FEDERAL COURT OF AUSTRALIA

Al-Anezi v Minister for Immigration & Multicultural Affairs [1999] FCA 355

MIGRATION – judicial review of decision of Refugee Review Tribunal refusing applicant protection visa – applicant of no nationality but had resided in three countries – Tribunal found applicant a refugee in relation to one only of those countries – Tribunal found other two countries were countries of *"former habitual residence"* of applicant – error of law – whether person may have more than one country of *"former habitual residence"* – whether applicant a *"refugee"* – *"effective protection"* – error of law – whether Tribunal considered particular circumstances of applicant

WORDS AND PHRASES – *"refugee"* – *"protection obligations"* – *"effective protection"* - *"country of former habitual residence"*

Migration Act 1958 (Cth) ss 36(2), 476(1)(a), 476(1)(e), 476(1)(g), 476(4)(a)

Convention Relating to the Status of Refugees 1951 Art 1 and Art 33

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 applied

Rajendran v Minister for Immigration and Multicultural Affairs (Federal Court of Australia, Mansfield J, 4 May 1998, unreported) applied

Rajendran v Minister for Immigration and Multicultural Affairs (Federal Court of Australia, von Doussa, O'Loughlin and Finn JJ, 4 September 1998, unreported) applied

Minister for Immigration and Multicultural Affairs v Gnanapiragasam (Federal Court of Australia, Weinberg J, 25 September 1998, unreported) applied

Rishmawi v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 421 applied

Tjhe Kwet Koe v Minister for Immigration and Ethnic Affairs (1997) 78 FCR 289 cited

Maarouf v Minister of Employment and Immigration (1993) 23 Imm LR (2d) 163 cited

Jong Kim Koe v Minister for Immigration and Multicultural Affairs (1997) 74 FCR 508 cited

Saket v Minister for Immigration and Multicultural Affairs [1999] FCA 301 distinguished

SHAYEA RAHAQ AL-ANEZI v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 1225 OF 1998

LEHANE J
1 APRIL 1999
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 1225 OF 1998

BETWEEN:	SHAYEA RAHAQ AL-ANEZI Applicant
AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	LEHANE J
DATE OF ORDER:	1 APRIL 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The matter be stood over to 9:30 am on 15 April 1999.

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	NG 1225 OF 1998

BETWEEN:	SHAYEA RAHAQ AL-ANEZI Applicant
AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	LEHANE J
DATE:	1 APRIL 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 By a decision dated 10 November 1998 the Refugee Review Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant seeks judicial review of the decision of the Tribunal on the grounds that the Tribunal, so it is said, failed to inquire into matters into which it was bound to inquire and thus failed to observe procedures which, under the *Migration Act* 1958 (Cth), it was bound to observe (*Migration Act* s 476(1)(a)), that the decision involved an error of law (s 476(1)(e)) and that there was no evidence or other material before the Tribunal capable of establishing a particular matter required by law to be established (s 476(1)(g) and s 476(4)(a)).

Background

2 The essential facts found by the Tribunal may be briefly stated. The applicant is a Bedouin or Bedoon. He was born in Kuwait in 1953. He lived there until 1991. As a Bedoon, however, he was not a Kuwaiti citizen, though until the outbreak of the Gulf War he served, according to his evidence, in the Kuwaiti Army. He married in 1974. His wife is an Iraqi national. They have ten children, seven of whom were born in Kuwait.

3 Following the Gulf War the Bedoons were widely suspected of sympathising or collaborating with Iraq. Many were deported. The Tribunal accepted that the Bedoons in Kuwait faced discrimination and hardship. In 1991 the applicant was arrested and he and his wife and children were deported to Iraq. The Tribunal found that he had been subjected to treatment in Kuwait that amounted to persecution and that he had a well-founded fear of persecution should he return to Kuwait. There is no controversy about those findings.

4 The applicant and his family lived in Iraq from September 1991 until December 1993. They rented a house in Basrah. The applicant did not work, but supported himself and his family from savings. Apart, possibly, from demands for bribes, the applicant was not harassed or disturbed by the Iraqi authorities. He was not arrested or detained. He was able to travel, within Iraq, on at least two occasions.

