FEDERAL COURT OF AUSTRALIA

Barnes v Minister for Immigration & Multicultural Affairs [2000] FCA 563

MIGRATION – Application for review of decision of Refugee Review Tribunal refusing protection order – Applicant is a male Tamil from Batticaloa in the eastern province of Sri Lanka – Tribunal accepted the possibility that the applicant had been targeted for extortion of money by the LTTE but left unclear whether or not it regarded this as persecution and, if so, whether it was for a Convention reason – Applicant also based his claim on fear of persecution by government officers in Batticaloa – Tribunal dealt with situation of Tamils in Colombo – without considering reasonableness of expecting applicant to relocate there – Tribunal decision set aside.

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

Sellamuthu v Minister for Immigration and Multicultural Affairs [1999] FCA 247 applied

SEBASTIANO SUGUMARA BARNES v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N1334 of 1999

WILCOX J

SYDNEY

19 APRIL 2000

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N1334 of 1999

BETWEEN:	SEBASTIANO SUGUMARA BARNES

	Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	WILCOX J
DATE OF ORDER:	19 APRIL 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside and the matter be remitted to the said Tribunal for reconsideration according to law.

2. The respondent pay the applicant's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N1334 of 1999

BETWEEN:	SEBASTIANO SUGUMARA BARNES Applicant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	WILCOX J
DATE:	19 APRIL 2000
PLACE:	SYDNEY

EXTEMPORE REASONS FOR JUDGMENT

1 **WILCOX J:** The matter before the Court is an application for review of a decision of the Refugee Review Tribunal concerning an application by Sebastiano Sugumara Barnes for the grant to him of a protection visa. Mr Barnes claimed to be a refugee, within the definition of that term contained in Article 1A(2) of the 1951 *Convention relating to the Status of Refugees* as amended by the 1967 *Protocol relating to the Status of Refugees*.

2 Mr Barnes is a citizen of Sri Lanka of Tamil extraction. He was aged 42 years at the time of the Tribunal decision. He arrived in Australia on 22 May 1997. On 27 June 1997 he lodged an application for a protection visa. This application was refused by a delegate of the Minister. He then sought review of that decision by the Refugee Review Tribunal.

3 In his reasons for decision, the Tribunal member set out the claims made by Mr Barnes, including a fairly full account of his life. The Tribunal member was not prepared to accept many of the factual statements made by Mr Barnes, including factual statements pertaining to claims of persecution. He concluded by holding that Mr Barnes was not a refugee, within the meaning of the Convention, and therefore that the application for a protection visa must be refused.

4 It is not, of course, open to this Court to review the factual findings of the Tribunal. Mr Colborne, counsel for the applicant, recognises that limitation. He has, however, raised two matters which he says, rightly I think, are matters within the purview of the Court.

5 The first criticism made of the Tribunal decision by Mr Colborne arises in the context of the claim made by the applicant to the Tribunal that he faced a real chance of persecution if returned to Sri Lanka because of targeting by the LTTE.

6 It appears that, over the years, Mr Barnes has worked in Saudi Arabia, returning from time to time to his family who live in Batticaloa in the eastern province of Sri Lanka. Mr Barnes was apparently born in Batticaloa. He has lived there all his life, except when abroad. He has only been to Colombo for the purpose of travelling abroad or obtaining permission to travel abroad. He has never lived there.

7 One of the claims made by Mr Barnes was that he has been subjected to extortion by the LTTE, apparently because he was perceived to be a Tamil with some wealth. The Tribunal member was sceptical about aspects of these claims but nonetheless did not reject their factual basis. The Tribunal dealt with this aspect of the case in the following way:

"The Tribunal is satisfied that although the Applicant may have been the victim of extortion demands by the LTTE or others (as a person returned from overseas employment and therefore presumed to be well-off by Sri Lankan standards) he was not otherwise targeted by the LTTE. The Tribunal accepts that the Applicant was occasioned some difficulties in 1984 when the LTTE unilaterally made use of resources or seek for which he was responsible. It is also plausible that the Applicant may have been questioned by the LTTE in 1984 to obtain information about the whereabouts of his cousin. **However, the Tribunal is satisfied that none of this amounted to persecution of the applicant by the LTTE for any convention reason**. On the evidence before it, the Tribunal does not accept that if they did ask the Applicant for money, the LTTE was thereby manifesting a motivation to harm or persecute him for any convention reason." [Emphasis added]

8 Mr Colborne complains the emphasised sentence in this paragraph leaves unclear whether the Tribunal is saying the applicant did not suffer persecution by the LTTE or saying that, although persecution was suffered, this was not persecution for a Convention reason. He submits the Tribunal ought to have made clear findings in respect of this matter, which was one of two bases of possible persecution put to the Tribunal. Mr Colborne also says the last sentence in the passage is irrelevant. If this was the reason for the conclusion expressed in the preceding sentence, then according to Mr Colborne it exhibits legal error. The likelihood that this was the reason, Mr Colborne submits, is supported by the fact that early in its decision, in its summary of the relevant law, the Tribunal quoted a statement made by Gummow J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 284. The Tribunal quoted Gummow J as stating that "the primary meaning of the term persecution in ordinary usage" is:

"The action of pursuing with enmity and malignity; especially the infliction of death, torture or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it."

