FEDERAL COURT OF AUSTRALIA

Minister for Immigration& Multicultural Affairs v Amani [1999] FCA 1040

MIGRATION – refugees – application by Minister for review of a decision of the Refugee Review Tribunal that application for protection visa be remitted to Minister for reconsideration with direction that applicant for visa is a person to whom Australia has protection obligations under the "Refugees Convention" – whether any utility in undertaking review of that decision – effect of Tribunal's direction that a prescribed matter be remitted for reconsideration in accordance with Tribunal's directions – whether Tribunal should have considered whether effective protection was available in a third country – whether Tribunal erred in failing to make enquiries whether third country could provide effective protection for the respondent – whether Tribunal misunderstood the relevant law.

Judiciary Act 1903 (Cth) s 39B

Migration Act 1958 (Cth) Pt 2 Div 3 Subdiv AI; Div 8; (ss 91A – 91G); ss 36, 65, 411, 411(1), 412, 414, 415, 415(1), 415(2), 415(3), 420, 427(1), 475(1), 476, 479 481, 485; pars 411(1)(c), 415(2)(c), 427(1)(d), 476(1)(a)

Migration Regulations 1994 (Cth) reg 4.33

J Crawford, P Hyndman, "Three Heresies in the Application of the Refugee Convention", *International Journal of Refugee Law* 1 (1989) 155

G S Goodwin-Gill, *The Refugee in International Law* (2nd Ed), (Oxford: Clarendon Press, 1996)

K Hailbronner, "The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective", *International Journal of Refugee Law* 5, (1994) 31

J C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991)

Shorter Oxford English Dictionary (3rd Ed), (Oxford: Clarendon Press, 1973)

Benson v Benson (1941) P 90 cited

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 cited

Minister for Immigration and Ethnic Affairs v Singh (1997) 74 FCR 553 cited

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

Ali v Minister for Immigration and Multicultural Affairs [1998] FCA 578 cited

Hussein v Minister for Immigration and Multicultural Affairs [1999] FCA 288 cited

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

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 151 ALR 685 cited

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v HAKIZIMANA AMANI

W 2 OF 1999

LEE J

2 AUGUST 1999

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 2 OF 1999

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Applicant
AND:	HAKIZIMANA AMANI

	Respondent
JUDGE:	LEE J
DATE OF ORDER:	2 AUGUST 1999
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

The application be dismissed with costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 2 OF 1999

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Applicant
AND:	HAKIZIMANA AMANI Respondent

JUDGE:	LEE J
DATE:	2 AUGUST 1999
PLACE:	PERTH

REASONS FOR JUDGMENT

1 This is an application by the Minister for Immigration and Multicultural Affairs ("the Minister") under s 476 of the *Migration Act 1958* (Cth) ("the Act") seeking review of a decision made by the Refugee Review Tribunal ("the Tribunal").

2 On 22 May 1998 the respondent ("Mr Amani") arrived in Australia from South Africa. He was then twenty-seven. Mr Amani had travelled to Australia on a South African passport endorsed with a visa permitting entry into this country. On 4 June 1998 Mr Amani reported to the Minister's department where he was interviewed by an officer. In the course of that interview the visa was cancelled. The grounds for cancellation were that upon entering Australia Mr Amani had produced a false passport and the visa had been obtained as a result of false information supplied to Australian authorities in South Africa.

3 At the interview Mr Amani applied for the issue of a protection visa claiming that he feared persecution if he were returned to his country of nationality. Mr Amani stated that his country was Burundi and that he was a member of the Hutu ethnic group. It was not in dispute that at material times Burundi was controlled by the Tutsi and that regular and indiscriminate acts of persecution against Hutu people were carried out, or sanctioned, by Burundi authorities.

4 On or about 21 August 1998 a delegate of the Minister considered the application for a protection visa and, not being satisfied that a criterion prescribed by s 36 of the Act had been satisfied, refused the grant of a visa, as required by s 65 of the Act.

5 The decision of the delegate was an "RRT-reviewable decision" to which s 411 applied and Mr Amani applied to the Tribunal under s 412 of the Act to have the decision reviewed. On 17 December 1998 the Tribunal made the following direction on the application for review:

"The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention."

6 Under s 475(1) of the Act, a decision of the Tribunal is a "judicially-reviewable decision" and application may be made to this Court under s 476 for review of that decision. Section 479 provides that the Minister may apply for such a review.