5 In December 1993 the applicant voluntarily left Iraq and entered Jordan. He was permitted to do so though he had no passport. Shortly afterwards his wife (who had an Iraqi passport) and their children joined him. The applicant and his family were given a residency permit for three months, which was later renewed for a further three months (but was not renewed again). They obtained accommodation and employment on a farm near Amman.

6 On 8 July the applicant arrived in Australia. He had travelled via Singapore on a false passport. Shortly after his arrival, he indicated that he claimed to be a refugee and on 16 July 1998 he applied for a protection visa.

Legal context

7 The applicant thus was a person not having a nationality who had lived for substantial periods in each of three countries and claimed to be a refugee as that term is defined in the *Convention Relating to the Status of Refugees* 1951 as amended by the *Protocol Relating to the Status of Refugees* 1967 (I shall refer to those two instruments together as the *"Convention"*). The question for the Tribunal was whether the applicant was, in the words of s 36(2) of the *Migration Act*:

"… a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

8 No question arose as to other criteria for a protection visa. The meaning of the term *"protection obligations"* is, of course, to be ascertained by construing the *Migration Act*. The *Migration Act* does not include a definition of the term, nor is there a definition in the Convention, but the structure of the Convention throws light on the meaning of the statute. The Convention imposes upon Contracting States a number of duties to *"refugees"*. Those duties are grouped in a series of chapters of the Convention. Some are expressed to be duties owed to *"refugees"* generally; others to refugees *"within the territory of"* a Contracting State; several are expressed as obligations to refugees *"lawfully"* within the territory of a Contracting State. But Australia has no obligation to *"protect"* a refugee in cases where the refugee may, consistently with Australia's obligations under the Convention, be refused admission or deported. In that context, Art 33 of the Convention is particularly important. It is headed *"Prohibition of expulsion or return ('refoulement')"* and provides:

"1 No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2 The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

9 Thus, even if a person is a refugee as defined by Art 1 of the Convention, Australia's obligation not to expel or return that person is not unqualified. A person who may be expelled or returned, consistently with Art 33, is not one to whom Australia has protection obligations. The extent of the qualification of the *"non-refoulement"* obligation was considered by the Full Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543, followed by Mansfield J and by the Full Court in *Rajendran v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, respectively 4 May 1998 and 4 September 1998, unreported) and by Weinberg J in *Minister for Immigration and Multicultural Affairs v Gnanapiragasam* (Federal Court of Australia, 25 September 1998, unreported). In *Thiyagarajah* the Full Court accepted the proposition that Australia had no obligation to consider a claim for asylum as a refugee where the claimant's refugee status had already been recognised by another Contracting State which had issued to the claimant a travel document under Art 28 of the Convention and so was obliged to readmit the claimant to its territory. Von Doussa J, with whom Moore and Sackville JJ agreed, said at 562:

"It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, including a right to reside, enter and re-enter that country. The expression 'effective protection' is used in the submission of the Minister in the present appeal. In the context of the obligations arising under the Refugees Convention, the expression means protection which will effectively ensure that there is not a breach of Art 33 if the person happens to be a refugee."

10 The applicant in *Rajendran* was a Sri Lankan national who had a right of permanent residence in New Zealand, though he had not been recognised there as a refugee. At first instance Mansfield J, with whose approach the Full Court agreed, held, at 13, that the effect of the decision in *Thiyagarajah* was that:

"… for the purposes of determining whether Australia has protection obligations under the Convention, it is necessary to look to the individual circumstances of a particular visa applicant to determine whether, if Australia were to return that person to the third or intermediate country, Australia might be in breach of one of the operative Articles of the Convention (relevantly, Art 33). If not, then whether or not the visa applicant is a 'refugee' under Art 1, Australia has no protection obligations in respect of that person. If Australia would be in breach by such action, then it will be necessary to determine whether that person is a 'refugee' under Art 1."

