FEDERAL COURT OF AUSTRALIA

Nouredine v Minister for Immigration & Multicultural Affairs [1999] FCA 1130

MIGRATION – Refugees – right to genuine hearing – whether persons following the occupation of beautician, viewed by Muslim extremists as immoral, constituted "a particular social group" – circumstances in which, though applicants failed, their application was a "bona fide resort to rights" under the Convention which should not incur costs (*Ahnee v Director of Public Prosecutions* [1999] 2 WLR 1305 at 1315 applied).

Migration Act 1958 (Cwth), ss 425, 476

Minister for Immigration and Multicultural Affairs v Zamora (1998) 51 ALD 1 distinguished

Ram v Minister for Immigration and Ethnic Affairs (1995) 57 FCR 565 applied

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 distinguished

Abebe v Commonwealth of Australia (1999) 162 ALR 1 applied

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 162 ALR 577 applied

Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (Lindgren J, 6 May 1997, unreported) applied

Sook Rye Son v Minister for Immigration and Multicultural Affairs (1999) 86 FCR 584; 161 ALR 612 applied

Sanchez v Minister for Immigration & Multicultural Affairs [1999] FCA 265 referred to

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 referred to

Ahnee v Director of Public Prosecutions [1999] 2 WLR 1305 applied

Shelton v Repatriation Commission (1999) 85 FCR 587 applied

CHENINA NOUREDINE& ANOR v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 155 of 1999

Burchett J

18 August 1999

Sydney

IN THE FEDERAL COURT OF AUSTRALIA		
NEW SOUTH WALES DISTRICT REGISTRY		N 155 of 1999

BETWEEN:	CHENINA NOUREDINE First Applicant FADIA CHERIF Second Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	BURCHETT J
DATE OF ORDER:	18 AUGUST 1999

WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

(1) The application of each applicant be dismissed.

(2) There be no order as to costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 155 of 1999

BETWEEN:	CHENINA NOUREDINE First Applicant FADIA CHERIF Second Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	BURCHETT J
DATE:	18 AUGUST 1999

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 This application to review (in the very limited way permitted by the *Migration Act 1958* (Cwth)) a decision of the Refugee Review Tribunal involves special difficulties. The difficulties arise from the nature of the oral hearings afforded to the two applicants, who are husband and wife but have put forward independent grounds to be accepted as refugees. Each had a statutory right to be heard under s 425. Both matters were listed on 23 December 1998 when, presumably because of the season, the Tribunal's time was limited, and an interpreter was only available before lunch. The hearing took place from 10.17am to 1.30pm, with a break between 11.50am and 12.07pm. For most of that time, the second applicant (the wife) was excluded from the hearing room. Although, according to the first applicant (the husband), a key event recounted in his evidence, his arrest, took place in his wife's presence, and he specifically stated she would give evidence about it, the Tribunal member decided he would "just ask her a few questions", not about that, but about her own separate claim to have received a death threat. In taking this course, the Tribunal said:

"I don't think it's necessary to ask her the other things. … We should be finished in 10 minutes. This takes a long time."

The Tribunal's comments and manner of proceeding could fairly have been taken to indicate it accepted what the husband had said, and therefore needed no confirmation of it. Then, a few minutes later, when the representative of the applicants was attempting to address (at the beginning of the hearing, the Tribunal had said it would "invite [him] to make some statements on [the applicants'] behalf"), the Tribunal interrupted him upon his referring to the rejection by the delegate of the "applicant's [ie the male applicant's] overall credibility" which had, the representative said, led the delegate to say "I do not accept his claim to have been assaulted". The Tribunal's interruption was to the effect:

"Let me cut you short. I have no problem on the credibility issue. The only problem I have was [sic] whether he was being persecuted for reason of his political opinion when, of course, his evidence is that the police were persecuting him – or at least the security were interested in compelling him to give information. They didn't care, as he put it, whether he was a member of FIS [as to what FIS was, see below] or not."

