FEDERAL COURT OF AUSTRALIA

De Silva v Minister for Immigration & Multicultural Affairs [2000] FCA 765

MIGRATION - Application for protection visa - Whether procedures required by Act observed in connection with making of decision - Whether Tribunal failed to make finding on material question of fact - Requirement that applicant be invited to appear before Tribunal to give evidence and present arguments relating to issue arising in relation to decision under review - Whether imposes obligation on Tribunal to identify issues and draw them to applicant's attention.

Migration Act 1958, ss 424A(1), 425(1), 430(1)(c), 476(1)(a)

The Minister v Cho (1999) 164 ALR 339 applied

Mohammed v The Minister [2000] FCA 264 applied

Chan v The Minister (1989) 169 CLR 379 cited

Ram v The Minister (1995) 57 FCR 565 cited

Diatlov v The Minister (1999) 167 ALR 313 cited

DODAMPEGAMAGE KUMUDU SUSIL DE SILVA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 67 of 2000

HILL, CARR and SUNDBERG JJ

9 JUNE 2000

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 67 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT

BETWEEN:	DODAMPEGAMAGE KUMUDU SUSIL DE SILVA APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	HILL, CARR and SUNDBERG JJ
DATE OF ORDER:	9 JUNE 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant 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.

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 67 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT

BETWEEN:	DODAMPEGAMAGE KUMUDU SUSIL DE SILVA APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	HILL, CARR and SUNDBERG JJ
DATE:	9 JUNE 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT

BACKGROUND

1 The appellant is a Sri Lankan national of Singhalese ethnicity. He worked in Sri Lanka for a large Tamil owned company. In August 1997, at the request of a Tamil friend, he gave two young Tamil men a lift in his vehicle. In early September 1997 the appellant was questioned by army personnel about the two men. The army personnel raised with the appellant his employment by a Tamil owned company, suggested that he supported the Liberation Tigers of Tamil Eelan ("the LTTE"), and expressed the opinion that Singhalese who assist the LTTE should be shot. They threatened to take the appellant into custody if the two men had not surrendered by the end of October 1997. Soon after this the appellant heard that a bombing incident had occurred at Yala. He assumed that the army had questioned him about the two men because they were under suspicion in relation to the bombing. He decided to leave Sri Lanka. On 22 September 1997 he was issued with a passport in his own name, and on 1 October left from the international airport without difficulty.

2 The appellant arrived in Australia on 2 October 1997. He applied for a protection visa on 12 November 1997. The application was rejected by a delegate of the Minister, and an application for review of that decision was dismissed by the Refugee Review Tribunal. Branson J dismissed an application to review the Tribunal's decision. The present appeal is from her Honour's decision.

GROUNDS OF REVIEW

3 The grounds of review aired before the primary judge were failure to observe procedures, misinterpretation of the phrase "for reasons of … political opinion" in Article 1A(2) of the Refugees Convention, failure to apply the "real chance" test, and failure to make a finding as to whether the appellant was unwilling to avail himself of the protection of his country of nationality.

Failure to observe a procedure: ss 430(1)(c) and 476(1)(a)

4 Section 430(1)(c) of the *Migration Act* 1958 requires the Tribunal to set out in its written reasons for decision its findings on all material questions of fact. The primary judge appears to have assumed that a failure to comply with s 430(1) is a ground of review under s 476(1)(a). We will assume, without deciding, that it is. Compare *Xu v The Minister* [1999] FCA 1741 with *The Minister v Yusuf* [1999] FCA 1681. It was contended before the primary judge that the Tribunal had failed to make a finding on a material question of fact, namely whether on two occasions after the appellant came to Australia men in civilian clothing called at his home at Kandi in Sri Lanka inquiring as to his whereabouts. All the Tribunal said about this was that "no particular conclusion necessarily flow[s] from the reported inquiry". The primary judge said:

"I understand the Tribunal … to be saying that it did not attach weight, in the circumstances, to the vague and inconclusive evidence

concerning the visit or visits, (the evidence is not entirely clear in this regard) of the men in civilian clothing who may or may not have represented the authorities, and whose intentions concerning the applicant were they able to find him, were unknown.