11 His Honour continued, at 14:

"I conclude that it is not correct to restrict the operation of Thiyagarajah to cases where the third country has granted the visa applicant refugee status. The fundamental question is whether the status and legal entitlements of the visa applicant in the third country have the consequence that Australia is not obliged to assess the claim to refugee status."

12 His Honour proceeded to consider the applicant's status and rights in New Zealand. The findings of the Tribunal were that he had permanent resident status in New Zealand, was permitted to travel to and from New Zealand as he wished, subject to his obtaining a Returning Residence Visa; was entitled, after a period of residence, to become a citizen of New Zealand; and had, while in New Zealand, effective protection *"both generally and specifically from threats to his life or freedom on account of a Convention reason"* (at 15).

13 In *Gnanapiragasam,* the respondents were Sri Lankan nationals; the question was whether, assuming them to be refugees, Australia might nevertheless return them to Germany, an *"intermediate country"* where they had resided. Weinberg J held that it was not necessary, in order that Australia

be entitled to return the respondents to Germany, that they have a right of *"permanent residence"* there. The question to be addressed was (at 16):

"… whether Germany, which is of course a signatory to the Convention, is a country in which the life or freedom of the respondents would not be threatened (within the meaning of Art 33) and the Government of which would not send the respondents elsewhere in a manner contrary to the principles of the Convention."

14 His Honour stated, at 22, 23, the test to be applied by Tribunal:

"The RRT is required to ascertain as clearly as it can whether or not the respondents would be permitted to re-enter Germany, at least on a temporary basis, thereby enabling their claim to refugee status to be considered by that country. Neither Thiyagarajah nor Rajendran should be taken as stipulating as a minimal basis for the applicability of Art 33 that a person who has been resident in a third country before coming to Australia must be shown to have a continuing right to reside there permanently in order for the third country to be able to accord that person 'effective protection'.

It seems to me that a right to re-enter, albeit temporarily, the country in which the claimant has previously lived, together with the right, while proper consideration is given to any claim for refugee status, to leave and re-enter that country thereafter, renders Art 33 potentially applicable. Australia can then require the claimant to return to that 'safe third country' without the need first to consider his possible refugee status under Art 1A(2). The right to reside temporarily is capable, in any given case, of meeting the 'effective protection' criterion no less than the right to resume permanent residence.

That is not to say that a right to return to temporary residence will, of itself, be sufficient in any given case. Art 33 requires that there be 'effective protection' in the third country. Australia must be satisfied that the third country will consider any claim to refugee status in accordance with the Convention, and will not simply refuse entry and, without giving the claim any such consideration, return the claimant to the country from which he came originally."

15 Counsel for the Minister criticised the use of *"effective"* as an adjective qualifying *"protection"*. As counsel conceded, however, to criticise the use of that adjective is to swim against the tide; in any case, to say that the *"protection"* must be *"effective"* is, in my view, simply to emphasise that, in a practical sense, it must be genuine protection. What the cases emphasise is that the inquiry is directed to the position of the particular applicant. Has the applicant a right of admission (or readmission) to the third country concerned? Has the applicant a right to reside there? Will the third country give proper consideration to the applicant's claim for protection as a refugee? Information concerning the attitude of the third country generally to persons in positions analogous to that of the applicant is relevant to the inquiry. But the inquiry is directed to the rights and treatment which the third country will accord to the particular applicant.

16 Where the decision maker concludes, on the facts, that Art 33 precludes Australia from expelling or returning a claimant if the claimant is a refugee, it is then necessary, in order to determine whether Australia owes *"protection obligations"* to the claimant, to ascertain whether he or she is in fact a refugee. The Tribunal approached matters in a different order (that, by itself, it should be said immediately, does not involve error). It dealt first with the question whether the applicant was to be regarded as a refugee, in relation to each of Kuwait, Iraq and Jordan. It held that, though he was a *"refugee"* in relation to Kuwait, he was not in relation to either Iraq or Jordan. The Tribunal then considered the question whether, if contrary to its view the applicant was a refugee in relation either to Iraq or to Jordan, nevertheless, Art 33 did not preclude his return there.

