Sahtout v Minister for Immigration & Multicultural Affairs [2002] FCAFC 16

Sahtout v Minister for Immigration & Multicultural Affairs [2002] FCA 114

NOTE: CHANGES TO THE MEDIUM NEUTRAL CITATION (MNC)

The Federal Court adopted a new medium neutral citation (FCAFC) for Full Court judgments effective from 1 January 2002. Single Judge judgments will not be affected and will retain the FCA medium neutral citation.

The transitional arrangements are as follows:

- All Full Court judgments delivered *prior* to 1 January 2002 will retain the FCA medium neutral citation.
- All Full Court judgments delivered *between* 1 January 2002 to 30 April 2002 have been assigned **parallel** medium neutral citations in both the FCA and FCAFC series.
- All Full Court judgments delivered *from* 1 May 2002 will contain the FCAFC medium neutral citation only.

FEDERAL COURT OF AUSTRALIA

Sahtout v Minister for Immigration & Multicultural Affairs [2002] FCA 114

MIGRATION – appeal from decision not to grant protection visa – stateless Palestinian resident in Syria – registered with United Nations Relief and Works Agencies for Palestinian Refugees in the Near East (UNRWA) – claim of well-founded fear of persecution if returned to Syria – whether primary judge erred in upholding Refugee Review Tribunal decision – whether any grounds for appeal

MIGRATION – whether art 1D excludes appellant from the operation of Convention – where Tribunal assumed appellant not excluded – where primary judge found no error in Tribunal's approach

MIGRATION – whether appellant at present receiving UNRWA protection or assistance - whether art 1D confers automatic refugee status where stateless Palestinians are no longer receiving protection or assistance – where ground not properly raised before Tribunal or primary judge – role of the Court where litigant is unrepresented

Migration Act 1958 (Cth), ss 48B, 417

Abou-Loughod v Minister for Immigration and Multicultural Affairs [2001] FCA 825 considered

Minister for Immigration and Multicultural Affairs v Quiader [2001] FCA 1458 considered

Minogue v Human Rights and Equal Opportunity Commission [1999] FCA 85; (1999) 84 FCR 438 at 445 applied

Convention relating to the Status of Refugees 1951

United Nations High Commission for Refugees, *Handbook on Procedures and Criteria for determining Refugee Status* 1988

Grahl-Madsen *The Status of Refugees in International Law* 1966 at p 415

Akram & Goodwin-Gill *Brief Amicus Curae* (Undated), United States Department of Justice, Executive Office for Immigration Review

KHALED SAHTOUT v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

W 324 OF 2001

SPENDER, NORTH& GYLES JJ

MELBOURNE (Heard in Perth) (Heard in part via videolink)

20 FEBRUARY 2002

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W324 OF 2001
ON APPEAL FROM A DECISION OF A JUDGE OF THE COURT	

BETWEEN:	KHALED SAHTOUT APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, NORTH & GYLES JJ
DATE OF ORDER:	20 FEBRUARY 2002
WHERE MADE:	MELBOURNE (Heard in Perth) (Heard in part via videolink)

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs.

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W324 OF 2001
ON APPEAL FROM A DECISION OF A JUDGE OF THE COURT	

BETWEEN:	KHALED SAHTOUT APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, NORTH & GYLES JJ
DATE:	20 FEBRUARY 2002
PLACE:	MELBOURNE (Heard in Perth) (Heard in part via videolink)

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a judgment of a judge of the Court which dismissed with costs an application for review of a decision of the Refugee Review Tribunal ('the Tribunal'). The Tribunal, by its decision made on 4 January 2001, had affirmed a decision made by a delegate of the respondent, to refuse to grant to the appellant a protection visa.

2 The appellant arrived in Australia without travel documents on 23 August 2000. He was interviewed by an officer of the Department of Immigration and Multicultural Affairs on 27 August 2000. On 2 September 2000 he lodged an application for a protection visa and on 12 September 2000 a delegate of the respondent ('the delegate') refused to grant him a protection visa.