Clearly, this was an intimation that the account of the husband's arrest, and of his mistreatment by the security officers to compel him to give information, had been accepted.

2 It is true that, later, the Tribunal again broke in when the representative made a general statement about "credibility [being] no longer the barring element". This time, the Tribunal remarked:

"Overall credibility is not. I am perturbed by the, you know, lack of evidence of the trial in absentia. In other words, it's very, very indirect. That raises an issue."

But this was a separate question, on which the first applicant only gave hearsay evidence. The Tribunal did not suggest it had changed its mind on the direct evidence of the arrest and subsequent treatment of this applicant.

3 Notwithstanding what the Tribunal had said at the hearing, when its reasons issued they included the following:

"A major issue in this case is the question of credibility. The gravamen of the applicant husband's claim rests upon the story of the raid on his house in the morning following the marriage feast, his detention by the local officers of the Security, his forced recruitment as a spy and the trial and conviction in absentia. For obvious reasons this story cannot be verified independently."

4 To understand the effect and significance of this apparent *volte-face*, it is necessary to outline the account the applicant husband gave of his reasons for seeking asylum. That account must be seen against the savage backdrop of recent Algerian history. Mr Nouredine was born in Algeria on 6 July 1964, and was at school there until 1982. Between 1982 and 1990, a period of relative peace, Mr Nouredine studied chemistry at universities in Algeria, while also trading as an importer. Because of his studies, he was able to obtain exemption from military service. He had been born into a fairly conservative Muslim family, and he showed his sympathy for the Islamic Salvation Front (in French, Front Islamique de Salut, known by its acronym FIS) by distributing food and clothing for the party. It was not then illegal, and indeed it had widespread support in Algeria, being banned only after the notorious events involving the cancellation of an election in 1992.

5 Late in 1991, Mr Nouredine was admitted to a course in Islamic law at a university in Saudi Arabia. His exemption from military service having expired, he left Algeria illegally in order to make his way to Saudi Arabia, to commence the course. In Saudi Arabia, he was able to obtain a deferment through the Algerian Embassy, and he returned to Algeria in 1992 and 1993 on business and family affairs. In January 1994, he returned to Algeria to marry his wife, the other applicant, who was born in Algeria in 1972. It was following the marriage feast that the raid occurred, according to Mr Nouredine, to which the Tribunal referred in the passage I have quoted from its reasons. Mr Nouredine described his wife being knocked unconscious by armed men who burst into the house and took him away. He was held for several days and subjected to threats and mistreatment, he said, in order to compel him to agree to act as a spy on other Algerians after his return to

Saudi Arabia. He agreed under duress, and then returned, with his wife, to Saudi Arabia, but performed no spying activities. He claimed to have received further threats as a result, and to have been told in 1995 that he had been tried and convicted in absentia. After 1995, when he obtained a degree in Islamic Law, he was able until August 1998 to obtain work permits to live in Saudi Arabia. But this was precarious, and in that month the applicants left for Australia. During 1995, while they were living in Saudi Arabia, the applicant wife was able to return to Algeria on a visit. It was then that she claimed to have received a death threat from religious extremists who considered her occupation as a beautician to be immoral.

6 The Tribunal discussed some peripheral matters, and proceeded to make the finding:

"I accept that the applicant husband was enrolled at the University and obtained a degree in Sharia Law, although with what degree of diligence he attended his studies and how he obtained the degree may be a matter for debate on which I need not make findings. It is clear that he continued to conduct his importing business in Algeria. I further accept that he obtained employment in Saudi Arabia and a resident permit and that he continued to reside in that country until he left for Australia via another country.

