JUDGMENT No. 702 / 92

CATCHWORDS

IMMIGRATION - application for refugee status - definition of 'refugee' in Migration Act - application of Article 1 of Convention and Protocol Relating to the Status of Refugees - whether refugee is recognised in host country as having the rights and obligations attached to nationality.

Migration Act 1958, s. 4(1)

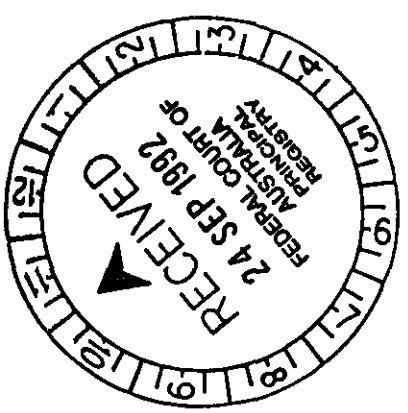
Migration Regulations, regulations 22D and 117A

Chan v Minister for Immigration and Ethnic Affairs (1989) 87 ALR 412

McDonald v Director-General of Social Security (1984) 1 FCR 354

Swan Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal (1985) 61 ALR 319

JEGANATHAN NAGALINGAM v
MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS and NOEL BARNSLEY



No. VG 309 of 1992

Olney J
Melbourne
15 September 1992 (Decision)
22 September 1992 (Reasons)

IN THE FEDERAL COURT OF AUSTRALIA)
VICTORIA DISTRICT REGISTRY)
GENERAL DIVISION) No. VG 309 of 1992

B E T W E E N:

JEGANATHAN NAGALINGAM

Applicant

- and -

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

First Respondent

- and -

NOEL BARNSLEY

Second Respondent

Coram: Olney J

Place: Melbourne

Decision: 15 September 1992

Reasons: 22 September 1992

REASONS FOR JUDGMENT

By application filed on 18 August 1992 the applicant sought judicial review of a decision made by the second respondent as delegate of the first respondent that the applicant was not a refugee within the meaning of the *Migration Act* 1958 (the Act), and a consequential decision to refuse to grant the applicant a domestic protection (temporary) entry permit.

The application was heard on 14 September 1992 and on 15 September 1992 I made orders setting aside the decision and referring the matter to the first respondent for further consideration according to law.

I now publish reasons for my decision.

THE APPLICANT'S BACKGROUND

The applicant is a national of Sri Lanka. In 1987 he left his homeland and later that year on 13 September arrived in Norway. It is accepted for the purpose of these proceedings that at the time of his arrival in Norway his circumstances were such that he came within the definition of a refugee in Article 1 of the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (the Convention) as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (the Protocol) and was subsequently recognised as such by the Norwegian authorities. On 16 November 1988 he was issued with a Norwegian alien's passport which was valid to 12 July 1990. On 13 September 1989 he was granted a settlement permit. In July 1990 his passport was extended to 12 July 1992 and on 18 August 1990 he departed Norway for Australia, arriving on 20 August 1990 when he was granted a one month temporary entry permit. He has remained in Australia ever since. On 7 September 1990 the applicant applied for refugee status and a refugee temporary entry permit.

REFUGEE STATUS UNDER THE *MIGRATION ACT*

Before outlining the fate of the application for refugee status it is necessary to refer to the relevant provisions of the ***Migration Act*** 1958 (the Act).

The Act makes no reference to the term 'refugee status' nor to the granting of same. However, the term 'refugee' is defined in section 4(1) and in regulation 117A of the Migration Regulations one of the criteria for the granting of a domestic protection (temporary) entry permit (DPTEP) is that the applicant has been determined by the Minister to have refugee status. (Regulation 117A was not part of the Migration Regulations at the time of the applicant's application for refugee status but it supersedes an earlier regulation relating to refugee temporary entry permit.) By virtue of regulation 22D an application to the Minister for refugee status lodged before 1 July 1991 has effect as an application for a DPTEP.

The term 'refugee' is defined in section 4(1) of the Act as having the same meaning as it has in Article 1 of the Convention as amended by the Protocol.

