FEDERAL COURT OF AUSTRALIA

Anwari v Minister for Immigration & Multicultural Affairs

[2002] FCA 217

MIGRATION – application for protection visa – rejection of applicant's claim to be a national of Afghanistan – whether Tribunal obliged to find that the applicant was a person not having a nationality – whether Tribunal obliged to consider whether applicant was a habitual resident of Afghanistan.

Migration Act 1958 (Cth) ss 36(2), 425, 476(1)

Migration Legislation Amendment (Judicial Review) Act 2001 (Cth)

Migration Amendment Act 1991 (Cth)

Hussain v Minister for Immigration & Multicultural Affairs [2001] FCA 523 – applied

Yusuf v Minister for Immigration & Multicultural Affairs (2001) 180 ALR 1 – applied

Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 – referred to

MUHAMMAD ALI ANWARI v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

S.108 of 2001

MANSFIELD J

15 MARCH 2002

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S.108 OF 2001

BETWEEN:	MUHAMMAD ALI ANWARI APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	MANSFIELD J
DATE OF ORDER:	15 MARCH 2002
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The application is dismissed.

2. The applicant pay to the respondent costs of the application to be taxed.

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S.108 OF 2001

BETWEEN:	MUHAMMAD ALI ANWARI APPLICANT

AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	MANSFIELD J
DATE:	15 MARCH 2002
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 This is an application to review a decision of the Refugee Review Tribunal (the Tribunal) given on 13 July 2001. The Tribunal affirmed a decision of a delegate of the respondent made on 28 March 2001 refusing to grant a protection visa for which the applicant had applied under the *Migration Act 1958* (Cth) (the Act) on 22 January 2001. As the application to the Court was made on 20 July 2001, before the commencement of the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) on 2 October 2001, the Act as in force on the date of the application applies.

2 The real issue before the Tribunal was whether the applicant satisfied the criterion specified in s 36(2) of the Act for the grant of the visa, namely whether the Tribunal was satisfied that he is a person to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol, using those terms as defined in the Act (the Convention). The applicant would have met that criterion if the Tribunal were satisfied that he is a refugee as defined in Article 1A(2) of the Convention. It defines a refugee as 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or, 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."

The claims and the Tribunal's reasons

3 The applicant is a young man. He claimed to be an Afghani national of Hazara ethnicity and Shi'a Muslim religion. He told the Tribunal that he feared persecution from the Taliban if he were returned to Afghanistan for reasons of his ethnicity and his religion. The Tribunal accepted that Hazaras and Shi'as are persecuted in Afghanistan. It also accepted that the applicant is a Hazara and a Shi'a. The application failed because the Tribunal was not satisfied that the applicant is a national of Afghanistan as he claimed. The Tribunal did not proceed to find that the applicant is a national of any other country.

4 That lack of satisfaction as to the applicant's claimed nationality followed on the view of the Tribunal about the applicant's credibility. It referred to problems with the way he presented his entire evidence. He claimed to be an uneducated labourer engaged on the family farm, and the eldest of seven siblings, but he did not meet the Tribunal's expectations of the level of knowledge of land area measurements, dates, or sources of money in his circumstances. He attributed basic knowledge such as that concerning counting, weights and measures, distances and local geography to specific teaching by his father but the Tribunal thought that much of that knowledge would come from unattributable learning in infancy. He had too limited a knowledge of his local geography, and his level of knowledge suggested to the Tribunal that he "had been coached and had little direct experience of life" in the area he claimed as his local area, nor any knowledge (at least initially when interviewed shortly after his arrival in Australia) of the notorious drought in his general area and more widely in Afghanistan.

5 The Tribunal had available to it a language analysis of a recording of the applicant's interview shortly after his arrival in Australia. The analyst reported that the applicant was speaking Dari "probably using an accent occurring" in Afghanistan. It noted that the applicant, contrary to his claim to illiteracy, corrected the interpreter's translation on one occasion from Dari to English, referred to American dollars, and used an Urdu word used in Pakistan and Iran but not in Afghanistan which, according to the analyst, "indicates he has lived for a long time out of the Afghanistan border". The conclusion of the linguistic analysis was that the applicant's language background probably is to be found in Afghanistan, but he has probably lived for a long time in big cities in Pakistan. (I interpose that, if the foundation for the latter part of that conclusion is only that which the analyst identified, it appears to me to be a fairly flimsy foundation for that conclusion in relation to a person who has been exposed to the system of people smuggling and has travelled to Australia under that regime). The Tribunal's use of that report is not clear. It said:

"The language analysis speaks of an accent probably occurring in Afghanistan, and a probable language background in Afghanistan, and probable residence in Pakistan. This is vague, and does not describe clearly the applicant's own connection with Afghanistan. The analysis does not establish satisfactorily that the applicant is a national of Afghanistan, in light of the abovementioned evidence militating against such a finding. Nor does it establish that he is a national of any other country. But the Tribunal does not accept that this state of affairs obliges it to

find that the applicant is a national of the country of which he claims nationality" (the Tribunal's emphasis).