Mr Colborne argues the only way in which the Tribunal's reasons can be understood is as indicating a view that any extortion that was exerted upon the applicant was not exerted for reasons of enmity or malignity; but presumably simply to obtain funds for the LTTE. He says that, if this is the correct interpretation of the Tribunal's reasons, it

exhibits error of law, as can be seen from the decision of the High Court of Australia in *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs* [2000] HCA 19 (13 April 2000).

9 In fairness to the Tribunal member it should be noted that *Chen* was decided after the Tribunal's decision in the present case. In *Chen*, at paras 33-35, the High Court dealt with the question whether it is an element of persecution, within the meaning of the Refugees Convention, that the discriminatory conduct be motivated by enmity or malignity towards the subject group of people. At para 35 the Court said this:

"Persecution can proceed from reasons other than 'enmity' and 'malignity'. Indeed, from the perspective of those responsible for discriminatory treatment, it may result from the highest of motives including an intention to benefit those who are its victims. And the same is true of conduct that amounts to persecution for a Convention reason. Accordingly, French J [the trial judge in Chen] was correct to hold, as did the Full Court, that the Tribunal erred in finding that, because the different treatment which the appellant was likely to receive was not motivated by 'enmity' or 'malignity', that treatment was for a reason other than his being a 'black child'".

10 Ms Backman, counsel for the Minister, submits the Tribunal did not really make a finding of extortion against the applicant. She says this is not surprising; the evidence of extortion was sparse and unpersuasive.

11 I agree with Ms Backman that there is not a positive finding by the Tribunal that the applicant had been the victim of extortion demands by the LTTE. I also agree that the evidence of extortion might be regarded by some people as unpersuasive, although I hasten to say I have not evaluated that evidence. It is not the province of the Court to form a view about the facts. To the extent Ms Backman's submission invites the Court to enter into that area, it must be rejected.

12 The Tribunal chose to deal with this aspect of the case upon the basis of accepting the possibility that the applicant had been the victim of extortion. I emphasise the word. "possibility", because I agree there is not a positive finding of extortion. However, once the Tribunal accepted the possibility, it was logically necessary for it to consider the result of that possibility being correct. It needed then to ask whether, if there were extortion, this amounted to persecution within the meaning of the Convention and, if so, whether it was for a Convention reason.

13 The difficulty I see about the paragraph to which I have referred is that it does not indicate what view the Tribunal took upon either of those matters. The only clue is the final sentence in the paragraph. If this is to be understood as the reason for the Tribunal rejecting the claim of persecution by the LTTE in respect of extortion demands, then it plainly indicates legal error. If this sentence is not to be understood as indicating the reason for the rejection of the claim, then the decision fails to explain whether or not the

Tribunal accepted that extortion may be persecution and, if so, whether it was for a Convention reason. This is a serious deficiency in the decision.

14 Mr Colborne's second point arises out of the second limb of Mr Barnes' claim: that he faced a threat of persecution, as a Tamil, by government officers. It seems to have been accepted by the Tribunal that the tensions between the government forces and the LTTE are particularly acute in the Jaffna Peninsula, in the north of Sri Lanka, and in the eastern province, of which the major city is Batticaloa. Mr Barnes' case was that he would suffer persecution from government officers, if he returned to Sri Lanka and his family in Batticaloa.

15 In dealing with the likelihood of persecution of Mr Barnes by government officers, the Tribunal member had regard to a considerable amount of material of the nature generally called "country reports". The Tribunal member quoted extensively from that material, including from a cable of the Department of Foreign Affairs and Trade as recent as March 1999.

16 However, as Mr Colborne points out, the whole of the quoted material relates either to the position of Tamils generally in Sri Lanka (various statements made by government officers and law enforcement authorities) or with the position in Colombo. Nothing in the quoted material relates specifically to the position in Batticaloa.

17 The country material that was before the Tribunal has been reproduced in the bundle of relevant documents provided to the Court. I note it does include a reference to Batticaloa in which the suggestion is made that the situation, in relation to detention and torture of Tamils, is worse in Batticaloa than in Colombo. It is not necessary to go to the detail of the material; it is sufficient to say that any reader of the relevant material would obtain the impression that a person of Tamil extraction had a greater chance of being detained in Batticaloa than in Colombo and that the likely consequences, in terms of length of detention and liability to torture, were greater in Batticaloa than in Colombo.

