FEDERAL COURT OF AUSTRALIA

Saleh v Minister for Immigration & Multicultural Affairs [2002] FCA 248

MIGRATION – protection visa – application for review of decision of Refugee Review Tribunal – applicant claimed fear of persecution based on involvement with an officially banned Islamic organisation in Egypt – whether applicant faced a real risk of persecution if returned to Egypt

Migration Act 1958 (Cth) ss 5, 36, 65, 476

Hathaway The Law of Refugee Status 1991 at pp. 84-86

ESSAM ALSADAWI TAHA SALEH v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

W 300 OF 2001

LEE J

14 MARCH 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 300 OF 2001

BETWEEN:	ESSAM ALSADAWI TAHA SALEH
	APPLICANT

AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	LEE J
DATE OF ORDER:	14 MARCH 2002
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs.

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

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REASONS FOR JUDGMENT

1 This is an application under s 476 of the *Migration Act 1958* (Cth) ("the Act") for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") which "affirmed" a decision of a delegate of the respondent ("the Minister") that the applicant not be granted a "protection visa".

2 The applicant is a citizen of Egypt, born in 1975. He entered the Australian migration zone without a visa on 28 October 2000. Pursuant to ss 13 and 14 of the Act, the applicant became an "unlawful non-citizen" upon entry. Under ss 189 and 196 of the Act, the applicant was placed in "immigration detention" and has been kept there ever since. On 17 April 2001 the applicant lodged an application for a protection visa. Grant of the visa was refused by a delegate of the Minister on 18 May 2001 and the applicant applied to the Tribunal for review of that decision. The Tribunal made its decision on 9 July 2001.

3 Under s 65 of the Act, if the Minister is satisfied that, *inter alia*, the criteria for a visa prescribed by the Act have been satisfied, the Minister is to grant the visa, but if the Minister is not so satisfied, the grant of the visa is to be refused.

4 At material times, s 36(2) of the Act provided the following criterion in respect of a protection visa:

"A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

5 In s 5 of the Act, "Refugees Convention" and "Refugees Protocol" (together referred to as "the Convention") are defined respectively as "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and "the Protocol relating to the Status of Refugees done at New York on 31 January 1967". The term "protection obligations" is not defined in the Act and is not a term used in the Convention.

6 The Convention is a treaty pursuant to which the "Contracting States" agree to apply the provisions of the Convention to a "refugee". Sub-Article 1(A) of the Convention defines a refugee as follows:

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

…

(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;…"

Exceptions to, or cessations of, the operation of that definition are set out in, *inter alia*, sub-Articles 1(C), 1(D), 1(E) and 1(F). It was not contended that any of the foregoing sub-Articles applied to the applicant.

7 As a Contracting State, Australia has undertaken the obligations imposed on Contracting States by the Convention, save for the obligations set out in Article 32 which, by a statement of reservation, Australia declined to accept when it acceded to the Convention on 22 January 1954.

8 Numerous obligations in respect of refugees are set out in the Convention, including undertakings by a Contracting State not to discriminate against a refugee, and to offer a refugee some of the opportunities available to a national of that State. All such obligations may come within a broad meaning of "protection obligations" but in s 36(2) of the Act that term is limited to the specific obligations imposed on Australia as a Contracting State not to penalize a refugee who has entered Australia without authority having come directly from a territory where the life or freedom of that person was threatened for a Convention reason, and not to expel or return (refoul) a refugee where the life or freedom of the refugee would be so threatened.

9 At the first interview conducted with the applicant by an officer of the Minister's Department, the applicant stated that he had lived in Egypt before leaving for Jordan with his friend Mr Halim ("Halim"). He and Halim lived in Jordan from February 1999 until July 2000 when they left Jordan for Australia. For the first 12 months in Jordan, the applicant had been granted a work permit and was able to obtain employment.

10 The applicant said, in essence, that he and Halim had left Egypt in early 1999 after they had become targeted by a family in their village seeking redress over a perceived matter of honour. The applicant said he and Halim had been falsely accused of violating a daughter of that family. Whilst the applicant had been out of the village, members of the aggrieved family had attacked the home of the applicant and had threatened to kill the applicant and Halim. The applicant and Halim departed for Jordan soon after. They chose Jordan because that country accepted Egyptians and permitted them to work. Some 20 months later they received news from home that the young

woman's family knew where they were and that her brothers had gone to Jordan to deal with them. The applicant and Halim then left Jordan and made their way to Australia, being in fear that they might be killed if they remained in Jordan. At the interview the applicant said that he had not been involved in any political activities. He stated that the reason he could not return to Egypt was because the young woman's family would kill him.