6 The Tribunal concluded that it was not satisfied, on the information before it, that the applicant faces a real chance of persecution "anywhere".

the review application

7 The applicant had no legal assistance in the preparation of his application to the Court. It does not identify any ground of review referable to s 476(1) of the Act. It simply reasserts in very general and brief terms his claim to Afghani nationality, and his fear of persecution if he were to return by reason of being an Hazara and a Shi'a. The application was accompanied by a statement from the applicant entitled "affidavit" which had the same character. The applicant also appeared in person at the hearing of his application, and again to a substantial degree simply repeated his claims or sought to contradict the Tribunal's assessment of matters which it regarded as unsatisfactory.

8 He said that he was aware of the drought in his area. He thought first that he was being asked about the existence of the drought in strictly technical terms, and later explained that he had said that there had been some rain, but less over succeeding seasons. He debated the length of time it would take to travel from his claimed home area to Sang-e-Mashah. He professed that he knew only very localised features of his area as he had not travelled around other regions. He suggested that a misinterpretation at an early interview exposed him to unfair criticism that he did not know at one point whether it was his father's funds which were used to bribe the smuggler who assisted his escape from Afghanistan. As to that particular matter, in my view his complaint reflects a misunderstanding on his part on the thrust of the Tribunal's criticisms. It was that the applicant did not know the source of his father's funds, rather than that he did not know whether it was his father or someone else who had provided those funds. He said his knowledge of land area measurements was of a particular local system.

9 In my judgment, none of those matters either individually or collectively demonstrate that the Tribunal has erred in the making of its decision in any way which is reviewable under s 476(1) of the Act. They simply demonstrate a wish on the part of the applicant to revisit the merits of the findings made by the Tribunal. It is not the function of the Court to do so. Nor does such re-assertion or explanation on the applicant's part demonstrate reviewable error by the Tribunal, even if there was further evidence or different evidence upon which different findings of fact might have been made.

10 The applicant also criticised the linguistic analysis report. He pointed out that there had been a large movement of persons between Pakistan and Afghanistan over many years, so that the pure quality of regional idioms has progressively been sullied. As the Tribunal did not use the linguistic analysis

report adversely to the applicant in reaching its conclusion, his concern about its quality does not provide any basis for a ground of review of the Tribunal's decision. Moreover, even if the linguistic analyst did not have regard to that state of affairs when forming the views expressed, that would amount to a failing on the part of the linguist and not on the part of the Tribunal. The linguistic analysis report still remained as a piece of evidence available to the Tribunal. In those circumstances, even if the linguist failed to appreciate the significance of the movement of persons between Pakistan and Afghanistan, that would not demonstrate reviewable error on the part of the Tribunal.

11 The applicant also complained that he had not received from the Tribunal any communications including, I assume, that required by s 425 of the Act. That claim is clearly in error. The material before the Court indicates that all communication from the Tribunal to the applicant was sent to him at the address given in his application to the Tribunal, namely the Immigration Reception and Processing Centre at Woomera (as well as to his migration agent). The applicant in fact signed the response to the invitation to attend the hearing issued to him by the Tribunal pursuant to s 425 of the Act.

12 Although the applicant was not represented at the hearing, counsel had reviewed his claim and sent to the Court on his behalf a written submission which the applicant adopted. By that submission the applicant sought leave to amend his application to add the following:

The Tribunal made an error of law in interpreting and applying the definition "refugee" under the Refugees Convention and Protocol and s 36(2) of the Migration Act 1958.

PARTICULARS

The Tribunal failed to consider or make any finding on the issue of whether Australia had protection obligations to the applicant by reason of his former habitual residence in Afghanistan.

The respondent did not oppose that application. I accordingly give leave to amend the application by adding that ground.

