FEDERAL COURT OF AUSTRALIA

SGLB v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCA 176

MIGRATION ACT – Application for protection visa – powers of Federal Court on judicial review – Migration Act s 474 – finding of psychiatric condition – in the absence of any expert evidence – use of finding in relation to credit – failure to consider whether proceeding should continue – whether jurisdictional error

Migration Act 1958 (Cth)

Judiciary Act 1903 (Cth)

Federal Court of Australia Act 1976 (Cth)

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002 v Commonwealth of Australia[2003] HCA 1

Plaintiff S157/2002 v Commonwealth of Australia[2003] HCA 2

Craig v South Australia (1995) 184 CLR 163

Re Refugee Review Tribunal; Ex parte AALA (2000) 204 CLR 82

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Eastman v The Queen (2000) 203 CLR 1

SGLB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

No S 6 OF 2003

SELWAY J

ADELAIDE

11 MARCH 2003

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 6 OF 2003

BETWEEN:	SGLB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	SELWAY J
DATE OF ORDER:	11 MARCH 2003
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The order of the Tribunal dated 13 August 2001 is quashed.

2. Remit the matter to the Refugee Review Tribunal for further consideration.

3. The Applicant have his costs of the appeal and his application for judicial review (if any).

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

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 6 OF 2003

BETWEEN:	SGLB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	SELWAY J
DATE:	11 MARCH 2003
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

PROCEDURAL BACKGROUND

1 On or about 8 June 2000, the appellant arrived in Australia by boat and without a visa. He was and is a “non-citizen” as defined in the *Migration*

Act 1958 (Cth) ('the Act"). He was taken into detention and very soon thereafter he was interviewed by a Departmental officer. On 27 September 2000, he applied for a protection visa. In order to obtain such a visa it was necessary that the Minister be satisfied that "Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol": s 36(2)(a) of the Act. In general terms such an obligation would arise if the appellant was a "refugee" as defined in Article 1A(2) of the Refugees Convention.

2 The appellant's application was initially considered by a delegate of the Minister. On 8 December 2000, the delegate refused the application. The appellant sought a review of that decision by the Refugee Review Tribunal. On such a review the Tribunal may exercise all of the powers and discretions of the delegate: see s 415(1) of the Act. On 26 April 2000, the Tribunal affirmed the decision not to grant a protection visa.

3 Although the detail is not altogether clear on the material before me, it would appear that the appellant then instituted proceedings in this Court to review the decision of the Tribunal. It would seem that the parties before the Court were agreed that the hearing before the Tribunal had miscarried on the basis that the appellant had been provided with a Farsi interpreter whereas he required the assistance of an Arabic interpreter. By consent the determination of the Tribunal was set aside and the matter was remitted to it. I note that, notwithstanding the apparent reasons given by this Court for overturning the first decision of the Tribunal, the appellant subsequently sought and was provided with a Farsi interpreter.

4 The Tribunal again considered the claim for a protection visa. Its hearing was delayed in part by requests for adjournments made by the appellant on the basis of his severe depression and psychological problems. When the hearing did proceed the appellant gave oral evidence before the Tribunal, but in the course of that evidence he became "highly agitated" and it was necessary to conclude his evidence in writing. In the result the Tribunal gave its decision on 13 August 2002. It again affirmed the decision not to grant a protection visa.

5 The appellant again sought review in this Court. The review was instituted by an application filed on 29 November 2002. The application is not particularly helpful in identifying what jurisdiction this Court has to review the decision of the Tribunal. The appellant was represented at the time and the application was filed by a firm of solicitors. It is possible, of course, that they were acting on a pro-bono basis, but I am not certain that that excuses the filing of an application which does not reveal a clear basis for jurisdiction. The application does mention "a contravention of a jurisdictional factor" and does seek an order requiring the Tribunal to reconsider the appellant's case "according to law". Taking a particularly generous view of it, this may suggest that the appellant is seeking a writ of mandamus against an officer of the Commonwealth. On that basis this Court has jurisdiction to hear the matter pursuant to s 39 of the *Judiciary Act 1903* (Cth). If it were thought that this approach is too generous then the difficulty could be resolved by giving the

appellant leave to amend the application by inserting immediately after the words “Amended Application for Review” the words “Judiciary Act 1903 section 39B” and by deleting paragraph 3 of the “Orders Sought” and inserting in lieu the words, “Mandamus to the Refugee Review Tribunal directing it to reconsider the application for a protection visa”. I grant the appellant leave to make such an amendment.

