

FEDERAL COURT OF AUSTRALIA

Foroghi v Minister for Immigration & Multicultural Affairs [2001] FCA 1875

IMMIGRATION –protection visa - Refugee Review Tribunal – application for judicial review – whether Tribunal erred by failing to fulfil a duty to inquire – whether Tribunal constructively failed to exercise jurisdiction – whether decision based on non-existent material or viable evidentiary basis – whether logical is an allowable ground of review – whether Tribunal failed to take relevant considerations into account

Migration Act 1958 (Cth) ss 427(1)(d), 476(1)

Migration Regulations 1994 (Cth)

Convention relating to the Status of Refugees done at Geneva on 28 July 1951

Protocol relating to the Status of Refugees done at New York on 31 January 1967

Paramanathan v Minister for Immigration & Multicultural Affairs (1998) 160 ALR 24 referred to

Prasad v Minister for Immigration & Ethnic Affairs (1985) 6 FCR 1555 cited

Teoh v Minister for Immigration & Ethnic Affairs (1994) 49 FCR 409 cited

Minister for Immigration & Ethnic Affairs v Anthonypillai [2001] FCA 274 at [86], (2001) 106 FCR 426 applied

Yusuf and Israelian v Minister for Immigration & Multicultural Affairs [2001] HCA 30, (2001) 180 ALR 1 discussed

Nagappan v Minister for Immigration & Multicultural Affairs [2001] FCA 863 referred to

Cujba v Minister for Immigration & Multicultural Affairs [2001] FCA 699 referred to

Minister for Immigration & Multicultural Affairs v Al-Miahi [2001] FCA 744 referred to

CCC v Minister for Immigration & Multicultural Affairs [2001] FCA 682 referred to

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 applied

Giraldo v Minister for Immigration & Multicultural Affairs [2001] FCA 113 followed

Kopalapillai v Minister for Immigration & Multicultural Affairs [1997] FCA 1510 referred to

Kopalapillai v Minister for Immigration & Multicultural Affairs (1998) 86 FCR 547 applied

Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 29 referred to

REZA FOROGHI V THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

V 726 of 2001

MARSHALL J

MELBOURNE

21 DECEMBER 2001

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

V 726 OF 2001

BETWEEN: REZA FOROGHI
APPLICANT

AND: MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
RESPONDENT

JUDGE: MARSHALL J

DATE OF ORDER: 21 DECEMBER 2001

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs of the application, including reserved costs.

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

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PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 The applicant, Mr Reza Foroghi, is a 39 year old Iranian National. Mr Foroghi arrived in Australia on 13 May 1999. On 12 August 1999, Mr Foroghi applied to the respondent Minister for a protection visa. In a decision dated 22 November 1999, a delegate of the respondent Minister refused to grant Mr Foroghi a protection visa. Subsequently, on 9 December 1999, Mr Foroghi applied to the Refugee Review Tribunal ("the RRT") to review the decision of the delegate. In a decision dated 15 June 2001, the RRT affirmed the

delegate's decision not to grant Mr Foroghi a protection visa. The application before the Court seeks judicial review of the RRT's decision. The review is sought pursuant to Part 8 of the *Migration Act 1958* (Cth) as it stood at the material time ("the Act").

Legislative CONTEXT

2 Section 36(1) of the Act provides for a class of visa known as a protection visa. Criteria for the grant of a protection visa are set out under s 36 of the Act and Part 866 of Sched 2 of the Migration Regulations 1994 (Cth). Pursuant to s 36(2) of the Act, a criterion for the grant of a protection visa is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). Australia is a signatory and party to the Convention.

3 Article 1A(2) of the Convention provides that a refugee is any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

4 Under s 475(1)(b) of the Act as it stood at the material time a decision of the RRT is a "judicially-reviewable" decision. Section 476 of the Act sets out the grounds upon which an application may be made to the Federal Court to review a judicially reviewable decision.

Claims before the RRT

5 The evidence before the RRT consisted of

- the Departmental file, which included:
 - the initial visa application
 - a written statement by Mr Foroghi in support of his application ("the written statement")
 - a taped interview with an officer of the Department ("the Departmental interview");

- oral evidence given by Mr Foroghi at the RRT hearing on 26 April 2000 (“the oral hearing”);
- oral evidence given by Mr Dais, a political refugee from Iran, appearing as a witness for the applicant; and
- a letter from Mr Foroghi to the RRT further commenting on the location of a central event (“letter to the RRT”).

