FEDERAL COURT OF AUSTRALIA

Mijoljevic v Minister for Immigration & Multicultural Affairs [1999] FCA 834

MIGRATION – *Migration Act 1958* (Cth) – review of decision of Refugee Review Tribunal – whether error of law – proper construction of cl 866.21 and cl 866.22 of Schedule 2 of the Migration Regulations – applicant from mixed ethnic background – whether applicant's objection to military service sufficient to attract the protection of the Refugees Convention

Migration Act 1958 (Cth), s 476(1)(e)

Migration Regulations 1994, Schedule 2, cl 866.21, cl 866.22

Munkayilar v Minister for Immigration and Multicultural Affairs (1997) 49 ALD 588, followed

Marr v Australian Telecommunications Corporation (1991) 25 ALD 473, cited

Bank of Western Australia v Federal Commissioner of Taxation (1994) 125 ALR 605, cited

Murill-Nunez v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 150, cited

Timic v Minister for Immigration and Multicultural Affairs [1998] FCA 1750, cited

Hathaway, *The Law of Refugee Status*

MILENKO MIJOLJEVIC v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

NG 490 of 1998

BRANSON J

SYDNEY

25 JUNE 1999

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 490 of 1998

BETWEEN:	MILENKO MIJOLJEVIC Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	BRANSON J
DATE OF ORDER:	25 JUNE 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

The application be dismissed.

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

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REASONS FOR JUDGMENT

INTRODUCTION

1 The applicant has applied to the Court for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). By its decision, dated 24 April 1998, the Tribunal affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs which refused to grant to the applicant a protection visa.

2 To be entitled to a protection visa, an applicant must satisfy the criterion that the applicant is a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Refugees Convention").

3 A refugee is defined as a person who:

"owing to a 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, owing to such fear, is unwilling to avail himself of the protection of that country …." (Article 1A(2) of the Refugees Convention).

BACKGROUND FACTS

4 The applicant was born on 11 February 1947 in Novi Sad, Vojvodina, in the former republic of Yugoslavia ("Yugoslavia"). His mother is Croatian and his father is Serbian. Both are from a region called Eastern Slavonia which before the current conflict was part of Croatia. In 1967-68, at age 20 the applicant served in the army in Sarajevo. The death of his best friend during that time of military service triggered pacifist views in the applicant. When the current war commenced in 1991, the applicant found the idea of being called up to serve in the army as "*totally unacceptable*".

5 In his original application for a protection visa, the applicant states that he received a military draft summons in June 1996, and he then decided to go to Australia. The applicant states that if he is returned to Yugoslavia he would be forced to go to war against his will and against his political opinions.

6 In his statement in support of his application to the Tribunal, the applicant said that when the latest conflict started in 1991, many people, regardless of age, were involved in military action in Eastern Slavonia. The applicant claimed that because of his political beliefs about the war, he was not considered to be a "true" Serb. The applicant asserted that there was a practice to call-up for military service people who were of non-Serb ethnic background and Serbs who opposed the official political line. He claims that he was called up three times between 1991 and 1993 but managed to avoid the call by hiding. The applicant commenced to work for the United Nations (UNPROFOR) in Eastern Slavonia in January 1994 as an interpreter, and he continued to work there for two years. At the conclusion of the Dayton peace talks only "*Croatian nationals*" were to be employed as interpreters in *"the 'new' Croation regime of Slavonia"*, and the applicant lost his position.

7 In written submissions to the Tribunal, the applicant's then migration agent submitted that the applicant's work for the UN made his status *"even more vulnerable"*, as the United Nations were considered to be aligned with the Croats *"and became the enemy"* as far as most Serbs were concerned.

APPLICANT'S CLAIMS

8 The application for review was made on the ground that the decision of the Tribunal involved two errors of law, being errors involving the incorrect interpretation of the applicable law (*Migration Act 1958* (Cth), s 476(1)(e)). First, the applicant claims the Tribunal erred in that it misconstrued the requirements of sub-items 866.21 and 866.22 of Schedule 2 of the Migration Regulations in relation to the effect of adding a claim of the kind referred to in sub-item 866.211(b) after the application was made. Secondly, the applicant claims that the Tribunal misconstrued the ambit of "persecution" in concluding that conscientious objection to military service and the penalties flowing from such objection can not be a sufficient ground to attract the protection of the Refugees Convention.

THE DECISION OF THE TRIBUNAL

Family Unit

9 The applicant's de facto wife was granted a protection visa in October 1996.

10 Clauses 866.21 and 866.22 of Schedule 2 of the Migration Regulations, so far as are here relevant, provide:

"**866.21 Criteria to be satisfied at time of application**

866.211 The applicant claims to be a person to whom Australia has protection obligations under the refugees convention and:

(a) Makes specific claims under the refugees convention; or

(b) Claims to be a member of the same family unit as a person who:

(i) Has made specific claims under the refugees convention; and

(ii) Is an applicant for a protection (class az) visa.

