JUDGMENT No. 889/94

CATCHWORDS

IMMIGRATION - review of criminal deportation order by Administrative Appeals Tribunal - misunderstanding by Tribunal of quantity of heroin involved in offence - whether Tribunal took into account applicant was drug user - relevance of Ministerial policy

Migration Act 1958, s 55
Administrative Appeals Tribunal Act 1975, s 44

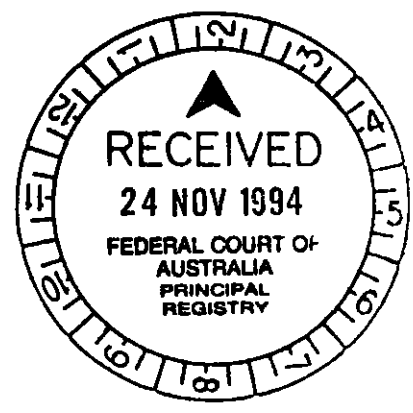
No. NG 27 of 1994

GHEORGHE BENGESCU v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

MOORE J

SYDNEY

23 NOVEMBER 1994



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) **No. NG 27 of 1994**
)
GENERAL DIVISION)

BETWEEN: **GHEORGHE BENGESCU**

Applicant

AND: **MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS**

Respondent

JUDGE: **Moore J**

PLACE: **Sydney**

DATE: **23 November 1994**

ORDER OF THE COURT

THE COURT ORDERS THAT:

1. The appeal is dismissed.

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

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

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REASONS FOR JUDGMENT

This is an appeal, so styled, under s44 of the Administrative Appeals Tribunal Act 1975 ("AAT Act") against a decision of the Administrative Appeals Tribunal ("the Tribunal"). The decision, made on 17 January 1994, was to affirm an order of 14 May 1993 of a delegate of the Minister for Immigration and Ethnic Affairs ("the Minister") to deport Mr Gheorghe Bengescu ("the applicant").

Legislation

Section 55 of the Migration Act 1958 authorises the Minister to deport a person who has been convicted of a criminal offence. It provides:

"55 Where-

(a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;

(b) at the time of the commission of the offence the person

(i) was not an Australian citizen; and
(ii) had been present in Australia as a permanent resident for a period of less than 10 years or for periods that, in the aggregate, do not amount to a period of 10 years; and

(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year,

the Minister may order the deportation of the person."

It can be seen that if the criteria in pars(a), (b) and (c) are satisfied, the Minister has a broad discretion whether or not to order deportation.

The factual background

The factual background leading to the decision to deport is detailed in the Tribunal's decision. It is mostly uncontentious and it is unnecessary to repeat all of it. I will deal later in this judgment in more detail with some factual matters when considering the issues raised by the application. In describing the facts I have generally drawn from the Tribunal's decision though I deal with some factual issues by reference to other material when findings concerning them are said by the applicant to be associated with the alleged errors of law.

The applicant was born in Romania in 1957 and remains a citizen of that country. He entered Australia in 1980 as a

refugee though has no family in Australia. He was convicted of offences in 1983 of breaking, entering and stealing and with intent to steal and having safe-breaking implements in his possession which resulted in his imprisonment. He became a heroin user while in prison between 1982 and 1984. He was, in this period, interviewed by an officer of the Department of Immigration and warned that he was liable to deportation as a result of the convictions that lead to his imprisonment though he was told no action was contemplated against him at that time. He was, however, told that any further offence would result in a reconsideration of the question of his deportation.

In January 1987 he committed an offence, supplying heroin, for which he later pleaded guilty and was sentenced to imprisonment by a Judge of the District Court of New South Wales in October 1990. The applicant appealed against the severity of the sentence and the Court of Criminal Appeal imposed a lesser sentence which resulted in the period of his imprisonment concluding on 26 October 1992. It was this conviction that founded the order to deport.

The Tribunal's decision

The reasons for decision of the Tribunal were published on 17 January 1994. The conclusion reached by the Tribunal is found in par32 which reads:

"On balance I have come to the view that the gravity of his offence looked at in the light of his previous criminal history, in the light of his failure to heed warnings or to observe conditions of parole or to face charges, indicates a likelihood of a moderate degree that further crimes will be committed. In view of the seriousness of the previous crimes, it is not appropriate to ask the Australian community to accept such a risk. In paragraph 10 of the Minister's guidelines, the observation is made that the greater the potential effect on the community or the greater the potential damage to the community, the lower is the acceptable level of risk that the person concerned will commit further offences. The potential damage to the community from dealing in heroin is universally accepted as great. Although the risk of recidivism is only moderate, it is enough to outweigh, in my view, any other consideration of hardship to others or to the applicant that might make the carrying out of the deportation order inappropriate."

