JUDGMENT No. 194 / 94

IN THE FEDERAL COURT OF AUSTRALIA)
)
VICTORIA DISTRICT REGISTRY) No. VG 69 of 1994
)
GENERAL DIVISION)

B E T W E E N:

IBRAIM DZELILOSKI

Applicant

and

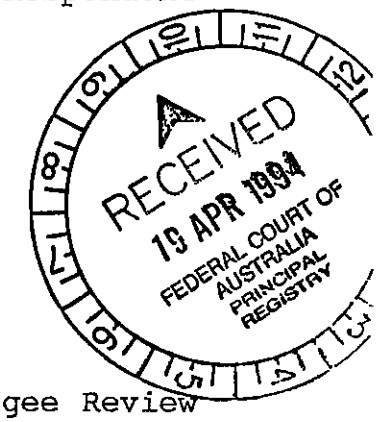
THE MINISTER FOR IMMIGRATION LOCAL GOVERNMENT AND ETHNIC AFFAIRS

First Respondent

and

M W GERKENS (Member of the Refugee Review Tribunal)

Second Respondent



JUDGE: Heerey J

DATE: 31 March 1994

PLACE: Melbourne

REASONS FOR JUDGMENT

The applicant seeks review of a decision of the Refugee Review Tribunal (the Tribunal) on 11 February 1994 which affirmed the departmental decision that the applicant was not a refugee in terms of the Geneva Convention of 1951 and that his application for a domestic protection (temporary) entry permit be refused.

The applicant is a citizen of the Former Yugoslav Republic of Macedonia having been born in that country on 7 May 1956. Ethnically he is Albanian. He practices the Muslim religion.

On 28 August 1987 he arrived in Australia as a tourist with a

temporary entry permit which expired on 22 February 1988. He stayed in Australia after the expiration of that permit and thus became a prohibited non-citizen. On 7 December 1993 he was arrested and on the following day lodged an application for refugee status and a domestic protection (temporary) entry permit. It would seem that the only event which precipitated the application for refugee status was the applicant's arrest. For the previous six years that he had lived in this country, during which time he married and subsequently separated from an Australian citizen, his fear of persecution in Macedonia was not sufficient to provoke an application. On 24 December 1993 a delegate of the Minister made a decision that the applicant was not a refugee.

The appeal was heard by the Tribunal constituted by Mr M W Gerkens on 4 February 1994. The applicant was represented by a solicitor. He called a witness, a friend Mr Bckiorfeski. On 11 February the Tribunal gave a decision affirming the decision of the delegate.

I turn now to consider the various attacks that were made on the Tribunal's decision by counsel for the applicant.

United States Country Reports on Human Rights Practices

Ethnic Albanians constitute between 20 and 40 per cent of the population of Macedonia. The applicant's case was largely based on a contention that he would suffer persecution in various forms by reason of his being an Albanian were he to be

returned to Macedonia. The material principally relied upon by the Tribunal for information as to present conditions in Macedonia as they affect the Albanian minority was the extract dealing with Macedonia in "Country Reports on Human Rights Practices for 1992". That document is a report prepared by the United States Department of State and submitted to the Foreign Relations Committees of the United States Senate and House of Representatives. It was published in February 1993.

The structural approach adopted by the Tribunal was to summarise each claim made by the applicant and then make a finding. Counsel for the applicant complains that at the hearing the Tribunal put some passages from the Country Reports to the Applicant, but relied on others which were not put.

The Tribunal recorded the first claim of the applicant as follows (at 4):

> "Claim. Mr Dzeliloski and his witness, Mr Isa Bckirovski, claim that, in general, ethnic Albanians in Macedonia are the subject of discrimination and are not treated with respect by the general population. They do not have the same job opportunities as Macedonians and generally work on farms and in labour intensive industries. They find it difficult to get jobs commensurate with their academic qualifications. Other forms of discrimination are lack of co-operation from petty officials; substitution of Macedonian school names for Albanian ones, substitution of a cross for the star and moon top-piece of a central city museum building built during the time of the Ottoman empire; restrictions on Albanian music; inferior health care and random unjustifiable arrests."