General Claims

6 Mr Foroghi claimed to have previously lived in the city of Yazd, where his wife and two children continue to live. At the oral hearing he alleged to be formerly employed by a company in Yezd owned by a relative of his wife. The company imported and exported goods. Mr Foroghi claimed that after 8 years of work he was promoted to a position involving distribution of products. Mr Foroghi claimed to have ceased work for the company around “the 5th month of 1377”. The interpreter present at the hearing calculated this to be approximately July 1998.

7 Mr Foroghi claimed that if he were to return to Iran he would suffer persecution based on his political opinion and religious practices. In his initial application to the Minister for a protection visa Mr Foroghi stated:

“I left Iran because I was tired of the political pressure and I wanted to express my opinion freely”

In the same application he later stated:

“I have been a Muslim all my life but I do not accept the religion the Iranian government is promoting.

Since the Islamic revolution in Iran I have never taken part in religious activities such as Friday prayers etc.

In the recent riots in Iran, I started to oppose the government and I took part in the demonstrations.”

8 Mr Foroghi claimed that he believed that if he were returned to Iran he would be arrested and tortured and possibly killed.

Mr Pouyandeh’s Memorial Service

9 Mr Foroghi claimed that he became of interest to the authorities after he attended a memorial service for “a renowned Persian author”, Mr Pouyandeh. Mr Foroghi claimed that Mr Pouyandeh was “well respected for his anti-regime views and writings.” While Mr Foroghi had never met Mr Pouyandeh in person, he had read articles about Mr Pouyandeh and claimed that he had befriended the family of Mr Pouyandeh who also lived in Yazd. Mr Foroghi claimed Mr Pouyandeh had been assassinated for political reasons, and rumours suggested that the government was connected to the killing.

10 When visiting relatives in Tehran, Mr Foroghi claimed he attended a memorial service held in Mr Pouyandeh’s honour. In his written statement Mr Foroghi claimed the memorial service was forty days after Mr Pouyandeh’s funeral. Mr Foroghi stated:

“The service was quite inciting and all speakers including [Mr Pouyandeh’s] daughter requested the government authorities to find the killers. Handouts were distributed by intellectual writers asking the government to protect them and provide a safe environment for them.”

11 At the oral hearing before the RRT, Mr Foroghi claimed the ceremony was held at Behesht-e-Zahra cemetery, and was attended by about 1000 people. When the RRT noted it had reports that the 40th day ceremony was held at another location, Mr Foroghi claimed that there was more than one ceremony. In a letter to the RRT following the hearing, Mr Foroghi claimed that the ceremony had been held at Behesht-e-Zahra because it was a very important place and there was suggestion that Mr Pouyandeh had been killed there.

Encounters with the Company’s Protection Officers

12 On returning to Yazd after the memorial service, Mr Foroghi claimed he discovered that many of the people who had attended the memorial service were informers. Subsequently, Mr Foroghi alleged that his employer company’s “protection officer” contacted him to ask where he had been. Mr Foroghi told the officer he had been visiting his brother in Tehran. Mr Foroghi claimed the officer had then said “*do not lie, we know you went to the memorial service, if it was up to us we would have sent you to the other world to meet Pouyandeh*”. Following this encounter Mr Foroghi was told not to discuss the meeting with anyone until his fate was decided. Ten days later Mr Foroghi was demoted from manager to distributor and his salary was reduced.

13 Mr Foroghi alleged that following this first encounter with the protection officer, he was again summoned by the protection officer and given a questionnaire to complete. There are some discrepancies in Mr Foroghi’s evidence regarding the interval of time between the first and the second encounters with the protection officer. The questionnaire required details of who Mr Foroghi stayed with in Tehran; the addresses of all friends and relatives in Tehran; what Mr Foroghi did in Tehran and where he went; what publications Mr Foroghi read; and what was Mr Foroghi’s opinion about the Guidance Minister. Mr Foroghi was then told he would later be informed of the

result of the investigation. In the Departmental interview Mr Foroghi claimed that he filled out the questionnaire forms about “7 months and 10 days ago” (about 25 March 1999).

