FEDERAL COURT OF AUSTRALIA

MIGRATION - refugee status - internal protection principle - approach to be adopted - whether error of law to decide relocation in country of nationality before determining whether applicant had a well founded fear of persecution - whether Tribunal failed to act on rational or probative evidence in finding that arrest warrant was a forgery

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

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

Minister for Immigration & Ethnic Affairs v Surjit Singh (1997) 144 ALR 284 referred to

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

Syan v Refugee Review Tribunal & Anor (1995) 61 FCR 284 applied

SINAN ARAS V MINISTER FOR IMMIGRATION & ETHNIC AFFAIRS

VG 32 OF 1997

FINKELSTEIN J

MELBOURNE

20 MARCH 1998

IN THE FEDERAL COURT OF AUSTRALIA	
victoria DISTRICT REGISTRY	vg 32 of 1997

between: sinan aras

Applicant

and:	minister for immigration & ethnic affairs Respondent

JUDGE:	finkelstein j
DATE OF ORDER:	20 march 1998
WHERE MADE:	melbourne

THE COURT ORDERS THAT:

1. The application is dismissed.

2. The applicant pay the respondent's costs of the application.

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

IN THE FEDERAL COURT OF AUSTRALIA	
victoria DISTRICT REGISTRY	vg 32 of 1997

BETWEEN:	sinan aras Applicant
AND:	minister for immigration & multicultural affairs Respondent

JUDGE:	FINKELSTEIN J

DATE:	20 MARCH 1998
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

HIS HONOUR: This appeal concerns a challenge to the approach taken by the Refugee Review Tribunal in dealing with the review of a decision of a delegate to the respondent (the Minister) denying to the applicant the status of refugee under the *Migration Act 1958 (Cth)*.

The applicant is a citizen of Turkey. He is a member of the Kurdish community and is of the Alevi faith. The applicant arrived in Australia in April 1996 to attend a commemorative dinner to mark the 81st anniversary of Anzac Day. A few weeks later the applicant applied to the Minister for the grant of a protection visa. Pursuant to the *Migration Act* the Minister may grant a protection visa to an applicant if the Minister is satisfied that the applicant is a refugee as defined in the Convention Relating to the Status of Refugees 1951 as amended by the Protocol relating to the Status of Refugees 1967: see s 36 of the *Migration Act* and the definition of Convention and Protocol in s 4(1). According to that definition a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...".

The critical elements of the definition are that the applicant must fear persecution, that fear must be well founded and the fear of persecution must be for one of the stated reasons. In *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 the High Court explained that in order to establish a well founded fear of persecution two elements are involved, viz that the applicant has a genuine fear of persecution (a subjective element) and that fear is based on a "real chance" of persecution (an objective element) for one of the stated reasons.

The applicant claimed that he had a well founded fear of persecution on account of his race, religion and political opinion. His contention was that Kurds and Alevis in Turkey suffer persecution at the hands of government forces. He also asserted that in consequence of his involvement with a number of political organisations who are opposed to the government he has suffered harassment and mistreatment at the hands of the security police and this would continue if he returned to Turkey.

The application for a protection visa was considered by a delegate of the Minister and was refused. The reason given was that the delegate did not accept that the applicant had a well founded fear of persecution if he was required to return to Turkey. In substance the delegate found that the applicant's involvement in political activities, especially those in support of the Kurdish community's attempt to establish a separate state, were not of such significance to attract the attention of the government and thus there was no real chance of the applicant being persecuted on his return.

The applicant applied to the Tribunal to review the decision of the delegate. The Tribunal affirmed the decision of the delegate and it is from this decision that the applicant asks the Court to set aside under s 476 of the *Migration Act*. The applicant relies on two of the available grounds for setting aside a decision of the Tribunal namely (a) that the procedures required by the Act to be observed were not observed (s 476(1)(a)) and that there was no evidence to justify the making of the decision (s 476(1)(g)).

In accordance with s 430(1) of the *Migration Act* the Tribunal provided reasons for its decision. Those reasons demonstrate that the Tribunal gave consideration to each ground relied upon by the applicant to establish that he had a well founded fear of persecution. Thus the Tribunal considered the position of the Kurds and Alevis in Turkey. It accepted that members of these groups do suffer discrimination. But it found that not all Kurds and not all Alevis were the object of discrimination. It referred to evidence that indicated that Kurds and Alevis who were not actively involved with separatist groups or terrorist organisations were of little interest to the authorities. The Tribunal also considered the applicant's account of his political activities and the nature and extent of those activities. This included evidence to the effect that as a result of his political activities the applicant was suspected of being involved with terrorist organisations. The applicant said that on a number of occasions he had been arrested and detained by the security police and had been severely beaten by them. The applicant also said that there was an outstanding warrant for his arrest that had been issued because he was a member of illegal political parties and involved in various, presumably illegal, activities.