The Tribunal then made what was called a finding as follows:

> **Finding.** Ethnic Albanians in Macedonia number between 20% and 40% of the population (the exact number is disputed). The United States Country Reports on Human Rights Practices for 1992, Feb 1993 ("US State Reports"), states at p 842 -
>
> > 'All citizens are equal under the law. The Constitution guarantees the protection of the ethnic, cultural, linguistic, and religious identity of ethnic groups. In spite of these guarantees, Albanians allege that they are being discriminated against ... Albanians pressed their claims of discrimination in January at the Yugoslav Peace Conference and from June onward in talks with the Government under the auspices of the Peace Conference. They also expressed their claims within Parliament, where they hold about 20% of the seats, and within the cabinet, where they have five ministerial portfolios. They claimed ... patterns of employment discrimination. Albanian advocacy groups and political parties charged that Albanians were also under represented in both the military and police forces. The Government acknowledged this, and both the Ministries of Defence and interior instituted moderate measures to ameliorate the imbalance, including special competitions for mid-level positions open only to members of ethnic minorities and quotas for the induction of ethnic minorities into the military college and police academy ... President Gligorov has been a vocal advocate of interethnic co-operation and has played an influential behind-the-scenes role in promoting such co-operation. He has stated he is in favour of strict measures against discrimination and also favours enhanced linguistic and cultural autonomy. The Government considers the participation of Albanian parties and ministers in the coalition Government as an indication of progress.'

The inference I draw from this passage and from a reading of the Macedonia section (pp839 -844) of the US State Reports in general is that there are Macedonian/Albanian ethnic tensions which result in petty acts of discrimination and some infringements of human rights. I have reservations, however, about a number of the complaints made by the applicant and his witness. The very fact that Albanians enjoy considerable influence in government and that there are active steps being taken to ameliorate the problem leads me to the conclusion that discrimination generally falls short of persecution.

So far as the suggestion of unjustifiable arrests is concerned, I am not satisfied that the Government has failed to offer protection to its citizens. At p840 of the US State Reports, the authors say -

> 'There were no confirmed reports of arbitrary arrest in 1992. Some ethnic Albanians reported instances of

> unprovoked police harassment, but these claims were not confirmed. The Constitution states that a person must be arraigned in court within 24 hours of arrest and sets the maximum duration of detention pending trial at 90 days. The accused must be informed of their legal rights and the reasons for their arrest and detention. The accused is entitled to contact a lawyer at the time of arrest and to have a lawyer present during police and court proceedings. The Constitution also provides that a person illegally detained has the right to compensation ... The operation of the judicial system appears to be consistent with the constitutional guarantees.'"

The passage quoted from p 842 of the Country Reports was put to the applicant but the passage quoted from p 840 was not. Nor was the whole section (p 839 to 844) put.

I do not think any substantial defect in the Tribunal's procedures in this regard is disclosed. It was probably not strictly accurate to include in the description of the applicant's claim reference to "random unjustifiable arrests", this apparently being the aspect which prompted the Tribunal to quote from p 840 of the Country Reports. The applicant's written reasons for his application to the Tribunal do not make any reference to random arrests. There were two specific instances of arrests raised, one involving some cousins of the applicant and another concerning a friend of the witness Mr Bckirovski, but the applicant did not put forward arbitrary arrest as a general hazard of daily life operating in Macedonia as one of the grounds on which he feared persecution.

Lack of Protection by Macedonian Authorities

Counsel for the applicant complained that the way the Tribunal

dealt with this issue involved taking into account irrelevant considerations. The following passage from the Tribunal's decisions (at 6) is relevant:

> "**Claim.** About 1982, the applicant paid $5000, given to him by his father-in-law, pursuant to a government initiative whereby individuals could obtain employment at a local textile factory in return for the money. Because he was Albanian, the manager of the factory took every opportunity available to demean him and, although he had a Diploma, forced him to do menial work. He was deliberately given inadequate materials and, when the result was unsatisfactory, his wages were reduced by one quarter. In 1987, he was forced by the manager to train two unqualified Macedonians. He suspected that they were going to take over his job. Eventually, the manager instructed the two Macedonians to throw him into a steel container of boiling water. He resisted strongly and the police eventually arrived and saved him. After that, the discrimination continued and one day he was paraded in front of the other workers and told that he was being dismissed because he was Albanian. He remonstrated with the manager in his office afterwards about the $5000; saying that he would pursue his rights in the courts. The manager's reply was that, if the applicant did that, the manager would arrange for him to be murdered by some of the other workers. Fearing that the threat was not an idle one, he made immediate arrangements to leave for Australia. His wife did not want to come so she divorced him. His mother gave his wife the money to arrange a quick divorce as, without it, divorce can take years. Because he lost his job, his mother has no pension rights.
>
> In August 1987, the security police visited his home and asked his mother about his whereabouts. She told them he had gone to Australia because he had lost his job and they said they would find him and kill him.