11 In his application for a protection visa, however, the applicant made claims about involvement in Egypt with a political organisation called the Islamic Liberation Party. The applicant said the party aimed to restore "Islamic rule in the Islamic countries through non-violent activities". In Egypt the party was "embodied in the character of Saleh Sairy" who, he said, had been executed by the Egyptian Government in 1979. Many party members were reportedly executed in Egypt, Iraq, Libya, Tunisia and Jordan. The applicant claimed to have distributed leaflets for the party and to have attended a meeting of people involved with the group. On one occasion he and Halim had kept a lookout while a friend, who had introduced them to the activities of the party, distributed leaflets. The applicant and Halim had observed police following their friend and they decamped when it appeared that he was going to be arrested. The applicant feared that, under torture, the friend would have been forced to reveal his involvement with the applicant. Subsequently, the applicant's family home was raided, as was Halim's. The applicant feared that if he or Halim had been apprehended, they would have been tortured and imprisoned for co-operating with an "officially banned organisation". For that reason the applicant and Halim left for Jordan. After a period in Jordan, the applicant had received information that government forces were looking for them. As a result, he and Halim felt unsafe in Jordan and decided to leave for Australia. The applicant claimed that he feared he would be arrested, interrogated and tortured if he returned to Egypt because the authorities treated harshly those who cooperated with banned Islamic parties.

12 At the hearing before the Tribunal, the applicant stated that at his first interview he had been afraid to reveal to the Departmental officer the full grounds for his claim to be a refugee because he had encountered an Egyptian interpreter prior to the first interview and was afraid that the interpreter was involved with Egyptian intelligence. The Tribunal noted that the first interview with the applicant had been conducted with a Syrian interpreter. The applicant said that he knew of a student from his village who was accused of "Islamic activity" and whose mother had been murdered by the authorities.

13 After the hearing, the Tribunal wrote to the applicant and his adviser giving them the opportunity to further explain the "major discrepancy" between the applicant's "on arrival interview in Australia in which he gave no indication of any political involvement, and his subsequent claims regarding feared persecution for reason of his involvement with an Islamic organisation". In response, the applicant said that the Egyptian interpreter at the detention centre had asked the applicant to give his full name and address, and as a result he had been "seized with fright" with "memories of the Egyptian Intelligence struck my mind". He said he could not mention the name of the

Islamic Liberation Party "for fear of the torture that may be inflicted upon my family in Egypt". His fear was increased because the interview was being recorded.

14 In a written statement of its reasons for decision, provided by the Tribunal as required by s 430 of the Act, the Tribunal said as follows under a heading "Findings and Reasons":

"The Tribunal had significant problems with the applicant's credibility, and in particular his failure to mention any kind of political activity at his on arrival interview. This was an aspect of his claims explored at the Tribunal hearing. However, when the Tribunal was not satisfied by the reasons given by the applicant for failure to mention political activity when he arrived in Australia, and wrote to the applicant after the hearing giving him a further opportunity to explain the discrepancy between the claims put forward on arrival and those put forward subsequently, he essentially reiterated the explanations he had already given at the hearing. The Tribunal remains unsatisfied by the applicant's reasons for not making any reference to political activities or organisations at his on arrival interview.

…

On the other hand, the applicant's claims relating to problems which arose for him following his friend's involvement with a girl he wished to marry, have been broadly consistent from the time of the arrival interview to the Tribunal hearing, both orally and in writing, and the Tribunal is satisfied of the general credibility of these claims.

The Tribunal therefore accepts that the applicant left Egypt for Jordan about February 1999, having been falsely accused, with his friend, of rape, and fearing that the relatives of the girl whom he allegedly raped would take further action against him.

…

The Tribunal accepts that the applicant remained in Jordan without a work permit until July 2000, when he decided to leave for Australia, having been told that the relatives of the girl he allegedly raped knew he was in Jordan, and would pursue him and his friend there.

…

The Tribunal is very doubtful that there was ever a real chance that the applicant would be pursued and seriously harmed by the girl's relatives. It does, however, accept that the applicant feared that this might happen. It is clear from the applicant's evidence, however, that even if he were to be pursued by the associates of a girl he was accused of raping, the reason for the pursuit would not be Convention-related.

