FEDERAL COURT OF AUSTRALIA

Al-Amidi v Minister for Immigration & Multicultural Affairs

[2000] FCA 1081

MIGRATION – refugees – application for protection visa – error of law – scope of "internal protection principle" or "relocation principle" discussed – whether the Refugee Review Tribunal erred in its understanding and application of the law – whether findings of fact not made on material issues.

Migration Act 1958 (Cth) ss 476, 476(1)(a), 476(1)(e), 476(1)(g)

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 referred to

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 referred to

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 referred to

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1998) 80 FCR 543 referred to

Tharmalingham v Minister for Immigration and Multicultural Affairs [1999] FCA 1180 referred to

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

Minister for Immigration and Multicultural Affairs v Sameh [2000] FCA 578 considered

J Hathaway, *The Law of Refugee Status* 1991

YAGOUB YOUSIF MOUSA AL-AMIDI V MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

W11 of 2000

LEE J

4 AUGUST 2000

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W11 OF 2000

BETWEEN:	YAGOUB YOUSIF MOUSA AL-AMIDI APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	LEE J
DATE OF ORDER:	4 AUGUST 2000
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The application for review be allowed.

2. The decision of the Refugee Review Tribunal be set aside.

3. The matter be remitted to the Tribunal for determination according to law.

4. The respondent pay the applicant'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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JUDGE:	LEE J
DATE:	4 AUGUST 2000
PLACE:	PERTH

REASONS FOR JUDGMENT

1 This is an application under s 476 of the *Migration Act 1958* (Cth) ("the Act") for review of a decision of the Refugee Review Tribunal ("the Tribunal"), made on 21 January 2000, which affirmed a decision of a delegate of the respondent ("the Minister") not to grant a protection visa to the applicant.

2 The applicant, a citizen of Iraq, is 56 years of age. He left Iraq by entering Syria illegally on 1 July 1999 and remained in Syria for ten days and, using false documents, travelled to Indonesia where he remained for approximately twenty-three days. He became an unlawful non-citizen under the Act when he arrived by boat on Christmas Island on 13 August 1999. He has been held in detention in Australia since that date. On 16 September 1999 the applicant lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs ("the Department"). On 8 November 1999

a delegate of the Minister refused the application and on 9 November 1999 the applicant sought review of that decision by the Tribunal. The Tribunal conducted a review hearing on 22 December 1999 and received further written submissions from the applicant's "adviser" on 18 January 2000.

3 After the application for review was filed in this Court, Legal Aid Western Australia agreed to act on behalf of the applicant. The principal grounds of review relied upon were that the Tribunal misinterpreted the law or incorrectly applied the law to the facts (s 476(1)(e)) and that the Tribunal failed to observe procedures required by the Act to be observed (s 476(1)(a)).

4 In the reasons for decision provided by the Tribunal pursuant to s 430 of the Act, the Tribunal set out its understanding of the provisions of the Act relating to the grant of a protection visa and of the operation of Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "the Convention"). The Tribunal referred to decisions of the High Court in which the Act and the Convention had been construed and explained, in particular *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559. It was not submitted that the exposition of law set out by the Tribunal displayed legal error.

5 The Tribunal had before it the Department's file containing records of interviews conducted between the applicant and officers of the Department and "country information" from various sources which set out conduct of the ruling Ba'athist regime in Iraq, likely to ground a well-founded fear of persecution for many in that country. In addition the Tribunal had the applicant's evidence at the review hearing; submissions prepared by the applicant's "adviser" and a handwritten statement prepared on the applicant's instructions.

6 Counsel for the applicant submitted that the Tribunal had found the applicant to be a credible witness and had accepted his account of treatment at the hands of Iraqi authorities. That appears to be so. The Tribunal was satisfied that the applicant's claims were supported by the "country information" reports and accepted that the applicant had been persecuted by the regime by reason of his religion and his political opinion. It noted that given the nature of the regime's regard for Shi'ites as potential political foes, those two grounds tended to merge. In 1977, whilst participating in religious commemorations, the applicant was detained for two months and tortured. He was detained briefly in 1979 and in 1982 for participating in Shi'a religious practices. In 1985 he was tried and sentenced to twenty years imprisonment, and his personal assets seized, for comments critical of the Ba'ath government and its involvement in the Iran-Iraq War. The applicant served six years of that imprisonment before being released under an amnesty in 1991. In 1987 the applicant's brother was arrested, placed in the same jail as the applicant and executed. Whilst the applicant was imprisoned, the military