That is, the Tribunal took the view that, assuming it to be true, it was not assisted one way or the other by the evidence. The Tribunal accepted that the authorities may wish to question the applicant concerning the two young Tamil men. In the circumstances of the applicant's case I do not regard the Tribunal as having been under an obligation under s 430(1) to make a finding of fact concerning whether men in civilian dress visited the applicant's home in Kandi. Such a finding was not in the context of the other findings made by the Tribunal, a finding on a material question of fact."

We agree with her Honour's treatment of this point. The incident in question is simply too bald and unspecific for it to qualify as a material fact in the context of the case presented by the appellant. But even if it were a material fact, we are of the view, as we think her Honour was, that the Tribunal did not fail to make a finding on it. The Tribunal set out the appellant's evidence about the civilians, and a fair reading of what it later said is that it accepted it, but concluded that it did not lead anywhere. This understanding of the Tribunal's reasons is supported by the fact that it regarded the appellant as a generally credible witness and accepted his evidence.

Failure to observe a procedure: ss 425(1) and 476(1)(a)

5 Before its amendment by the *Migration Legislation Amendment Act* (No 1) 1998 s 425 provided:

"(1) Where section 424 does not apply, the Tribunal:

(a) must give the applicant an opportunity to appear before it to give evidence; and

(b) may obtain such other evidence as it considers necessary.

(2) Subject to paragraph (1)(a), the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review."

Section 424 dealt with the case where the Tribunal was able to decide in favour of the applicant "on the papers". In its present form s 425(1) provides:

"The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review."

Sub-section (1) does not apply in three cases, one of which is where the Tribunal considers that it should decide the review in the applicant's favour "on the papers": sub-s (2)(a). The significance of the amendment to s 425(1) for present purposes lies in the addition of the words "and present arguments". Although the words "relating to the issues arising in relation to the decision under review" were also

added to sub-s (1), they were, by reason of the former sub-s (2), implicit in the former sub-s (1).

6 The appellant received an invitation under s 425(1) which was in part as follows:

"The Tribunal has looked at all the material relating to your application but it is not prepared to make a favourable decision on this information alone. You are now invited to come to a hearing of the Tribunal to give oral evidence, and present arguments, in support of your claims. You are also entitled to ask the Tribunal to obtain oral evidence from another person or persons."

The notice then set out the time and place of the hearing. The appellant attended the Tribunal with his solicitor, who was described by her Honour as "a solicitor with considerable experience in refugee matters".

7 The primary judge noted that it had not been suggested that the appellant's solicitor, Mr Karp, had been placed under any restrictions in advancing his client's case before the Tribunal. The complaint was that the Tribunal did not tell Mr Karp that in determining whether the appellant was of any interest to the authorities it proposed to place weight on the fact that he had been able to leave without let or hindrance on a passport in his own name. Her Honour noted that the capacity of a person freely to obtain a passport in his or her own name and to pass through airport security checks without difficulty is commonly relied on by decision makers as suggesting that the person is not of interest to the authorities. She continued:

"More importantly, however, I do not consider that s 425 imposes any procedural obligation within the meaning of s 476(1)(a) of the Act on the Tribunal subsequent to its issuing of the invitation referred to in the section.

The way in which the Tribunal is to operate is indicated by s 420 of the Act. A failure by the Tribunal to operate in such a way is not a failure to observe a procedure required by the Act to be observed within the meaning of s 476(1)(a) of the Act, **Minister for Immigration and Multicultural Affairs v Eshetu** [1999] HCA 21, (1994) 162 ALR 577. A breach by the Tribunal of the rules of natural justice does not give rise to a ground of complaint before this Court. It would be artificial, in my view, to construe s 425 as indirectly imposing on the Tribunal an obligation to advise an applicant during the course of the hearing of each matter upon which the Tribunal proposed to place weight for the purpose of allowing the applicant to present argument on the topic. I do not so construe it."