The Tribunal accepted that there were occasions when the applicant had been arrested by the police although not as often as the applicant had claimed. It is not clear whether the Tribunal accepted the applicant's evidence that he had been severely beaten on some of the occasions when he had been arrested. However, the Tribunal rejected the applicant's evidence that a warrant had been issued for his arrest. The Tribunal found that the warrant that had been produced by the applicant was a "patent obvious forgery". Moreover the Tribunal found that the applicant "does not have a political profile" by which the Tribunal meant that the political activities that the applicant had engaged in were not so significant as would result in him being of particular interest to the authorities.

These findings would support a conclusion that there was no real chance that the applicant would face persecution for a convention reason if he returned to Turkey. However, the Tribunal did not make that finding. Instead, the Tribunal found that the applicant's circumstances were such that even if the applicant was at risk of persecution in the area where he lived, it would not be unreasonable for him to relocate to another part of Turkey in which case he would not suffer any persecution. This is the way the Tribunal put the matter:

"The applicant lived and worked for fifteen months in Bandirma. During this time he had no difficulties. This satisfies the Tribunal that even if he is known to the police in his small village there would be no difficulty in him relocating to another area. He is not from the south east or an area where his identity card would raise suspicions. He has worked in the building trade for many years and does not seem to have had difficulty in obtaining work. His skills are transferable. He is young and single. In these circumstances therefore the Tribunal considers that it would not be unreasonable for the applicant to move to another location in Turkey. He could for example relocate to a city where he would be one Kurdish person among many. This would not even have to be a big city although his parents were at the time of the hearing living in Istanbul. However relocating to an area with a larger population would in the Tribunal's view solve his problems. Given the findings made about his political profile the Tribunal is satisfied that his political profile would not follow him. If it is not unreasonable for the applicant to relocate to another part of Turkey then the obligations that Australia has under the United Nations Convention do not arise. The Tribunal is satisfied that the applicant can relocate to another part of Turkey".

In this passage the Tribunal does not deny that the applicant would have a well founded fear of persecution if he returned to that region of Turkey in which he was living before he came to Australia. What is does deny is that the applicant would hold a well founded fear of persecution if he was to live in another region of Turkey.

It is clear that a person who claims to be a refugee will not be regarded as such if he is able to be protected from persecution or will not suffer persecution in some part of that person's country of nationality: see J Hathaway, "The Law of Refugee Status" (1991) at 133. The point was explained by Black CJ in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* 52 FCR 437 at 440-441:

"Although it is true that 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. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders."

It is important to note that the principle involved (the principle is sometimes referred to as the relocation principle) can only be applied to deny a person the status of refugee if it is reasonable in all of the circumstances that the person should be required to live in some other region of his country of nationality: *Randhawa* at 442. That the Tribunal understood this to be the position is evident from the passage cited where the Tribunal sets out the factors that led it to conclude that it would be reasonable for the applicant to live away from his home region.

Once the Tribunal found, as it did, that it was reasonable for the applicant to relocate to another part of Turkey to "solve his problems" the Tribunal was bound to conclude that the applicant was not a refugee and therefore not entitled to a protection visa.

The applicant contends that the Tribunal erred in law in considering the issue of relocation without first having determined whether the applicant had a well founded fear of persecution at least in the area from whence he came. The submission is that unless the Tribunal made such a determination, being a determination that could only be made after the Tribunal had considered all of the relevant material in some detail and made findings based on that material, it was not possible for the Tribunal to determine whether it was reasonable for the applicant to relocate to some other region.

Once it is accepted that an applicant does not fit the definition of refugee because he is able to obtain protection from persecution in some region of his or her country of nationality, there is no reason why that issue cannot be considered without the Tribunal having first determined whether the applicant would in all other respects satisfy the definition.

There are a number of ways in which the Tribunal could proceed when considering whether it is reasonable for an applicant to relocate to some other region of his country of origin in order to avoid persecution. One way is for the Tribunal to assume in the applicant's favour all of the facts asserted by the applicant that give rise to his well founded fear of persecution and on the basis of that assumption determine whether the applicant is able to relocate to some other region where he or she will not suffer persecution. An alternative way in which the Tribunal might proceed is first to make findings about such of the asserted facts as the Tribunal thinks necessary for it to be able to determine whether the applicant is able to relocate to another region to avoid persecution and on the basis of those findings decide whether it is reasonable for the applicant to do so.