The issues

The applicant seeks to impugn the decision of the Tribunal on a number of grounds, each of which is said to concern a question of law. They are:

(i) Whether the Tribunal erred in law in that it did not properly take cognisance of the circumstances of the applicant's conviction.

(ii) The related question of whether the Tribunal erroneously concluded that the applicant had been engaged in trafficking in heroin.

(iii) Whether the Tribunal erred in law in not taking into account the fact that the applicant was a user himself of hard drugs.

(iv) Whether the Tribunal erred in law in the manner in which it relied upon the way in which the applicant answered questions concerning the possibility of the supply of drugs prior to the incident giving rise to his conviction.

(v) Whether the Tribunal erred in law in relation to the inferences it drew as to the warning given to the applicant after his first conviction in 1983.

(vi) Whether the Tribunal failed to take into account the hardship that the applicant's business partner would suffer.

(vii) Whether the Tribunal erred in concluding that the applicant would not suffer any greater hardship in returning to Romania than any other Romanian.

In setting out the issues in this way I have endeavoured to distil from the submissions made by counsel for the applicant what I understand to be the issues. Additional particulars of the alleged errors of law were raised on the day of the hearing though the submissions did not appear to deal entirely coherently with the case as it was finally particularised.

The first and second issue: The conviction of the applicant for the 1987 offence

The offence of supplying heroin was the offence which led to the deportation order. The circumstances of the offence were that the applicant had spent the evening with a woman and they had consumed some heroin they had earlier bought on the street though they did not consume all of it. They decided to exchange the remaining heroin for cocaine and that the best way of doing this would be to sell what was left and use the money to purchase the cocaine. The applicant later received a call from the woman asking him to sell her the heroin. He met her in the street in Potts Point where he handed her the heroin in exchange for cash. Police, who were not uniformed, were in attendance and arrested the applicant.

These facts are, in substance though in different terms, recounted by Shadbolt J of the District Court of New South Wales in his reasons for judgment when sentencing the applicant. Those reasons are set out in the Tribunal's decision. One of the findings made by Shadbolt J was that the weight of the heroin in the possession of the applicant was a gram and another was that the applicant's imprisonment in 1983 was, in part, as a result of his conviction on twenty-three counts of breaking, entering and stealing.

The Tribunal refers to the fact that the sentence imposed by Shadbolt J was quashed by the Court of Criminal Appeal and a lesser sentence imposed. The Tribunal did not have the reasons for judgment of the Court of Criminal Appeal though it did have a certificate from the Registrar of that Court identifying the lesser sentence imposed by it. The Tribunal says of the reduction in the sentence, "It is not possible to speculate why this was done. It is, however, certain that the sentence was reviewed by three appellate judges and that, for whatever reason, some eighty percent of the minimum term imposed was found to be appropriate."

In the proceedings in this Court the applicant referred, without objection, to the judgment of the Court of Criminal Appeal. The Court imposed a lesser sentence on two grounds. The first was that Shadbolt J had erroneously concluded that the 1983 conviction involved twenty three counts of breaking, entering and stealing. The second was that Shadbolt J had

erroneously concluded that the applicant had had one gram of heroin in his possession when arrested whereas, in fact, he had only .53 grams in his possession.

The Tribunal was alive to the error made by Shadbolt J about the number of counts of breaking, entering and stealing that gave rise to the imprisonment of the applicant in 1983. The Tribunal was not aware of the error of Shadbolt J concerning the weight of the heroin. The Tribunal makes no express finding as to the weight of heroin involved and simply refers to it in pars 26 and 27 of its decision as an amount which was small. However an inference can be drawn that it did so on the basis of what Shadbolt J had said was the quantity.

The applicant contends that the Tribunal erred in two related respects. The first is that it failed to pay regard to the decision of the Court of Criminal Appeal which is, by operation of s6 of the Criminal Appeal Act 1912 (NSW), the sentencing Court. This submission is plainly wrong given the discussion by the Tribunal of the sentence imposed by that Court. The Tribunal was aware that the Court of Criminal Appeal had imposed a lesser sentence. The related submission is that the Tribunal, by not obtaining the reasons for judgment of the Court of Criminal Appeal, proceeded on a mistaken understanding of the amount of heroin involved. In my opinion this does not constitute an error of law.