3 The Tribunal reviewed the decision of the delegate. It accepted the appellant's claim to be a stateless Palestinian refugee who had been living in Syria where he was registered with the United Nations Relief and Works Agency for Palestinian Refugees ('UNRWA'). It found that as an UNRWA-registered Palestinian refugee in Syria, the appellant is protected from expulsion and would normally be entitled to re-enter and reside in Syria.

4 In view of the above claim, which the Tribunal accepted, for the appellant to be entitled to a protection visa it was necessary for the relevant decision-maker (in this case initially the delegate and subsequently the Tribunal) to be satisfied that the appellant is 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…not having a nationality and being outside the county of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

5 Before the Tribunal, the appellant claimed to have been a political detainee in the past in Syria and he claimed that he faces similar treatment in the future in that country if he returns to it. He asserted a well-founded fear of persecution in Syria for reasons of race (ie that he is a Palestinian refugee with limited rights in that country) and political opinion, in that he is perceived to be an opponent of the Syrian government.

6 Among the claims advanced by the appellant are the claims that he was detained for three months in 1995 and that upon his release his original travel document was confiscated by Syrian officials because he was suspected of supporting Yasser Arafat and his *Fatah* political faction. He stated that as a consequence of these events he was banned from working for the Syrian government. The appellant also claimed that he was unjustly implicated in June 2000 in a *graffito* attack on the new Syrian President, resulting in his detention for 40 days and nights during which period he was beaten and interrogated before being released unconditionally.

7 The appellant gave evidence before the Tribunal. The Tribunal took the view that *"*[a]*s the hearing progressed the* [appellant] *showed an increasing inability to adhere to one consistent account of his claimed past."* The Tribunal concluded that all of the evidence going to his claim that Syrian authorities have suspicions about him that have arisen in the past was unreliable. It found that there were substantial discrepancies between his own claimed experiences and the widely-reported behaviour and resources of Syrian authorities. It categorised him as a *"seriously unreliable witness"* because of his tendency to claim as facts matters which on examination proved to be baseless and arbitrary perceptions, unsupported by objective evidence.

8 The Tribunal was not satisfied that the appellant had ever been charged with an offence in Syria or that he was denied his travel document and travelled to Australia on his brother's travel document. The Tribunal found that the appellant left Syria using his own travel document. Further, the Tribunal took the view that, even if it was wrong in its finding that he had concocted his claims, the fact that he had supposedly been released without condition from detention in mid-2000 indicated that any earlier concerns which the authorities may have had about him had been set aside. For this reason, the Tribunal concluded that as long as the appellant did not oppose the regime in Syria he would not get into trouble with it. The Tribunal noted that the bulk of the appellant's evidence revealed that he has no motivation to concern himself with politics at all.

9 The Tribunal was not satisfied that the appellant faces a real chance of being persecuted in Syria for reasons of race, religion, nationality, membership of a particular social group or political opinion. For this reason, it concluded that the appellant was not entitled to a protection visa.

the reasoning of the primary judge

10 The appellant raised four points before the learned primary judge. The first was that Australian law required that protection be provided to persons who have no country of nationality. The primary judge rightly pointed out that Australian law does not so require. As is pointed out above, for the appellant to be entitled to a protection visa it was necessary for the relevant decision maker to be satisfied that he was unable or unwilling to return to Syria

because of a well-founded fear of persecution. Neither the delegate nor the Tribunal was so satisfied.

11 The second point raised by the appellant before the primary judge was that Syria is governed by the secret service. As the primary judge rightly identified, the nature of the government of Syria had no direct relevance to the appellant's entitlement to a protection visa, which was relevantly dependent on whether he has a well-founded fear of persecution in that country. Adopting the conventional approach of reaching a view as to what is likely to happen in the future by looking at what had happened in the past, the Tribunal did not accept that the appellant faces a danger of persecution if he returns to Syria. The appellant was not able to identify any basis upon which the Court could interfere with the tribunal's views in this regard.

