that city. The reasons for decision of the Tribunal record:

"As for the applicant's claim that she fears persecution based upon her clan membership, the Tribunal does not accept this claim on the grounds that she is not a credible witness, and therefore the Tribunal finds that she is not a member of the Ogaden/Darod clan."

17 This would appear to be a finding that Ms Ahmed does not have a subjective fear of persecution. That is, that as Ms Ahmed is not a member of the Ogaden/Darod clan, her claim that she fears persecution because of her membership of that clan must be rejected.

18 The Tribunal also found that objectively it would not be reasonable for Ms Ahmed to fear returning to Somalia. The Tribunal's reasons for decision include the following passage:

"But even if the Tribunal has arrived at the wrong conclusion as to the applicant's lack of credibility, it is nonetheless of the view that the applicant does not have a well-founded fear of persecution in Somalia as a result of the 31 January 1998 cease fire. Coupled with the Cairo and Sodere agreements, this cease fire has set the stage for a permanent and lasting peace in Somalia. … The fact that there has been no recent reports of clan-based violence in Mogadishu, combined with the

dismantling of roadblocks, the absence of any evidence before the Tribunal that the cease fire is not effective, and the optimistic report of The Economist that the cease fire will hold, suggests to the Tribunal that a substantial and desirable change in conditions has occurred in Somalia since 31 January 1998 which removes any reasonably foreseeable risk to the applicant. … The facts seem to be that peace has existed in Somalia since 31 January 1998, and the evidence before the Tribunal is such that the possibility of inter clan hostility resuming is remote. Accordingly, the applicant does not have a real chance of persecution if she were to return to Somalia and the Tribunal is not satisfied that she has a well-founded fear of persecution for a Convention reason."

The Tribunal had earlier in its reasons noted that:

"Neither the applicant nor her adviser were able to present any documentary evidence to suggest that the present ceases [sic] fire is not effective."

Consideration

19 The judge at first instance gave his decision in this matter at a time when it was appropriate for him to act on the basis that the decision of the majority of the Full Court of this Court in *Eshetu* (1997) 71 FCR 300 reflected a satisfactory approach to the interpretation of the *Migration Act 1958* (Cth) ("the Act").

20 The notice of appeal was filed before the High Court delivered judgment in the cases of *Abebe v The Commonwealth of Australia* (1999) 162 ALR 1 and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577. Understandably, the grounds of appeal identified in the notice relied in part on the majority view expressed in the Full Court of this Court in *Eshetu*. The appellant was required by the Court's directions to file and serve her written submissions on the appeal within a time frame which expired before the High Court delivered judgment in *Eshetu*. Counsel for the appellant, Mr Beech-Jones was thus required, at short notice, to recast Ms Ahmed's submissions.

21 At the hearing of the appeal, Ms Ahmed placed reliance on two aspects of the decision of the Tribunal. First, the finding of the Tribunal that she was not a member of the Ogaden/Darod clan and, secondly, the finding of the Tribunal that there had been a change in circumstances in Somalia such that, whatever Ms Ahmed's clan, she does not have a well-founded fear of persecution were she to return to Somalia.

22 It seems to me that the reasons of the Tribunal are open to the construction that the Tribunal's decision was principally based on its conclusion, set out in full above, that as it did not believe the story put forward by Ms Ahmed, there was nothing before it upon which it could be satisfied that

Ms Ahmed has a well-founded fear of persecution were she to return to Somalia. If the reasons of the Tribunal are properly so construed, and if this conclusion is not open to review, then the aspects of the Tribunal's reasons upon which Ms Ahmed places reliance will have no real significance. However, neither party contended for this construction of the reasons of the Tribunal and it may, therefore, be placed to one side.

23 It is convenient to turn first to the second issue raised by Ms Ahmed. Unless Ms Ahmed can establish that the conclusion of the Tribunal concerning changed circumstances in Somalia is open to review, her appeal must fail.