Visits by the Authorities

14 Following the filling out of the questionnaire forms, Mr Foroghi claimed in his written statement:

“... some members of the Iranian intelligence bureau came to my house and asked for me. I was not home and my wife told them that I had gone to Tehran ... After their departure my wife called me (I was staying at my mother-in-law’s house) and explained the situation. I knew if I went home I would be arrested and imprisoned because the protection officer had threatened me to do so. I went immediately to Tehran and asked my brother to assist me. My brother found a person who helped me to obtain an Australian visa and I left the country.”

15 Since his departure from Iran, Mr Foroghi claims that the authorities have visited his house twice. Mr Foroghi claims that he believes the authorities have now stopped visiting his house because they have realised he had left the country. Mr Foroghi claims his family has not been punished.

Interrogation of Others at the Memorial Service

16 In the Departmental interview Mr Foroghi was asked whether he knew if the police had interrogated anyone else after the wake. Mr Foroghi claimed that two more writers were murdered after Pouyandeh. At the oral hearing the RRT asked how Mr Foroghi knew the two writers were murdered. Mr Foroghi claimed the writers were from Yazd and he had been in Yazd at the time. The RRT noted that this contradicted earlier oral evidence given by Mr Foroghi suggesting he was in Australia when the murders occurred. Mr Foroghi then claimed he had been in Australia, but had been called by someone in Yazd informing him about the arrest of the two writers.

Other Political/ Religious Activity

17 At the oral hearing Mr Foroghi said he had not been involved in other demonstrations against the government. In the Departmental interview, Mr Foroghi stated that he was not a member of a political group, nor had he had any dealings with one. Mr Foroghi claimed that he had never discussed his feelings about Iranian politics with anyone in Iran because of the high risk he would be reported. He claimed that in every suburb, 50% of the occupants would be with the authorities.

18 As noted above, Mr Foroghi claimed to not accept the religion promoted by the Iranian government and to have “never taken part in religious activities” since the Islamic revolution. While not attending Friday prayers is not illegal, Mr Foroghi claimed that it meant that he was socially isolated and this “would make trouble for him”. At the oral hearing Mr Foroghi claimed that his beliefs had not attracted adverse attention from the authorities before.

Departure from Iran

19 Mr Foroghi alleged that he was able to obtain an exit permit and visa by the use of bribes. Mr Foroghi claimed that he had been able to leave Iran without any trouble because he was not yet “black listed”. At the oral hearing Mr Foroghi claimed that at the time of his departure, he was not yet on the black list because he was only being preliminarily investigated.

20 In the oral hearing, the RRT noted that Mr Foroghi had renewed his passport in October 1998, before Mr Pouyandeh’s death. Mr Foroghi claimed he had renewed his passport at this time because he needed a different passport from the one he had used to go on pilgrimage in Syria. However, Mr Foroghi alleged that at the time of the renewal he could not have afforded to travel, and had no reason to. Mr Dais, a witness for Mr Foroghi, noted that because of the lengthy security checks in Iran, having a passport is an important privilege, and people try to keep their passports current even if they have no immediate plans to travel.

RRT’S FINDING AND REASONS

21 Based on the country information provided (“the country information”), the RRT accepted that Mohammad Jaf’ar Pouyandeh was a well-known Iranian writer and translator. Summarising the available country information, the RRT found at 8 of its decision:

“Pouyandeh disappeared on 9 December 1998 and on 13 December his body was found in Shar-e Ray, a suburb of Tehran – from where it was moved to a Tehran city morgue. According to the family, he had been strangled.”

22 Centrally, the RRT did not accept Mr Foroghi’s claim that he attended Mr Pouyandeh’s ceremony. The RRT found at 14-15:

“The Tribunal does not accept that the applicant attended a memorial service for Pouyandeh and, consequently, does not accept that he suffered any interrogation, or demotion from his job, or that the authorities continued to look for him after he left Iran, in connection with Pouyandeh. It does not accept that he knows anyone who has been incarcerated due to memorial services for Pouyandeh.

The applicant’s evidence contained too many internal inconsistencies, and inconsistencies against the country information. Some of these matters would be minor in themselves, but once combined together it is impossible to escape the conclusion that the events surrounding Pouyandeh were not real to him.”