12 Thirdly, the appellant complained to the primary judge that three of his fellow detainees who are Palestinians from Syria have been granted visas to stay in Australia. As his Honour pointed out in his reasons for judgment, the Tribunal is required to consider each individual case separately and different facts may lead to different decisions.

13 Fourthly, the appellant sought to criticise the Tribunal for refusing to receive a document which showed that he was wanted by the authorities in Syria. However, the document, which has never been seen by the appellant and is not in Australia or Australian by origin, was not offered to the Tribunal. It had no significance to his Honour's review of the decision of the Tribunal.

The Grounds in the Notice of Appeal

14 The grounds of appeal, contained in the Notice of Appeal, have been completed by hand, apparently by the appellant.

15 The first ground is that the judgment"*did not consider the relevant immigration law concerning the person* [sic] *fear of persecution under the UN Convention*".

16 The second ground is that there was:

"no evidence or other material to justify the making of the decision that the applicant did not have a well founded fear of persecution by reason of his political opinion real or imputed, the possibility of just disappearing is a danger for a returned asylum seeker in Palestine".

The Grounds of appeal in the appellant's written statement

17 At the callover of the appeal on 26 July 2001, French J ordered that the appellant prepare a statement of his argument in writing, to be read to the Court and translated at the hearing of the appeal.

18 The appellant prepared the statement in Arabic, and it was translated in Court at the commencement of the appeal.

19 The grounds of appeal set out in the notice are not sufficiently particularised to establish a successful challenge to the judgment of the primary Judge. As the appellant was not represented on the appeal it is appropriate in this case for the Court to treat his written statement as the expression of his grounds of appeal.

20 The statement put forward four grounds of complaint. The appellant repeated some of the arguments in very brief oral submissions without any further elaboration. These were made by the appellant without legal representation and via videolink from the Port Headland Immigration Reception and Processing Centre.

21 The first complaint was that the Tribunal was wrong to disbelieve the appellant, and to concluded that he did not suffer persecution in Syria.

22 Whether the appellant had suffered persecution as he alleged, was a question of fact for the Tribunal. It was not the function of the primary Judge to reassess the facts or analyse the evidence before the Tribunal in order to reach his own conclusions. As the primary Judge recorded in his reasons for decision, the grounds upon which the Court may review a decision of the Tribunal are limited. The primary Judge was correct to limit his role in this way. The appellant's first complaint cannot succeed.

23 The second complaint related to the finding by the Tribunal that the appellant, as an UNRWA registered Palestinian in Syria, was entitled to most rights enjoyed by Syrian citizens. As a result of this view, the Tribunal was not satisfied that the appellant was persecuted in Syria. The appellant explained that in or about May 2001 he had been issued with a Palestinian passport. It followed, Mr Sahtout alleged, that his Syrian documentation had been invalidated.

24 Whatever the consequence of the issue of a Palestinian passport to the appellant, this question was not before the Tribunal. The Tribunal gave its decision on 4 January 2001, that is, before the passport was issued. The subsequent issuing of the passport does not ground any challenge to the decision of the Tribunal. Ms Price, who appeared as counsel for the respondent, rightly observed that the change in circumstances may be addressed by an application to the Minister under s 417 or s 48B of the *Migration Act 1958* (Cth).

25 The third ground of complaint related to the Tribunal's finding that the appellant was given assistance and protection by UNRWA in Syria and would

be given such protection and assistance were he to return to Syria. The appellant submitted that the Tribunal was wrong in this conclusion.

26 Again, the appellant's argument amounts to a disagreement with the Tribunal's finding of fact. As previously explained, this is not a ground upon which the Court may review the decision of the Tribunal.

27 The fourth ground of complaint is a little unclear, but we take it to relate to art 1D of the *Convention relating to the Status of Refugees 1951* ('the Convention'). This article provides:

"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."