7 The instant case raises a threshold question of the nature of the determination made by the Tribunal and whether it is appropriate for this Court to undertake a review if there would be a lack of utility in so doing. The Court did not receive full argument on the issue. The limited submissions that were made by counsel for the parties were *ad idem* and supported continuation of the proceeding. Therefore, the substantive point raised by the Minister in his application for review must be determined, but some comments may be made on the foregoing question.

8 Under s 414 of the Act the Tribunal must review an "RRT-reviewable decision" if a valid application for review is made to the Tribunal. Section 415(1) states that in conducting the review the Tribunal may exercise all the powers and discretions conferred by the Act on the person who made the decision and under s 415(2) may:

"(a) affirm the decision; or

(b) vary the decision; or

(c) if the decision relates to a prescribed matter – remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or

(d) set the decision aside and substitute a new decision."

9 Regulation 4.33 of the *Migration Regulations 1994* (Cth) ("the Regulations") states that an application for a protection (Class AZ) visa is prescribed for the purposes of par 415(2)(c) and that it is a "permissible direction" under that paragraph "that the applicant must be taken to have satisfied the criteria for the visa that are specified in the direction".

10 Section 415(3) provides that if the Tribunal varies a decision, or sets aside a decision and substitutes a new decision, the decision as varied, or substituted, is taken to be a decision of the Minister. Neither the affirming of a decision nor the remitting of a matter for reconsideration is "taken to be" a decision of the Minister. With regard to decisions affirmed by the Tribunal, it may be assumed that the decisions, whether made by the Minister personally or by a delegate, continue as decisions of the Minister and not as a decision of the Tribunal, other than for the purpose of "appeals" from decisions of the Tribunal. The reference to "appeals" in s 415(3) must mean, *inter alia*, applications to this Court for review of "judicially-reviewable decisions" under s 476.

11 With regard to a direction that a prescribed matter be remitted for "reconsideration" in accordance with such directions or recommendations of the Tribunal as are permitted by the Regulations, the question arises as to the effect of such a direction by the Tribunal.

12 A determination of the Tribunal in the terms described in par 415(2)(c), remitting an application for a protection visa to a primary decision-maker for reconsideration, must be taken to have, at least, set aside the decision under review, without substituting a new decision therefor. The entire matter of the application is remitted to the primary decision-maker for reconsideration and re-determination. Presumably, that re-determination by the Minister, or delegate, would be an "RRT-reviewable decision" under s 411 of the Act.

13 If nothing further were done by the Tribunal, it is difficult to see that any useful purpose would be served by determining an application to this Court to review such a decision by the Tribunal. Upon the matter being so remitted by the Tribunal, all discretions and powers conferred by the Act would be available to the Minister and the Minister would determine the application according to law. A decision of the Tribunal which sets out the Tribunal's understanding of the law may assist the Minister but could not control the application of the law by the Minister to the relevant facts as found by the Minister. There would be no utility in this Court applying resources to a proceeding to determine whether the review performed by the Tribunal should be set aside and done again when, by reason of the Tribunal's decision, the Minister, forthwith, may determine afresh whether the application for a visa is to be granted or refused.

14 In the present case the Tribunal has "directed" that Mr Amani "is a person to whom Australia has protection obligations under the Refugees Convention". That direction is not expressed in the words of reg 4.33, namely "must be taken to have satisfied" such a criterion. For the purpose of this case the direction is assumed to be within the terms of the Regulations.

15 What is the intended effect under the Act of such a direction? It cannot have the effect of an order made by this Court under s 481 of the Act which binds the parties to the application as the order of a superior court of record. It is an administrative direction which has such force as the Act may provide, a question to be determined by construction of the Act.

16 Reconsideration of the matter must entail consideration by the decision-maker of such material as is put before that person, or is obtained by that person, in the exercise of powers and discretions provided by the Act. The material before the decision-maker when the decision-maker reconsiders the application for a protection visa may differ in significant respects from material available when a decision was made on the application by another decision-maker on an earlier occasion. Therefore, it could not have been contemplated by the Act that a decision of the Tribunal to remit an application for reconsideration will bind the eventual decision-maker as to what findings of fact may be made or how a discretion available to that person may be exercised.