866.22 Criteria to be satisfied at time of decision

866.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the refugees convention.

866.222 In the case of an applicant referred to in paragraph 866.211(b):

(a) the Minister is satisfied that the applicant is a member of the same family unit as a person who has made specific claims under the refugees convention (a "claimant"); and

(b) that claimant has been granted a Protection visa."

11 The applicant and his de facto wife each applied for protection visas in August 1996. Neither of them claimed in his or her application to be a member of the same family group as the other. The Tribunal dealt with the applicant's claim to be entitled to a protection visa on the ground that his de facto spouse had been granted a protection visa in the following paragraph from its written reasons for decision:

"The applicant has submitted that his case should be looked at in terms of his family position ie. his de facto wife has obtained refugee status in Australia and he is part of that family unit. Clause 866 of the Migration (1994) Regulations distinguish between criteria to be satisfied at the time of application and at the time of decision. Clause 866 is read as a whole and it emerges that not only are these two criteria cumulative, but that the reference in cl 866.211(b)(ii) to a person who "is" an applicant for a protection visa should be taken literally. The applicant's de facto wife no longer qualifies as a person who "is" an applicant for a protection visa. It could not be a possible construction of this provision that it's [sic] criteria could be satisfied if a person had been an applicant for such a visa. Where the applicant has made a specific "free standing" claim it is not possible to interpret the claims there made to be claims to be a member of the same family unit within the meaning of cl 866.211 or cl 866.222. Per: Beaumont J in Munkayilar v Minister for Immigration& Multicultural Affairs (unreported) 21 October 1997."

Persecution

12 The Tribunal accepted the applicant's claim that he is a pacifist, and that he has avoided being called up for military service during recent conflict. However, the Tribunal made a finding that the draft was the enforcement of a law of general application, and that although he has a conscientious objection to war, *"[t]he obligation to perform military service is universal upon all males in the applicant's country, and hence it does not in itself amount to discrimination against him"*.

13 The Tribunal did not find the claim that the applicant would be singled out and called up because of his mixed parentage and mixed marriage to be credible.

CONSIDERATION

14 The crucial question so far as the applicant's claim to be entitled to a protection visa by reason of his de facto spouse having been granted such a visa is the proper construction of cl 866.211 of Schedule 2 of the Migration Regulations.

15 Beaumont J gave consideration to the proper construction of cl 866.211 in *Munkayilar v Minister for Immigration and Multicultural Affairs* (1997) 49 ALD 588 at 592-593. His Honour noted that cl 866.21 deals with criteria to be satisfied at the time of application, whereas cl 866.22 addresses the criteria to be satisfied at the time of decision. His Honour then said:

"When cl 866 is read as a whole, it emerges clearly, in my opinion, that not only are these two criteria cumulative but that the reference in cl 866.211(b)(ii) to a person who "is" an applicant for a protection visa, should be taken literally. The contrary argument now sought to be advanced on behalf of the applicant is that a construction should be available, by way of implication, as an alternative, of the expression "(or was)" into cl 866.211(b).

The reason for the need for the applicant to advance this argument is that each of his brothers no longer qualifies as a person who "is" an applicant for a protection visa. They were applicants and were granted visas. In my opinion, there is no basis for the making of the implication suggested. On the contrary, the need for the present tense in the description of the applicant in cl 866.211(b)(ii) is manifest.

As I have said, the criteria in cll 866.21 and 866.22 are cumulative. When cl 866 is read as a whole, it envisages the undertaking of a two stage process. First, the making of the application, and, second, the making of a decision. At the first stage, where a member of the same family unit is an applicant for a protection visa, the assumption must be that the application is not being dealt with at that point. It could not be a possible construction of this provision that its criteria could be satisfied if a person had been an applicant for such a visa as a member of the family unit, and had been refused that application.

It is equally clear, in my view, upon a reading of cl 866 as a whole, that its provisions may be satisfied in two alternative ways. Either the applicant may make a specific claim, in effect as a "free-standing" claim under cl 866.211(a) or, pursuant to cl 866.22, the applicant proceeds in a derivative fashion, as it were, by claiming to be a member of the same family unit as a person who is making a specific claim under the Refugees Convention and who is also an applicant for a protection (class AZ) visa.