6 The powers of this Court on any review are limited in a number of ways. This includes the limitations within s 39B of the *Judiciary Act 1903* (Cth) (including whatever limitations are contained within s 75(v) of the Commonwealth Constitution). It also includes the provisions of s 474 of the Act as understood in the light of the recent High Court decisions in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1 (“*S134*”) and *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 (“*S157*”). Section 474 provides:

“474 Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

“privative clause decision” means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the

following:

(a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

…"

The decision of the Tribunal in this case was a "privative clause decision". It follows that this Court did not have jurisdiction in relation to decisions of the Tribunal: "which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act" (*S157* at [76]).

In determining whether or not a particular error is a "jurisdictional error" or not it is necessary to have regard to the whole of the Act, including s 474. (See *S157* at [77]-[78]). Errors that may be characterised as "jurisdictional errors" include errors of law:

"which causes it [an administrative tribunal] to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it." (Craig v South Australia (1995) 184 CLR 163 at 179).

In particular, a failure of an administrative tribunal to afford procedural fairness in accordance with the relevant statutory scheme is a jurisdictional error (see *S157* and *Re Refugee Review Tribunal; Ex parte AALA* (2000) 204 CLR 82). So too is the making of findings and the drawing of inferences in the absence of evidence: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-357. What is clear is that this Court does not have jurisdiction to engage in "merit" review.

7 When the application for review first came before this Court on 13 September 2002, it was transferred to the Federal Magistrates Court pursuant to s 32AB of the *Federal Court of Australia Act 1976* (Cth). The Federal Magistrate's jurisdiction was also limited to the correction of "jurisdictional errors". The Magistrate delivered his decision on 20 December 2002, dismissing the application on the basis that there was no error of law by the Tribunal in reaching its decision.

8 Pursuant to s 24 of the *Federal Court of Australia Act 1976* (Cth) the applicant has appealed the decision of the Federal Magistrate to the Full Court of this Court. Under s 25(1A) of that Act the Chief Justice has advised that he

considers it appropriate that the appellate jurisdiction of this Court be exercised by a single Judge. The result of the foregoing is that the appellant comes before me after being in detention for more than two years and nine months. He is now unrepresented, although he has sought an adjournment from me so that he can obtain representation. His appeal grounds are unhelpful, suggesting generally that his case has not been "considered deeply". This is not a ground of appeal. In any event it is untrue as the above history shows. Whatever else may be said, the appellant's case has received very extensive consideration over many years. Given that the appellant is unrepresented, I propose to treat his appeal grounds as being a general ground that the learned Federal Magistrate erred in not finding that the decision of the Tribunal given on 13 August 2002, involved a jurisdictional error.

THE APPELLANT'S CLAIM

9 The appellant's evidence has varied from time to time. It is clear that he is Iranian, but of Arabian ethnicity. When first interviewed by a Departmental officer at the detention centre he claimed that the reason for coming to Australia was to find a bride. When interviewed by the Minister's delegate he claimed that he was in fear of persecution by reason of his Arab ethnicity. He said that such persecution had become significant during the Iran/Iraq war, and that it had subsequently continued in relation to him. He also referred to a demonstration in which he was involved in 1999. The delegate rejected the appellant's claim on the basis that the claimed discrimination against Arabs was inconsistent with other material and on the basis of the inconsistency between the evidence given to the delegate and his statements on first interview.

10 When the matter first came before the Tribunal the appellant provided a written statement. In that statement he claimed that his family were actively involved in the Iran/Iraq war including: "smuggling the heavy weapons from Iraq to the Iranian inland".

11 He said that in consequence his grandfather and uncle were executed by the Iranian authorities. He said that his grandfather had been a chieftain. Subsequently the appellant's father had been detained at least once a year and the family house was raided by the police five or six times per year. He also gave evidence that he had personally been involved in two demonstrations against the Iranian Government and that he had personally been detained for periods of two and five months. The Tribunal found that the appellant was not a creditable witness. It referred in particular to the previous inconsistencies in his statements, to the inconsistencies in the evidence he gave before the Tribunal and to his evidence being "confused and unconvincing". In the result the Tribunal was not satisfied that the appellant had a well-founded fear of prosecution.

12 When the matter was returned to the Tribunal, the Tribunal had information that the appellant claimed to be having psychological problems. Mr

> Cox, who had acted for the appellant in the past, wrote a letter dated 28 March 2002, either to the Department or to the Tribunal expressing: “grave concerns about [the appellant’s] present fitness to present his case or answer the Tribunal’s questions because he is seriously ill.”