17 Counsel for the Minister conceded that in some circumstances, for example, where there is fresh material which suggests that there are changed circumstances in the country of nationality, or that the application is fraudulent, it could not be argued that the direction of the Tribunal could bind the Minister.

However, the word “directions” as used in par 415(2)(c) cannot be taken to have variable meaning according to circumstances. Where the paragraph refers to “directions or recommendations” the Tribunal may make, the directions contemplated are not directions in the sense of a binding order issued by a body empowered to compel parties to whom the order is directed. (See: *Benson v Benson* (1941) P 90.) It should be assumed that this provision in the Act refers to directions in the sense of assistance, guidance, instruction or aid to administrative functions. (See: *Shorter Oxford English Dictionary* (3rd Ed), (Oxford: Clarendon Press, 1973), at 556.) It is intended to be a facultative measure, in the nature of an emphatic recommendation, not a binding order. It is a directory provision, not mandatory.

18 It would follow that a decision to remit to the Minister an application for a visa for reconsideration in accordance with directions made by the Tribunal, will not have the effect under the Act of fettering, or limiting, the exercise of the Minister’s powers or discretions in determining the application. No assistance from this Court in the form of an order setting aside such directions would be required by the Minister to enable the Minister to carry out his, or her, functions under the Act.

19 I turn now to the grounds for review relied upon by the Minister.

20 The relevant facts are as follows. Mr Amani resided in South Africa for a period of eight to twelve months before arriving in Australia. His entry into South Africa was irregular and was not made with the formal permission of that country. During his period of residence in South Africa he supported himself as a “hawker”, no doubt a regular means of subsistence for persons who illegally enter that country.

21 No material was put before the Tribunal to show how South Africa treated persons in that country displaced from Burundi, whether South Africa had acceded to the 1951 Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees (collectively referred to as “the Refugees Convention”), or whether South Africa would provide travel documents and accept Mr Amani if Australia decided to return him to that country.

22 The Minister submits that before the Tribunal could determine whether Australia had protection obligations under the Refugees Convention, a criterion for the grant of the visa stipulated in s 36 of the Act, the Tribunal had to consider whether effective protection was available to Mr Amani in a third country, namely South Africa.

23 The question the Minister submits the Tribunal was obliged to consider appears to be a compendious concept of a “safe country” which involves a discretion to return a person to a third country, without determining the refugee status of that person, and an assumption that the discretion will be so exercised whenever it arises. The matter of the return of a person to a third country seems to be particularly ill-suited for the application of such an assumption. Obviously, sensitive political considerations arise in such

decisions and possibly bilateral arrangements or understandings will be involved, all being issues particularly suited to the application by the Minister of policies established by the executive arm of government. As has been commented: "Safe country determinations involving elements of discretion must remain within the area of the government's political responsibility." (See: K Hailbronner, "The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective"*, International Journal of Refugee Law* 5, (1994) 31 at 56.)Unilateral decisions based on the concept of a safe country may lead to a waste of time and effort and be detrimental to international comity. International agreement on how the concept is to be applied is essential. (G S Goodwin-Gill, *The Refugee in International Law* (2nd Ed), (Oxford: Clarendon Press, 1996) at 339, [Footnote 65], 340 – 341, 344.)

24 The ill-defined circumstances in which the discretion may be exercised and the variable consequences that may follow may be contrasted with the contents of Pt 2 Div 3 Subdiv AI (ss 91A – 91G) of the Act, in which it is provided that certain non-citizens, in relation to whom there is a prescribed "safe third country", cannot apply for a protection visa and that they are subject to removal from Australia under Div 8. The provisions give effect to the terms of agreements made between Australia and a "safe third country". The "safe third country", and the connection between the non-citizen and that country which triggers the operation of the subdivision, are prescribed by regulation. The provisions have limited duration. They are directed at the international problem of "Indo-Chinese Refugees" and follow an accord reached at an international conference.

25 That is, the Act defines circumstances in which particular non-citizens who arrive in Australia are deemed to have a safe country and are unable to make application for a protection visa. The discretion available at law and, impliedly, under the Act to waive the power to remove a non-citizen who has a safe country and to proceed to determine an application for a protection visa made by that person, has, in the case of certain non-citizens, been replaced by express statutory provisions.

