FEDERAL COURT OF AUSTRALIA

Mehmood v Minister for Immigration and Multicultural Affairs [2000] FCA 1799

Matter No. S 87 of 2000

MEHMOOD v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

von DOUSSA J

ADELAIDE

12 DECEMBER 2000

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 87 OF 2000

BETWEEN:	MEHMOOD APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	von DOUSSA J
DATE OF ORDER:	12 DECEMBER 2000
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant to pay the respondent's costs to be taxed.

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

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DATE:	12 DECEMBER 2000
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 This is an application seeking a review of a decision of the Refugee Review Tribunal (the Tribunal) made on 22 June 2000. The Tribunal affirmed the decision of a delegate of the Minister for Immigration and Multicultural Affairs to refuse the grant of a Protection Visa to the applicant.

2 The applicant, a citizen of India, is a thirty-four year old Muslim man from Delhi. He arrived in Australia on 16 August 1998. On 16 September 1998 he lodged an application for a Protection Visa on the ground that he was a person to whom Australia had protection obligations under the 1951 Convention Relating to the Status of Refugees (the Refugees Convention) and the 1967 Protocol Relating to the Status of Refugees. A submission which accompanied his application stated that the applicant had been politically active and referred to tensions between Hindus and Muslims which exist in India.

3 Review is sought on the sole ground that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law and an incorrect application of the law to the facts as found by the Tribunal: s 476(1)(e) of the *Migration Act 1958* (Cth) (the Act). The applicant contends that the Tribunal asked the wrong question in reaching the decision that the subjective fear held by him of persecution were he to return to India was not a well-founded fear within the meaning of the definition of a refugee contained in Article 1A(2) of the Refugees Convention.

4 The information before the Tribunal was not extensive. It consisted of the short submission made in support of the original application, a statement made by the applicant in October 1998, oral evidence given by him to the Tribunal on 16 June 2000, and country information available to the Tribunal.

5 The applicant's descriptions of his experiences in India contained in his 1998 statement differed in important respects from the description given in his oral evidence. In his 1998 statement the applicant referred to tensions between Hindus and Muslims which exist in India. He said that he and his parents had been exposed to "many small and ongoing incidents of verbal abuse". As well, stones were thrown at the front door of their home, often through windows. He said there would be talking and shouting outside their house and sometimes banging on the door to make the family nervous and anxious about their safety. They therefore stayed in at nights. The applicant said the family went to the police but the police were mainly Hindus and had not been interested. The applicant also described in his 1998 statement more serious incidents. He said he had been assaulted five times by "Hindu thugs". Twice the thugs had pushed in the door of his home and beaten him. Twice he was assaulted at the market, and the other occasion occurred when he was on his way home from a wedding one night in 1995. He said in his statement that "at the time of the troubles between Hindu fundamentalists and others as to the Ayodhya mosque incident in 1996, (his family's) home was invaded and (their) possessions thrown into the street and vandalised". [In fact the incidents concerning the Ayodhya mosque occurred in 1990 and 1992.] The applicant also said that his family's financial situation meant that moving had not been possible.

6 At the hearing before the Tribunal the applicant said he had no involvement in politics. He said that the verbal abuse he had received had included death threats and that he believed he was being attacked because he was a Muslim. He said that his family had lived in a number of rented

places in Delhi and moved often. He said that people had thrown stones at their house, tried to break the door, tried to pull him from the house to beat him but that others in the house at the time had acted to save him from his fate. Once someone had thrown a stone which hit him on the forehead. When he walked, people would call him a Muslim because he lived in a Muslim area and wore a traditional Muslim outfit. The applicant said that his parents had also experienced harassment.

7 In the course of describing his experiences in India the applicant confirmed that people had come to his house twice but said they had not actually entered the house, although they had damaged an external space, and that he had been physically assaulted twice. The Tribunal asked the applicant about whether he had gone to the police for help and he said that he had. He said that when people attacked the family home he had gone to the police for help and on another occasion his father had done so. The police had said they would take action but nothing happened.

8 In its reasons for decision the Tribunal, under the heading "Findings and Reasons", discussed inconsistencies in the applicant's evidence, and then expressed its conclusions as follows:

"Following my review of the evidence about what happened to him and the independent information about Hindu-Muslim relations, I am prepared to accept that he experienced some harassment and verbal abuse in his life because he is a Muslim, that he was injured when a stone was thrown at him when he was twelve or thirteen and later when he was at the market and that he is afraid of being caught up in future outbreaks of violence between Hindus and Muslims which might occur. I also accept that he and his father may have reported incidents to the police but that no action was taken.