This issue was considered in *Syan v Refugee Review Tribunal & Anor* (1995) 61 FCR 284. That was a case where the Tribunal considered the issue of relocation having assumed as true everything the applicant claimed had happened to him in the Punjab being an assumption that would ordinarily result in a finding that the applicant had a well founded fear of persecution if he was required to return to India. However, the Tribunal decided that the applicant did not have such a fear because he was able

to live in some other part of India. The applicant sought to challenge this decision on a number of grounds one of which was that the Tribunal adopted a wrong approach in dealing with the possibility of relocation without first having determined whether the applicant satisfied the Convention definition of refugee. Beazley J rejected this argument. Her Honour said that it was open for the Tribunal to proceed on the basis of an assumption that apart from the issue of relocation the applicant would satisfy the definition of refugee and on that assumption consider the question of relocation. This approach is clearly correct.

In this case the Tribunal did not accept as true all of the facts asserted by the applicant and made certain findings about what it regarded to be the true position. The Tribunal then proceeded on the assumption that on the facts as found by it the applicant would fall within the definition of refugee but for the possibility that the applicant might be able to relocate to another part of Turkey. It then considered that possibility and found against the applicant. There was no error of law in that approach.

It will be noticed that the finding by the Tribunal that the applicant was able to relocate to another region of Turkey to avoid persecution was based in part on the Tribunal's view that the applicant did not have a political "profile" that would follow him. In arriving at that conclusion one factor that influenced the Tribunal was its finding that the arrest warrant which the applicant had relied upon to demonstrate why he could not return to Turkey was a forgery. Moreover, the Tribunal also said that the applicant's reliance on the forged warrant could not be ignored when considering the other evidence that he gave about his involvement in political activities and about his treatment at the hands of the security police as a consequence of those activities.

The applicant contends that the finding by the Tribunal that the warrant was a forgery was infected by errors of law. If this contention can be made out then, so the argument goes, the finding was sufficiently critical to the ultimate decision of the Tribunal that the applicant could locate to another region that its decision should be set aside.

The finding is attacked on two grounds. First it is said that contrary to s 420(2)(b) of the *Migration Act*, which imposes an obligation on the Tribunal to act according to substantial justice and the merits of the case, the finding was based on speculation and was not supported by rational or probative evidence. Secondly, it is said that there was no evidence to justify the making of the finding.

The passage from the reasons of the Tribunal where it dealt with the warrant reads:

"The arrest warrant is patently obviously a forgery. It states that the applicant is wanted for being a member of various illegal political parties and is dated 4 February 1996. This is some months before the applicant left Turkey. It is also before he was

last detained by the police if his claims are true. It is implausible in the Tribunal's view for the applicant to be wanted pursuant to an arrest warrant that is dated before his last claimed detention. That the document does not allege that the applicant has committed any specific offence but rather states that he is wanted for being a member of illegal political parties without naming these confirms this view. The lack of letterhead and illegible wet seal also confirms that the document is a forgery."

Does this show that the Tribunal failed to act on rational or probative evidence to arrive at its finding? In my opinion no such conclusion can be drawn. It was quite legitimate for the Tribunal to form an opinion that the warrant was a forgery by having regard to the language and the appearance of the document. It was not incumbent upon the Tribunal before it made that finding to obtain expert evidence in that behalf. It is true that in some circumstances that will be an appropriate course for the Tribunal to follow before it makes a finding that a document is a forgery. But there is no obvious reason why that is a necessary step for the Tribunal to take in most cases (see *Minister for Immigration & Ethnic Affairs v Surjit Singh* (1997) 144 ALR 284) and certainly no obvious reason why the Tribunal should have done so in this case.

Further, in arriving at its finding the Tribunal took into account the fact that the warrant had purportedly been issued before the applicant had been detained and then released by the police for other political activities. No doubt, what the Tribunal had in mind was that if there had been an outstanding warrant for his arrest because of his political activities the applicant would not have been released from detention. It was permissible for the Tribunal to rely on this material in arriving at its finding.

In the result the finding by the Tribunal, based as it was both on direct evidence (the purported warrant) and on inferences drawn from other facts (the timing of the applicant's detention and subsequent release) the finding was not speculative in any sense and there was evidence upon which the finding was based.

I certify that this and the preceding seven (7) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein

Associate:

Dated: 20 March 1998

Counsel for the Applicant: D Lennon

Solicitor for the Applicant:	Baker & Armstrong
Counsel for the Respondent:	W Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	5 September 1997
Date of Judgment:	20 March 1998