The Tribunal is under no obligation to make inquiries itself. As a general principle, it is no part of a decision-maker's function to make out an applicant's case nor is there a duty to make inquiry: see Hamilton v Minister for Immigration, Local Government and Ethnic Affairs (1993) 48 FCR 20 at 34 and the cases there cited. Exceptions were discussed by Black CJ in Teoh v Minister for Immigration, Local Government and Ethnic Affairs (1994) 121 ALR 436 in the following passage at 442:

> "Although it is in general not for the decision-maker to make out a case for someone seeking the exercise of a discretion in their favour, it has been recognised that there are occasions when the adequate consideration of a relevant matter necessarily involves the making of some inquiry as to the facts: see *Waniewska v Minister for Immigration and Ethnic Affairs* (1986) 70 ALR 284 per Keely J at 299, citing the observations of Wilcox J in *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4 per Forster J at 9; *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455 per Wilcox J at 472-3; see also *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 per Toohey J at 178-9; 69 ALR 342; *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363 per Lee J at 373. It should also be noted that a failure by a decision-maker to obtain readily available factual material likely to be of critical importance in relation to a central issue may lead to the conclusion that a decision has been unreasonably made: *Luu v Renevier* (1989) 91 ALR 39 at 50; *Tickner v Bropho* (1993) 114 ALR 409 at 424-5."

While the Tribunal has a power to "inform itself on any matter in such manner as it thinks appropriate": s33 of the AAT Act, its primary obligation is to deal with the application on the material put to it. There was nothing said by the applicant in these proceedings to suggest that the applicant did not have the opportunity to put to the Tribunal either the reasons for judgment of the Court of Criminal Appeal or evidence to show that the amount of heroin involved

was less than that referred to by Shadbolt J. As the Court of Criminal Appeal was the sentencing court it would have been open to the applicant to establish what facts that Court found when determining the appropriate sentence. It is unnecessary for me to consider the extent to which and the circumstances in which the Tribunal may review findings of fact of the Court convicting or sentencing a person at risk of criminal deportation: see Lai v Minister for Immigration, Local Government and Ethnic Affairs (1991) 28 FCR 346 and Beckner v Minister for Immigration, Local Government and Ethnic Affairs (1991) 13 AAR 433.

Section 44 of the AAT Act limits appeals to this Court to appeals on questions of law. While it is open to the Court, in certain circumstances, to deal with issues not raised before the Tribunal but raised in the proceedings before the Court: see Kuswardana v Minister for Immigration and Ethnic Affairs (1981) 35 ALR 186, the case of the applicant in this matter is, in substance, that the Tribunal proceeded on a misunderstanding of the facts. As Brennan J said in Waterford v The Commonwealth (1986) 163 CLR 54 at 77:

> "A finding by the A.A.T. on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the A.A.T Act confers on a party to a proceeding before the A.A.T. a right of appeal to the Federal Court of Australia 'from any decision of the Tribunal in that proceeding' but only 'on a question of law'. The error of law which an appellant must rely on to succeed must arise on the facts as the A.A.T. has found them to be or it must vitiate the findings made or it must have led the A.A.T. to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact. Therefore an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact."

See also Mendoza v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FLR 405 at 416-417.

It is clear from the observations of Brennan J that the applicant cannot rely on the judgment of the Court of Criminal Appeal in these proceedings to show what was the fact, namely that the quantity of heroin that was involved was 0.53 grams. However even if the applicant can rely on the Court's judgment in this way, the relevant finding of the Tribunal was, as I earlier noted, that the amount of heroin was small and that the applicant had engaged in the commercial dealing with, or the trafficking of, heroin. This appears from par27 of the Tribunal's decision which reads:

> "Counsel for the applicant submitted that I should take into account that the crime was not committed in the course of commercial dealing, that it wasn't an introduction of an uninitiated person into the use of heroin, that the amount involved was small, that the execution of the offence showed naivety and that the applicant was easily caught. The last 2 considerations in my view have nothing to do with the gravity of the offence. The first submission does not bear examination. The heroin was to be sold in the course of a commercial dealing in order to obtain money so as to purchase another drug. Trafficking or commercial dealing in heroin is singled out in paragraph 12 of the Minister's policy statement as an example of a serious offence which may render non-Australian citizens liable to deportation. In paragraph 11 the guidelines point out that deportation of a person convicted of crime may be appropriate where that person has committed a crime so offensive to Australian community standards that the community rebels against having within it a person who has committed such an offence. There can be no doubt that commercial trafficking in heroin, whether or not the amount was small and whether or not it was part of the introduction of an uninitiated person into the use of heroin, is offensive to Australian community standards."