8 It was submitted for the appellant that s 425(1) is not restricted to inviting an applicant, prior to the date set for the hearing, to attend the hearing in order that he or she may give evidence and present arguments, but has a continuing operation during the hearing obliging the Tribunal to identify issues and draw them to the applicant's attention. We do not accept this construction of the provision. The governing word in s 425(1) is "invite". The purpose of

the invitation is to enable an applicant to attend the hearing so that he or she can give evidence and present arguments relating to the issues in the case. On the plain words of the sub-section the obligation is to invite the applicant to appear. It does not impose on the Tribunal an obligation to identify issues and draw them to an applicant's attention. That s 425 does not bear the construction placed upon it by the appellant is confirmed by s 424A, which was inserted into the Act at the same time as s 425 was amended. Section 424A(1) provides:

"Subject to subsection (3), the Tribunal must:

(a) give the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it."

The obligation thus imposed does not apply to certain classes of information, one of which is information given by the applicant for the purposes of the application: sub-s (3). The existence of an express provision imposing obligations on the Tribunal to assist an applicant in relation to matters that may be important to the outcome of the case shows that s 425(1) does not impose obligations of the type asserted by the appellant.

9 The ambit of s 425(1)(a) in its earlier form was considered by a Full Court (Tamberlin, Sackville and Katz JJ) in *The Minister v Cho* (1999) 164 ALR 339. Sackville J, at 354-355, said:

"Section 425(1)(a), as its language and context make clear, is directed to ensuring that the applicant has an **opportunity to appear** before the RRT to **give evidence**, in cases where the RRT cannot decide in favour of the applicant simply on the papers. It is not concerned with procedural irregularities at the hearing that do not deny the applicant the opportunity to appear to give evidence. Procedural irregularities of that kind, whatever other consequences they may have, do not constitute a breach of s 425(1)(a) and thus do not provide a ground of review under s 476(1)(a) of the **Migration Act**. As Tamberlin and Katz JJ have pointed out, the procedural entitlements of an applicant appearing before the RRT are carefully delineated by the **Migration Act**. They plainly do not include the full panoply of procedural protections that may be available in other forums."

This passage was approved by a Full Court (Sundberg, Katz and Hely JJ) in *Mohammed v The Minister* [2000] FCA 264. The 1998 amendment of s 425 did not affect the structure of the section, and in our view what was said by Sackville J aptly describes the purpose of the current section. Adapting his Honour's language to the amended provision, that purpose is to ensure that the applicant has an opportunity to appear before the Tribunal to give evidence and present arguments in cases where

the Tribunal cannot decide in favour of the applicant "on the papers". The section is not concerned with procedural irregularities at the hearing that do not deny the applicant the opportunity to appear and give evidence and present arguments.

Real chance test

> 10 The complaint under this head was that the Tribunal failed to apply the "real chance" test espoused in *Chan v The Minister* (1989) 169 CLR 379. The failure was said to lie in the Tribunal's use of the expression "*probable* consequences of the questioning of a Singhalese". However, when it used this expression the Tribunal was answering the appellant's claim that there was a "chance or even *likelihood* that he would be beaten during questioning". It is clear from the context that when the Tribunal said it did "not accept that the probable consequence of the questioning of a Singhalese in these circumstances will be his physical mistreatment", it was not purporting to apply the well-founded fear or real chance test, but was stating that it did not accept the claim that it was likely or probable that the appellant would be beaten during questioning. It is clear that the Tribunal did not misunderstand the real chance test. It correctly stated the law on the point at the outset of its reasons.

"for reasons of … political opinion"

> 11 The Tribunal was satisfied that there was no real chance that the appellant would be arrested or detained as a suspected LTTE member or supporter. It said:
>
> "The authorities' interest was in what the Applicant could tell them at that time about the movement of two Tamils he had innocently assisted and if the authorities' interest was not sufficiently sustained to re-interview the Applicant after the initial questioning on 11 September 1997 up to his departure from Sri Lanka three weeks later, it is most implausible that any interest would be sustained (or the information of much relevance) after an interval of two years. The Tribunal does not accept that on return to Sri Lanka there is a real chance that the Applicant would be detained or questioned about this matter."