28 The article applies to persons receiving assistance or protection from UNRWA. The first sentence operates to exclude person from the operation of the Convention while they are receiving protection or assistance from UNRWA. There are some controversies in Australian and international case law, and among scholarly writers, as to the scope of the concept of receiving protection or assistance.

29 One controversy concerns persons outside the area of operation of UNRWA. On one view, such persons cannot be described as receiving assistance or protection from UNRWA.

30 The opposing view is that if such persons would, upon return to the geographical area of operation of UNRWA, receive UNRWA protection and assistance, then they should be considered as being presently entitled to receive UNRWA protection and assistance. Consequently, on this view, such persons are properly described as receiving protection or assistance from UNRWA within the meaning of art 1D.

31 This opposing view was applied in the decision of Heerey J in *Abou-Loughod v Minister for Immigration and Multicultural Affairs* [2001] FCA 825. The Tribunal refused a protection visa to an UNRWA-registered Palestinian who was residing in Syria before coming to Australia. The Tribunal held that the applicant was excluded from the Convention under the first sentence of art 1D because:

"While it is obvious that he does not have the complete protection and assistance of UNRWA while he is in Australia, it is also clear that he retains a current entitlement to that protection that can be realised should he return to Syria."

32 His Honour said at par 13:

"In my opinion, the construction the Tribunal put on article 1(D) is correct, notwithstanding that earlier decisions of the Tribunal have taken a different view. Given the findings of fact that the applicant can obtain UNRWA documents and return to Syria where he would enjoy the rights that have been mentioned, it is correct to say that he is 'at present receiving' protection or assistance from UNRWA, in the sense that he has the immediate right to practical assistance in the ways I have mentioned. This is the view of Professor James C. Hathaway in 'The Law of Refugee Status', Butterworths, Toronto, 1991 at page 208 where, speaking of article 1(D) the learned author says:

> 'It does not exclude only those who remain in Palestine, but equally those who seek asylum abroad.'"

33 The Tribunal went on to consider and reject the applicant's case that he was a refugee within the meaning of art 1A of the Convention.

34 The Minister contends that the approach of Heerey J in *Abou-Loughod* his correct.

35 *Minister for Immigration and Multicultural Affairs v Quiader* [2001] FCA 1458 dealt with a Tribunal decision which held that an UNRWA-registered Palestinian from Syria who applied for a protection visa in Australia, was not receiving assistance or protection from UNRWA for the purposes of art 1D. This conclusion was based partly on the construction of art 1D to the effect that a person outside the geographical area UNRWA's operations was not receiving assistance from UNRWA, and partly on the finding of fact that the applicant had not received assistance from UNRWA since 1975. The Tribunal then proceeded to find that the applicant was a refugee within the meaning of art 1A. In reaching this conclusion, the Tribunal relied upon the construction proposed in United Nations High Commission for Refugees *Handbook on Procedures and Criteria for determining Refugee Status* 1988 as follows:

"With regard to refugees from Palestine, it will be noted that UNWRA (sic) operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention."

36 The Minister sought review of the Tribunal's decision. He contended that the applicant was excluded from the Convention because he was entitled to protection by UNRWA. French J dismissed the application saying at par 33:

"In my opinion, Art 1(D) does not apply, to exclude from the protection of the Convention, a Palestinian, entitled to protection and assistance from UNRWA, who is nevertheless at risk of persecution if returned to his home region notwithstanding that it is within the territorial competence of UNRWA. It is not necessary for present purposes to consider the full range of circumstance in which the exclusion under Art 1(D) does not apply to Palestinian refugees. I am inclined to the view that the interpretation given in the UNHCR Handbook and quoted by the Tribunal is

consistent with the approach which I have taken in this case. However, further consideration of that may await another day."

The Minister has filed an appeal against the decision in Quaider.