…

The Tribunal has considered the claims put forward by the applicant relating to his involvement with an Islamic extremist group. The applicant has claimed that because of his political activities with a member of this group who was subsequently arrested, he is now sought by the Egyptian authorities. The Tribunal has already indicated that it is not satisfied of the applicant's credibility in relation to these claims. Not only were these claims not put forward initially by the applicant, but his account of these events in his written and oral evidence has some major inconsistencies…The Tribunal does not accept that it was the arrest of the political friend, and his presumed revelation to the authorities of the names of the applicant and his friend as colleagues, that led to the flight of the applicant and his friend to Jordan…**In summary, the Tribunal is satisfied that the applicant's claims in relation to political activities on behalf of an extremist Islamic group have been fabricated in order to support his claims of Convention-related persecution.**" (Emphasis added.)

15 On the hearing of the application for judicial review, the applicant appeared in person. The Court also received a written submission, prepared by, or on behalf of, the applicant.

16 Essentially, the applicant contended that the Tribunal had not adequately considered his explanation for failing to raise his political activities in Egypt at the first interview and had made incorrect or inadequate findings of fact in respect of the dangers he faced if returned to Egypt.

17 The Tribunal stated that it was not "satisfied" by the reasons given by the applicant for failing to mention his involvement in political activities when he was asked why he had left his country of nationality; why he had chosen to come to Australia; and, whether he had any reason for not wishing to return to Egypt. The applicant had said that he had seen an Egyptian interpreter in the detention camp before that interview was conducted and was afraid to make a full disclosure. Although the statement by the Tribunal that it was "not satisfied" on that issue may have suggested that a definite finding in that regard could not be made by the Tribunal, it is apparent from the context of the whole of the Tribunal's reasons that, by reason of the applicant being unable to provide an explanation satisfactory to the Tribunal for failing to make such claims when given the opportunity to do so, and stating at the time that he had no fear of persecution on political grounds, the Tribunal had rejected the applicant's subsequent claim to the contrary. In fact, the Tribunal stated that the applicant had fabricated the claim that he had engaged in political activities on behalf of an extremist Islamic group.

18 In assessing the credit of an applicant who claims to be a refugee, the Tribunal must caution itself against a precipitous finding adverse to the applicant where that finding is based on a failure to disclose promptly, facts on which the fear of persecution is said to be grounded. In particular, in having regard to the content of an initial interview, necessarily a brief record, the Tribunal must keep in mind also that an applicant under arbitrary detention and authoritarian control may perceive the authority conducting the interview to be hostile to a person who has entered Australia without authority.

19 The following comments by Professor Hathaway in *The Law of Refugee Status* 1991 at pp. 84-86 are pertinent:

"First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state. The past practice of the Board of assessing credibility on the basis of the timeliness of the claim to refugee status, compliance with immigration laws, or the consistency of statements made on arrival with the testimony given at the hearing is thus highly suspect, and should be constrained in the contextually sensitive manner discussed previously in Chapter 2.

Second, it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true." (Footnotes omitted.)

20 In the instant case, however, the Tribunal gave the applicant appropriate opportunity to deal with an aspect of the applicant's case that the Tribunal considered cast grave doubt on the applicant's credibility. The Tribunal did not make a bare assertion that the applicant's account was incredible without probative material or reasonable grounds to support that conclusion. The Tribunal was entitled to reject the applicant's claims after deciding that the explanation for failing to disclose those claims stretched credulity. It was obvious to the Tribunal that if facts had occurred as now claimed by the applicant, those facts would have been in the forefront of his mind when asked why he had left Egypt and could not return. No real reason had been provided by the applicant as to why he could not have described such events if, indeed, they had occurred. The Egyptian interpreter, who had spoken to him before the interview, was not the interpreter at the interview and nothing untoward about the conduct of the interview was raised by the applicant before the Tribunal.

21 Accordingly, the applicant's claims disintegrated once the Tribunal made a positive finding that the acts of a political nature described by the applicant had not occurred.

22 It followed necessarily that whatever arguments may have been put in respect of other parts of the reasons of the Tribunal, the ultimate decision of the Tribunal followed a chain of reasoning that reflected no error of law in the decision-making process. It was not contended by the applicant that the Tribunal erred in concluding that the applicant's fear that he would suffer extreme harm if returned to Egypt by reason of the prosecution of a private

feud against him, was not a fear of persecution for a reason recognised by the Convention.

23 It follows that the application for review must be dismissed.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 14 March 2002

	The Applicant appeared in person
Counsel for the Respondent:	A A Jenshel; T C Ling
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14, 20 December 2001
Date of Judgment:	14 March 2002