FEDERAL COURT OF AUSTRALIA

El Hejjar v Minister for Immigration & Multicultural Affairs [2000] FCA 263

MIGRATION – application for protection visa – claim of well-founded fear of being persecuted for reasons of political opinion or membership of particular social group – review of decision of Refugee Review Tribunal – whether no evidence to justify the making of the decision – where finding by Tribunal that there was no evidence before it of a particular fact – whether there was evidence before the Tribunal establishing that the particular fact did exist – whether persecution feared would be for a Convention reason – whether failure to give adequate reasons – whether failure to follow procedures required by *Migration Act 1958* (Cth).

Migration Act 1958 (Cth) ss 430, 476(1)(a), (g), (4)(b)

Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5(1)(h), (3)(b)

Broussard v Minister for Immigration Local Government and Ethnic Affairs (1989) 21 FCR 472, cited

Arudselvan v Minister for Immigration and Multicultural Affairs [1999] FCA 622; [1999] FCA 1726, cited

Chopra v Minister for Immigration and Multicultural Affairs [1999] FCA 480, cited

Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212, applied

Minister for Immigration and Multicultural Affairs v Yusuf [1999] FCA 1681, cited

Xu v Minister for Immigration and Multicultural Affairs [1999] FCA 1741, cited

Singh v Minister for Immigration and Multicultural Affairs [1999] FCA 1126, cited

Ahmed v Minister for Immigration and Multicultural Affairs (1999) 55 ALD 618, cited

Addo v Minister for Immigration and Multicultural Affairs [1999] FCA 940, cited

Sivaram v Minister for Immigration and Multicultural Affairs [1999] FCA 1740, cited

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407, cited

ELIE JAMIL EL HEJJAR v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 1134 OF 1999

SUNDBERG, KATZ and HELY JJ

13 MARCH 2000

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 1134 OF 1999

BETWEEN:	ELIE JAMIL EL HEJJAR APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SUNDBERG, KATZ and HELY JJ

DATE OF ORDER:	13 MARCH 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.

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JUDGES:	SUNDBERG, KATZ and HELY JJ
DATE:	13 MARCH 2000

PLACE: SYDNEY

REASONS FOR JUDGMENT

BACKGROUND

1 The appellant is a citizen of Lebanon who arrived in Australia on 25 April 1998. On 30 July 1998 he lodged an application for a protection visa. A delegate of the respondent refused the application, and the Refugee Review Tribunal affirmed the delegate's decision. An application for review of the Tribunal's decision was dismissed by Emmett J. The appeal is from his Honour's decision.

THE APPELLANT'S CLAIMS

2 The following account of the appellant's claims was accepted by the Tribunal. From March 1993 to December 1997 the appellant worked as a "salesman clerk" for Reecha Dental Clinic. He travelled throughout Lebanon in a van, supplying dental goods to dentists and pharmacists and taking and delivering orders. Unknown to him, his employer had for many years been trading with dentists in the security zone in southern Lebanon occupied by Israel. In late 1996 the employer offered to increase the appellant's wages if he sold goods into the security zone. The appellant agreed, visited the zone about a dozen times over the next eighteen months, and supplied three dentists and one pharmacist. One of the dentists gave him an introduction to customers inside Israel, and he supplied them too.

3 In late 1997 while the appellant was on the road, a woman from his employer's office telephoned him and told him the army had taken away his boss. Because he suspected the reason for this, the appellant did not return to the company's premises but went to Beirut where a friend had a chalet. He was advised that his name was on a list of wanted persons kept at the airport. The appellant remained in Beirut for three months, concealed and frightened. When his cash ran out he tried to withdraw money from his US dollar account with the Arab Bank, but was informed that it had been frozen by court order. Later, with the assistance of his father and a friend who was the head of security at Beirut Airport, the appellant left for Australia.

