FEDERAL COURT OF AUSTRALIA

Cole v Minister for Immigration & Multicultural Affairs [2001] FCA 76

MIGRATION – appeal from decision of primary judge dismissing application for review of Refugee Review Tribunal ("RRT") refusing refugee status – whether trial judge had erred in not finding appellant had well-founded fear of persecution for a Convention reason – whether trial judge erred in not accepting RRT had erred in finding compelling evidence of material or substantial change in circumstances

Migration Act 1958 (Cth), s 476(1)(e)

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, cited

Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 175 ALR 585, cited

JOHN COLE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

No V 827 of 2000

SPENDER, MARSHALL, GOLDBERG JJ

MELBOURNE

16 FEBRUARY 2001

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY	V 827 OF 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	JOHN COLE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	SPENDER, MARSHALL, GOLDBERG JJ
DATE OF ORDER:	16 FEBRUARY 2001
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
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BETWEEN:	JOHN COLE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	SPENDER, MARSHALL, GOLDBERG JJ
DATE:	16 FEBRUARY 2001
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from the judgment of a single judge of this Court (Heerey J) given on 27 September 2000 whereby an application by the appellant John Cole for an order of review under Part 8 of the *Migration Act 1958* of a decision by the Refugee Review Tribunal made on 28 April 2000 affirming a decision of a delegate of the Minister not to grant a protection visa to the appellant, was dismissed.

2 Mr Cole is a 24-year-old male citizen of Sierra Leone. The Tribunal accepted some aspects of his accounts of events in Sierra Leone, but did not accept other parts. The Tribunal accepted that the appellant's father was a member of President Kabbah's army and was killed by rebel troops in 1997 because he refused to assist them in the overthrow of President Kabbah. The Tribunal was satisfied that whatever connection the appellant had with the rebels was not such that would result in a real chance that he would be persecuted should he return to Sierra Leone. The Tribunal accepted that his mother took the appellant and his sister to Kenema after his father's death and that their house was attacked in that village. In his initial account he stated that he fled *"into the bush"* and that his sister was unharmed, while his mother's arm was hacked off. At the hearing, he stated that when he returned

his sister was bearing the marks of an assault. He also said that he had shot one of the rebels in self defence when the deceased searched for him at the back of the house. The Tribunal said:

"It does not accept the later account that his sister was assaulted and that he killed a rebel. Nor does it accept that he then joined the rebels who, it seems, were pleased to have him join there [sic] cause."

3 The Tribunal accepted that the appellant and a friend went to South Africa where the friend was killed by criminals. The Tribunal found that:

"…since the Applicant fled Sierra Leone, there have been significant changes in the situation."

4 The Tribunal referred in some detail to various sources of country information, and noted in respect of some aspects that, *"…as submitted by the Applicant's adviser, not everything was going perfectly to plan"* and:

"…the information before the Tribunal, including that referred to by the Applicant, makes it clear that the peace agreement has not been a complete success."

Importantly, the Tribunal continued:

"On the other hand, it is equally clear that Freetown and its surrounding areas have been secured by the government and UN forces and that the UN has strongly committed itself to keeping the peace in those areas while it seeks to spread that peace by persuading the rebels to take advantage of the amnesty offered under the peace agreement and give up their arms. Freetown has not been attacked since government forces regained control there in early 1999. The UN has made a strong moral and financial commitment to securing the peace in Sierra Leone and has longer term plans to increase its military and civil presence to achieve its resolutions. As pointed out by the Applicant's adviser, referring to Somalia as a case in point, some UN missions have failed. However, the Tribunal is satisfied that, at least for the reasonably foreseeable future, Freetown and the surrounding areas, including the area where the Applicant lived just outside the capital city, will remain under the control of the peacekeeping forces and people in those areas can go about their daily lives without a real chance of being persecuted."

5 Two arguments were advanced for the appellant by his counsel, Mr Justin Serong, who appeared *pro bono*. The first is the submission that Heerey J erred in not finding that the appellant had a well-founded fear of persecution for a Convention reason when he left Sierra Leone. It is argued for the appellant that once the Tribunal accepted his evidence about the attack on his home in Kenema, it could not in law conclude that the attack did not occur for a Convention reason. It was submitted for the appellant that his claim that the rebels attacked Kenema looking for *"those who refused to support them"* should have been accepted, and that such a reason was within the Convention. The appellant referred to the observation of Gummow J in

Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 175 ALR 585 at paragraph 147:

"The notions of "civil war", "differential operation" and "object" or "motivation" of that "civil war" are distractions from applying the text of the Convention definition.

6 It was submitted for the appellant that in this particular case the Tribunal was so distracted, with the result that the notions of *"the general non-discriminatory violence of a civil war"* and the rebels' motivation in that conflict being *"a fight for control of territory"*, have been allowed to occlude the necessary Convention reason for the persecution.

7 The second argument for the appellant, while its formulation varied in the course of submission, amounted to the assertion that the material before the Tribunal did not permit it to conclude that there was compelling evidence of a material or substantial change in Sierra Leone since the appellant departed.