23 In particular, the RRT pointed to the following:

- Mr Foroghi was unable to correctly identify the date on which Mr Pouyandeh was killed or disappeared. The RRT rejected Mr Foroghi’s explanation that he couldn’t remember the date because the event occurred nearly two years ago and he had been so worried about his family that he had forgotten.

- There were significant discrepancies in Mr Foroghi's evidence regarding the time interval between the two interrogations by protection officer at his work.
- Mr Foroghi's account of the location of the 40-day memorial ceremony was unpersuasive. The RRT noted that the country information showed that Mr Pouyandeh is buried at Emamzadeh Taher cemetery. The country information also included a press report that noted several hundred people had gathered at Hassan Mosque to commemorate the 40th day since the death of Mr Pouyandeh and another writer. The RRT accepted that there may have been more than one ceremony held for Mr Pouyandeh. However, the RRT at 15 held:

"there was no logic to a ceremony being held in a different cemetery from the one that the applicant [sic] was buried in.

24 The RRT also rejected Mr Foroghi's evidence regarding the two writers he claimed to have been killed following the ceremony. The RRT held at 16 that Mr Foroghi's evidence in this matter "was at best confusing, and could even be described as evasive".

25 Relying on the country information the RRT concluded that a person who is under criminal investigation is usually on the black-list. As Mr Foroghi was able to leave Iran easily the RRT did not consider he was black-listed, and therefore did not consider Mr Foroghi was of any real concern to the authorities. The RRT rejected Mr Foroghi's claim that he was only under preliminary investigation and therefore not on the black-list, noting that "[a]s a practical matter, the authorities had several months in order to impose restrictions on his travel".

26 In concluding, the RRT held at 16:

"The Tribunal does not accept that the applicant participated in any other demonstrations. Although he referred to recent demonstrations in his initial application, at the Tribunal hearing he confined his claims to the Pouyandeh memorial ceremony and conceded he had not been involved in any other political activity.

The Tribunal does not accept that the applicant faces any persecution due to his religious beliefs, which have not been so unorthodox as to attract any attention to date.

The Tribunal is not satisfied that the applicant has a well-founded fear of persecution in Iran for any Convention reason."

CONTENTIONS BEFORE THE COURT

27 At the hearing of the application Mr Foroghi was represented by Mr Justin Castelan, of counsel, who appeared pursuant to the Court's pro bono scheme. The Court is grateful for his submissions and for the assistance that he gave the applicant without payment for his services.

28 Mr Castelan submitted that the RRT made two judicially reviewable errors in its decision. First, it was contended that the RRT failed to fulfil a duty to inquire into two critical matters which, it was submitted, constituted a judicially reviewable error under s 476(1)(a). The second alleged error was that the RRT constructively failed to exercise its jurisdiction.

29 While various other errors were alleged in the amended application, only the two submissions referred to above were advanced by Mr Castelan as reasons why the decision of the RRT should be set aside.

Duty to inquire

30 It was contended that the RRT erred by failing to inquire into two “critical” matters where information was allegedly “readily available”. The two identified critical matters were:

- Whether Mr Foroghi had been employed by the company in Yazd and whether he was demoted (“the nature of Mr Foroghi’s employment”); and
- Whether a memorial ceremony for Mr Pouyandeh took place at the Behesht-e-Zahra cemetery.

31 Mr Castelan submitted that failure to fulfil this duty to inquire constituted a reviewable error under s 476(1)(a) of the Act.

32 Mr Castelan submitted that a duty to inquire into the nature of Mr Foroghi’s employment and the occurrence of a memorial at the Behesht-e-Zahra cemetery arises from the inquisitorial nature of the RRT. In this regard Mr Castelan relied on observations by Merkel J in *Paramanathan v Minister for Immigration & Multicultural Affairs* (1998) 160 ALR 24 at 56, where his Honour held:

“Material and evidence, as well as arguments, may be presented to the RRT but its inquisitorial procedures or inquiries are not limited to or by the materials, evidence, or arguments presented to it. In an appropriate case the RRT may undertake its own inquiries and, in some instances, may be obliged to do so.”

33 Mr Castelan also relied on observations in *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 1555 at 170 and *Teoh v Minister for Immigration & Ethnic Affairs* (1994) 49 FCR 409 at 413- 4 to the effect that in circumstances where there is “readily available material” of “critical importance”, a decision maker may be under a duty to obtain such material. At the hearing, Mr Castelan particularly focused on the fact that the RRT had not attempted to call Mr Foroghi’s alleged employers, or the Behesht-e-Zahra cemetery.