In the second kind of case, the derivative claim may succeed, provided that the member of the family unit has applied for a protection visa (see cl 866.211(b)) and, subsequently, that visa has been granted (see cl 866.222(b)). In the present case, the applicant elected to make a claim of a former "free-standing" kind,

rather than that of the latter "derivative" kind. It is, therefore, not open to the applicant to suggest that the tribunal should have treated his application as being of the derivative kind."

16 The applicant seeks to distinguish this case from *Munkayilar's* case on the basis that at the time of the applicant's application he did meet the requirements of cl 866.211(a). That is, as I understand it, the applicant contends that since he made a specific claim under cl 866.211(a), he should subsequently have been allowed to press an alternative claim under cl 866.211(b) as a member of the same family unit as a person who, at the time of his application, was a person who was an applicant for a protection visa (cl 866.211(b)), albeit that, at the time that he first pressed the alternative claim, that person had already been granted a protection visa.

17 In my view the above contention is inconsistent both with the wording of cl 866 read as a whole, and with the reasoning of Beaumont J in *Munkayilar's* case. The reference in cl 866.222 to *"an applicant referred to in paragraph 866.211(b)"* can only, it seems to me, be sensibly read as a reference to a person who has made an application under cl 866.211(b). Moreover, to read it in the way suggested by the applicant would detract from the intended structure of the clause, as identified by Beaumont J, of providing alternative and cumulative bases for the grant of a protection visa.

18 It is appropriate for me to follow the approach taken by Beaumont J in *Munkayilar's* case to the construction of cl 866 unless I am satisfied that that approach is clearly wrong (*Marr v Australian Telecommunications Corporation* (1991) 25 ALD 473 at 475; *Bank of Wester n Australia v Federal Commissioner of Taxation* (1994) 125 ALR 605 at 627). I am not satisfied that his Honour is wrong. Indeed, it seems to me that his Honour was right. The applicant's claim to be entitled to a protection visa by reason of his de facto spouse having been granted such a visa must be rejected.

19 The second basis upon which the applicant seeks judicial review of the decision of the Tribunal relates to his claim to hold pacifist views. The Tribunal accepted that the applicant held pacifist views but took the view "*that conscientious objection to military service is not a sufficient ground to attract the protection of the* [Refugees] *Convention."*

20 The applicant contends that a law of general application, such as a law providing for compulsory military service can indirectly discriminate against particular classes of persons by imposing particularly heavy burdens on members of those classes. He submitted that where a law providing for compulsory military service does not provide an "appropriate and adapted" provision for conscientious objectors, the law could effectively persecute such people. The Tribunal found that the law to which the applicant would be subject were he to return to Yugoslavia recognised conscientious objection only if it were claimed within fifteen (15) days of the person's first summons for military service. The applicant is now fifty-two years old. His first summons for military service took place many years ago when, on his evidence, he did

not hold pacifist views. As mentioned above, the applicant developed pacifist views when his best friend died in the army during military service.

21 It may be that pacifist views which do not have a religious or political base, and which are not part of the belief system of a particular social group, are irrelevant to a claim to be entitled to a protection visa. However, it was not on this basis that the Tribunal found against the applicant so far as he claimed to be a conscientious objector. The Tribunal gave consideration to whether any harm that the applicant might suffer in Yugoslavia by reason of his pacifist views would amount to persecution.

22 The Tribunal rejected as incredible the applicant's claim that he would be singled out for military service because he was not accepted as a "true Serb" because his mother was a Croat and he was married to a Croat. It found that the obligation to perform military service is universal upon all males in the applicant's country, and that the relevant laws punishing those who avoided military service were laws of general application. The Tribunal concluded on this basis that any harm that the applicant might suffer in Yugoslavia by reason of his pacifist views would not amount to persecution. In any event, the Tribunal found that it was highly unlikely that a man of the applicant's age would be called-up for military service although, technically, the applicant would remain a member of the military reserve until he attained the age of sixty.

23 In my view, the conclusion of the Tribunal that the applicant's pacifist views did not provide a basis upon which it could be satisfied that he was a person to whom Australia owes protection obligations under the Refugees Convention was open to it on the evidence and material before it. Further, in my view, the Tribunal's reasons for decision do not suggest that the Tribunal's conclusion in this regard involved any error of law. This Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service, and for the punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention (see for example, *Murill-Nunez v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 150; *Timic v Minister for Immigration and Multicultural Affairs* [1998] FCA 1750). See also Hathaway, *The Law of Refugee Status* at para 5.6.2.

24 The decision of the Tribunal will be affirmed.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 25 June 1999

Counsel for the Applicant:	Mr S. Lloyd
Solicitor for the Applicant:	Parish Patience
Counsel for the Respondent:	Mr T. Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	10 March 1999
Date of Judgment:	25 June 1999