In a note to the Tribunal dated 20 May 2002, the appellant informed the Tribunal:

“I am an Iranian refugee residing in the Curtin IRPC. I have developed severe depression and psychological problems as a result of which I have made several attempts to hurt myself and end my life. On two of such occasions I have been sent to the hospital for treatment.

On 17/05/2002, I tried again to commit suicide and was sent to the Derby hospital. Since I feel I am not psychologically fit to attend the upcoming RRT hearing, I therefore request the Honourable Tribunal to postpone my hearing date to a later date.”

As noted above, the Tribunal agreed to delay the hearing, at the request of the applicant, for that reason. The Tribunal member also sought information from the psychologist at Woomera Detention Centre (where the appellant was then held). A letter dated 11 June 2002, addressed to the attention of the Psychologist provided in part:

“The Member would be grateful if you could provide to her a written assessment of [the appellant’s] general state of mind so that she can decide how best to conduct the hearing, and how well he is presently able to express himself and explain his actions. In particular she would like to know what to expect in terms of his ability to accurately recall incidents from his past. She also needs to know whether he is having difficulties in concentrating which might affect how he gives oral evidence at a hearing. She would appreciate any other observations you may wish to make which you think might assist her to take oral evidence from [the appellant].”

The response from the psychologist is contained in a letter dated 18 June 2002. It provides in part:

“<u>General Presentation and Psychological State:</u>

> Abdul presents as extremely tense, and shows signs of being both emotionally and physically volatile. In general he presents as a very angry self-focused person. Abdul has had a lot of contact with the medical staff due to his self-harming behaviour, and continues to behave in a threatening fashion towards staff. After physically violent acts either to himself or property, Abdul shows no sign of remorse or reflection on his behaviour. I have discussed with Abdul managing his anger through physical activities available at the centre such as use of the gym, etc but Abdul is not receptive to these suggestions.

<u>Abdul's Powers of Recall:</u>

Abdul has not been interested in discussing his past with me however I don't believe that he cannot recall his past. He says it makes him too angry to discuss his past. He holds very strong views on a variety of situations but expresses his views in few words. Abdul has sworn on the Koran that if he gets a negative RRT he will kill himself. Abdul has referred to conversations we have had previously. he(sic) does not seem to have blurred or confused recall. Although Abdul is tense and angry I believe he has the ability and the resources to present information if he felt he would benefit from that process. Abdul claims to suffer from headaches, poor concentration, and insomnia through anxiety however it seems that many of his actions are still clearly thought through and premeditated so I believe he has the capacity to think through events if required.

In summary Abdul probably has the ability to be more articulate than he presents but whether he co-operates in that process will depend upon his frame of mind, and if he believes his cooperation will be beneficial to his situation."

13 The Tribunal hearing commenced on 26 June 2002. The appellant was represented. His evidence seems to have been that his family did not assist the Iraqi army during the Iran/Iraq war, but they were suspected of doing so. This was the reason, he said, why his family had been persecuted. He referred to being detained by the Iranian Government on three occasions. When asked by the Tribunal member "what problems he might have if he went back to Iran now" he responded that he would rather take his own life than return to Iran. The appellant became highly agitated and the hearing was suspended. The Tribunal member then wrote to the appellant's representative, raising various matters that the Tribunal asked to be addressed. Attached to that letter was a copy of the letter from the psychologist. The Tribunal's letter stated:

"The Tribunal could infer from the [psychologist's letter] that the inconsistencies in [the appellant's] account do not arise from blurred or confused recall."

The appellant's representative responded by letter dated 30 July 2002. That letter made it plain, apparently for the first time, that the claim was based not on ethnicity, or not only on ethnicity, but also on being a member of a particular social group, namely his family and upon his political beliefs. In relation to the psychologist's report, the letter from the appellant's representative provided:

"We address the very worrying and complex issue of our client's psychological and emotional condition. Considering that Abdul's self-harming has been happening over an extended period of time, we believe, may indicate considerably deeper trauma than reported by the Woomera camp psychologist. In our view, it seems extreme to suggest that a person would continue to seriously attempt to take his life as a result of anger and self-focus. It is imperative that the source of this anger is assessed thoroughly by anexpert in the field of psychology or psychiatry to enable the Tribunal to know its true source. We also question the camp psychologist's statement that he has no remorse or reflection on his behaviour. From a layman's observation, our c1ient's behaviour does not have a rational basis and his Barrister Mark Cox has observed that Abdul sometimes does not even remember what be has done. We are not attempting to impugn the Woomera camp psychologist's ability, but contend that