17 The Tribunal, having stated its view of the tests to be applied in determining whether a country was to be regarded as one of former habitual residence, held that each of Iraq and Jordan was a country of the applicant's former habitual residence. A question then arose which the Tribunal stated as follows:

"Whether an applicant can have more than one such country for the purposes of Article 1A(2) of the Convention and if so, whether a well-founded fear of persecution must be established in relation to each, is not settled in Australian law. The Tribunal agrees with the view of Grahl-Madsen (The Status of Refugees in International Law, Sijthoff-Leyden, 1966, Volume I, at p. 160-61) that it is possible to have more than one such country, and that where an applicant has more than one country of habitual residence, a well-founded fear of Convention persecution must be established in relation to each. According to Grahl-Madsen:

> In such case, it seems fair to apply the second sub-paragraph of Article 1A(2) mutatis mutandis, or [in] other words, to require that the person concerned shows a well-founded fear of being persecuted in both of them in order to qualify as a refugee.
> It would seem to be best in keeping with the intention of the drafters if in the greatest possible number of cases, application of the term 'country of former habitual residence' would lead to the same practical result as application of the term 'country of nationality'.

This view is consistent with the policy of the Convention as articulated by academics and Australian courts, that Convention protection is intended to meet the needs of those who have no alternative to seeking international protection. … That is, it provides the protection of the international community to those who really need it."

18 The relevant portions of the definition of *"refugee"* in Art 1 of the Convention are as follows:

"A. 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; or who, not having a nationality and being outside the country of his former habitual residence …, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national. …"

19 In *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421 at 427 Cooper J said:

"… it is apparent that the object of the Convention was to treat uniformly persons seeking refugee status, so far as was possible, whether or not those persons had a nationality. This equality of treatment is seen in the equation of country of nationality with country of former habitual residence and in the inability or unwillingness to obtain the protection of the country of nationality with the inability or unwillingness to return to the country of former habitual residence. And finally, the object of the draft Convention was to provide sanctuary to persons who had a well founded fear of persecution for a Convention reason and not for any other reason."

20 I respectfully agree with that conclusion and with the reasons which led his Honour to it. Two particular consequences were held to follow. One was that a stateless person was to be regarded as a refugee only if he or she was in the first place outside the country of former habitual residence as a result of a well-founded fear of persecution for a Convention reason. In this respect the Convention should not be construed as treating stateless persons substantially more favourably than persons having a nationality. And, properly construed, the Convention gave equality of treatment to stateless persons and those with a nationality in another respect: the formulation *"unable to return to the country of his former habitual residence"* was (like *"unable … to avail himself of the protection of that country"*) to be regarded as describing inability for any reason, not merely a well-founded fear of persecution. In other words, if a claimant were unable for any reason to return to the country of former habitual residence, he or she was a refugee if, and only if, the reason for the claimant's absence from the country of former habitual residence was a (past) well-founded fear of persecution; it did not matter that the well-founded fear did not continue.

21 Cooper J did not consider – the question did not arise – whether it was possible for a person to have more than one country of former habitual residence in the Convention sense. Nor was that question explicitly considered in *Tjhe Kwet Koe v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 289 which shortly preceded *Rishmawi*, though it may be that

the judgment in *Koe* proceeds on the assumption that it is possible for a person to have more than one such country. In principle, there is no obvious reason why that should be regarded as impossible. Cullen J, in *Maarouf v Minister of Employment and Immigration* (1993) 23 Imm LR (2d) 163, cited in *Tjhe Kwet Koe* at 294, appears to have thought it possible; and, importantly in my view, what is commonly known as the UN Handbook (*Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992) includes the following passage dealing with the words of the Convention *"or who, not having a nationality and being outside the country of his former habitual residence …, is unable or, owing to such fear, is unwilling to return to it"*:

"101. This phrase, which relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of stateless refugees, the 'country of nationality' is replaced by 'the country of his former habitual residence', and the expression 'unwilling to avail himself of the protection …' is replaced by the words 'unwilling to return to it'. In the case of a stateless refugee, the question of 'availment of protection' of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.