While I understand that stone throwing, verbal harassment, being chased and being hit at the market and having thugs damage the outside of the house may have been troubling or frightening at the time, the applicant's evidence was that the more serious incidents were infrequent and took place over a long period – the first occurred when he was twelve or thirteen and it appears that the last episode occurred in 1995 or 1996, when he was thirty or so and some two years before he came to Australia. The harassment and occasional abuse which he claims occurred often may have been unpleasant but the evidence does not indicate that it significantly limited the applicant's capacity to go about his life or to practise his religion. I have concluded that the incidents described by the applicant, even if seen cumulatively, are not of a type and severity so as to amount to persecution within the meaning of the Refugees Convention.

Nevertheless, what the applicant described does reflect the considerable tension between religions which exists in India. What has happened in the past is not necessarily the only indicator of what might happen to applicants in the future and he has said that he fears being caught up in communal violence which might erupt in future. While he has not been harmed in any outbreaks of large scale communal violence, I accept that he fears that he could be. The difficult relations between Hindus and Muslims will most probably continue in many local areas as they have

occurred for a very long time but I do not believe that the capacity of Muslims to practise their religion and to live according to Islamic rituals will diminish. The difficult relations between the two religious groups may be manifested in local harassment and abuse and fighting as well as in outbreaks of larger scale violence. I have, however, had regard to information which indicates that relations between religious groups are for the most part amicable and have concluded that the chance of the applicant being caught up in serious violence motivated by religious differences, and harmed as a result, is remote.

The applicant has submitted that the police did not respond to two reports concerning his treatment at the hands of Hindu people. Given the evidence about the nature of the incidents, I am not satisfied that the police failure to respond as the applicant might have wished indicates that the authorities are unable or unwilling to protect people from violence motivated by religious differences. I have considered carefully information about whether the Indian authorities are willing and able to act to stop communal violence at the earliest opportunity and I accept the advice from the Department of Foreign Affairs and Trade that they are, notwithstanding isolated reports of the police not doing so. As well, the Department of Foreign Affairs and Trade has indicated that the law provides for people who incite such violence to be prosecuted. I have also considered efforts by the Indian government to promote interfaith understanding and so reduce the likelihood that communal violence will erupt. I have concluded that the Indian authorities do not encourage or condone religious intolerance or violence nor the type of behaviour feared by the applicant or that the authorities are powerless to prevent it. What the applicant fears therefore lacks an 'official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality' which, as stated in the outline of the relevant legal principles earlier in this decision, is necessary for conduct to be regarded as persecution within the meaning of the Refugees Convention. It is important to note that the term 'protection' by no means implies that the authorities must or can provide absolute guarantees against harm. In the circumstances of this case, I am satisfied that, in the event of an outbreak of communal violence or if harm is otherwise threatened or done to the applicant, he would be able to avail himself of the relevant services which are available in India such as policing and a functioning legal system.

…

I am not satisfied that the applicant's fear that he might face persecution because of his religion if he were to return to India is well-founded and note that no other Convention reason is presented in the circumstances he has described."

> 9 The applicant contends that the real issue which the Tribunal was required to determine was whether India was able to offer meaningful protection to the applicant. It was submitted that in three respects, the Tribunal implicitly posed, and answered, a different question and in the result failed to answer the real question. Those three respects were said to be evidenced by the following statements which appear in the conclusions set out above:

- "…the harassment and occasional abuse which he claims occurred often may have been unpleasant but the evidence does not indicate that it significantly limited the applicant's capacity to go about his life or to practise his religion;

- What the applicant fears therefore lacks an 'official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality';

- It is important to note that the term 'protection' by no means implies that the authorities must or can provide absolute guarantees against harm."

10 The ultimate question which the Tribunal was required to decide was whether the applicant had a "well-founded fear of being persecuted for reasons of … religion …" if he were to return to India. That ultimate question was addressed and decided adversely to the applicant in the final passage of the Findings and Reasons.

11 In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 the High Court held that an applicant for the status of refugee would satisfy the definition in the Refugee Convention if he showed a genuine fear founded on a real chance that he would be persecuted for one of the Convention reasons if he returned to the country of his nationality. In the present case the Tribunal accepted that the applicant subjectively entertained such a fear, and turned its attention to whether there was an objective basis for that fear such as to found a real chance that persecution would occur on account of his religion if he were to return to India. In determining whether there is a real chance that a persecutory event will occur for a particular reason in the future, the degree of probability that events amounting to persecution have occurred in the past for particular reasons is relevant: *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559. It was to this question that I consider the Tribunal was addressing its attention when making the first of the impugned statements.