While its conclusion that the amount was small was in all likelihood based on the finding of Shadbolt J, that conclusion

is also consistent with the actual quantity involved. The difference between the amount of heroin actually in the possession of the applicant and the amount the Tribunal believed had been in the possession of the applicant was unlikely to be "of critical importance" to use the words of Black CJ in Teoh, supra.

As to the Tribunal's conclusion in par27 that the applicant was engaged in commercial dealing or trafficking, I do not accept the applicant's submission that the Tribunal was using both the word "commercial" and the word "trafficking" as terms of art. On this question, the applicant referred to the schedules to the Drug Misuse and Trafficking Act 1985 (NSW) which define traffickable and commercial quantities of heroin as 3.0g and 250g respectively. The applicant also referred to another judgment of the Court of Criminal Appeal in R v Bardo, 14 July 1992, unreported, in which the Court said of the expression "trafficking alone" as it appeared in an earlier judgment of that Court, that ""trafficking" clearly carries with it the connotation of supply on more than one occasion". However the use by the Tribunal of these words in the fourth and last sentence in par27 was intended to be a description of what the applicant did, namely sell heroin. It was, in that context, unexceptional. I note that in the judgment of Lee AJ in the Court of Criminal Appeal in the applicant's appeal, his Honour said:

> "There can be no doubt that the fact that there is a commercial element in the sale of heroin, be it large or small, is a very

> significant matter in regard to the need for a prison sentence to be imposed. The whole drug trade depends on people being willing to sell drugs and when it is found that it is done in an open street with total strangers and lacks any element of personal or social relationship with the individual buyer concerned, it takes on the commercial aspect which gives it, as I say, real significance."

Those observations, and the reference to "commercial element" in particular, were clearly directed to the circumstances in which the applicant was apprehended when selling heroin in 1987. The applicant has not established any error of law in the Tribunal's consideration of the offence that was committed by the applicant and its characterisation of it nor in its consideration of the basis upon which the applicant was convicted and sentenced.

The third issue: the applicant as a user and the Ministerial policy

The applicant submits that the Tribunal did not give sufficient weight to the fact that he was a user and failed to properly consider policy evident in a Ministerial statement on Australia's Criminal Deportation Policy effective from 24 December 1992 which contained guidelines for assessing whether a person satisfying the statutory criteria should be deported. The Tribunal referred in par27 of its decision to the Minister's policy statement as it concerned the types of offences which may expose a non-Australian citizen to deportation. The relevant part of the guidelines for deportation in the policy statement is in the following terms:

"11. Deportation of a person convicted of crime may be appropriate when a person:

- constitutes a threat because there is a risk that he/she will commit further offences if allowed to remain; or
- has committed a crime so offensive to Australian community standards that the community rebels against having within it a person who has committed such an offence; or
- has not established sufficient ties with Australia to have become a full member of the community and, by reason of his/her conduct, is unsuitable for permanent residence in Australia.

12. Examples of serious offences which may render non-Australian citizens liable to deportation include:

- Production, importation, distribution, trafficking or commercial dealing in heroin or other 'hard' addictive drugs or involvement in other illicit drugs on a significantly large scale (persons who embark upon drug-related crime for financial gain show a callous disregard for insidious effects on the health and welfare of Australia's young people); this does not necessarily apply to persons who use hard drugs for their own consumption who were not involved in the above illegal actions. It would be invidious if non-citizen residents who seek to profit from the import or supply of drugs, whether or not that profit is motivated by their own need for illicit drugs, were likely to be allowed to remain in Australia. It is important both as a deterrent and to protect Australian society that it is clearly understood that a person convicted of drug trafficking, which puts at risk the very lives of young Australians, has no place in our society;" (emphasis added)

This policy is a relevant consideration for the Tribunal: see Drake v Minister for Immigration and Ethnic Affairs, (1979) 46 FLR 409 at 420 - 421 but it is not bound to apply it and should not slavishly follow it: see Gumus v Minister for Immigration and Ethnic Affairs (1990) 30 FCR 145.

This extract from the Ministerial statement is not a model of clarity. The words in par12 "on a significantly large scale" qualify only "other illicit drugs". However it is quite unclear whether the expression "this does not

necessarily apply to persons who use hard drugs for their own consumption who are not involved in the above illegal actions", renders inapplicable to such persons, users, the consequences of committing an offence of the type described as the production, etc. of heroin or other "hard" addictive drugs. On one reading of the guidelines it appears that the qualification concerning users is not intended to lessen the prospect of deportation of people who are drug users and who also sell them, given what might have been the intended effect of the words "who were not involved in the above illegal actions". It may be, however, that the Minister was saying that a user who produces, etc. may be viewed differently to someone who engages in the same activity and does not use drugs. If this is so, it is difficult to understand the later observation that "it would be insidious if non-citizen residents who seek to profit from the import or supply of drugs, whether or not that profit is motivated by their own need for illicit drugs, were likely to be allowed to remain in Australia".