34 Counsel for the respondent Minister, Mr Cahal Fairfield, submitted that the procedure contemplated by the Act for the making of inquiries by the RRT

is that set out in s 427(1)(d). It was also submitted that it is not for the RRT to make out a case for the applicant.

Consideration

35 Section 427(1)(d) of the Act provides that:

“For the purposes of the review of a decision, the Tribunal may:

...require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.”

36 I agree with Mr Fairfield that this section sets out the procedure contemplated by the Act for making inquiries. It is important to note that s 427(1)(d) of the Act is permissive rather than mandatory. The RRT has no duty to make further inquiries, but may do so, in its discretion, given the circumstances before it; see *Minister for Immigration and Ethnic Affairs v Anthonypillai* [2001] FCA 274, (2001) 106 FCR 426 at [86] (“*Anthonypillai*”). In *Anthonypillai* the Full Court agreed with the approach of the primary judge to the proper construction of s 427(1)(d) of the Act and its interaction with s 476(1)(a) of the Act, noting at [28] that the primary judge:

“...concluded that it was unlikely that the mere failure to exercise a power under s427(1)(d) of the Act to cause inquiries to be made would amount to a breach of any duty by the Tribunal in the absence of some special or exceptional circumstances such as a failure by the Tribunal to honour an undertaking to inquire.”

37 I do not consider that in this matter there were such ‘special or exceptional circumstances’. Additionally, it is doubtful whether material concerning Mr Foroghi’s employment and the occurrence of the memorial at Behesht-e-Zahra can be considered ‘readily available’. Consequently, the RRT committed no breach of s 476(1)(a) of the Act in not making the further inquiries that counsel for the applicant suggested should have been made by the RRT.

Constructive failure to exercise jurisdiction

38 It was contended on behalf of the applicant that the RRT constructively failed to exercise jurisdiction in respect to the finding that the Behesht-e-Zahra memorial did not take place, and by allegedly not taking a relevant consideration into account. I will deal with these two submissions separately.

Finding that Memorial at Behesht–e-Zahra did not take Place

39 It was contended the RRT had constructively failed to exercise jurisdiction by finding that the memorial ceremony at Behesht-e-Zahra did not take place. Mr Castelan submitted that the RRT’s finding that the memorial at Behesht-e-Zahra did not take place constituted a reviewable error under ss 476(1)(b) & 476(1)(e) because it was based on irrelevant or non-existent material, had no reasonable evidentiary basis and was illogical. In making this submission Mr Castelan purported to rely on comments made by the High Court in *Yusuf and Israelian v Minister for Immigration and Multicultural Affairs* [2001] HCA 30, (2001) 180 ALR 1 at [84] (“*Yusuf*”), *Nagappan v Minister for Immigration & Multicultural Affairs* [2001] FCA 863 at [19] and [21], and *Cujba v Minister for Immigration and Multicultural Affairs* [2001] FCA 699 at [105]. Mr Castelan especially relied on comments in *Yusuf* by McHugh, Gummow & Hayne JJ (with whom Gleeson CJ agreed) at [84], where their Honours held:

“... If the Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as affects the exercise of its power, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found. If that is so, the ground in s476(1)(e) is made out.”

40 In particular, Mr Castelan took issue with the following passage from the RRT decision:

“The Tribunal can accept that more than one ceremony might have been held, for example one might be held at the Hassan Mosque, and one at the Emamzadeh Taher cemetery where both Mokhtari and Pouyandeh are buried. Other mosques around Tehran might have been the sites of services (in principle). But there was no logic to a ceremony being held in a different cemetery from the one that the applicant was buried in. Even if Behesht-e-Zahra had some (real or rumoured) connection with the murder, there is no evidence of any memorial events at Behesht-e-Zahra. There were press reports of the Hassan Mosque event and the one at Emamzadeh, and one for another writer and his wife, and the arrest of Pouyandeh’s wife in November 2000 after a memorial service for Majid Sharif. If the ceremony the applicant claimed to have attended (with many more people attending that [sic] the ones at Hassan Mosque and Emamzadeh cemetery) in fact took place, the Tribunal would have expected it to receive publicity.”

