FEDERAL COURT OF AUSTRALIA

Hagi-Mohamed v Minister for Immigration & Multicultural Affairs [2001]

FCA 1156

MIGRATION – appellant a citizen of Somalia, and a member of a particular social group – the Refugee Review Tribunal failed to determine whether appellant had a well-founded fear of persecution by reason of his association with Hawadle clan – error of law established

Randhawa v Minister for Immigration, Local Government & Ethnic Affairs (1994) 52 FCR 437 referred to

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 180 ALR 1 applied

H v Minister for Immigration & Multicultural Affairs [2000] FCA 1348 referred to

Migration Act 1958 (Cth) s 476(1)(e), (a), s 476(2)(a), s 424A

AHMED DAHIR HAGI-MOHAMED v MINISTER FOR IMMIGRATION& MULTICULTURAL AFFAIRS

N 146 OF 2001

WILCOX, WEINBERG & HELY JJ

23 AUGUST 2001

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 146 OF 2001

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

BETWEEN:	AHMED DAHIR HAGI-MOHAMED APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	WILCOX, WEINBERG & HELY JJ
DATE OF ORDER:	23 AUGUST 2001
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the primary judge on 5 February 2001 be set aside.

3. The matter be remitted to the Refugee Review Tribunal (differently constituted) for determination according to law.

4. The respondent pay the appellant's costs of the appeal and of the proceeding before the primary judge.

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

IN THE FEDERAL COURT OF AUSTRALIA	
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BETWEEN:	AHMED DAHIR HAGI-MOHAMED APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	WILCOX, WEINBERG & HELY JJ
DATE:	23 AUGUST 2001
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT:

1 The appellant is a citizen of Somalia who arrived in Australia on 15 September 1995. Shortly after his arrival he applied for a protection visa on the ground that he had a well-founded fear of persecution in Somalia by reason of his membership of one or more particular social groups. On 25

September 1998 the Refugee Review Tribunal ("the RRT") affirmed a decision of the Minister's delegate not to grant a protection visa.

2 The RRT found that Somalia was in a state of civil war, much of it clan based, with unstable and frequently shifting factional and clan alliances.

3 The appellant's father was a member of the Geledi clan, and his mother was a member of the Hawadle clan. In Somalia, clan identity comes from the father's side although the independent evidence before the RRT suggested that there was a special son-to-mother bond in Somali culture that defies the laws of patriarchy. The RRT accepted that the Geledi clan was a cognisable group in Somali society, and that as such it formed a particular social group. The RRT also accepted that the Hawadle subclan was a cognisable group within Somali society, and as such it too formed a particular social group.

4 The RRT said:

"I accept the applicant's evidence regarding the events of the war in Somalia and the consequent displacement and killings of members of his family and I accept that these events and the harm suffered by the applicant is of sufficient severity that it may amount to persecution. The question I must consider, however is whether the harm occurred for reasons of his membership of a particular social group, that is either because he is a member of the Geledi clan **or because of his association with his mother's clan, the Hawadle**."

(emphasis added)

The Geledi clan claim

5 The Geledi are pastoralists whose lands are generally located in the Afgooye area, not far from Mogadishu. During the war the land and its produce were taken over by General Aideed and his forces and, in the appellant's contention, the Geledi clan was decimated as a result.

6 The RRT made the following finding with respect to the claim based on membership of the Geledi clan:

"I find that the motivation of General Aideed's militia was not to eliminate the Geledi clan but to take control of their land and resources. I accept the independent evidence set out in this decision which states that the Geledi 'may be safe from bullets, but their harvest may not be safe from roving gangs'. This independent evidence is consistent with the applicant's own evidence to the Tribunal and negates any suggestion that it is for reasons of their membership of a particular social group, namely their clan, that the Geledi are at risk of harm. I find that the reason for the harm suffered by the Geledi was their resources desired by the militia. **The clan identity of the Geledi was not a motivating factor to General Aideed's militia**."

(emphasis added)

7 The finding that the Geledi "may be safe from bullets, but their harvest may not be safe from roving gangs" might not be sufficient, in all cases, to preclude a finding of persecution for a Convention reason. Much would depend upon the circumstances of the particular case. One can envisage circumstances in which the taking of harvests of those perceived as "enemies", rather than those perceived as "allies", might found a conclusion of persecution for a Convention reason.