12 The applicant had described a number of incidents of harassment. It was relevant for the Tribunal to consider whether those events, insofar as they were accepted by the Tribunal, constituted persecution within the meaning of the Refugees Convention. Not every act of harassment will have that quality. "Persecuted" is not defined in the Refugees Convention. However in *Chan* Mason CJ at 388 said that the Refugees Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns. Dawson J at 399 said:

"… there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution … Some would confine persecution to a threat to life or freedom, whereas others would extend it to other measures in disregard of human dignity." The handbook (the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status) in par 51 expresses the view that it may be inferred from the Convention that a threat to life or freedom for a Convention reason is always

persecution, although other serious violations of human rights for the same reasons would also constitute persecution."

McHugh J at 430 in considering the meaning of the term "persecuted" said that the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute persecution for the purposes of the Convention, and instanced measures in disregard of human dignity. These statements of principle were applied by six members of the High Court in *Guo's* case at 570. In the present case it was relevant for the Tribunal to consider whether the kind and seriousness of the harassment that the applicant complained about in the past, constituted persecution and whether that conduct was indicative of a risk of more serious harm to the applicant in the future. If not, it would be open to the Tribunal to find there was no basis for a well-founded fear of being persecuted, and no question about the sufficiency of State protection would arise.

> 13 The finding that the evidence did not indicate that the incidents experienced by the applicant had significantly limited his capacity to go about his life or to practice his religion led on to the further finding, which was plainly open, that those incidents were not of a type and severity so as to amount to persecution. That conclusion was a relevant step in the Tribunal's process of reasoning in determining whether the applicant's fear was a well-founded one. The first impugned statement does not indicate that the Tribunal had misdirected itself, or that it erred in law.
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> 14 In my opinion the second impugned statement does not indicate error on the part of the Tribunal. In that statement the words "official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality" appeared in parenthesis as those words had been used by the Tribunal earlier in its reasons for decision when discussing the legal principles to be applied. The most obvious forms of persecution are the abuse of human rights by organs of the State or by unofficial groups which the government supports or condones. However it is well recognised that beyond these acts of commission carried out by entities with which the State is formally or implicitly linked, persecution may also consist of either the failure or inability of a government effectively to protect the basic human rights of its nationals: James C Hathaway "The Law of Refugee Status", Butterworths Canada Limited, 1991, at 125-127; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 per McHugh J at 354; *Ahmed v Minister for Immigration and Multicultural Affairs* [2000] FCA 123 at par 15; *Re Attorney-General (Canada)& Ward* (1993) 103 DLR (4th) 1 and *Minister for Immigration and Multicultural Affairs v Prathapan* (1998) 86 FCR 95 at 102. Whilst the impugned passage from the Tribunal's reasons inelegantly describes the inability of the authorities of the country of nationality to control persecutory conduct by others as an "official quality" it is clear that the Tribunal recognised that an inability of the State to offer meaningful protection could exist in fact quite independently of the intent or policy of the government. This is clear from the Tribunal's discussion of the country information which indicated that the Indian authorities are both willing and able to stop communal violence motivated by religious differences. The Tribunal's conclusion in that respect was an important factor bearing on the question whether there was an

objective basis for a well-founded fear of persecution: see *Ahmed* at par 26. In the discussion of the country information the Tribunal was considering the very question that the applicant contends that the Tribunal did not consider, namely whether the Indian authorities are able to offer meaningful protection against persecution of Muslims, for reason of their religion, by Hindus.

15 The last impugned statement, if it is anything more than a statement of the obvious in the factual context of the particular case, it is supported by authority. What is required is that the State offer effective protection from private persecution sufficient to remove any real chance that it will occur: see *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 566-568; *Prathapan* at 101-106; *Minister for Immigration and Multicultural Affairs v Kandasamy* [2000] FCA 67 at par 50-52 and *Ahmed* at par 27. However good the level of protection offered by a State might be, random acts of thuggery or other criminal behaviour cannot always be prevented, and hence absolute guarantees against harm are impossible in fact, and are not required in law to negative a real chance of persecution.

16 In my opinion the Tribunal did not fall into error of law. The ground upon which review is sought is not made out. The application should be dismissed.

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

Associate:

Dated:

Counsel for the Applicant:	Mr M W Clisby
Solicitor for the Applicant:	Mr M W Clisby
Counsel for the Respondent:	Ms S J Maharaj

Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	6 December 2000
Date of Judgment:	12 December 2000