However, I cannot accept the applicant husband's claim that he was impressed into the service of the Algerian Security to spy on fellow Algerians in Saudi Arabia, that he failed to do so and in consequence has been sentenced to death in absentia. Apart from the fact that the Algerian Security could easily have used less dramatic means to obtain the same objective, the applicant was remarkably vague about the espionage he was asked to conduct. He was not certain about the persons he was to spy on. He certainly had no 'inside information' but had only heard rumours about Algerians travelling to and from Afghanistan. It is difficult to see what he had to deliver to the Security."

The Tribunal pointed out that the alleged conviction seemed inconsistent with the official assistance Mr Nouredine had received in obtaining an extension of his stay in Saudi Arabia. Also, he had never been officially notified of any conviction in absentia, whereas the "country information" suggested such a conviction would be made public by the Algerian authorities. In addition, this particular claim had been made belatedly in the application for refugee status. The Tribunal expressly added:

"Nor, for the reasons already stated, can I accept the applicant husband's account of the wedding feast raid and the events which followed. But even if the story of the raid and detention were true and I do not accept this, then, although the Security made allegations of him being an Armed Groups supporter, the applicant husband stated at the hearing before me that they were not really interested in his political beliefs. They wanted to blackmail him into spying for them. Any harassment up to this point was certainly not for reasons of any particular political opinion, actual or imputed."

7 The Tribunal then turned to a discussion of the applicant husband's evasion of military service. It expressed the view that the authorities wanted able-bodied males between the ages of twenty and thirty, and added:

"This leads me to conclude that the applicant is not wanted by the Algerian authorities for draft evasion and does not have real chance of being prosecuted (and, a fortiori, persecuted) on that account."

The Tribunal went on to point out that prosecution for failure to perform a duty of military service is not generally persecution; to hold that the Algerian Armed Forces, confronted by terrorists, do not so violate the accepted norms of combat as to justify, for that reason, a refusal to perform military service; and to conclude that the Tribunal was not satisfied that Mr Nouredine has a genuine conscientious objection to service.

8 The Tribunal also concluded that there was not a real chance that Mr Nouredine would be persecuted "for any perceived … political opinion" if he returned to Algeria, drawing attention to his ability to obtain deferments of military service up to the age of thirty without apparent difficulty. The Tribunal added:

"As stated earlier, I do not accept his claim about the raid and the impressment by the Security, but even if this did take place, it was not because of his real or perceived political views."

The Tribunal expressly stated:

"I do not accept that he will face prosecution for evasion of conscription on return to Algeria, or, even if he did, that this would amount to persecution for a Convention reason, or that he holds a conscientious objection on religious grounds to participation in the war in Algeria."

9 Counsel for the applicants criticized the Tribunal for not dealing specifically with an argument that, if Mr Nouredine is required to serve in the armed forces, he and his family may become targets and victims of punitive attacks. There are, I think, difficulties with this proposition. Would reprisals of the kind envisaged, directed against a conscript rather than a government supporter, be for a Convention reason? But, in any case, the Tribunal's reasoning involves a conclusion that persons over 30 years of age, though not exempt from conscription, are not its likely objects. The applicant husband was approaching 35 at the time of the decision, and this particular point was neither elaborated and explained in any detail, nor pressed by the applicants at the hearing.

10 The Tribunal turned to the claim by the second applicant, the wife of the first applicant. It accepted her evidence, but rejected her claim on two grounds.

11 The first ground of rejection of the wife's claim was that the persecution she feared would not be for a Convention reason. Her evidence was that she had trained to work as a women's hairdresser, an occupation which is condemned by armed groups of Muslim extremists in Algeria. It was said that the perceived vice is in making women beautiful, rather than performing a useful task in society, such as teaching or treating the sick, occupations which women may follow without incurring censure. The applicant wife claimed to have visited Algeria for almost two months in 1995, when she stayed with her in-laws "most of the time". She continued:

"[A]fter that I visited. I stayed for a little while with my family. That's where I received the threats."

A letter was put outside her door threatening her death, and accompanied by a shroud. She said that at that time there was something "like a fatwa", and many hairdressers were killed.