41 In reference to this paragraph the applicant submitted:

“This finding is based on non-existent material, has no reasonable or viable evidentiary basis and lacks the support of any probative or logical grounds. In particular:

- a. the Applicant is not dead;
- b. there was no evidence before the RRT that the Memorial did not take place;

- c. there was independent evidence before the RRT that linked Pouyandeh's death to Behesht-e-Zahra cemetery;
- d. there was independent evidence before the RRT that 40th day ceremonies to commemorate the death of Pouyandeh did take place in several locations;
- e. the Applicant provided a reply to a specific inquiry from the RRT which stated:

"Another reason is that Behesht-e-Zahra is a very important place and each ceremony, which is hold there, can find a large effect on society and many people can know about it. I think they were the reasons that some people decided to transfer one part of the 40th day there..."

All of these matters were ignored by the RRT."

42 In oral submissions it was further contended that the Tribunal had failed to recognise that in Iran, the Government controlled the press, and the fact that the memorial at Behesht-e-Zahra was not reported on the internet, did not indicate it had not happened.

43 In reply, Mr Fairfield first contended that the ground of review relied on by the applicant exceeded the allowable grounds of review canvassed in ss 476(1)(b) or 476(1)(e). It was contended that jurisdictional error was restricted to cases where the RRT asked itself the wrong question, took into account an irrelevant consideration, or did not take into account a relevant consideration. It was submitted that the RRT had not made any of these errors.

44 In any event, the respondent submitted that the RRT's findings were open to it on the material in front of it. In written submissions Mr Fairfield addressed the applicant's contentions as reproduced in [41] above. First, it was submitted that the reference to "the applicant" in the passage of the RRT's reasons was obviously intended to be a reference to Mr Pouyandeh. On the other issues raised on behalf of applicant, Mr Fairfield contended that:

- it was open to the RRT upon the material before it to find that Mr Foroghi had not attended a ceremony at a cemetery at Behesht-e-Zahra.
- the RRT acknowledged the evidence which possibly linked Behesht-e-Zahra to Mr Pouyandeh's death. The weight to be given to that issue was a matter for the RRT.
- the RRT accepted that there were ceremonies to commemorate Mr Pouyandeh's death but it did not accept that those ceremonies occurred other than where Mr Pouyandeh was buried. In respect of the applicant's contention that the Iran government controlled the press, the respondent highlighted that the RRT had noted press reports of ceremonies with less

people than the one Mr Foroghi referred to, and considered it unlikely that there would be no publicity about the ceremony at Behesht-e-Zahra. Again it was contended that this was a conclusion open to the RRT on the material before it.

- the RRT did refer to the letter sent in by Mr Foroghi. The weight to be given to that letter was a matter for the RRT.

45 In the alternative, Mr Fairfield submitted that the RRT's decision is not reviewable on account of it containing allegedly unsatisfactory reasoning.

Consideration

46 As the Full Court in *Minister for Immigration & Multicultural Affairs v Al-Miahi* [2001] FCA 744 ("*Al-Miahi*") observed, a decision made by the RRT is not reviewable on the ground that it was illogically made; see at [35] of *Al-Miahi* where the following was said:

"Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, that would not amount to a an error of law. A party does not establish an error of law by showing that the decision-maker inferred the existence of a particular fact by a faulty process, for example by engaging in an illogical course of reasoning. This, at common law, want of logic is not synonymous with error of law. So long as the particular inference is reasonably open, even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place..."

47 Further it is not clear that ss 476(1)(b)& 476(1)(e) would allow review based on non-existent material or no reasonable or viable evidentiary basis. However, I will assume, without deciding that ss 476(1)(b) & 476(e) support such review, because I consider that, in any event, the RRT did not constructively fail to exercise jurisdiction.

48 First, it is worth noting that I agree with Mr Fairfield that the RRT did not intend to refer to "the applicant" as being dead, but Mr Pouyandeh. Occasionally the RRT, like other decision-makers, deliver reasons for decision without 100% proofreading. Occasionally mistakes are not discovered even when the best of proofreaders have examined draft reasons. The existence of a typographical error is best acknowledged rather than attempted to be exploited; see *CCC v Minister for Immigration and Multicultural Affairs* [2001] FCA 682.