24

The Tribunal implicitly accepted that Somalia has in recent years been in the grip of civil war. However, it made reference in its reasons for decision to evidence of a peace deal signed on 31 January 1998 by three Somali warlords – Ali Mahdi Mohamed Hussein, Mohamed Aided and Osman Hassan Ali. By that agreement the three warlords apparently agreed to form a central administration in Mogadishu. The Tribunal was satisfied that road blocks and checkpoints that had divided Mogadishu into separate zones over the previous seven years were being dismantled. It noted independent evidence of both earlier and subsequent agreements between faction leaders and to a national reconciliation scheduled to commence on 15 February 1998, but subsequently rescheduled to 31 March 1998 due to "logistical problems", to set up a federal state and transitional government. The Tribunal also noted a report from *Agence France Presse* dated 3 March 1998 that two of three warlords controlling Mogadishu, Hussein Mohamed Aidid and Ali Mahdi Mohamed, had met in a hotel in the south of the city to discuss the formation of a joint authority to administer the city and the upcoming reconciliation conference. These developments were said by the report *"to again raise hopes for a return to peace."* The Tribunal referred to a report sourced from Radio Mogadishu Voice of Somali Pacification on 8 March 1998 that the National Salvation Council met in Mogadishu on 8 March 1998 to look at ways of overcoming obstacles to the implementation of the Cairo Agreement and the holding of the national conference.

25 The Tribunal observed that:

"There have been no recent reports of violence in Mogadishu, which would suggest that this ceases [sic] fire is effective"

and commented, as mentioned above, on the inability of Ms Ahmed or her legal adviser to present any documentary evidence to suggest that the cease fire was not effective.

26 Ms Ahmed placed considerable weight on the provision to the Tribunal by her adviser on 5 March 1998 (ie. after the date of the Tribunal hearing but before the delivery of its decision) of a copy of a Reuters article concerning Somalia. The Reuters article reads in part:

"MOGADISHU, Feb 16 (Reuters) – Four people were killed and five wounded when rival militiamen from one of Somalia's main clans fought a pitched battle south of the capital on Sunday, witnesses said.

They said the fighting started after a member of the Suleiman sub-clan was killed in an attack blamed on militiamen on members of the Eyr sub-clan.

Both the Suleiman and Eyr – ostensible controlled by Somali warlord Hussein Mohamed Aideed – are offshoots of the main Habar-Gidir clan, which is split between Aideed and his rival Osman Ali Atto.

The fighting was the first serious outbreak of violence since Aideed and Atto came together with other faction leaders two weeks ago to announce a truce and pledge support for national reconciliation conference

…

Witnesses said Sunday's fighting broke out at Afgoe, about 30 kms (19 miles) southwest of Mogadishu, and militiamen exchanged heavy machinegun and small-arms fire..."

27 It may be noted that the Reuters article contains reference to the warlords Hussein Mohamed Aideed and Osman Ali Atto as leaders of rival sub-clans of one of Somalia's main clans. It would appear that these warlords are two of the three signatories to the peace deal signed on 31 January 1998 upon which the Tribunal placed great weight.

28 In the circumstances it is surprising that the Tribunal should have observed in its reasons for decision that there had been no recent reports of violence in Mogadishu and that Ms Ahmed and her advisers had not been able to present any documentary evidence to suggest that the cease fire was not effective. Even if the Tribunal had taken, what might in the circumstances be thought to be an artificially technical view, that 30 kms southwest of Mogadishu is not "in Mogadishu", the incident reported by Reuters tends to suggest that the cease fire was not wholly effective.

29 The Minister sought to characterise the Reuters report as a report of intra-clan violence rather than of inter-clan violence. The apparent complexity of clan and sub-clan structures in Somalia as revealed by the material before the Tribunal tends to suggest against such a simple dichotomy being valid. Ms Ahmed, for example, was in such material not infrequently described as being Ogaden, or of the Ogaden clan, although the material as a whole indicates that the Ogaden are a sub-clan of the Darod clan. It might also be thought to be significant that the two individuals apparently referred to in the Reuters article as sub-clan leaders constitute two of the three warlords accepted by the Tribunal to have been signatories to the peace deal.