Finding. Whilst I have some credibility reservations because of the curious divorce arrangements, I will assume the veracity of the claim. Such treatment would amount to persecution by the manager. At paragraph 65 of the Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, Geneva, January 1992, the observation is made

> 'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. ... Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecutions if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'

Professor James C Hathaway, in his book The Law of Refugee Status, Butterworths Canada Ltd, 1991,

refers with approval (p 127 fn 217) to the case of **Danial Cripaul** (Immigration Appeal Board Decision M81-1106, June 4, 1981). Professor Hathaway observes that, in this case, -

> 'the Board correctly denied the claim of a Guyanan Christian whose parents had been the targets of rocks and bottles thrown by the other East Indians who objected to their religion. Because there was no evidence of state awareness of the incident, much less complicity or inability to act, the claim of fear of persecution was not made out.'

Although I can sympathise with the applicant in his predicament, he chose to flee rather than test the will of the State to protect him. By so doing, he deprived himself of the benefit of this incident for refugee status purposes.

I am unsure what significance I can place on the police visit to the applicant's mother after he had departed for Australia. There is no evidence as to the motive of the police for making the visit and the evidence of the curious threat to kill the applicant is, at best, second hand. I attach no weight to this incident."

In support of the case of irrelevant considerations counsel argued that in reaching its decision the Tribunal relied on the applicant's flight from Macedonia in the face of threatened physical harm rather than remaining in Macedonia to test the will of the authorities to protect him. It was also said that the Tribunal relied on the applicant's inability to demonstrate that Macedonian authorities knowingly refused to offer protection to the applicant against threatened physical harm. Further it was said that the Tribunal relied upon the applicant's inability to demonstrate that the authorities were unable to offer him protection against threatened physical harm and that he did not have direct evidence of his likely persecution or threat to life should he be returned to Macedonia.

I do not think these attacks are made out. In particular I do not think it is correct to say, as counsel for the applicant argued, that the Tribunal somehow made failure to "test the will of the State" some kind of legal precondition to the establishment of refugee status.

As the publications cited by the Tribunal make clear, persecution can occur not only by direct action of the State authority but by a State authority being unable or unwilling to protect its citizens against maltreatment by others within the jurisdiction. Whether that happened in the present case was simply a question of fact. The Tribunal did no more than note that the applicant seemed to have done little to try and enlist the protection of the State, even though on his own account police had protected him from threatened maltreatment in the boiling water incident. Nor did the Tribunal wrongly rely on some legal precondition requiring an applicant to produce direct evidence of everything he complained of. It was legitimate for the Tribunal, in the course of weighing evidence and deciding what facts it should find, to take into account whether evidence was direct or not.

Threats by State Owned Enterprise

Counsel for the applicant argued that the Tribunal failed to take into account relevant considerations in that it should have treated the misconduct by the manager of the State owned enterprise where he worked as the actions of the Macedonian State. In his evidence before the Tribunal the applicant had

referred to the factory as being a "government factory". He said:

> "Over there there is nothing private, there are no private enterprises, private agencies. And everything, whatever you do is under government law".

But there is nothing to indicate that the Tribunal misunderstood the position. The fact that a commercial enterprise is owned by the State, whether in a socialist economy like the former Yugoslavia or in a capitalist economy like Australia, does not necessarily make the actions of management of such an establishment the actions of the State. It was a question of fact for the Tribunal to decide as best it could whether any misconduct by the manager of the factory was the action of the State or whether it was rather a case of the State authorities responsible for law and order being unable or unwilling to protect a citizen. I do not detect any error of law in the way the Tribunal dealt with this aspect.

Alleged Fear of Death

It was said that the Tribunal failed to take into account or give weight or sufficient weight to "the applicant's well-founded fear of death should he be returned to Macedonia". Seemingly allied with this complaint was the allegation that the Tribunal had failed to take into account or give weight to the applicant to

> "the applicant's stated motivation to the delegate for the visit by Macedonian police to the applicant's mother's home subsequent to the

applicant's departure from Macedonia".

Again this to my mind raises only questions of fact. Even on the applicant's own version the police protected him from maltreatment at the factory.