The meaning of the guidelines is both ambiguous and obscure. However it is important to bear in mind the use that was made of the policy by the Tribunal. All the Tribunal did was to identify, correctly, that trafficking or commercial dealing in heroin is singled out in par12 in the Minister's policy statement as an example of a serious offence which may render non-Australian citizens liable to deportation. I accept that the Ministerial statement may have intended the

words "trafficking or commercial dealing" to have a meaning akin to that in the Drug Misuse and Trafficking Act 1985 (NSW) and R v Bardo, supra and, to that extent, the Tribunal may have misunderstood what was comprehended by par12 of the statement. It is, however, by no means clear that the statement should be understood in this way. Nonetheless the question the Tribunal posed for itself and answered, was whether the offence committed by the applicant was one that was offensive to Australian community standards. The Tribunal concluded it was. An offence of that type was referred to in the preceding paragraph of the Ministerial guidelines, paragraph 11, as the type of offence, generally described, that might result in deportation. Paragraph 12 only gives examples of offences of that type.

It must be accepted that the Tribunal does not go on to refer to the fact that the applicant was a user and how the policy statement might apply having regard to that consideration. However, given the obscure and ambiguous way the policy is expressed as it relates to users, I am not satisfied that the Tribunal erred in failing to do so. The Tribunal considered the guidelines and decided it was appropriate to give effect to them as they broadly describe the types of offence that might justify deportation. It was not incumbent on the Tribunal to refer to every aspect of the case that might be relevant to the application of the policy: see Steed v Minister for Immigration and Ethnic Affairs (1981) 37 ALR 620 at 621 and, in any event, it may give limited

weight to policy that is not clear: see John Holman & Company Pty Ltd v Minister for Primary Industry, unreported (in full) 29 June 1983, Administrative Appeals Tribunal (Davies J, (President), and Messrs Pascoe and Sinclair, Members) noted - (1981-1983) 5 ALD, N 219.

Apart from its possible relevance to the application of the Ministerial guidelines, the fact that the applicant was a user of drugs was referred to by the Tribunal on three occasions when recounting the applicant's history. The weight, if any, to be given to that consideration was a matter for the Tribunal given the width of the discretion arising under s55, and its decision does not, in this respect, manifest an error of law.

The fourth issue: Possibility of earlier incidents of supply - answers to questions

In the course of the Tribunal's decision it made two observations about the answers given by the applicant to certain questions when giving evidence to the Tribunal. In par11 of its decision the Tribunal said:

> "After his release from prison, he found occasional work as a painter with another Romanian friend. He continued to be a user of drugs. Between 1984 and 1990 (the date of the deportable conviction) he agreed that he continued to take heroin and cocaine on occasions and marijuana quite frequently. He would not answer any direct questions relating to whether he supplied others after he was given a warning against self-incrimination. In reply to another question he said he couldn't remember whether anyone had asked him whether he could find drugs for them and added 'probably yes, probably not'. The meaning of this response is quite unclear. The fact that the suggestion was not vigorously denied may have some

> significance in categorising the subsequent deportable offences other than a one off crime. However, I can not act only on suspicion. Consequently, this consideration is not central to my conclusions."

and later in par26 the Tribunal said:

> "His equivocal response to questions relating to his being requested by others to supply them leave me uneasy, and leave me unsatisfied that the occasion in January 1987 which led to the 1990 conviction was an isolated transaction."

The questions that the Tribunal is referring to appearing at pages 33 and 34 of the transcript and arise from the cross-examination of the applicant. The transcript reads:

> "(MR MILSHON for the Department): In the period between your being released from prison in respect of the break and enter sentence and being in custody for the drug supply, did you buy any drugs from people and pass them on to somebody else?
>
> MR CRADDOCK (for the applicant): I object. Only for the purposes that he should be warned in relation to that particular question.
>
> THE D. PRESIDENT: Yes. Well, that certainly has not been particularised but in any event.
>
> What you are being asked is, did you commit a crime by supplying drugs to people during the six year period. You are not obliged to answer that if you do not wish to?---I'm not prepared to answer that.
>
> MR MILSHON: In the period of leaving the first gaol sentence and starting the second gaol sentence, did anybody ask you for drugs at all, cocaine or heroin?---Asked me?
>
> Yes, asked you whether you have got any available?---Well, not many people knew that I was using so.
>
> Okay. But did anybody ask you, Mr Bengescu, can you find me some heroin?
>
> MR CRADDOCK: I object.
>
> THE D. PRESIDENT: That is not a crime.
>
> MR CRADDOCK: No. It is clearly irrelevant unless it is a lead up to a question to a direct question as to a crime. Of itself, it is neither nor there. I mean, people might come up to me in the street and ask me.
>
> THE D. PRESIDENT: Yes. Well, I do not know what it---

MR CRADDOCK: It is of no consequence.