4 The Tribunal had before it documents indicating that the appellant was required to attend court in Lebanon to answer certain charges. The first document purports to be notification of service of a ruling of the Zahlah Criminal Court on 6 January 1998. The ruling is said to relate to *"preliminary investigation on transfer of information related to national security and entry inside the border zone".* The second document purports to be a communication from Major General Emad Lahoud, Army Commander, to the

General Department of Internal Security Forces endorsed with the date 19 August 1998. There was some uncertainty as to the translation of the relevant part of the document, but the Tribunal accepted the appellant's version of it. This was that the army was instructed to locate him because he was accused of avoiding the army which was seeking him in the context of his intended trial for a criminal offence. The appellant explained that the army becomes involved when security matters, such as trading with the enemy, are under investigation.

5 A third document, which bears an endorsement 12 April 1999 but no other date, purports to be a letter from the Prosecutor General, Zahlah Court of Appeals, to the First Magistrate. It is as follows:

"We, the Prosecutor General of Beqa Court of Appeals, having sighted the attached documents which are Preliminary Investigations;

Since they indicate suspicion against the defendant … Elie Jamil El Hejjar … that the defendant, inside the border strip and on a date not too long ago, smuggled and transferred secret information on national security in Lebanon beyond the border strip and inside the Israeli lands and dealt with the Israelis; a crime listed in the Lebanese law;

After sighting Articles 50 and 59 of the Penal Code; we request the Magistrate to issue an arrest order to search for him and conduct interrogation concerning the crime."

GROUNDS OF REVIEW

No evidence

6 In its statement of findings and reasons the Tribunal said:

"There is nothing in the documents produced by the applicant which indicates that the investigation into his conduct is anything other than a normal criminal investigation. Initial inquiries have been made and he is wanted for questioning. The independent evidence does establish that sometimes suspects may undergo mistreatment and even torture in the course of their interrogation. However there is no evidence that as a general rule or in this case those suspected of a security offence undergo any more rigorous treatment than those under investigation for other criminal offences, nor that the penalties are disproportionately severe."

The Tribunal found that if the appellant were to return to Lebanon there would be a real chance that he would be arrested for interrogation and that in the course of that interrogation he would suffer harm which would amount to persecution. The Tribunal was satisfied that the appellant's fear of such treatment was well-founded. But it

concluded that the harm feared would not be inflicted on him for a "reason" within Art 1A(2) of the Refugees Convention.

7 The appellant contended that the last sentence in the above passage gave rise to a complaint under par 476(1)(g) of the *Migration Act 1958* (Cth) as affected by par (4)(b). Under these provisions it is a ground of review of a decision of the Tribunal that there was no evidence or other material to justify the making of the decision, but the ground is not to be taken to have been made out unless the person who made the decision based it on the existence of a particular fact and that fact did not exist. The appellant submitted that a report of Amnesty International of 9 October 1997 entitled *Lebanon: Human Rights Developments and Violations*, to which the Tribunal referred, contained evidence that those suspected of a security offence may well undergo more rigorous treatment than those under investigation for other criminal offences.

8 The primary judge noted that the Tribunal's final sentence contained two statements. The first was that there was no evidence that, as a general rule, those suspected of a security offence undergo any more rigorous treatment than those under investigation for other criminal offences. The second was that there was no evidence that, in this case, the appellant, being suspected of a security offence, would undergo any more rigorous treatment than those under investigation for other criminal offences. His Honour carefully examined the relevant parts of the Amnesty Report, which he set out in [18] to [20] of his reasons, and concluded (at [23]), as to the first statement in the impugned sentence:

"The material in the Report to which I have referred demonstrates that there are instances of those suspected of security offences being tortured, as indeed the Tribunal has found. However, I do not read the material in the Report as demonstrating that, **as a general rule**, those suspected of a security offence undergo any more rigorous treatment than those under investigation for other criminal offences. The Tribunal did not say that more rigorous treatment never happens. If it had, it could not have reached the conclusion that it did that there is a real chance that the applicant would suffer harm which would amount to persecution."