8 It is not necessary to pursue that possibility in the circumstances of the present case for at least two reasons. First, the sentence which we have emphasised is a finding of fact that clan identity was not **a** motivating factorin dispossessing the Geledi from their lands. Second, the experience of the Geledi in the Afgooye area is remote from the appellant's situation. The appellant is not a pastoralist; he was not from the Afgooye area; he trained as an economist and worked as a shopkeeper in Mogadishu; the fact that the Geledi were dispossessed of their land because it was perceived to be productive has no bearing upon the appellant's situation. On the RRT's findings, the appellant is not at risk of persecution by reason of his membership of the Geledi clan should he return to Somalia.

The Hawadle clan claim

9 The RRT proceeded upon the basis that the appellant also claimed that he was at risk of persecution because of his association with his mother's clan, the Hawadle. The RRT did not reject that claim on the basis that the appellant's association with the Hawadle was not sufficient to make him a member of that social group. Rather, it proceeded on the opposite assumption and posed for consideration the question whether that association gave rise to a well-founded fear of persecution for a Convention reason.

10 The RRT gave scant consideration to that claim. It said:

"The applicant's evidence was that in 1994 Aideed declared the Hawadle as the enemy and that there is continuing fighting in Mogadishu. I accept the independent evidence set out in this decision that states that the Hawadle have formed an alliance with Ali Mahdi who controls the north part of Mogadishu and that states that some Hawadle live in Mogadishu. I accept the independent evidence set out in this decision which states that the degree of mistreatment in an area depends on the nature of the person's clan relationship with the ruling warlord's group. The applicant would be able to reside in the north part of Mogadishu which is controlled by Ali Mahdi.

I accept the independent evidence set out in this decision which states that the Hawadle control Beledweyne in the Hiraan region. According to the applicant's evidence he has lived in both Mogadishu and Beledweyne. The applicant would also be able to reside in Beledweyne.

I find that given the independent evidence the applicant would not be at an increased risk of harm for reasons of his association with the Hawadle clan in Somalia."

11 The RRT made no finding regarding the appellant's claim that he was at risk of persecution because of his association with his mother's clan, the Hawadle. Rather, it sidestepped that claim by pointing to two enclaves, the northern part of Mogadishu and Beledweyne which are controlled by the Hawadle or its allies, in which the Hawadle are able to reside, at least in the circumstances existing at the time of the decision. No consideration was given to whether the appellant would face any practical difficulties in gaining access to, or living at either of those places, or whether it would be reasonable for him to return to them. That omission is particularly serious having regard to the country information quoted by the RRT at RD 80:

"Internal flight alternatives for the Geledi, indeed of any Somali, was highly dependent on local conditions. The situation in Somalia is so fluid that a safe area one day can become a 'hell-hole' the next day."

12 It is no answer to this criticism to assert, as the respondent's counsel did, that this is a case of repatriation rather than relocation. In either case the question is whether the appellant has a well-founded fear of persecution in Somalia by reason of his association with the Hawadle clan. If that fear otherwise exists, the existence of enclaves in which members of the Hawadle clan are not currently exposed to persecution would only operate to defeat the appellant's claim if it were reasonable in all the circumstances for him to have recourse to those enclaves: *Randhawa v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 52 FCR 437 at 440-441. The RRT did not address this question.

13 The primary judge rejected this aspect of the claim because the RRT found that the applicant "would not be at an increased risk of harm for reasons of his association with the Hawadle clan in Somalia". That finding was consequential upon the RRT's finding as to the existence of the two enclaves in which the Hawadle were not then persecuted. For the reasons which we have given, the existence of those enclaves did not necessarily provide a sufficient answer to the appellant's claim. Further investigation and findings were required before a conclusion could be properly reached in that regard.