The First Ground: Persecution for a Convention Reason

8 It is necessary to set out in some detail the Tribunal's findings in relation to this aspect of the matter:

"The Applicant's father was abducted and killed because he refused to join the rebels. That discloses a Convention reason for his death, in that his assailants imputed a dissident political opinion to him. On the other hand, the Applicant was not harassed when he was at the family farm in Lungi, while the attack on his mother's house in Kenema does not appear, on his evidence, to have been provoked by Convention reasons. Rather, the attack was part of a fight for control of territory, unconnected with the reasons in the Convention. In those circumstances, the Tribunal concludes that the Applicant fled the general, non-discriminatory violence of a civil war in Sierra Leone and did not flee for a Convention reason …

Of course, flight for such generalised reasons does not exclude the possibility that there are additional reasons for flight that might bring a particular applicant within the ambit of the Convention. In the current matter, the Tribunal is satisfied that the Applicant fled from general violence and was not, therefore, a Convention refugee when he left Sierra Leone, despite the urgent need for protection from possible torture and execution. Thus, even if the situation in Sierra Leone remained the same today and for the reasonably foreseeable future, the Applicant would still not fit the Convention definition, notwithstanding the grave humanitarian concerns that arise in returning people to situations of serious violence."

9 The appellant submitted that the Tribunal drew an impermissible dichotomy and in truth had seen its task as concluding whether the appellant had fled from Sierra Leone from general violence or for a Convention reason. It is true that by itself there is some support for that submission in the sentence:

"In the current matter, the Tribunal is satisfied that the Applicant fled from general violence and was not, therefore, a Convention refugee when he left Sierra Leone, despite the urgent need for protection from possible torture and execution."

10 Reference was made to the observation by Gleeson CJ in *Ibrahim* (supra) at paragraph 7:

"Persecution and disorder are not mutually exclusive. The existence of disorder may provide the occasion of, and perhaps the opportunity for, persecution of an individual or a group. In such a case, the ground of the persecution may or may not be a Convention ground …"

11 However, when regard is had to the sentence preceding that set out immediately above, it is plain to us that the Tribunal was aware that flight from general non-discriminatory violence does not exclude the possibility that there were Convention reasons also for that flight.

12 On a fair reading of the Tribunal's reasons, it seems to us plain that the Tribunal considered and rejected the appellant's claim that the attack on his mother's house was for a Convention reason, namely the attack was on people *"who refused to support them".* The finding, contrary to the appellant's assertion, that the attack was part of a fight for control of territory, was open to the Tribunal. A submission lodged on the appellant's behalf by the Refugee and Immigration Legal Centre Inc contained the statement:

"In 1998 the applicant's village was attacked by rebels. The applicant fled, but his mother had her arm severed in a machete attack, and the applicant's sister was beaten."

13 It is simply not correct to say that because the Tribunal accepted the evidence of the appellant that his home in Kenema had been attacked, it was obliged in law to conclude that the attack occurred for the reason which the appellant nominated, namely:

"One day in late 97 or very early 98, rebels came to the village and began attacking people who refused to support them, and burning down houses."

14 The first argument on behalf of the appellant is not accepted.

The Second Ground: Substantial Change

15 It was submitted for the appellant that the conclusion by the Tribunal, that there was *"compelling evidence of a material or substantial change in Sierra Leone"* making it safe for the appellant to return there, was not possible as a matter of law on the material before the Tribunal, and that the trial judge erred in not accepting that the Tribunal had erred in that way. For the appellant it was submitted that the material before the Tribunal did not permit the conclusion that there was *"compelling evidence"* or that the change in Sierra Leone was material or substantial.

16 It is difficult to avoid the view that these submissions are really undertaking a merits review under a different style. It was open to the Tribunal to conclude that:

"…Freetown and its surrounding areas have been secured by the government and UN forces";

and:

"…the UN has strongly committed itself to keeping the peace in those areas while it seeks to spread that peace by persuading the rebels to take advantage of the amnesty offered under the peace agreement and give up their arms."

The Tribunal was entitled to conclude:

"Freetown has not been attacked since government forces regained control there in early 1999."

It was open to the Tribunal to conclude that:

"The UN has made a strong moral and financial commitment to securing the peace in Sierra Leone and has longer term plans to increase its military and civil presence to achieve its resolutions."

17 In the light of the material which permitted the making of those findings, the ultimate conclusion by the Tribunal on whether the appellant faced a real risk of persecution should he be returned to the area near Freetown was clearly open to it. In particular, there has been no error demonstrated in the finding by the Tribunal:

"…the Tribunal is satisfied that, at least for the reasonably foreseeable future, Freetown and the surrounding areas, including the area where the Applicant lived just outside the capital city, will remain under the control of the peacekeeping forces

and **people in those areas can go about their daily lives without a real chance of being persecuted**." (Emphasis added).

18 This finding by the Tribunal, which is that the appellant does not satisfy the test in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 so as to bring him within the class of persons to whom Australia owes obligations under the Refugee Convention, was open to the Tribunal on the material available to it.

19 For the above reasons, the appeal should be dismissed with costs.

20 The Court wishes to express its appreciation to counsel for the appellant, who appeared *pro bono* and presented substantial written and oral submissions. Those submissions were of assistance to the Court.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Spender, Marshall, Goldberg JJ.

Associate:

Dated: 16 February 2001

Counsel for the Appellant:	Mr J.J. Serong
Counsel for the Respondent:	Mr S.G.E. McLeish
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	12 February 2001
Date of Judgment:	16 February 2001