We have carefully examined the Amnesty Report, especially those parts of it dealing with *"Torture and Ill-Treatment"* and *"Violations of the Right to Fair Trial"*. We agree with the primary judge that there is nothing in the Report which falsifies the first part of the Tribunal's statement. Compare *Broussard v Minister for Immigration Local Government and Ethnic Affairs* (1989) 21 FCR 472 at 479-480 (Gummow J).

9 As to the second part, viz that dealing with the appellant in particular, the primary judge said:

"Further, there was no material referred to on behalf of the applicant to indicate that, in the present case, the applicant, in particular, being suspected of a security offence, would undergo any more rigorous treatment than those under investigation for other

criminal offences. Indeed, the material in the Report indicates that infringement of human rights occurs not only in relation to security matters but for ordinary criminal matters as well. Specifically, the statement that reports of torture and ill-treatment received by Amnesty International relate to both political and criminal detainees indicates that torture or ill-treatment is not limited only to security offences."

Our reading of the Report bears out what is said in the last two sentences. The appellant has not established that the Report shows that because he was suspected of a security offence he would undergo more rigorous treatment than those under investigation for other criminal offences.

10 In the course of its reasons the Tribunal said:

> "The applicant knowingly entered into trade with customers within the security zone and in Israel itself. He admitted his motivation was personal gain. He knew it was against the law and admitted to being frightened of being caught each time he undertook a mission into the south. At the end of the hearing when asked by the Tribunal which of the Convention reasons he saw as the reason for the harm he feared, he said that he held the opinion that the Lebanese residents of the security zone were entitled to be treated like other residents of the country and should have access to similar trade opportunities and goods. The Tribunal does not accept that it was this opinion, if indeed he held it, which led the applicant to undertake the activities he now fears may be the cause of his coming to harm, nor, more importantly, does it accept that this claimed opinion, or the belief that the applicant holds it, is the reason for the authorities' interest in him."

The Tribunal went on to say, in the passage we have quoted in par 6, that there was nothing in the documents produced by the appellant which indicated that the investigation into his conduct was anything other than a normal criminal investigation.

11 The primary judge was of the view that the rejection by the Tribunal of the appellant's claim that he faced harm because of his political opinion that the people of southern Lebanon were entitled to the same trading rights as others in Lebanon, coupled with its opinion that the investigation into his conduct was just a normal criminal investigation, was another reason why the ground in par 476(1)(g) and par (4)(b) was not made out. His Honour said:

> "[The requirement in par (4)(b)] is that the person who made the decision must have based the decision on the existence of a fact that did not exist. Even if it be established that the fact stated, and which is the subject of the complaint, did not exist, I do not understand the Tribunal's reasons as constituting a conclusion that was based in any way on that fact. Rather, the Tribunal considered that, to the extent that there is a real chance of persecution of the applicant, it is because he has committed offences against the law of Lebanon and not because of any political view he holds or any other Convention reason.
>
> …

I consider that on a fair reading of its reasons, the Tribunal was making abundantly clear that, while there was a real chance of persecution because of frequent infringement of human rights in Lebanon, the authorities are not interested in the applicant for anything other than the possibility of his being involved in security offences arising out of his trading with Israel."