26 Under s 91F(1), if the Minister thinks it is in the public interest to do so, the Minister may permit a non-citizen of the specified class to apply for a protection visa. Under s 91F(2), that discretion is exercisable only by the Minister personally. If the Minister grants permission, then notwithstanding that there is a prescribed safe third country for that person, the person may apply for a protection visa, and that application may be determined. Obviously, it could not be said that the protection visa applied for could not be granted because Australia had no protection obligation to that person under the Refugees Convention by reason of the existence of a safe country for that person.

27 Whether it may be said that a decision made by the Minister is an exercise of executive power available under international law and not a decision made under the Act is unnecessary to consider. If such a decision were not a decision made under the Act and, therefore, not a judicially-reviewable decision under s 476 of the Act, a right of review may be obtained

in this Court pursuant to s 39B of the *Judiciary Act 1903* (Cth) as a matter arising under federal legislation, not being a matter to which s 485 applies. A requirement of international law that there be appropriate review mechanisms available in respect of such decisions would thereby be satisfied.

28 Where a non-citizen has a safe country and makes an application for a protection visa, not being a person to whom the special provisions referred to above apply, the question to be determined is whether the person is to be returned to the safe country without determining the application for a visa and the status of the applicant.

29 First, there must be a finding or decision by the Minister, or his delegate if so authorised, that the person has a safe country. Thereafter a decision must be made whether that person is to be returned to that country or the application for a protection visa determined.

30 Neither decision would be an "RRT-reviewable decision" under s 411(1) of the Act unless par 411(1)(c) may be said to extend to a decision not to consider an application. The Act provides consequences where a visa application has been considered and refused and declining to consider an application would not attract those consequences. In s 411 the Act contemplates formal consideration and refusal as an RRT-reviewable decision, not the exercise of a discretion by the Minister not to consider an application. That may be contrasted with the express provisions for judicial review in such circumstances provided in s 477 of the Act. The decision may be a judicially-reviewable decision in respect of which this Court has jurisdiction under s 476 of the Act.

31 Under the Refugees Convention a contracting party has obligations which arise when a refugee is in that country but the obligations may be terminated, and no breach of the Refugees Convention committed, by returning a refugee to a country that is a safe country for that person, namely a country that has provided "effective protection" for that person.

32 However, the "obligation to consider the grant of asylum is not ultimately affected, and is certainly not displaced, by the fact that some other State might reasonably be expected to consider the request first". (J Crawford, P Hyndman, "Three Heresies in the Application of the Refugee Convention", *International Journal of Refugee Law* 1 (1989) 155 at 172.)

33 Under Art 33 of the Refugees Convention, the obligation on a contracting State not to expel or return a refugee extends to a person who has sought asylum and has not been formally recognised as a refugee. (See: G S Goodwin-Gill, *The Refugee in International Law*at 137.) However, the return of such a person to a safe country for that person will not infringe Art 33 or general international law. That is, a contracting State may so act without determining whether that person has a well-founded fear of persecution if returned to the country of nationality. There is no obligation under the Refugees Convention for a contracting State to determine a refugee claim and refrain from returning the applicant to a safe country before determining that

application. (See: G S Goodwin-Gill, *The Refugee in International Law* at 337, [Footnote 59].)

34 If a contracting State so acts, the third country becomes the responsible country for determining refugee status and the request for asylum. As far as international law is concerned, a State may determine whether an asylum seeker is a refugee but does not become obliged to do so unless it proposes to take steps to return that person to a country where life or freedom is threatened. (See: G S Goodwin-Gill, *The Refugee in International Law* at 341.)"The most that can be said at present is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter."

(G S Goodwin-Gill, The Refugee in International Law at 343.)

35 Pursuant to the foregoing a State may defer its pendent duty to determine an application for asylum and shift responsibility for such a determination to a country with which the applicant for asylum has pre-existing affiliation or close links. In other words, assessment procedures are suspended if the applicant is required to seek protection from that third country. (See: J C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), at 46 – 47.)

36 In the present case the Minister, by a delegate, took no step to suspend the assessment and, indeed, proceeded to decide that Mr Amani was not a refugee and, therefore, was not a person to whom Australia had protection obligations under the Refugees Convention. The decision the Tribunal was able, and obliged, to review was the decision that the grant of a visa be refused. No decision was made to suspend, or put aside, consideration of the application for a protection visa and determination of whether Mr Amani was a person to whom Australia had protection obligations under the Refugees Convention. If such a decision had been made, as noted above, it was unlikely to have been a decision able to be reviewed by the Tribunal under s 411 of the Act, and would not appear to be a decision the Tribunal is empowered to make under s 415 upon review of a decision not to grant a protection visa.