12 The Tribunal considered that persecution of this kind could not be brought within the Convention, either as persecution "for reasons of … religion" or as persecution "for reasons of … membership of a particular social group". So far as religion is concerned, the Tribunal said:

"The persecutors might be motivated by religious zeal, however misplaced, but they are quite oblivious of the religious opinion of the victims. They could be persons, like the wife, who consider themselves to be devout Muslims, they could be non-Muslims or agnostics. It is the hairdressing that is objected to as being immoral, not the religion of the beauty industry worker."

Although this view would mean that infants sacrificed to Moloch at Carthage and victims seized for immolation to the sun god of Aztec Mexico were not persecuted for reasons of religion, it does have support in authority: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 257-258, per McHugh J.

13 So far as concerned the question of membership of a particular social group, the Tribunal took the view that beauty industry workers did not constitute such a group in Algeria. It referred to the decision of the Full Court in *Minister for Immigration and Multicultural Affairs v Zamora* (1998) 51 ALD 1. However, I cannot think that the Tribunal's conclusion follows from the principles laid down by the Court in *Zamora*. In that case, the Court expressed

(at 7) caution about "characterising an occupational group as a particular social group". The actual decision was encapsulated in one sentence:

"It should not be concluded that tourist guides, or indeed members of any broader group, who are approached by criminal gangs to facilitate the robbing of tourists but refuse to do so, thus leaving themselves open to retribution, are a particular social group in Ecuadorian society."

This ruling is, of course, entirely consistent with that of an earlier Full Court, faced with another claim of blackmail by criminal gangs, in *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565. But in neither case was it denied that an occupational group may, in particular circumstances, also be a social group. In my judgment in *Ram* (at 568) I referred to the situation in Cambodia under Pol Pot, where "teachers, lawyers, doctors and others … were regarded as potentially dangerous to the new order", as a textbook example of persecution for membership of a social group. O'Loughlin and R D Nicholson JJ agreed. In *Zamora* (at 7) the joint judgment of Black CJ, Branson and Finkelstein JJ states:

"There will no doubt be cases in which persons who have in common no more than a shared occupation do form a cognisable group in their society. This may well come about, as McHugh J recognised in Applicant A's case [Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225], when persons who follow a particular occupation are persecuted by reason of the occupation that they follow. Thepersecution for following a particular occupation may well create a public perception that those who follow the occupation are a particular social group."

In *Zamora*, the Full Court instanced human rights workers in some countries. It is easy to think of further illustrations, such as landlords after the revolutions in China and Vietnam, prostitutes almost anywhere, swineherds in some countries, and ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural Revolution. It seems to me there is no comparison between the tourist guides of Ecuador, who were simply a convenient target for criminal depredations really directed against the supposedly wealthy people they were guiding, and beauty workers seen by religious extremists as purveyors of immorality, and therefore as a group within society that should be eliminated. Whether or not they were also attacked, in the words of the Convention, "for reasons of … religion", I think they plainly were attacked, on the Tribunal's own findings, "for reasons of … membership of a particular social group".

14 However, that is not an end of the applicant wife's claim. The Tribunal dismissed it also on another ground. It said:

"There is in addition the question of whether there exists an objective basis for a well-founded fear. The applicant wife received a death threat when visiting her parents in

their home town. According to Islamic custom, as she told me, she has to live with her in-laws. There is no evidence to suggest that she received threats there in the 2 months that she spent there. Whereas there may be a real risk of assassination should she return to live with her parents, I am not satisfied that such a risk exists if she were to live, as she indicated she would, with her parents-in-law. For those reasons I am not satisfied that the applicant wife has a well-founded fear of persecution for a Convention reason."