18 The fact that the situation seems to be worse for persons of Tamil ethnicity in Batticaloa than in Colombo points up the significance of Mr Colborne's submission about the way in which the Tribunal dealt with this second point. After referring to the country material, the Tribunal member said this by way of a finding applicable to the applicant's case:

"Having regard to all the evidence before it and the particular circumstances of the Applicant, the Tribunal is satisfied that the impact on the Applicant of security operations and measures in Colombo does not amount to a persecution for a Convention reason. Given the context in which such security measures are taking place and the policy and practice of the Sri Lankan Government directed against excess and abuses, the Tribunal does not accept that the if the Applicant returns to Sri Lanka the activities of the security forces in Colombo would give rise to a real chance of persecution of him for a Convention reason."

19 As will be apparent, that passage deals only with the position in Colombo. This might be a defensible approach if it was clear, on the evidence, that the position was worse in Colombo, from the point of view of a person of Tamil ethnicity, than in Batticaloa. However, the evidence suggests the opposite. It is, therefore, impossible to say that, if there is no real chance of persecution in Colombo, then there is no real chance in Batticaloa. In fairness, the Tribunal member did not say this. That really is Mr Colborne's point: the Tribunal member did not refer at all to the position in Batticaloa.

20 Of course, the fact that a person faces a chance of persecution in one part of his or her country of nationality does not inevitably lead to the conclusion that the person is a refugee. It may be reasonable to take the view that, although the person will suffer a risk of persecution in one part of the country of nationality, that person could re-locate in another part of the country of nationality. Perhaps that is what the Tribunal member had in mind in the present case, in looking at the position in regard to Colombo. However, Mr Colborne submits that, if so, this was insufficient. Before a case can be decided on the basis that the person can relocate in his or her country of nationality, it is necessary to consider the reasonableness of relocation.

21 Mr Colborne refers to the decision of the Full Court of this Court in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437. In that case the Court, in effect, upheld the approach stated by Professor Hathaway in his book, "The Law of Refugee Status" (1991) at 134 and taken from successive editions of the United Nations High Commission for Refugees' "Handbook on Procedures and Criteria for Determining Refugee Status":

"In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances, it would not have been reasonable to expect him to do so."

See for example, Black CJ at 442 and Beaumont J at 451.

22 According to Mr Colborne's argument, this approach required the Tribunal, in the present case, to address the question whether it would be reasonable to expect Mr Barnes to relocate in Colombo. He says that there is no indication that the Tribunal member did this.

23 I have to agree with that statement. There is no discussion in the Tribunal's reasons about the possibility of Mr Barnes relocating in Colombo. Several matters would need to be taken into account. First, as was pointed out in the submission put to the Tribunal on behalf of Mr Barnes, he had lived all his life in Batticaloa except for periods during which he worked in Saudi Arabia. Mr Barnes' house and family are, and always have been, in Batticaloa. He does not speak or read Singala, the language generally used in Colombo. I add the fact that Mr Barnes has a background of working in

agriculture, at least whilst in Sri Lanka. So a question might arise about availability of employment in Colombo.

24 It is obvious that significant questions would arise if it was contemplated Mr Barnes, if repatriated to Sri Lanka, would avoid a real risk of persecution by relocating in Colombo. It is equally obvious that these problems were not addressed by the Tribunal.

25 It seems to me the Tribunal failed to deal adequately with either the consequences of the possibility that LTTE had extorted money from the applicant or the possible effect of government activity upon a male Tamil living in Batticaloa. The situation is similar to that which occurred in *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247. By coincidence, that matter also involved a Tamil from Sri Lanka. But the significant point about the case was the summary offered by Madgwick J and myself, at paras 17 to 23, of the legal consequences of the Tribunal failing to address important elements of an applicant's claim. I do not need to repeat the points made in those paragraphs; I adopt them and apply them to the present case.

26 For me, it is always a matter of regret to remit a matter to the Tribunal, with the resultant necessity of another hearing. However, in this case, there is no alternative. The decision of the Tribunal must be set aside and the matter remitted to the Tribunal for re-consideration according to law.

27 Mr Colborne seeks an order for costs. Ms Backman is unable to resist this. The usual order should be made. The respondent must pay the costs of the applicant.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 19 April 2000

Counsel for the Applicant:	C Colborne
Solicitor for the Applicant:	Siva Logan Solicitors

Counsel for the Respondent:	A F Backman
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	19 April 2000
Date of Judgment:	19 April 2000