The alleged threat by police to the applicant's mother was simply a matter of evidence which was for the Tribunal to give acceptance or weight as it thought fit.

The Myzafer Letter

In his application to the department the applicant submitted a letter from a friend called Myzafer. It was in these terms:

> "Comrade Ibrahim,
>
> Concerning the letter you have requested, in the new Republic of Macedonia there are a lot of changes taking place but as far as Albanians are concerned it is the same as when you were here. At the place of employment where we worked together I expect every day to be dismissed and you should consider yourself lucky for going to Australia.
>
> We, who are still in Macedonia, have a very difficult life, just as before.
>
> Vera Stojanovska, the secretary, has no chance to get any letters in the name of Ibrahim Dzeliloski. She has been working here a long time, she started when the Socialist Federal Republic of Yugoslavia existed, well before 1992, when Macedonia was a constituent state within SFR Yugoslavia. Macedonia is now a separate State and the secretary told me that your letters are not here because more than 5 years passed and she could not locate you, because, we, the Albanians are now not respected, just as before, when you were here. Tell me how is your situation. I still live at the same address.
>
> Arifi Myzafer (sgd)"

This letter was not mentioned in the Tribunal's reasons. That is hardly surprising since there was virtually no mention of it at the hearing. Right at the end of the hearing the applicant's solicitor said

> "Just a minor administrative thing. Mr Dzeliloski said a document previously submitted as an authorisation has one error in it."

The solicitor went on to say that the word "letters" should be "documents". This was the only mention. The response of counsel for the respondent to the effect that the Myzafer letter "sank to the bottom of the case" was to my mind apt.

Exercise of Power at the Direction or Behest of Another

It was argued that the Tribunal had "blindly followed" the United States Country Reports.

That was plainly not the case. The United States State Department did not purport to give any direction to the Tribunal or Australian immigration officials.

Unreasonable Decision; No Evidence

Counsel concluded with a generalised attack. It was said the Tribunal gave excessive weight to irrelevant, outdated and unsubstantiated matters and little or no sufficient weight to relevant matters, particularly the visit by Macedonian police to the applicant's mother in Macedonia and the threat to the applicant's life during the course of his employment at a state owned enterprise in Macedonia. I think I need only

repeat what I have said earlier in relation to those matters.

It was also argued that it was unreasonable for the Tribunal to rely on the United States Country Reports prepared in 1992 for the purpose of assessing the status of Albanians in Macedonia as at the date of the application for refugee status in preference to "the more current testimony of Mr Bckirovski and the documentary evidence of Arifi Myzafer". Counsel expanded his attack on the Country Reports alleging that they were prepared for "political purposes". I do not accept that argument. It is understandable that Australian immigration officials and the Tribunal would seek the benefit of the greater resources of the United States in assessing human rights conditions in the world's many countries. The Tribunal is not bound by the rules of evidence and the use of a publication such as the United States Country Reports seems a legitimate mode of proceeding.

As to the evidence which is argued should have outweighed what was said in the Report, Mr Bckirovski spoke of only one incident which happened to a friend of his. The Myzafer letter is extremely vague. As has been noted it was not substantially relied on by the applicant himself. The Tribunal was engaged on a fact finding function. This application for review is in my opinion essentially an attempt to canvass those factual conclusions. No error of law has been established. The application will be dismissed with costs.

I certify that this and the preceding twelve (12) pages are a true copy of the reasons for judgment of his Honour Mr Justice Heerey.

Dated: 31 March 1994

Associate

Appearances

Counsel for the applicant:	P J Ginnane
Solicitor for the applicant:	Mulcahy Mendelson & Round
Counsel for the respondent:	K H Bell
Solicitor for the respondent:	Australian Government Solicitor
Date of hearing:	11 March 1994

JUDGES' CHAMBERS
FEDERAL COURT OF AUSTRALIA
450 LITTLE BOURKE STREET
MELBOURNE, 3000

11 April 1994

Ms Sonia Cornale
Federal Court of Australia
Principal Registry
Queens Square
Sydney NSW 2000

Dear Sonia,

re: Ibraim Dzeliloski v Minister for Immigration Local Government and Ethnic Affairs
No.VG 69 of 1994

Judgment of the above matter was delivered on 31st March.

Please note this judgment is not for general distribution.

Copy diskette is enclosed.

Yours sincerely,

David Brennan
Associate to Heerey J