This reasoning was attacked by counsel for the applicants on the basis that it involved a misapplication of the test laid down in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437. The true test, it was urged, was that approved by the Chief Justice in the case cited (at 442-443), whether the applicant wife "could reasonably be expected to relocate elsewhere" in Algeria. But I do not think the present application raises at all the principles that govern the question of relocation within a country where persecution is feared. The second applicant is not a person at risk of persecution in her home area, who, it is suggested, could find internal refuge elsewhere in Algeria. What the Tribunal has found is that the only threat related to her *former* home, which she was visiting but briefly at the time. Her home in Algeria, since her marriage and according to Muslim custom, was with her in-laws. What the Tribunal held was that she had not shown, indeed she had not alleged, that she was under threat there. This was a view of the evidence that was open to the Tribunal. Accordingly, the application of the second applicant must fail.

15 I return to Mr Nouredine's own claim. I have given anxious consideration to the question whether the Tribunal's truncation of Mr Nouredine's right to be heard, a right guaranteed him by s 425 of the Act, entitles him to have the decision set aside. There is no doubt that s 425(1)(a) entitled him to a genuine opportunity to adduce evidence in support of his claim, the effective denial of which would have given him a right of appeal under s 476(1)(a) (on the ground that procedures that were required by the Act to be observed in connection with the making of the decision were not observed), and, I think, also under s 476(1)(e) (on the ground that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law): *Abebe v Commonwealth of Australia* (1999) 162 ALR 1 at 44, per Gummow and Hayne JJ; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at 618, 620, per Callinan J, endorsing views expressed by Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (6 May 1997, unreported), a judgment also approved by Gleeson CJ and McHugh J at 588 and by Gummow J at 600-601; *Sook Rye Son v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584; 161 ALR 612; and see *Sanchez v Minister for Immigration & Multicultural Affairs* [1999] FCA 265 at para 5. However, if the Tribunal properly dismissed the application on an alternative ground, its decision cannot be set aside. In my opinion, the Tribunal did not err when it concluded the arrest and mistreatment of the applicant husband, if they occurred, were for reasons unconnected with the Convention. Nor is there any error of law in the further

conclusion that Mr Nouredine is not wanted by the Algerian authorities for draft evasion, and does not have a real chance of being prosecuted or persecuted on that account. It was open to the Tribunal to disbelieve the hearsay intimations of a trial in absentia. That matter set aside as not accepted, there was nothing to suggest Mr Nouredine would be seen on his return to Algeria, years after an arrest not motivated by antipathy to any political opinion of his, as a person to be persecuted now for reasons of political opinion. The Tribunal was entitled to take this view, notwithstanding his failure to act as a spy when in Saudi Arabia. Having regard to the various findings of fact made by the Tribunal, I do not think the error which occurred in relation to its consideration of the events following his marriage in 1994 had any vitiating effect upon the Tribunal's ultimate conclusion that the fear of persecution was not, in this case, well-founded.

16 The application of each applicant must fail. However, in each case I have found there was real ground to question the decision. The rights under the Convention are very important rights, and they concern matters of grave significance to individuals. What was said by the Privy Council, of rights concerning the maintenance of fair and effective administration of justice, in *Ahnee v Director of Public Prosecutions* [1999] 2 WLR 1305 at 1315 is also applicable here. Their Lordships said:

"Given that the real substance of the appeal concerned important matters of constitutional law, and that bona fide resort to rights under the Constitution ought not to be discouraged, their Lordships make no order as to costs."

It seems to me that, equally, Australia having entered into a solemn international covenant, persons claiming rights traceable to that covenant should not be discouraged from making bona fide resort to the means offered by Australia for the determination of their rights under the Convention. See also *Shelton v Repatriation Commission* (1999) 85 FCR 587 at 590. Accordingly, there will be no order as to costs.

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

Associate:

Dated: 18 August 1999

Counsel for the Applicants:	Mr C Colborne
Solicitor for the Applicants:	Legal Aid Commission
Counsel for the Respondent:	Mr D Godwin
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14 May 1999
Date of Judgment:	18 August 1999