There was material before the Tribunal that justified that conclusion. The Tribunal went on to find that even if there were a real chance of persecution, it would not be because of a Convention reason; rather it would be because the appellant was thought to be able to provide information about suspected terrorists. It is claimed by the appellant that in coming to its conclusion on this point the Tribunal misinterpreted the words "for reasons of" in Article 1A(2) of the Convention.

> 12 The primary judge noted that the appellant's solicitor, who appeared at first instance, had accepted that unless it could be established that the Tribunal failed to observe a procedure that the Act required to be observed in one of the two ways considered in paragraphs 4 to 9, the application had to fail. Her Honour observed that the finding that there was no real chance of the applicant being arrested or detained as an LTTE member or supporter was open to the Tribunal, and that the other criticisms, including the claim that the

Tribunal had misinterpreted the expression "by reasons of", were of no significance. Her Honour was correct to say that it was unnecessary to consider whether the persecution the appellant feared was based on a Convention reason when the Tribunal's conclusion that there was no such fear was not open to challenge. In any event, the appellant has not established that the Tribunal misunderstood the concept of motivation inherent in the expression "for reasons of" as explained in *Ram v The Minister* (1995) 57 FCR 565 at 568. Consistently with *Ram*, the Tribunal said "the reason for the persecution must be found in the singling out of one or more of the Convention reasons", and that the "phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution". The question was whether the army officers would impute a pro-LTTE political opinion to the appellant by reason of what they knew of him. The Tribunal did not accept that they would. There was material in the form of DFAT advices that supported its view that a pro-LTTE political opinion would not be imputed to the appellant in the circumstances. There was material that pointed in the other direction, which the Tribunal did not accept. It was for the Tribunal to find the facts, choosing where necessary between conflicting bodies of evidence. It is not the Court's task on review. The appellant has not established that the Tribunal misunderstood the law in relation to the meaning of "for reasons of".

Misinterpretation of "political opinion"

13 For the same reason her Honour did not find it necessary to deal with the "for reasons of" complaint, the primary judge did not deal with the claim that the Tribunal misinterpreted and misapplied the law in relation to the words "political opinion" in Article 1A(2). The Tribunal was said to have failed to ask itself whether the appellant's action in involving himself with the two youths prompted the army personnel to impute to him a pro-LTTE political opinion. There is no substance in this claim. The Tribunal's conclusion that the appellant would not be arrested or detained was made principally on the ground that he had not been pursued by the army following his first questioning, not even after there had been a terrorist attack in the region to which he had taken the two Tamil men. The Tribunal also had regard to the DFAT advices referred to in the preceding paragraph to the effect that it was implausible that the authorities would impute a pro-LTTE view to Singhalese. After considering the material presented by the appellant and the country information, the Tribunal did not accept that a political opinion would be imputed to the appellant because he worked for a Tamil organisation and had given a lift to two Tamils.

Failure to make finding as to unwillingness

14 The complaint here was that the Tribunal had failed to make a finding as to whether the appellant was "unwilling to avail himself of the protection of [his] country [of nationality]" as required by Article 1A(2). The Tribunal is not required to consider this issue unless it has first found that an applicant is outside his or her country of nationality owing to a well-founded fear of

persecution based on a Convention reason. See *Diatlov v The Minister* (1999) 167 ALR 313. There was no such finding in the present case

CONCLUSION

15 None of the grounds of review has been made out, and the appeal must be dismissed.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court

Associate:

Dated: 9 June 2000

Counsel for the Appellant:	R M Henderson
Solicitors for the Appellant:	McDonnells Solicitors
Counsel for the Respondent:	S Lloyd
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	16 May 2000
Date of Judgment:	9 June 2000