Article 1 of the Convention as amended by the Protocol is as follows:

Article 1

Definition of the term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) 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, 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. [Superseded by Protocol]

C. This Convention shall cease to apply to any person falling under the terms of Section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

THE FATE OF THE REFUGEE APPLICATION

By letter dated 14 January 1991 the applicant was advised by the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) that a case officer who had examined his

application had recommended against granting refugee status. He was told that before a decision was made he could comment on the case officer's recommendation or provide new material in support of his claim. The letter was accompanied by a document described as 'Assessment of Application for Refugee Status' which contained the following assessment and conclusion:

> ASSESSMENT OF CLAIMS
>
> Mr Nagalingam has been living in Norway since 1987 and has been granted refugee status in that country.
> Although he may have experienced problems in Sri Lanka there is no reason for him to return to that country in view of his prior protection in Norway.
>
> Australia's obligations under the Convention are not engaged as under Article 1E of the Convention -
>
> > "This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having rights and obligations which are attached to the possession of the nationality of that country."
>
> CONCLUSION
>
> Not a refugee, as under Article 1E of the Convention Australia's obligations are not engaged.

The applicant's solicitors wrote to DILGEA on 29 January 1991 indicating that a detailed statement was under preparation and would be forwarded in due course but no response was in fact made. On 19 April 1991 the applicant was advised that his application had been assessed and that it had been decided to refuse to grant him refugee status. He was however advised that he could seek a review of the decision by the Refugee Status Review Committee (RSRC) and through his solicitor he made such an application. In support of the review application the solicitor wrote at considerable length as well

as forwarding a long statement made by the applicant.

On 1 November 1991 the applicant was advised by DILGEA that upon further examination of his claims, his refugee status and his right to return to Norway had been established and accordingly the Australian government's obligations under the Convention and the Protocol were not invoked as he had prior protection as a refugee in Norway. Following an inquiry made by the applicant's solicitors, DILGEA advised that the letter of 1 November 1991 conveyed the position at the time of the initial decision and was not a decision by RSRC.

On 16 July 1992 the chairman of RSRC wrote advising that the application for review had been considered by RSRC which had assessed that the applicant did not meet the criteria for the grant of refugee status and had therefore made a recommendation that he not be determined as a refugee. The basis for the recommendation was set out in a separate document which was enclosed and the applicant was advised that before RSRC made its final recommendation to the Minister or his delegate he had the opportunity to comment on the assessment or to provide new material in support of his claim. The document enclosed with the letter was headed 'Summing up of Refugee Status Review Committee (RSRC) Deliberations' and contained the following statement of reasons:

> **Reasons For Proposed Recommendation**
>
> ***The applicant has based his application for refugee status on***

the following claims:

- The applicant is a Sri Lankan Tamil who has refugee status in Norway, and who travelled to Australia on a Norwegian Aliens Passport.

- The applicant claims to have been an active member of the TELO group in Sri Lanka until his marriage. He claims that he was well known in his village as a member of TELO.

- The fact that his membership of TELO was well known, plus the army's general targeting of young men and the fact that his brothers were members of the militants, resulted in him or close members of his family being detained or arrested, suffering mental or physical mistreatment and being subjected to interrogation.

- The applicant claims that he and his family were persecuted in Sri Lanka because of their race.

- The applicant claims that the Norwegian government might return him to Sri Lanka. He cites generalised unrest between a number of Sri Lanka groups within Norway, as well as concern that the authorities would subject him to intimate questioning as to his motives for leaving Norway and seeking protection elsewhere.

In arriving at their findings, the Committee had regard to all material forwarded by the applicant to date. They gave the following reasons for their proposed recommendation:

- In respect of the applicant's claims against Sri Lanka, the Committee is guided by the advice of the Attorney-General's Department that the applicant is - even assuming that he is still a refugee from Sri Lanka - excluded *from* the protections given by the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees as a person who enjoys in Norway the "...rights and obligations which are attached to the possession of the nationality of ..." Norway.

- In respect of the applicant's claims against Norway, the Committee considers that no Convention-related claims have been presented. Any proceedings which may or may not be instituted against him in that country relate to a reasonable Norwegian police suspicion in a criminal investigation. There is no evidence to suggest:

  - that the applicant would be dealt with otherwise than in accordance with the rule of law in Norway;

  - that he would be unable to gain effective protection from the Norwegian government; or

  - that the Norwegian government would recant on the residence/settlement permit which the applicant has been granted and return *him summarily to Sri Lanka.*

The applicant has therefore not established a well founded fear of persecution were he to return to Norway.