30

However, questions of this kind can, in my view, be left to one side. The failure of the Tribunal to qualify in any way its assertion that Ms Ahmed and her advisers were not *"able to present any documentary evidence to suggest that the present ceases* [sic] *fire is not effective"* strongly suggests that the Tribunal did not have regard to the Reuters article for the purpose of reaching its decision as to whether it was satisfied that Ms Ahmed is a person to whom Australia has protection obligations under the Refugees Convention.

31 Had the Reuters article been considered by the Tribunal, it seems almost inevitable that it would have been referred to in its reasons for decision. First, the cease fire upon which the Tribunal placed reliance was of recent origin. It had been signed only eleven days before the Tribunal hearing. A conclusion by a decision-maker as to the likely effectiveness of the cease fire, having regard to the preceding seven years of civil war in Somalia, called for some caution. Secondly, the material before the Tribunal upon which it based its conclusion that peace had existed in Somalia since 31 January 1998 was, at best, tentative in character. The later *Agence France Presse* report spoke not of peace having been achieved but of developments which *"were said to again raise hopes for a return to peace".* Other reports noted by the Tribunal referred to obstacles in the way of the implementation of the Cairo Agreement and the holding of the National Reconciliation Conference.

32 Furthermore, s 430 of the Act places the Tribunal under an obligation to set out in a written statement not only its decision, but also the reasons for its decision, its findings on any material questions of fact and references to the evidence or other material on which its findings of fact were based. It is, in my view, too technical a view of the obligation imposed by s 430 of the Act to construe it as obliging a Tribunal to refer to material before it which supports a finding on a material question of fact but as never requiring reference to be made to material which suggests against a finding made. Section 430, in my view, is to be understood as requiring an exposure of the reasoning process undertaken by the Tribunal and a justification of its findings of fact (cf *Fleming v R* (1998) 158 ALR 379 at 388). Where weight is not placed by the Tribunal on apparently probative evidence or other material, a reference to "the evidence or other material on which the findings of fact were based" will involve, in my view, an explanation for the apparently probative material not being accorded weight. This will not require the making of exhaustive

reference to the evidence and other material before the Tribunal. However, it will require that the Tribunal's written statement assist the applicant in understanding the basis upon which the Tribunal chose to make a particular finding on a material question of fact where a different finding was reasonably open on the whole of the evidence and other material before the Tribunal (see *Paramananthan v Minister for Immigration and Multicultural Affairs* (1999) 160 ALR 24 per Wilcox J at 27 and 31-32; see also Merkel J at 47).

33

Justification in the circumstances of this case of the Tribunal's finding of fact that the cease fire in Somalia would hold and *"that a substantial and durable change in conditions has occurred in Somalia since 31 January 1998 which removes any reasonably foreseeable risk to the applicant"* required reference, as the Tribunal recognised, to any material tending to suggest that the cease fire was not effective. The Tribunal's failure to refer to the Reuters article in its reasons for decision can, in my view, only be explained on the basis that it did not have regard to the article.

34 To so conclude is not, in my view, to engage in merits review of the fact-finding process of the Tribunal by reference to the written statement of its reasons for decision (see *Eshetu* per Gummow J at 603). It is to allow the statutory requirement of s 430 of the Act to inform this Court's understanding of the procedure adopted by the Tribunal.

35 If I am wrong in concluding that the Tribunal failed to have reference to the Reuters article for the purpose of reaching its decision, I would conclude that the Tribunal failed to comply with its obligation under s 430 of the Act to refer to the evidence or other material upon which its finding of fact that there had been a change of conditions in Somalia such as to remove any reasonably foreseeable risk to the applicant, was based.

36 It is also to be observed, as is mentioned below, that the reasons for decision of the Tribunal contain no reference to apparently persuasive evidence concerning Ms Ahmed's membership of the Ogaden/Darod clan. Without reference to such material, the Tribunal positively found that Ms Ahmed was not a member of the Ogaden/Darod clan solely on the bases that she had asserted that she was a member of the Ogaden/Darod clan and that the Tribunal had found that she was not a credible witness.