THE D. PRESIDENT: I do not know whether it will turn out to be relevant or not but let us wait and see.

MR MILSHON: Anyway, if I just may interpose here. The point of that question, deputy president, is part of the tribunal's task is, with respect, is to assess character and reputation. To ask certain people whether they have drugs would be a total affront to their character and personality and in certain other people perhaps not if they are known to be able to find certain illicit drugs.

THE D. PRESIDENT: Yes. Well, it is fine line, Mr Milshon, but I think at this stage you can ask that preliminary question.

MR MILSHON: Thank you, deputy president.

Mr Bengescu, did anybody in that period between your being released on the first gaol sentence and the second one, ever ask you, Mr Bengescu, words to the effect, can you find me some heroin?---I don't remember.

Anybody ask you, Mr Bengescu, can you find me some cocaine?---Probably, yes, probably not. I don't---

Probably yes?

MR CRADDOCK: Probably yes, probably not.

MR MILSHON: Probably yes, probably not; is that your answer?---yes.

Did anybody ask you at any time in the six year period we are talking, between sentences, Mr Bengescu, are you able to supply me with some - are you able to find me some - sorry, do you have - do you have access to any marijuana?

MR CRADDOCK: I object.

THE D. PRESIDENT: I will allow the question on the same basis.

MR MILSHON: Did anybody ask you in that period or that six year gap between the first and second sentence whether you were able to supply marijuana?---I wouldn't put it supply because we share sometimes.

Has anybody asked you whether you ---?---I don't know, I can't say yes or no." (emphasis added)

The applicant submits that the approach of the Tribunal in relying upon what might appear to be equivocal answers in the underlined sections of the transcript failed to pay regard to the right of a person to refuse to answer questions that might tend to incriminate them. This is said to be evident from the Tribunal's reference, in the passage from its

decision I have earlier quoted, to the applicant having not "vigorously denied" a suggestion that others had asked him whether or not he could find drugs for them.

Counsel for the applicant says "He (the Tribunal) is considering this non-answer on a proper right to an exercise of silence in a way that he could not in law, in any jurisdiction" (transcript in these proceedings - p25). I have some difficulty in understanding what precisely the error of law is said by counsel for the applicant to be. Reliance is placed by the applicant on Petty v The Queen (1991) 173 CLR 95 in which the High Court makes clear that in a criminal trial it should not be suggested that the accused's exercise of the right to silence provides a basis for inferring consciousness of guilt of the accused in that trial. It is not said, as I understand the submission, that the Tribunal permitted questions to be asked that should not have been asked or that the inferences drawn were not capable of being drawn from the evidence given. Rather the submission is that whatever inferences were drawn, they should not have been drawn as a matter of law.

The respondent submits that the answers relied upon were answers volunteered in response to a question asked and, in any event, what the Tribunal was indicating when relying on the form of the answers was that it could not be positively satisfied that the incident in January 1987 was an isolated one.

I view with some concern the course the proceedings took in the Tribunal during the cross-examination of the applicant. If the right to refuse to answer a question on the ground that it might tend to incriminate is properly invoked, and both the parties and the Tribunal appear to have accepted that is was, then I fail to see how questions should then be permitted to be put, over objection, that seek to elicit an answer that might less directly establish guilt but nonetheless might do so as a matter of inference. While the reason given by the departmental representative for the questions was to demonstrate something about the character or reputation of the applicant, it was, in substance, to seek to show that the applicant had been asked to provide drugs because those asking knew or suspected he would supply them. Indeed this appears to be the way the questions were understood by the Tribunal given the way in which it referred to the form the answers took in response to them. But the fact is that those questions were asked and answered.

I have already said that I have had some difficulty in understanding what is the error of law relied upon by the applicant. I take the alleged error to be that the applicant, having refused to answer a question on the grounds that it might incriminate him, was then required to answer questions, over his counsel's objection, intended to establish indirectly the commission of the crime to which the earlier question was directed and that it was relied on for this purpose. There is authority to support the proposition that if a witness is

required to answer questions which have been objected to on the grounds that they might tend to incriminate him, then they may not later be used as a voluntary admission of guilt by the witness: see R v Coote (1873) LR 4 PC 599 and R v Clyne (1985) 2 NSWLR 741 at 746.