49 Second, I agree with Mr Fairfield that the findings of the RRT were open to it on the facts. The RRT does not have to accept an applicant's claims uncritically. The RRT considered the applicant's claims and evidence before it, including press reports on other memorial ceremonies and possible connections between Mr Pouyandeh's death and the Behesht-e-Zahra cemetery. It was up to the RRT how much weight it would give that evidence. The submissions made by the applicant in this respect amount to a complaint

that the RRT did not accept the contentions advanced on behalf of the applicant.

50 Even if I am wrong and it was not open to the RRT on the evidence to conclude that the ceremony at Behesht-e-Zahra did not occur, this is an immaterial error in that the decision would have remained the same regardless of the alleged error: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Giraldo v Minister for Immigration & Multicultural Affairs* [2001] FCA 113. Regardless of whether a memorial took place at Behesht-e-Zahra, The RRT did not accept that the *applicant attended* a memorial service for Mr Pouyandeh. This conclusion was based on a credibility finding relating the inconsistencies in the applicant's evidence (see [22] above).

Relevant Considerations

51 Mr Castelan further contended that in reaching this conclusion the RRT failed to take into account several relevant considerations including the special considerations that are applicable when considering the reliability of evidence in refugee cases. Reference, inter alia, was made to the observation of Merkel J in *Kopalapillai v Minister for Immigration and Multicultural Affairs* [1997] FCA 1510 where his Honour highlighted the following passage from Professor Hathaway in *The Law of Refugee Status* (1991, Butterworths):

“it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution.”

52 Mr Castelan submitted that the RRT over emphasised Mr Foroghi's recollection of dates, failing to appreciate that difficulties in language and culture may explain apparent inconsistencies. Mr Castelan suggested that the critical factor was that Mr Foroghi got the date of Mr Pouyandeh's death right at first instance.

53 Mr Fairfield contended that the RRT had regard to a number of inconsistencies in Mr Foroghi's evidence - including internal inconsistencies and inconsistencies against the country information - regarding central pieces of evidence.

Consideration

54 I do not consider that any basis has been established for the assumption that the RRT was not cognisant of the special considerations that apply in refugee cases. Mr Castelan's submission in this regard is reminiscent of a submission rejected by the Full Court in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 (*“Kopalapillai”*) at 556-557. At 558-559 the Full Court said:

“Whilst a decision maker concerned to evaluate the credibility of the testimony of a person who claims to be a refugee in Australia will need to consider, and in many cases consider sympathetically, possible explanations for any delay in the making of claims, and for any evidentiary inconsistencies, there is not a rule that a decision maker may not reject an applicant’s testimony on credibility grounds unless there are no possible explanations for the delay or inconsistency (Taylor, “Informational Deficiencies Affecting Refugee Status Determinations”). Nor is there a rule that a decision maker must hold a “positive state of disbelief” before making an adverse credibility assessment in a refugee case. The reference by Foster J, sitting as a member of the Full Federal Court in Guo’s case at 191, to a requirement for a “positive state of disbelief” was not directed to this issue of the determination of credibility, but rather to the question of when an adverse credibility finding will logically found a positive finding that a particular fact asserted by the witness does not exist.”

55 In my view the Full Court’s answer to the submissions put to it in *Kopalapillai* apply to the circumstances of the instant matter. To the extent that the submission advanced by Mr Castelan differs from that put in *Kopalapillai*, the difference lies in the emphasis in this matter on an alleged failure to take into account a relevant consideration. However, putting to one side the issue of refugee cases being special, it has not been established that the RRT was specifically bound to consider such issues in formulating its reasons for decision; see *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 29 at 39-42.

56 The RRT, in this matter for the reasons disclosed above did not constructively fail to exercise its jurisdiction. In that:

- it did not misunderstand the nature of its jurisdiction
- it did not apply a wrong test
- it did not misconceive its duty
- it did not fail to apply itself to the real question to be decided
- it did not misunderstand the nature of the opinion it was required to follow
- it did not take into account an irrelevant consideration
- it did not fail to take a relevant matter into account; see *Yusuf* per Gleeson CJ at [41].

conclusion

57 The application will be dismissed with costs.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 21 December 2001

Counsel for the Applicant:	Mr J Castelan (who appeared pro bono)
Counsel for the Respondent:	Mr C Fairfield
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	4 December 2001
Date of Judgment:	21 December 2001