102. It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

103. Such reasons must be examined in relation to the country of 'former habitual residence' in regard to which fear is alleged. This was defined by the drafters of the 1951 Convention as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned'.

104. A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.

105. Once a stateless person has been determined a refugee in relation to 'the country of his former habitual residence', any further change of country of habitual residence will not affect his refugee status."

22 That passage, in my view, both affirms that a person may have more than one country of former habitual residence and indicates important limitations on the consequences that follow from that proposition. It is, I think, no accident that the Convention makes particular provision (Art 1A(2); and see *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 508) for persons with dual or multiple nationalities but not, correspondingly, for persons with more than one country of former habitual

residence. Countries and their nationals have (see the discussion in *Jong Kim Koe* at 515-517) reciprocal rights and duties which do not necessarily arise as between a country and non-citizens who reside (or have resided) within its territory. Subject to limitations of kinds indicated in *Jong Kim Koe*, a claim to be a refugee made by a person having dual nationalities will be assessed by reference to each country of nationality; but it does not follow that a stateless person who has had more than one country of former habitual residence is necessarily to be assessed, in relation to a claim for recognition as a refugee, by reference to each of those countries. Indeed, to approach the matter in that way would be to distinguish between persons with a nationality and stateless persons significantly to the detriment of the latter. A person who has a nationality, who has left the country of nationality owing to persecution for a Convention reason and is, as a result of a fear of such persecution, unwilling to return or is unable to avail himself or herself of the protection of that country, remains a refugee no matter in how many intermediate countries he or she may have resided and however many of them may correctly be described as countries of former habitual residence. It would be surprising if a stateless person who, owing to a well-founded fear of persecution for a Convention reason, had left (was outside) a country of former habitual residence and was unable or, due to such a fear, unwilling to return to that country, ceased to be a refugee merely because of subsequent habitual residence in another country in which he or she had no fear of persecution. That the Convention definition does not have that surprising result is precisely what the UN Handbook says: a stateless person may have more than one country of former habitual residence; he or she may have a fear of persecution in relation to more than one of them; but the definition does not require that he or she satisfy the criteria in relation to all of them; rather, if the person satisfies the criteria in relation to one of those countries (I do not think *"determined to be a refugee"* should be taken as requiring some earlier formal assessment) the person's status is not affected by a *"further change to his country of habitual residence"*. That reasoning in the Handbook is supported by the Travaux Préparatoires of the Convention: see *Rishmawi* at 424-427.

Tribunal's reasoning on applicability of definition of "refugee"

23 If my conclusions about the construction of the Convention definition of *"refugee"* are correct, it follows that the Tribunal made an error of law. Having decided that, considered by reference to Kuwait, the applicant was a refugee it should not have proceeded to consider the applicant's status as a refugee by reference to his reasons for being outside Iraq or Jordan (or by reference to the question whether he had a well-founded fear of persecution should he be returned to either of those countries). The consequence of the Tribunal's conclusion that, considered by reference to Kuwait, the applicant was a refugee was that he must continue to be regarded as a refugee so that (as would be the case if he were a Kuwaiti national) he could be returned to Iraq or Jordan only if either of those countries would offer

him *"effective protection"* in the *Thiyagarajah* sense. Argument before me, however, dealt almost exclusively with the *Thiyagarajah* principle and almost not at all with the construction of the Convention definition in relation to stateless persons. That has consequences for the final disposition of this application, to which I shall return.

Tribunal's reasons concerning "effective protection" of applicant

(a) Iraq

24 The Tribunal's finding was expressed as follows:

"In my view, the applicant would be allowed to re-enter Iraq. … I find furthermore, that there is no real chance that the applicant will be sent back to Kuwait if he returns to Iraq …"

25 The matters which led the Tribunal to that conclusion may be shortly summarised: the applicant and his family were able to reside in Iraq and to rent accommodation there, with the approval of the authorities. They were able to use the food ration system available to Iraqi nationals. Country information indicated that *"bedoons in Iraq have been treated generously and have not generally been persecuted"*; the applicant held *"some form of Iraqi identity document"* that enabled him to live and travel there; even if the applicant left Iraq illegally, *"this should not prevent him from returning to Iraq as a bedoon from Kuwait"*; the applicant's wife was an Iraqi citizen with relatives there; and, according to country information, *"bidoons [sic] from Kuwait have not been sent back to that country from Iraq"*.