14 In *Minister for Immigration & Multicultural Affairs v Yusuf* 180 ALR 1, in the joint judgment of McHugh, Gummow and Hayne JJ at par 75, their Honours said:

"If the tribunal, confronted by claims of past persecution, does not make findings about those claims, the statement of its reasons and findings on material questions of fact may well reveal error. The error in such a case will most likely be either an error of law (being an erroneous understanding of what constitutes a well-founded fear of persecution) or a failure to take account of relevant considerations (whether acts of persecution have occurred in the past)."

Their Honours went on to say at pars 83 and 84:

"No doubt full weight must be given to s 476(3) and the limitations which it prescribes in the construction of improper exercise of power in para (d) of s 476(1). Equally,

however, it is important to recognise that these limitations, unlike those prescribed by s 476(2), are limitations on only one of the grounds specified in s 476(1). All this being so, there is no reason to give either para (b) or para (c) of s 476(1) some meaning narrower than the meaning conveyed by the ordinary usage of the words of each of those paragraphs. In particular, it is important to recognise that, if the tribunal identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material, it 'exceeds its authority or powers'. If that is so, the person who purported to make the decision 'did not have jurisdiction' to make the decision he or she made, and the decision 'was not authorised' by the Act.

Moreover, in such a case, the decision may well, within the meaning of para (e) of s 476(1), involve an error of law which involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. That it cannot be said to be an improper exercise of power (as that expression is to be understood in s 476(1)(d), read in light of s 476(3)) is not to the point. No doubt it must be recognised that the ground stated in para (e) is not described simply as making an error of law. The qualification added is that the error of law involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. That qualification emphasises that factual error by the tribunal will not found review. Adopting what was said in Craig [Craig v South Australia (1995) 184 CLR 163], making an erroneous finding or reaching a mistaken conclusion is not to make an error of law of the kind with which para (e) deals. That having been said, the addition of the qualification of para (e) is no reason to read the ground as a whole otherwise than according to the ordinary meaning of its language. 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 powers, 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 s 476(1)(e) is made out."

15 The appellant claimed that he had a well-founded fear of persecution by reason of his association with his mother's Hawadle clan. That claim was not determined by the RRT in accordance with correct legal principles. An error of law within s 476(1)(e) is therefore established consistently with the decision in *Yusuf*.

The homosexuality claim

16 The RRT accepted that the appellant is a homosexual and that male homosexuals constitute a particular social group. Nonetheless the RRT concluded that whilst taunting and negative attitudes to homosexuality could be expected in Somalia, which would be hurtful and demeaning, they would not amount to persecution for the purpose of the Convention. There was no challenge to this finding before the primary judge. However, the Amended Notice of Appeal sought to raise the issue of homosexuality on the basis that the RRT obtained generalised information from Emeritus Professor Ioan Lewis, Professor of Social Anthropology on that question after the hearing, which it did not communicate to the appellant before giving its decision.

17 It is clear that the RRT obtained such information, and did not communicate the information thus obtained to the appellant for comment. It may well be that in proceeding in that way the RRT was guilty of a denial of natural justice, but this is not a ground of review: s 476(2)(a). Reliance was placed on s 476(1)(a), but counsel for the appellant was unable to point to any procedure that was required by the Act or the Regulations to be observed in connection with the making of the decision, which was not observed by the RRT when it obtained comments on Somali attitudes towards homosexuality from Professor Lewis. It was not suggested that there was any contravention or failure to comply with s 424A, nor could there be having regard to the provisions of s 424A(3). This ground on which review is sought fails.

18 Whilst we have disposed of this ground on its merits, we agree with the observations of the Full Court in *H v Minister for Immigration & Multicultural Affairs* [2000] FCA 1348 that it is becoming increasingly difficult to establish that it is expedient in the interests of justice that the time of three or more judges should be spent giving original consideration to issues that ought to have been raised before the primary judge.

Conclusion

19 The appeal is allowed; the orders made by the primary judge on 5 February 2001 are set aside; in lieu thereof it is ordered that the matter be remitted to the RRT (differently constituted) for determination according to law; the respondent should pay the appellant's costs of this appeal and of the proceeding before the primary judge.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 23 August 2001

Counsel for the Appellant:	Dr S C Churches
Counsel for the Respondent:	Mr N J Williams

Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14 August 2001
Date of Judgment:	23 August 2001