12 His Honour's conclusion as to the basis of the Tribunal's conclusion is reinforced by passages from its statement of findings and reasons to which he did not refer. Having disbelieved the appellant on his political opinion claim, the Tribunal considered whether it could be said that he feared persecution because of his membership of a particular social group. It concluded that it could not. It followed, said the Tribunal, that it was *"not satisfied that harm which the applicant fears would be inflicted on him for a Convention reason".* We agree with the primary judge that it was because the Tribunal was not satisfied that the appellant's fear was for a Convention reason, and not because it had not been shown that those suspected of a security offence were the subject of more rigorous treatment than those suspected of other offences, that it formed the view that he was not entitled to a protection visa. The "particular fact" referred to in par 476(4)(b) is not some single particular fact that may be said to be the foundation of the decision. A decision may be based upon the existence of many particular facts. It will be based upon the existence of each particular fact that is critical to the making of the decision. Compare *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 220-221 (Black CJ, Spender and Gummow JJ agreeing), a decision on the materially identical provision in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). And see *Arudselvan v Minister for Immigration and Multicultural Affairs* [1999] FCA 622 (Katz J; unreported; 9 September 1999); affirmed on appeal [1999] FCA 1726 (French, Heerey and Lindgren JJ; unreported; 12 November 1999) and *Chopra v Minister for Immigration and Multicultural Affairs* [1999] FCA 480 (Lee, Whitlam and Weinberg JJ; unreported; 23 April 1999), a decision of the Full Court, both on par 476(4)(b). The fact that those suspected of security offences did not undergo more rigorous treatment than those suspected of other offences was not a link in the chain of reasoning leading to the conclusion that the appellant's fear was not based on a Convention reason. The distinction between security and other offences was in truth irrelevant to the Tribunal's reasoning process.

Failure to give adequate reasons

13 The case was conducted before the primary judge on the basis that a failure by the Tribunal to set out the reasons for its decision as required by par 430(1)(b) constitutes a failure to observe a procedure for the purposes of par 476(1)(a). Different views have been expressed as to whether this is so. Compare *Minister for Immigration and Multicultural Affairs v Yusuf* [1999] FCA 1681 (Heerey, Merkel and Goldberg JJ; unreported; 2 December 1999) with *Xu v Minister for Immigration and Multicultural Affairs* [1999] FCA 1741 (Whitlam, RD Nicholson and Gyles JJ; unreported; 17 December 1999). We will assume, without deciding, that it is.

14 The case for the appellant was that the Amnesty Report had the potential to substantiate important aspects of his case, and the Tribunal's failure to indicate its response to the allegations in the Report made it impossible to understand how it came to its findings. The primary judge rejected this contention. In our view he was correct to do so. The Tribunal referred to the Amnesty Report, and used it to confirm that torture and ill-treatment of suspects are reported by both political and criminal detainees. It plainly had the Report in mind when it later said that *"independent evidence does establish that sometimes suspects may undergo mistreatment and even torture in the course of their interrogation"*, and when it said that there was no evidence that those suspected of a security offence were more rigorously treated than others. The Tribunal made quite clear how it responded to the Report. In its view the Report did not establish what the appellant sought to derive from it, and it was this that led it to conclude that there was no evidence that those suspected of security offences were treated more rigorously than those under investigation for other offences.

15 The primary judge accepted "for present purposes" the view expressed in *Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1126 (Drummond J; unreported; 17 August 1999) that the Tribunal must explain why it rejects apparently probative material. As his Honour observed, the occasion to discharge that obligation did not arise. For the reasons he and the Tribunal gave, the Report was not probative material relevant to whether or not an inference should be drawn that the motive for the prosecution of the appellant was Convention related. No error has been shown in his Honour's treatment of the claim based on par 430(1)(b). Before parting with this aspect of the case we note that the view taken in *Singh* has not been taken in some other cases. See, for example, *Ahmed v Minister for Immigration and Multicultural Affairs* (1999) 55 ALD 618 (Lee, Branson and Marshall JJ), *Addo v Minister for Immigration and Multicultural Affairs* [1999] FCA 940 (Spender, O'Connor and Emmett JJ; unreported; 9 July 1999), *Sivaram v Minister for Immigration and Multicultural Affairs* [1999] FCA 1740 (Whitlam, RD Nicholson and Gyles JJ; unreported; 17 December 1999). Compare *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 (McHugh J). There is no need for us to come to a view as to the correctness of *Singh* in this respect.

CONCLUSION

16 The appeal must be dismissed with costs.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 13 March 2000

	The appellant appeared in person.
Counsel for the Respondent:	D Jordan
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	29 February 2000
Date of Judgment:	13 March 2000