action taken against Iraq by forces of the United Nations in 1990/1991 led to uprisings against the Iraqi regime, one of which occurred in the Shi'ite region from which the applicant came. In the suppression of that uprising, the applicant's house was destroyed by Iraqi authorities and the son of the applicant's deceased brother was executed. The applicant's eldest son was also arrested at that time. The applicant believes that subsequently his son was able to flee to Iran. After his release, the applicant returned to his home district but went into hiding, moving between the homes of relatives in fear of the government security forces. In 1994 the applicant left southern Iraq, and his family, to live in northern Iraq where Kurdish groups had re-asserted authority in the region. After an uprising by the Kurds in 1991 had been put down by Iraqi forces, the United States had created a "comfort zone" by directing that Iraqi forces not move beyond the 36º parallel. In fact, Iraqi security personnel continued to operate in the Kurdish region of northern Iraq. In 1996 Iraqi forces entered the area to join a Kurdish group engaged in conflict with another, and took the opportunity to liquidate a number of Iraqi nationals who had formed a political opposition to the regime in northern Iraq. Until 1996 the applicant had had connections with Iraqi anti-government parties. When the Iraqi forces entered the Kurdish zone the applicant, on two occasions, left Iraq and entered Iran staying on one occasion for more than a month before returning to the area.

7 Whilst in northern Iraq the applicant's family continued to operate the transport business established by the applicant, a service in great demand after trading sanctions were imposed on Iraq by the United Nations in 1991. Money was sent to the applicant by his family but the applicant had no employment in northern Iraq and moved from place to place in fear of being apprehended.

8 The applicant stated that he was not in fear of the rival Kurdish factions in northern Iraq nor had he experienced any difficulties with the Wahabis, an extremist Sunni Muslim sect hostile to Shi'ites. Nevertheless, he pointed to the religious differences between the Kurds and himself, the Kurdish tribal support structure of which he was unable to avail himself and expressed a fear that his safety in the enclave was "illusory or unpredictable" because the Iraqi security forces operate there at will. The Tribunal disputed that latter point stating that:

"The regime in Baghdad does not exercise effective control over the enclave and hence it cannot engage in the arbitrary acts of persecution and revenge it is known for in the south. It may be able to target specific persons in the north it may wish to eliminate."

9 The Tribunal was of the opinion that the applicant did not have a sufficient profile to warrant attention from the Iraqi authorities.

10 The Tribunal was satisfied that there was no "safe third country" to which the applicant could be returned. (See: *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1998) 80 FCR 543 per von Doussa J at 562-563; *Tharmalingam v Minister for Immigration and Multicultural Affairs*

[1999] FCA 1180 per Ryan, Tamberlin and Madgwick JJ at [12].) The Tribunal accepted that it would not be possible for the applicant, as an Iraqi national, to enter Iran legally and nor could he enter Syria in the manner allowed by Syrian law. He had no right to re-enter Indonesia. The Tribunal did not refer to the prospect of the applicant entering Turkey but it had evidence before it that the applicant had been returned by Turkish authorities to northern Iraq when the applicant had attempted to enter Turkey in 1996.

11 The Tribunal stated that it was not necessary to determine "whether the applicant faces a real chance of persecution in southern Iraq if the applicant can safely relocate in northern Iraq". In the Tribunal's opinion, "country information" monographs produced by the Department of Refugee and Migration Affairs, Netherlands which assessed the suitability of northern Iraq as a refuge for those persecuted by the Ba'athist regime in Iraq, were of particular relevance. The Tribunal noted that:

"It is apparently easy for 'ordinary' people to travel to and from central Iraq and the north…Other than (prominent political activists and deserting officers above the rank of captain)…there are no indications that Iraqis of Arabic descent, who have evacuated to the north, are in danger of attacks from the Iraqi security forces."