The applicant did not make any response.

On 10 August 1992 the Minister's delegate (the second respondent hereafter referred to as the decision-maker) reviewed the decision to refuse refugee status and determined that the applicant was not a refugee within the meaning of the Convention and the Protocol. The decision-maker's determination and reasons indicate that originally the applicant advanced no claims of persecution or fear of return to Norway but under the heading 'Issues/summary of claims at review stage' he said:

> The applicant requested a review of the decision to refuse to determine him a refugee in a letter dated 4 May 1991, claiming that:
>
> - He has only been granted "provisional stay" in Norway and that he should therefore not be excluded on the basis of Article 1E of the United Nations Convention.
> - The Norwegian government might return him to Sri Lanka. He cites generalised unrest between a number of Sri Lanka groups within Norway, as well as concern that the authorities would subject him to intimate questioning as to his motives for leaving Norway and seeking protection elsewhere.

In his reasons for decision, after referring to the definition of refugee in the Convention and Protocol and to the High Court decision in Chan v Minister for Immigration and Ethnic Affairs (1989) 87 ALR 412, the decision-maker concluded:

> In reaching my decision I find myself in agreement with the assessment of the RSRC in respect of the applicant's claims against Sri Lanka, concurring that he is excluded from the protections offered by the Convention and Protocol by virtue of Article 1E of the Convention.
>
> I further concur with the RSRC in their assessment of the situation in Norway and of the applicant's likely treatment were he to return to Norway.
>
> After careful consideration of all the available evidence, I conclude that the applicant does not have a real chance of persecution were he to return to Norway. He has therefore not

established a well founded fear of persecution. Accordingly, I determine that the applicant is not a refugee.

There is a quantity of material before the Court indicating the type of investigations made by RSRC from relevant sources including the Norwegian Embassy and from the United Nations High Commission for Refugees in Canberra. It is not necessary to canvass that information in detail. Sufficient to say that it was relevant to the question of the applicant's status in Norway and that on the basis of that material it was open to the decision-maker to find that the applicant had taken up residence in Norway, that at the time of the decision (10 August 1992) he had the status of a refugee in Norway and that he was able to return to that country. The applicant had asserted from the outset that he had refugee status in Norway and did not resile from that position. Furthermore, the finding that the applicant was not a refugee vis-a-vis Norway was clearly open on the material before the decision-maker. However, I do not understand the applicant to have even asserted that he was a refugee from Norway.

THE APPLICATION FOR JUDICIAL REVIEW

The application for review filed on 18 August 1992 is a long document. As seems to be common practice in this type of case, the application pleads a whole range of grounds and verges on the prolix.

I find it unnecessary to deal in detail with the assertion that the decision was made in breach of the rules of natural justice. In my view the evidence is quite conclusive that no such denial occurred. Nor is there any substance in the multiple complaints that the decision was an improper exercise of power. When all of the irrelevancies are put to one side the application raises two serious issues, namely the proper construction of the definition of the term 'refugee' in the Act, and the proper application of paragraph E of Article 1 of the Convention in the facts of the case. Both involve questions of law and if the decision-maker has erred in his approach to either, the decision is reviewable.

THE FIRST ISSUE - THE DEFINITION:

The first issue which arises is whether for the purpose of the Act, 'refugee' has the meaning set out in paragraph A of Article 1 of the Convention as amended by the Protocol or whether the term is to be construed as meaning a refugee to whom the Convention and Protocol apply. Put another way, the question is whether for the purpose of the Act the term 'refugee' is to be construed as excluding a person to whom paragraph E of Article 1 applies.