Were it apparent that the Tribunal placed any real reliance on what it perceived to be the consequences of the answers given, then this issue would warrant further consideration notwithstanding the comparatively superficial way the matter was argued in these proceedings. However the Tribunal made no finding that the applicant had supplied drugs on an earlier occasion. It spoke of "suspicion" and being "uneasy" and "unsatisfied".

The Tribunal drew together in the penultimate paragraph of its decision, paragraph 32 which I set out earlier, the matters it saw as decisive. It concluded there was a moderate risk that further crimes would be committed. Several factors were identified in support of this conclusion. They were the gravity of the offence which was to be looked at in the light of his previous criminal history, his failure to heed warnings and his failure to observe conditions of parole or face charges. The Tribunal expressed the view that the Australian community should not be asked to take the risk that further crimes might be committed given the seriousness of the previous crimes. At this point the Tribunal makes no reference to any reliance on its suspicion or being

unsatisfied about other incidents of supply arising from the manner in which the questions were answered. I am not satisfied that the decision of the Tribunal was ultimately made on the basis that the Tribunal entertained a suspicion that there may have been other incidents of supply. Accordingly, even if it be assumed that the manner in which the Tribunal considered the answers involved an error of law, no error of law material to the decision of the Tribunal has been established by the applicant.

The role of the Court in proceedings such as these must constantly be borne in mind. As a Full Court said in Collector of Customs v Pressure Tankers Pty Ltd (1993) 115 ALR 1 at 8:

> "The limitation of the jurisdiction to the resolution of questions of law imposes a significant constraint upon the role of the court in reviewing decisions of the tribunal. The appealable error of law must arise on the facts found by the tribunal or must vitiate the findings made or must have led the tribunal to omit to make a finding it was legally required to make. A wrong finding of fact is not sufficient to demonstrate error of law: *Waterford v Commonwealth* (1987) 163 CLR 54 at 77-8; 71 ALR 673. Where the decision of the tribunal involves matters of fact and degree, then provided it applies correct principles of law, no appeal will lie: *FCT v Brixius* (1987) 16 FCR 359 at 365.
>
> The limits within which the jurisdiction is conferred require that it be exercised with restraint. Only in exceptional circumstances should the decision of the tribunal not be the final decision: *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs* (1980) 47 FLR 131 at 145 (Fisher J); *FCT v Cainero* 88 ATC 4427 (Foster J). As the Full Court said in *Repatriation Commission v Thompson* (1988) 82 ALR 352 at 357:
>
> > ...the nature of the task of this court is clear. It is to leave to the tribunal of fact decisions as to the facts and to interfere only when the identified error is one of law.
>
> This translates to a practical as well as principled restraint. The court will not be concerned with looseness in the language of the tribunal nor with unhappy phrasing of the tribunal's thoughts: *Lennell v Repatriation Commission* (1982) 4 ALN N54 (Northrop and Sheppard JJ); *Freeman v Defence Force Retirement*

> *and Death Benefits Authority* (1985) 5 AAR 156 at 164 (Sheppard J); *Repatriation Commission v Bushell* (1991) 13 AAR 176 at 183 (Morling and Neaves JJ). The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Politis v FCT* (1988) 16 ALD 707 at 708 (Lockhart J)."

The fifth issue: the 1983 warning

After the applicant was convicted of various offences in 1983 he received a written and oral warning from the Department of Immigration and Ethnic Affairs. This is referred to by the Tribunal in par28 of its decision:

> "In addition to these convictions I must take into account the fact that he appeared to have completely ignored the formal warning about his possible deportation..."

The Tribunal had earlier recorded in par9:

> "While he was in prison he was interviewed by an officer of the respondent department. As a result of that, he was warned that he was liable to deportation because of his convictions. He was told that no action was contemplated against him at that time but he was warned that any further offence would result in reconsideration of the question of his deportation. By a formal letter received by him on 13 March 1984 he was advised to remain aware of the possible liability to deportation and to moderate his behaviour accordingly."

Counsel for the applicant submits that there was evidence before the Tribunal that the applicant's understanding of English at the time was limited. Counsel referred to some notes taken by an officer of the department of an interview with the applicant in January 1984. In response to one question "what is reaction to conviction and sentence?", the interviewer recorded "doesn't know - more like doesn't

understand you - stand the question.". However several questions later the interviewer records, in relation to question 47, that the applicant "has been learning English - speaks English well" then notes that one of the benefits derived from imprisonment is "learning English".