37

As is mentioned above, the Tribunal found Ms Ahmed's testimony implausible. However, none of the criticisms made of her evidence touched directly on the issue of her clan membership. It was not suggested, for example, that she had given inconsistent accounts of her clan membership. Nonetheless, the Tribunal made its positive finding that Ms Ahmed was not a member of the Ogaden/Darod clan without making any reference in its reasons for decision to statutory declarations, provided to the Tribunal between the time of the hearing and the publishing of the Tribunal's

decision, which touched on the issue of her clan membership. It was only during the course of the hearing that the question of Ms Ahmed's clan membership assumed importance. The statutory declarations contain evidence which, if accepted, indicate that Ms Ahmed's father was an Ogaden, that when Ms Ahmed lived in Somalia she frequented Ogaden clan social functions such as marriages, births and funerals, and that certain Somalians who know Ms Ahmed, and members of her family, regard her and them as Ogaden. Although the Tribunal had indicated to Ms Ahmed's legal representative at the close of the hearing that it did not think that evidence about her clan membership, other than expert evidence on that topic, would help much, it is plain that the material in the statutory declaration was, if accepted, logically probative of the issue of whether or not Ms Ahmed was a member of the Ogaden/Darod clan.

38 The Tribunal's finding concerning Ms Ahmed's clan membership was accepted by the Minister to be a finding on a material question of fact. I find it very difficult to accept that if the Tribunal had had regard to the content of these statutory declarations, it would have made a positive finding that she was not of the Ogaden/Darod clan based purely on her credibility, without first explaining why it rejected the evidence contained in the statutory declarations. If it did have regard to the contents of the statutory declarations, s 430 of the Act, in my view, placed it under an obligation to refer in its statement of reasons to its reasons for rejecting the evidence in the statutory declarations.

39 The only additional material provided to the Tribunal after the hearing, but before its decision, was the Reuters report and the statutory declarations. As is mentioned above, none of this material is referred to in the Tribunal's reasons for decision. In the circumstances it seems necessary to conclude, and I do conclude, that the Tribunal, presumably by reason of some administrative error which prevented the material from coming to its attention, did not have regard to this additional material.

40 Section 55(1) of the Act provides:

"55(1)Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision."

41 In conducting a review of a decision of the respondent, the Tribunal exercises the powers and discretions given by the Act to the Minister (s 415(1) of the Act). Although strictly an obligation, rather than a power or discretion, s 55(1) of the Act must, in my view, be regarded as binding on the Tribunal in the conduct of a review of a decision made by the respondent. The subsection is a statutory reflection

of the common law obligation on an administrative decision-maker to make decisions having regard to the best information actually or constructively available to him or her (*Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 per Mason J at 45-46, Brennan J at 64-65 and Deane J at 70). Whilst, ordinarily the obligation may be regarded as an aspect of natural justice (*Peko-Wallsend* per Mason J at 45), s 55(1) of the Act, in my view, elevates it in the context of the Act to a statutory procedural requirement.

> 42 Section 55(1) is not a "general exhortatory [provision], the terms of which do not conform to the common understanding of a 'procedure'" (per Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324, cited in *Eshetu* per Gummow J at 599-600). It is a provision directing the Minister to take the step of having regard to a certain category of material for the purpose of reaching a decision. It is, in my view, as much a provision establishing a procedure required by the Act to be observed as, for example, s 425 which requires the Tribunal to give an applicant the opportunity to appear and give evidence before the Tribunal if it is unable to reach a decision favourable to the applicant "on the papers". I conclude that the failure of the Tribunal to have regard to the additional information provided to the Tribunal on 3 March 1998 (ie. the Reuters article and the statutory declarations) amounted to a failure to observe a procedure required by the Act to be observed in connection with the making of the decision (s 476(1)(a)).
>
> 43 As is mentioned above, if I am wrong in concluding that the additional information is material to which the Tribunal did not have regard for the purpose of reaching its decision, I would find that the Tribunal failed to meet its statutory obligation under s 430 of the Act to refer to the evidence or other material on which its material findings of fact were based.
>
> 44 Although the notice of appeal in this matter did not explicitly refer to s 55(1) of the Act, the grounds raised by the notice of appeal, and the wide ranging argument before this Court, in my view, sufficiently placed the respondent on notice of Ms Ahmed's complaint concerning the Tribunal's failure to have regard to or place weight on the material provided to it after the hearing.
>
> 45 In my view, the matter should be remitted to the Tribunal for rehearing.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons

for Judgment herein of the Honourable Justice Branson.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 3 of 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MISBAL AYDID AHMED Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	LEE, BRANSON AND MARSHALL JJ
DATE:	21 JUNE 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MARSHALL J:

46 I have had the advantage of reading, in draft form, the reasons for judgment of Branson J in this appeal. I am content to adopt her Honour's summary of the relevant facts subject to one reservation that I will outline later in these reasons.

47 I agree with the view expressed by her Honour that unless the appellant can establish that the conclusion of the Refugee Review Tribunal ("the RRT") regarding changed circumstances in Somalia is open to challenge then the appeal must fail.

48 As recounted by Branson J the RRT relied upon a peace-deal signed in January 1998 by three warlords to support its finding that there had been a substantial or material change in circumstances in Somalia. The RRT had no regard, in its reasons for decision, to material published by Reuters on 16 February 1998 concerning renewed violence near Mogadishu. Despite not referring to the Reuters material the RRT did have regard to matters which post dated the Reuters publication.

49

The RRT referred to a meeting on 3 March 1998 between two warlords, which produced certain agreements described as "*developments … to again raise hopes for a return to peace*"by Agence France Presse on 3 March 1998. The RRT also referred to a Radio Mogadishu broadcast of 8 March 1998 which detailed a meeting of the National Salvation Council. That meeting "*concluded with members agreeing to pacify and form a single administration for the Banaadir (Mogadishu and its environs) before the holding of a national conference*…"

50 In my opinion the material referable to developments in early March 1998, prior to the RRT's decision of 16 March 1998, provided the basis for the RRT to be entitled to say that:

"The changes in Somalia since the 31 January 1998 cease fire indicate that there has been a material or substantial change of circumstances in the country, such that a very high degree of real protection is once more viable in the applicant's state of origin."

51 It is unfortunate that the RRT did not refer to the Reuters article of 16 February 1998 and that it made reference to peace existing in Somalia since 31 January 1998. Whilst the Reuters article deals with intra-clan as distinct from inter-clan violence its text appears to relate to a breakdown of the peace agreement and is evidence of a disturbance of peace after 31 January 1998. However, reliance on the March 1998 material which reflected upon further developments aimed at achieving peace in Mogadishu was, in my opinion, a sufficient basis upon which the RRT could legitimately form the view it did about material or substantial change in circumstances.

52 Consequently the crucial aspect of the RRT's reasoning in this regard, referred to at par 50 above, is supported by the totality of the material which was before the RRT notwithstanding that the RRT appears not to have had regard to one isolated instance of resumption of hostilities in mid February 1998.

53 In my view the RRT complies with s430(1)(c)& (d) of the *Migration Act 1958* (Cth) ("the Act") by setting out its findings on any material question of fact and by referring to evidence on which the finding was based. In the current matter the RRT set out its finding concerning changed circumstances and referred to evidence to support that finding. The fact that the RRT did not refer to evidence to the contrary does not mean that it has not complied with its obligations under s430(1) of the Act.

54 I agree, with respect, with Branson J's views concerning the RRT's incorrect approach to a determination of whether the appellant was a member of the Ogaden/Darod clan. The RRT's erroneous reasoning on that issue is, however, of no assistance to the appellant having regard to the RRT's finding concerning changed circumstances in Somalia.

55 I agree with Lee J that the order of the Court should be that the appeal be dismissed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 21 June 1999

Counsel for the Appellant:	Mr R. Beech-Jones with Mr A. Iuliano
Counsel for the Respondent:	Mr N.J. Williams with Ms S. McNaughton
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	17 May 1999
Date of Judgment:	21 June 1999