> 37 Returning now to the present appeal; it is true, as the appellant contends, that the Tribunal found that the appellant would be entitled to the protection of UNRWA if he returned to Syria. However, the Tribunal did not use this finding to exclude the appellant from consideration as a refugee under art 1A. The Tribunal did not find that the appellant was excluded by the operation of the first sentence of art 1D. Rather, the reference to the role of UNRWA was in the context of determining whether the appellant faced a real change of persecution. Thus, in relation to the controversy over the construction of art 1D, the Tribunal implicitly assumed in favour of the appellant that he could claim the protection of the Convention if he brought himself within the requirements of art 1A.
>
> 38 The gist of the appellant's argument, enunciated in the written statement, seems to be that he should have been found to qualify under art 1A because other Palestinians from Syria had been found to be refugees. However, as the primary judge correctly held (see par 12 of these reasons for judgment), the assessment of each case under art 1A depends on its own facts. The appellant's application for a protection visa failed because the Tribunal found that he did not have a well-founded fear of persecution.

A further construction argument

> 39 Counsel for the Minister felt obliged to point out to the Court that there was another construction argument which may assist the appellant. The Court is grateful for the responsible and fair-minded approach of the Minister in drawing this matter to the Court's attention.
>
> 40 Counsel for the Minister explained that a number of academic writers have suggested that, if an applicant is not excluded from the protection of the Convention by the first sentence of art 1D, then the second sentence operates to confer automatic refugee status on that applicant. The basis for this construction is the absence of UNRWA protection or assistance, which, under this view, obviates the need for the applicant to establish eligibility under art 1A. For instance, in Atle Grahl-Madsen's *The Status of Refugees in International Law* (1966), the author opined at 415:

"Nevertheless, the wording of the second paragraph of Article 1 D gives rise to the question whether the persons who have been receiving UNRWA assistance and/or protection will automatically – i.e. without any further test – become entitled to the benefits of the Convention, as soon as they cease to receive such assistance and/or protection; or if it is only meant that cessation of UNRWA assistance and/or protection shall free the persons concerned from the suspensive effect of the first paragraph of Article 1 D , it being understood that each person's claim to refugeehood is to be tried in accordance with the provisions of Article 1 A(2).

…

The words 'ipso facto' in the second paragraph of Article 1 D suggest that no new screening is required for the persons concerned to become entitled to the benefits of the Convention."

41 More recent writings have acknowledged that decided cases in Germany, Austria, Switzerland, the Netherlands, the United States, Canada and Australia have not accepted this interpretation: see, for example, Susan Akram & Guy Goodwin-Gill, *Brief Amicus Curae* (undated), United States Department of Justice, Executive Office for Immigration Review. Rather, these countries have required persons registered with UNRWA, who no longer receive UNRWA protection or assistance, to establish their refugee claim under art 1A.

42 Before the Tribunal, the appellant was legally represented. Before the primary judge and this Court, he did not have legal representation. Therefore, we bear in mind the obligations on the Court in dealing with an unrepresented litigant*: Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85 at [26]; (1999) 84 FCR 438 at 445. However, in written submissions to the Tribunal, the appellant's solicitor contended that the appellant was not excluded from the protection of the Convention by the first sentence of art 1D, and further, that he had a well-founded fear of persecution in Syria within the meaning of art 1A. Much evidence and argument was devoted to the issue whether the appellant had experienced persecution in Syria. This is the case with which the Tribunal dealt. It was no part of the appellant's case before the Tribunal, before the primary Judge, or before the Full Court, that he was automatically entitled to refugee status without proving a well-founded fear of persecution. In those circumstances, it is not appropriate, or necessary, for this appeal Court to consider the proper construction of art 1D any further.

CONCLUSION

43 The appeal must be dismissed with costs.

I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 19 February 2002

The appellant appeared via videolink on his own behalf.

Counsel for the Respondent:	Ms L B Price
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	28 November 2001
Date of Judgment:	20 February 2002