26 That last statement appears to be based on a misunderstanding of the departmental cable referred to (counsel for the Minister accepted that the cable does not make, in terms, the statement attributed to it). In any case the Tribunal's reasons do not, in my view, correctly reflect the test discussed in *Thiyagarajah* and the cases following it. The material referred to in support of the conclusion that the applicant will be permitted to enter Iraq is of a very general character and does not specifically address the position of someone, such as the applicant, who has sought refuge in, and is returned from, a country outside the region. In other words, in my view, the reasoning does not focus sufficiently on the particular position of the applicant. Nor, in my view, is it sufficient, in the light of the cases, simply to find that the applicant would be admitted and would not be returned to Kuwait. The requirement that the third country, to which an asylum seeker is to be returned, offer effective protection means, in my view, that consideration be given to the terms on which the asylum seeker will be admitted. I have quoted the passages, in the recent judgments of the Court, which indicate the nature of the tests to be applied.

(b) Jordan

27 The Tribunal found that the applicant would be allowed to re-enter Jordan, albeit temporarily. In the Tribunal's view, the Jordanian authorities would grant the applicant a three month visa, renewable for three months, during which time a residency permit could be sought or the recognised refugee assessment agency approached. There was no real chance that the applicant would be returned either to Kuwait or to Iraq.

28 In reaching that conclusion, the Tribunal relied on the circumstances that the applicant and his family had been allowed to enter and reside in Jordan without being troubled by the authorities; that country information suggested that Jordan had been generous in receiving refugees from Iraq; and that the applicant's wife and children still live there. The Tribunal quoted what it described as Jordan's Law Number 24 of 1973, said to provide that *"international laissez-passers shall be issued to stateless persons and persons with no established nationality, refugees recognised as such … ."* The Tribunal also stated that Jordan usually gives a *"reprieve in respect of strict application of immigration laws"* to asylum seekers who claim to be Bedoons and have entered Jordan clandestinely; and Jordan respects refugees' rights of asylum.

29 It is by no means clear on what basis the Tribunal held that the applicant would receive a three month visa, except, perhaps, that that was what he had received previously. Nor did the Tribunal give any particular consideration to the procedures available to the applicant, should he be returned, for seeking residency or recognition as a refugee. Neither, more importantly, did the Tribunal consider the particular situation of the applicant (a situation not particularly dealt with in the country information referred to) as a person being returned from outside the region, after an unsuccessful attempt to obtain asylum, rather than a Bedoon clandestinely crossing the border from Iraq. It appears that the Tribunal had some discussions with an official of the Jordanian Embassy; the reasons include the following observation about that:

"In informal discussions with the Tribunal on 4 November 1998, an official from the Embassy of Jordan in Canberra said nothing which would detract from these views on Jordan's policy towards refugees, whether Iraqis or bedoons, who arrived in Jordan legally or illegally."

30 It is fair to say that that is a somewhat cryptic account. A conversation on a wide number of topics could, with literal accuracy, be recorded in those terms. Particularly, there is no suggestion that the discussion focused on the particular situation of an asylum seeker returned from Australia. So far as can be gathered, the discussion appears to have been of a substantially more general nature.

31 Counsel for the Minister suggested that the Tribunal was under no obligation to make more specific inquiries and that it was up to the applicant to put before the Tribunal, if he could do so, information which indicated that, in his particular case, Jordan would not offer *"effective protection"*. That submission referred particularly to the Law Number 24 on which the Tribunal relied, of which the applicant's solicitors had been able to obtain, through

publicly available sources, a copy which may not have been current. It was suggested by the applicant that, equally, the copy relied upon by the Tribunal may not have been current. The Minister's submission was that the Tribunal was entitled to rely upon what it had; it was not obliged to seek further.