37 If the foregoing analysis is not correct and the question whether Mr Amani could obtain "effective protection" in a third country was an issue to be determined by the Tribunal, on the facts of this case the issue barely arose. The relevant facts were that Mr Amani had entered South Africa illegally and had spent one year, or less, in that country obtaining subsistence as a hawker. Those facts were insufficient to provide a discretion to return Mr Amani to South Africa.

38 If, as should be accepted, the minimum requirement for exercise of a discretion to decline to consider an application for asylum, is substantial evidence of admissibility to South Africa, no evidence to that effect was before

the Tribunal. At law, the Tribunal could not have made a determination on that evidence that Australia should suspend any obligations it may have to Mr Amani under the Refugees Convention and return Mr Amani to South Africa.

39 It was submitted by the Minister that the Tribunal erred in law in failing to make enquiries to obtain material relevant to that issue. To date it has not been held that the review procedure prescribed by the Act includes a duty that the Tribunal make further enquiries, in other than strictly limited circumstances. (See: *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553.)

40 In so far as *Prasad* based the requirement on the failure so to act being an exercise of power so unreasonable that no reasonable person would have so exercised it, that is a ground of review now expressly excluded by s 476. In so far as *Singh* predicated that the failure to make further enquiries may amount to a denial of substantial justice in particular circumstances and failure to observe the requirements of s 420 of the Act, the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 has determined that such an event has no consequence under s 476 in respect of the grounds of review provided thereunder.

41 *Singh*, however, also raised the question whether a duty to make enquiries could be imposed by par 427(1)(d) of the Act, and failure to act pursuant to that duty could be a failure to observe procedures required by the Act to be observed, a ground of review provided in par 476(1)(a). If the duty does arise under par 427(1)(d), it could only be in the circumstances posited by Wilcox J in *Prasad*, namely “in a case where it is obvious that material is readily available which is centrally relevant to any decision to be made”. (See: *Ali v Minister for Immigration and Multicultural* Affairs [1998] FCA 578 at 8; *Hussein v Minister for Immigration and Multicultural Affairs* [1999] FCA 288.)

42 In this case, the material considered by the Minister’s delegate, being material gathered by the Minister’s officers, did not show that it was obvious that other material of cardinal relevance to the issue whether Mr Amani had a right of admission to South Africa, a right to reside in South Africa, and whether South Africa would give proper consideration to Mr Amani claim for protection as a refugee, was readily available. (See: *Al-Anezi v Minister for Immigration and Multicultural Affairs* [1999] FCA 355 at [15].)

43 The latter question is not answered by ascertaining whether South Africa is a contracting State under the Refugees Convention. A contracting State may maintain that it has no responsibility for determining a claim to refugee status by a person who has departed from that State. The Tribunal had no reason to conclude that any such material was readily available and, indeed, in the circumstances the Tribunal may have concluded that it was not.

44 Counsel for the Minister submits, however, that it was apparent on the face of the reasons that the Tribunal did not turn its mind to the question

whether Mr Amani had a safe country and, therefore, it should be concluded that the Tribunal misunderstood the relevant law it was required to apply. The submission continued that even if the Tribunal had no duty to make further enquiries, and the material before the Tribunal was inadequate to attract the relevant law, any misunderstanding of that law by the Tribunal would vitiate the decision it had made. It was submitted that the decision should be set aside and the matter reconsidered by the Tribunal where upon it may decide that it was appropriate to exercise the powers provided by s 427(1).

45 Such a submission may have weight if it can be shown that the Tribunal had misinterpreted the relevant law. In the present case it may be speculated that the Tribunal did not turn its mind to that part of the law discussed in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 151 ALR 685, and in subsequent decisions of the Court, but if the material before the Tribunal did not attract the law referred to in those decisions, it is impossible to say that the Tribunal misunderstood the task it was to perform according to law, and did not conduct an appropriate review on the material before it, with the consequence that it must be ordered to do it again.

46 The application will be dismissed.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated:

Counsel for the Applicant:	P R Macliver
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	H N H Christie
Solicitor for the Respondent:	Legal Aid, Western Australia
Date of Hearing:	2 July 1999
Date of Judgment:	2 August 1999