12 Although the Tribunal did not make a finding of fact in that regard, there was ample material on which the Tribunal could have found that the risk of persecution for the applicant in southern Iraq was real and not fanciful and that the applicant had a well-founded fear of persecution if returned to that part of Iraq. For the purpose of this application it should be taken to have been assumed that the applicant would be a person who has a well-founded fear of persecution if it were concluded that it was not reasonable for him to avail himself of the protection of his country in some other part of the country.

13 The scope of the "internal protection principle" or "relocation principle" was discussed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437:

"Although it is true and 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.

…

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 in 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."

(per Black CJ at 440-443)

14 The starting point in consideration of the applicant's circumstances is that the persecution for reasons of religion or political opinion that he fears is persecution at the behest of the government of his country, rather than persecution inflicted by political or racial groups against which his country of nationality is unable to provide protection.

15 Therefore, normally it would follow that for a person in the applicant's circumstances no part of the country responsible for his fear of persecution would be a place where it could be said that the applicant would not have a well-founded fear of persecution.

16 To put it in the terms of the Convention definition, if the applicant is outside the country of his nationality because of a well-founded fear of persecution, is he unable to avail himself of the protection of that country? That was not a question addressed by the Tribunal. It involves consideration of the applicant's circumstances as they are now and his ability to return to his country of nationality and obtain protection.

17 If, without deciding the point, it could be said a person would be protected by his "country" if a geographical or political circumstance in an area of that country inhibited the capacity of the authorities of the country to inflict persecution upon a person who otherwise may be persecuted, that in itself would not decide the question whether that person is a person to whom Australia owes protection obligations.

18 First, as discussed in *Randhawa*, there must be a determination whether it is reasonable, in all the circumstances, to expect that person to live in one part of a country when it is accepted that he would not be safe from persecution elsewhere in that country. Determination of what would be a reasonable expectation would involve numerous considerations. If resumption of control of northern Iraq by government authorities is unpredictable, that circumstance would have to be considered, as well as the personal circumstances of the applicant. In the latter respect, if the expectation of relocation is to be regarded as reasonable, there must be satisfaction of the basic norms of civil, political and socio-economic human rights in that relocation. (See: J Hathaway, *The Law of Refugee Status* 1991 at 134.) In that regard the Tribunal would have to consider the age of the applicant; his ability to resume life with his family as a free person and not as a person moving from one hiding place to another; and his ability to be able to sustain himself and his family with dignity.

19 The fundamental issues relevant to the reasonableness of such an expectation were not addressed by the Tribunal. The Tribunal limited itself to

the question whether the applicant had been able to maintain a bare existence in northern Iraq without coming to the attention of Iraqi authorities. The Tribunal accepted that the applicant was justified in fleeing northern Iraq in 1996. The Tribunal gave no attention to the prospect of increased presence of Iraqi authorities in northern Iraq in future nor to whether the basic entitlements of the applicant in his future life would be met. In failing to do so, the Tribunal erred in its understanding of the law and in the application of the law to the applicant's circumstances. The ground of review provided by s 476(1)(e) of the Act, therefore, is made out.

20 Second, the Tribunal failed to determine whether the applicant was unable to avail himself of the protection of his country. To make findings of fact material to that issue, the Tribunal had to consider whether the applicant could be returned from Australia to northern Iraq, if the Tribunal determined that it was reasonable to expect the applicant to live there. (See: *Minister for Immigration and Multicultural Affairs v Sameh* [2000] FCA 578.)

21 The Tribunal was satisfied that the applicant could not enter Iran or Syria and was likely to be satisfied on the evidence before it that he could not enter Turkey. There was nothing before the Tribunal to allow it to be satisfied that the applicant would be given travel documents, and, if returned from Australia, that he would be able to enter northern Iraq. Indeed, the Tribunal did not consider that question. That represented a fundamental flaw in the decision-making process and one which meant that the task set for the Tribunal by the Act was not carried out.

22 As findings of fact were not made on material issues, the requirements of s 430 that the Tribunal provide reasons which set out those findings were not satisfied and the ground of review provided by s 476(1)(a) was established.

23 The application for review will be granted and the matter returned to the Tribunal for determination according to law.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 4 August 2000

Counsel for the Applicant:	H N H Christie
Solicitor for the Applicant:	Legal Aid Western Australia
Counsel for the Respondent:	M T Ritter
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	19 July 2000
Date of Judgment:	4 August 2000