32 That, it seems to me, is not an issue of central importance. The meaning of the law quoted by the Tribunal is by no means clear in its application to a person such as the applicant. In applying the *Thiyagarajah* test, the Tribunal was obliged, on the assumption that the applicant was a refugee, to determine whether Art 33 of the Convention was applicable. That required the Tribunal to decide whether Jordan would offer the **applicant** protection of the kind discussed in the cases. Again, in my view, the Tribunal did not focus on that central question. In my view (as in its reasons in relation to Iraq) the Tribunal misapprehended the test to be applied. That is an error as to the interpretation of the applicable law.

33 This case is, perhaps, reasonably close to the borderline. Since the hearing of the application, the solicitor for the Minister has referred me to the reasons for judgment of Whitlam J in *Saket v Minister for Immigration and Multicultural Affairs* [1999] FCA 301, delivered on 25 March 1999. That case, in some respects, closely resembles this. The applicant was a stateless Bedoon, born in Kuwait. He was expelled to Iraq, from where he and his family travelled and settled in Syria. About two years later the applicant travelled to Australia and applied for a protection visa. Whitlam J declined to set aside the decision of the Tribunal by which it affirmed the refusal of the application. His Honour held that the Tribunal had correctly applied the *Thiyagarajah* test; particularly, it had not erred by relying on information from the Department of Foreign Affairs and Trade, and by not making inquiries of its own of those representing Syrian interests in Australia. There can, with respect, be no cavil with anything his Honour said on those subjects. What is notable about *Saket*, however, is both that the country information relied on was more specific than the corresponding information before the Tribunal here, particularly as to the rights accorded by Syria to Arab non-citizens, and that the Tribunal asked questions of, and obtained answers from, the Department specifically directed to the situation of a Bedoon in Australia seeking asylum here. The Tribunal in *Saket* thus addressed the right question and obtained information relevant to that question. As I have explained, I do not think that, in this case, the Tribunal proceeded on a correct understanding of the *Thiyagarajah* test.

Conclusion

34 It follows, subject to one matter, that the application should succeed and the matter should be remitted to the Tribunal for re-determination in accordance with law. The applicant being in immigration detention, it is important that final orders be made without undue delay. However, because the Convention definition of *"refugee"* was not substantially dealt with in argument and because my reasons are, to a significant extent, based on a view of the way in which the definition operates in the case of a stateless

person, it is appropriate that the Minister – and the applicant as well – should have the opportunity to submit further argument on that matter. The argument on both sides assumed that the issue was *"protection"* by Iraq or Jordan; implicit in that assumption is a proposition that, even if it were correct to assess the applicant as a refugee separately in relation to each of those countries as well as Kuwait, he would be rightly regarded as a refugee if he could find *"protection"* neither in Iraq nor in Jordan. The assumption, in other words, seemed to be that on the facts as found by the Tribunal an answer to the *Thiyagarajah* question would dictate the answer to the question whether, in relation to Iraq or Jordan, the applicant was a *"refugee"*.

35 In those circumstances, the appropriate course, I think, is to indicate the orders which follow from my conclusions, but to give the parties the opportunity to consider my reasons and make further submissions on the *"refugee"* point if they wish.

36 The orders which would follow from my reasons are that:

1. The decision of the Refugee Review Tribunal dated 10 November 1998 be set aside.

2. The matter be remitted to the Refugee Review Tribunal for re-determination in accordance with law.

3. The respondent pay the applicant's costs.

37 I shall stand the matter over to 9:30 am on 15 April 1999. If either party, before that date, notifies the other party and my associate that he wishes to submit further argument, I shall on 15 April make directions with a view to ensuring that submissions are made, and the matter is disposed of, promptly. If neither party does so, then on 15 April I shall make the orders I have indicated.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lehane.

Associate:

Dated: 1 April 1999

Counsel for the Applicant:	Mr N C Poynder

Solicitor for the Applicant:	Legal Aid Commission of NSW
Counsel for the Respondent:	Ms R M Henderson
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	5 March 1999
Date of Judgment:	1 April 1999