Counsel for the applicant also refers to evidence the applicant gave during the hearing before the Tribunal that he did not read English in those days though is able to do so now. Counsel also referred to notes of an interview conducted with the applicant on 30 January 1992 in which it is recorded that:

> "When reminded that he had already received one warning in 1984 with regard to his liability to deportation, he said that his command of English then had not been good, and that he had not fully understood the implications of the warning."

However the respondent points to other evidence which would sustain a finding that the applicant had understood the warning when it was given in 1982 at least in its oral form. Not only is there the reference I have already set out concerning question 47 in the record of the interview conducted in January 1984, but in answer to an earlier question as to whether he would commit the offence again, the applicant is recorded as saying: "No different now, I can speak English now. I'll find a job more easily." In his evidence to the Tribunal, the applicant admitted to knowing there had been a "kind of warning from the immigration people" and that he was concerned about it.

The Tribunal's finding that the applicant had ignored the warning clearly involves, impliedly, a finding that the applicant understood the warning. There is material that would support such a finding and it is not the Court's task to review it: see Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 355-356 and Pressure Tankers, supra.

The sixth and seventh issues: the position of the applicant's business partner - applicant not suffering greater hardship in returning to Romania - relevant and irrelevant considerations

Since his release from prison in October 1992, the applicant has been working in a business with another person restoring furniture. The applicant has invested $20,000 from a workers compensation payment he had received as the result of a work related accident in 1982 in which he injured his back.

The gravamen of the applicant's submissions concerning these matters is that the Tribunal failed to take into account the effect of the deportation of the applicant on his partner's business and failed to take into account the injury suffered by the applicant and its impact on him were he to retu to Romania. T Tribunal in its decision referred to the business and limited success the business has enjoyed to date. The applicant referred to the statement of the Tribunal in par31 that:

> "There is no evidence of any hardship that would be suffered by any person in Australia if the deportation order were carried out."

and to evidence given by the partner to the Tribunal to the effect that he may have problems finding someone who could work on weekends in the way the applicant had done. The applicant had also made a significant financial contribution to the business. I accept that the Tribunal overstated the position when it said that there is no evidence of any hardship that would be suffered by any person in Australia though the Tribunal's conclusions expressed in paragraph 32 suggest that it accepted some hardship would be suffered by a person in Australia when it said:

> "Although the risk of recidivism is only moderate, it is enough to outweigh, in my view, any other consideration of hardship to others or to the applicant that might make the carrying out of the deportation order inappropriate."

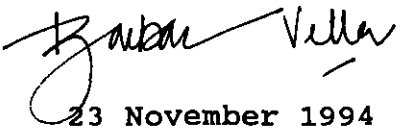
Section 55 does not identify criteria by reference to which a decision to deport should be made other than satisfaction of the preconditions in pars(a), (b) and (c). Thus the factors to be taken into account are those that might by implication arise from the subject matter, scope and purpose of the Act. Assuming that hardship to an Australian citizen is such a matter then in my view the approach taken by the Tribunal falls squarely within the principle discussed by Mason J in Minister for Aboriginal Affairs v Peko Wallsend Limited (1986) 162 CLR 24 at 41 when his Honour said:

> "Not every consideration the decision maker is bound to take into account but fails to take into account will justify the Court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision."

As to the circumstances of the applicant, the Tribunal expressed the view that "there is no reason to believe that he would suffer more economic hardship than any other Romanian if he were to be deported to his own country." While it was not a matter pressed before the Tribunal, the applicant now appears to say that the injury he suffered at work in 1982 would mean that he might suffer greater hardship in Romania were he deported. However, the observations of the Tribunal to the effect that there was no reason to believe that the applicant would suffer more economic hardship was preceded by a discussion of the skills of the applicant and jobs he has, in fact, performed including work since his injury in 1982. The reference to no greater economic hardship was in this context. In my opinion the conclusion of the Tribunal on this matter was one that was open to it and it discloses no error of law.

For the preceding reasons I dismiss the appeal.

I certify that this and the preceding twenty-seven (27) pages are a true copy of the Reasons for Judgment herein of his Honour Justice Moore.

Associate: 

Date: 23 November 1994

Counsel for the Applicant:	Mr P. Skinner
Solicitor for the Applicant:	Mr Ekstein of Andrews, Solicitors
Counsel for the Respondent:	Mr G. Johnson
Solicitor for the Respondent:	Australian Government Solicitor
Date of hearing:	14 October 1994
Date of judgment:	23 November 1994