The opinion of the decision-maker was that paragraph E is part of the definition and a person to whom it applies is not a refugee for the purpose of the Act. In my opinion the decision-maker correctly construed the statutory definition,

for the following reasons:

1. Whilst it is true that the Australian Parliament has not taken the legislative action necessary to make the Convention and Protocol part of the domestic law of Australia, there is no cogent reason to believe that as a signatory to both, Australia would in its domestic law adopt a definition of a term which is central to its international obligations, wider in scope than that accepted by it upon becoming party to those obligations.
2. The definition in section 4(1) of the Act refers to the meaning the term has in Article 1 of the Convention as amended by the Protocol. It does not confine the meaning to that ascribed by paragraph A of the Article.
3. It is clear from the Convention document itself that the whole of Article 1 deals with the "Definition of the term 'refugee'". This view is supported by the provisions of the Protocol which effectively amended the Convention by deleting an earlier temporal limitation that had applied. The first Article of the Protocol provides:

> **Article I**
>
> **General provision**
>
> 1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
>
> 2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." and the words "...as a result of such events", in article

1A(2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol.

Clearly, the authors of the Protocol regarded the whole of Article 1 of the Convention as containing the definition of the term 'refugee'.

Having regard to the ordinary meaning of the words used in section 4(1) of the Act, and the particular context in which they apply, there can be no doubt that the term 'refugee' in the Act means a person to whom Article 1 of the Convention as amended by the Protocol, applies.

THE SECOND ISSUE - ARTICLE 1, PARAGRAPH E:

The second question which arises has to do with the construction of paragraph E of Article 1 of Convention and its application in the facts of the case.

The substantial question in this application is whether the finding that pervades the decision under review as well as the earlier recommendations and decisions namely that the applicant had refugee status in Norway and was able to return to Norway was sufficient to establish that the applicant is "recognised by the competent authorities of the country in

which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country".

It is common cause that the applicant had taken residence in Norway in September 1987 and had in fact resided in that country until 18 August 1990. The question which requires determination is whether recognition by the host country of a person as a refugee confers upon the refugee the same rights and imposes upon him the same obligations, which are attached to the possession of nationality of that country. The answer to that question will inevitably be a matter for the domestic law of the host country. As a starting point however, a perusal of the terms of the Convention shows that refugees, in a country which is a Contracting State are, in some respects, to be accorded the same treatment as nationals e.g. freedom to practise their religion and freedom as regards the religious eduction of their children (Art. 4); the protection of industrial property and rights in literary, artistic and scientific works (Art. 14); access to courts (Art. 16); rationing (Art. 20); elementary education (Art. 22); public relief (Art. 23); matters relating to labour legislation and social security (Art 24); fiscal charges (Art. 29). But in other respects the status of refugee confers only the same rights as an alien. Indeed, Article 7(1) provides:

> Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

And there are many specific provisions in the Convention equating the rights of a refugee to those of an alien.

It may be that the domestic law of Norway accords to refugees the same rights as are attached to the possession of Norwegian nationality but there was no material before the decision-maker that justifies a finding to that effect and it is clear that the decision-maker did not address that issue. It is a fair inference that a refugee in a Contracting State will be accorded at least the rights contained in the Convention, but the decision-maker seems to have taken the view that the mere granting of refugee status in another country is sufficient to give rise to the exclusionary provisions of paragraph E of Article 1. It was not open on the available evidence to draw such an inference and to that extent the decision is tainted by an error of law.

The decision-maker may well have been misled by the advice from the Attorney-General's Department to which reference is made in RSRC's 'Reasons for Proposed Recommendation'. The relevant passage is:

> In respect of the applicant's claims against Sri Lanka, the Committee is guided by the advice of the Attorney-General's Department that the applicant is - even assuming that he is still a refugee from Sri Lanka - excluded from the protections given by the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees as a person who enjoys in Norway the "...rights and obligations which are attached to the possession of the nationality of ..." Norway.

The advice in question is found in a letter written by the Attorney-General's Department representative on RSRC dated 8 July 1992 addressed to the other committee members in which the writer said:

> I am prepared to adopt the determination made by the Norwegian authorities that the applicant was a refugee from Sri Lanka although I consider the risk of persecution is now much reduced by the changes in circumstances in Sri Lanka in the time intervening between his application for refugee status in Norway and now.
>
> I note that the applicant has acquired and retained permanent residence status in Norway. (See the information contained in the Note Verbale of Embassy of Norway, dated 26 June 1992, that the applicant's passport for Norway is valid until 20 August 1992 and that he will be granted a re-entry permit to Norway). The question, therefore, is whether the applicant is a person to whom article 1E of the Convention applies to exclude him from its coverage insofar as Australia is concerned. That question resolves itself into the further question of construction of the Convention whether he is a person who enjoys in Norway "... the rights and obligations which are attached to the possession of the nationality of ..." Norway.
>
> In deciding that the applicant is such a person, I have taken note of the paragraphs 144, 145 and 146 of the Handbook on Procedures and Criteria for Determining Refugee Status and advice provided to the Committee on 20 February 1991 by UNHCR forwarding relevant passages from "A Commentary by Nehemiah Robinson" on the Convention. I am fortified in the construction of the article 1E that is propounded in those texts by the fact that the drafters of the Convention have provided expressly for persons who had acquired a new nationality in article 1C(3). The rights to (sic) referred to in article 1E must, therefore, be something less than the rights attaching to the possession of nationality. Demonstrably, he enjoys in Norway, at least, the protection of the state from persecution in his own country.
>
> I have, therefore, determined that the applicant is a person who is, in Australia, excluded from the coverage of the Convention pursuant to article 1E.

There is no question that paragraph E applies in cases where the person concerned possesses something less than nationality. If this were not so, paragraph E would have no purpose in view of the provisions of paragraph C(3). But the fact that the applicant may enjoy in Norway the protection of

the state from persecution in his own country is a normal consequence of being granted refugee status and says nothing about whether his rights and obligations in Norway equate those of a Norwegian national. Further, the statement in the above extract that "the applicant has acquired and retained permanent resident status in Norway" misrepresents the advice from the Norwegian Embassy which was:

> Jeganathan NAGALINGAM, DOB 21.02.62, was on 13.09.89 granted a residence permit valid for an indefinite period which, according to s51 of the new Immigration Act, is considered as a settlement permit.
> This permit lapses when the holder has had his place of abode outside Norway for a continuous period of more than two years (r49 of the Immigration regulations).
> Mr Nagalingam apparently did not leave Norway until after 03.07.90, when he renewed his passport, which is valid until 12.07.92. As he also has a settlement permit, re-entry visa may be granted if applied for. The aliens passport may be renewed until 20.08.92.

Whatever may be the rights and obligations attaching to a settlement permit under Norwegian law, the Norwegian authorities have clearly indicated that the applicant does not enjoy "the rights and obligations which are attached to the possession of the nationality of" ... Norway and nothing in the advice from the Embassy supports an inference that such rights are enjoyed by the applicant.

In the course of argument, counsel for the respondent seemed to be asserting that there was in effect an onus on the applicant to provide evidence of his rights and obligations as a refugee in Norway. The argument would appear to be that he had ample opportunity to show that he came within the

definition of refugee and by his failure to show that he was not caught by paragraph E, and thus excluded from the definition, he has failed to make out his own case. I totally reject any such argument. It is now well established that it is rarely appropriate to speak in terms of onus of proof in relation to administrative decision-making (see McDonald v Director-General of Social Security (1984) 1 FCR 354 at p. 357; Swan Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal (1985) 61 ALR 319 at p. 324) and this is particularly so in circumstances such as the present in which the individual members of RSRC have been shown to have made their own inquiries as a preliminary to the committee making its recommendation. It is perhaps unfortunate that in the course of that process someone did not think to ask the Norwegian authorities the question which paragraph E of Article 1 poses, namely: Is the applicant recognised by the competent authorities in Norway as having the rights and obligations which are attached to the possession of Norwegian nationality? If the question had been asked, the answer would have been decisive of the issue of whether or not the applicant was excluded from the definition of refugee by operation of paragraph E.

The decision made by the second respondent on 10 August 1992 should be set aside and the matter referred back to the first respondent or his delegate for further determination according to law.

I certify that this and the preceding 18 pages are a true copy of the Reasons for Judgment of the Honourable Mr Justice Olney

Associate: James Peters

Dated: 21.9.1992

Ms M.E. Kennedy (instructed by Ravi James & Associates) appeared for the applicant.

Mr T. Ginnane (instructed by Australian Government Solicitor) appeared for the respondents.

Date of Hearing:	14 September 1992
Place:	Melbourne
Date of Judgment:	15 September 1992
Reasons Published:	22 September 1992