13 The applicant's contention is that the Tribunal's focus was upon whether the applicant is a national of Afghanistan. It was not satisfied that he was. He accepted that the Tribunal was not then obliged to decide as a fact what was the applicant's country of nationality: see *Hussain v Minister for Immigration & Multicultural Affairs* [2001] FCA 523. But, it is submitted, the Tribunal was obliged in the circumstances to address the alternative element of the definition of "refugee" in Article 1A(2) of the Convention, namely whether the applicant is a person who does not have a nationality and who is outside the country of his former habitual residence, and who owing to a well-founded

fear of persecution for a Convention reason is unable or unwilling owing to such fear to return to the country of his former habitual residence. The applicant, through counsel, pointed out that there was evidence apart from the applicant's own assertions that he may have been a former habitual resident of Afghanistan. That evidence was identified as the language analysis report referring to the applicant speaking Dari with a typical Hazaragi dialect spoken in parts of Afghanistan, Iran and Pakistan, and that he has a language background which is to be found in Afghanistan.

14 If that issue, namely whether the applicant did not have a nationality and that he had a well-founded fear of persecution in the country of his former habitual residence so that he could not or was unwilling to return to it, was before the Tribunal, the Tribunal would clearly have committed an error of law in not addressing that claim: see e.g. *Yusuf v Minister for Immigration & Multicultural Affairs* (2001) 180 ALR 1 at [83]. The respondent contends that the Tribunal did in fact address that claim, because it expressly said that it is not satisfied that the applicant faces a real chance of persecution anywhere. Alternatively, the respondent contends, in the circumstances, the Tribunal was not obliged to address that claim because it was not one made by the applicant at all, and that the Tribunal's focus upon the applicant's nationality was simply because that was the focus of the applicant's own claim.

15 I do not accept that the Tribunal has addressed the claim that the applicant may be a person without a nationality and who may have a well-founded fear of persecution in relation to Afghanistan as his country of his former habitual residence. The comment by the Tribunal that it is not satisfied that the applicant faces a real chance of persecution "anywhere" must be read in the context of the Tribunal's reasons as a whole. It specifically addressed whether he was a national of Afghanistan because it was that country in respect of which he claimed nationality and that country in respect of which he feared to return by reason of the Taliban persecution of Hazaras and Shi'as. In my view, the use of the word "anywhere" in that observation of the Tribunal must be taken to be referring to the applicant's claims, namely in relation to Afghanistan and not more generally.

16 I accept the respondent's contention, however, that in the particular circumstances the Tribunal was not obliged to determine whether the applicant had a well-founded fear of persecution upon return to Afghanistan for a Convention reason on the basis that he is a person without nationality but whose country of habitual residence is Afghanistan. The heart of the refugee determination process is the careful consideration of the claimant's own evidence: *Hathaway, The Law of Refugee Status, Butterworths* 1991, p 83. The Tribunal in this matter did not decide that the applicant was not, as he claimed, from Afghanistan. It was simply not satisfied that he had an Afghani nationality as he claimed. The introduction into the criteria for the grant of a visa by the satisfaction of the decision-maker, as distinct from the objective fact, effected by the *Migration Amendment Act 1991* (Cth) is a significant one: see *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 273-275 per Brennan CJ, Toohey, McHugh and Gummow

JJ. This is not a case where the applicant claims not to have a nationality, but attributed to Afghanistan the status of a country of his former habitual residence. By parallel reasoning to that which attracted Carr J in *Hussain v Minister for Immigration & Multicultural Affairs* [2001] FCA 523 at pars 21-23, I have reached the conclusion that once the Tribunal was not satisfied as to the applicant's claims, there was nothing left to his application for refugee status. I do not think, in the circumstances, there was a requirement on the Tribunal to go on and make a finding as to the applicant's actual nationality, or to make a finding in the face of his claim to a particular nationality, about which it was not satisfied, that he was a person who did not have a nationality. That is a matter to be addressed in the circumstances of each particular case. Moreover, in my view, although the Tribunal's focus is explicitly on the nationality of the applicant, that is because it is upon the basis of his nationality and his long-standing connection with Afghanistan by reason of that nationality that his claim was presented. In fact, in his original application for the visa, the applicant claimed that he is both a national and an habitual resident of Afghanistan. The claim to habitual residence was, in a practical sense, subsumed into his claim to be an Afghani national who had never left the country of his birth. It was that claim which the Tribunal did not accept.

17 For those reasons, in my judgment the Tribunal has not fallen into error in a way which would expose it to review under s 476(1) of the Act. Accordingly, the application should be dismissed. I see no reason why the normal order as to costs would not apply. The applicant is ordered to pay to the respondent costs of the application to be taxed.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 8 March 2002

Counsel for the Applicant:	The applicant appeared in person
Counsel for the Respondent:	Ms S Maharaj
Solicitor for the Respondent:	Sparke Helmore

Date of Hearing:	22 February 2002
Date of Judgment:	15 March 2002