a further, more independent and expert assessment be undertaken to determine Abdul's state of mind and whether there can be justified links to his past claims of trauma and persecution. In other words, an expert assessment to determine the source of such behaviour and whether it stems from serious Post Traumatic Stress Disorder (PTSD). We consider that the Tribunal has a duty to ask the question about Abdul's anger and the source of that anger. Our client has given evidence of constant persecution of his family, which has been a feature of his whole life in Iran, which has also brought fear, sometimes terror, of the Iranian authorities as a constant in his life. He has given evidence of his own arrests and detention and severe mistreatment during detention. We submit that it could be possible that our client's anger is a symptom of deeper trauma, which only an expert opinion could determine. We also consider that Abdul's detention is an exacerbating factor in this case and refer to independent information in relation to refugees, asylum processing and detention."

The letter then went on to discuss, at some length, a report written by an English psychiatrist, Stuart Turner, which discusses, amongst other things, PTSD suffered by refugees. Certainly the parts of the report quoted by the appellant's representative would suggest that a person suffering from PTSD may have difficulty in properly giving evidence about traumatic events. Indeed, the report states that: "to expect someone with post traumatic stress disorder to be able to provide a complete narrative is unreasonable."

> 14 Consequently what the Tribunal had before it was an assessment by a psychologist which inferred that the appellant was not suffering from any disease, but in any event clearly stated that he could give evidence if he wished. The member had the benefit of her own observations of the appellant's behaviour. The Tribunal also had the benefit of the submissions seeking a further expert report and suggesting that the appellant may have PTSD and, if he did, this might explain some of the inconsistencies in the evidence. What the Tribunal did with all this was to make a finding that the appellant was suffering from PTSD:

"It is the case that [the appellant's] evidence has changed over time as to his family's, and his own, problems inIran after the end of the war in 1988. The Tribunal is asked to accept, in brief, that he may be suffering from Post Traumatic Stress Disorder, and that this has led to his not revealing all his claims from the outset, and has also given rise to some confusion in his description of particular events. I have not agreed to his adviser's request that he be assessed by a psychologist in order to confirm this. That is because I consider it highly likely that [the appellant] is suffering from PTSD, as indicated by his repeated incidents of serious self-harm while in detention. I therefore propose to accept that his ability to give evidence clearly has almost certainly been influenced by this. As to whether his current condition is a consequence of Convention-related events in Iran, (rather than during his period of over two years in detention in Australia, for example), it is for the Tribunal to make findings on the events which [the appellant] claims led to his decision to leave Iran."

> 15 There are a number of problems with this. First, there is simply no evidence before the Tribunal upon which it could be satisfied that the appellant was suffering from PTSD. I do not suggest that the Tribunal is under a duty to inquire whether a person has a mental disability, even where that person's

behaviour may seem bizarre: see *Eastman v The Queen* (2000) 203 CLR 1. Certainly in this case there may not have been a jurisdictional error if the Tribunal had simply relied upon the psychologist. But the Tribunal did not do so. Nor could the member be criticized for not relying on the psychologist. She was perfectly entitled to reach the view, particularly after observing the appellant's behaviour, that she was not prepared to rely upon the psychologist. But the Tribunal was not entitled to diagnose the appellant as suffering from PTSD without evidence. To do so was an error as to jurisdiction.

16 The second problem is that, even if the appellant is suffering from PTSD there was no evidence before the Tribunal, other than the quotations from the Turner report referred to above, which would enable the court to assess the effects of PTSD on the creditability of the appellant. As the above quotation makes clear, the Tribunal was prepared to rely upon the diagnosis of PTSD in relation to "his ability to give evidence clearly." It is not altogether clear what this means. What is clear though is that the Tribunal nevertheless made credit findings based upon inconsistencies in his evidence. For example, the Tribunal found that his first version of a where he was living immediately prior to leaving Iran was true, and the later version untrue. The Tribunal analysed the issue in this way:

"These two assertions as to his whereabouts in the months leading to his departure from Iran are entirely irreconcilable, and he has not provided any explanation as to why they differ. I consider untrue his claim to have been in hiding throughout his last six months in Iran. I am satisfied that he was living at his family home throughout that period. It follows, and I am satisfied, that he was not detained again by the authorities because they did not wish to detain him. It also follows, as he willingly remained at his family home where he could be readily located by the authorities, that he did not fear arrest."

But, having found that the appellant was suffering from PTSD there was no evidence before the Tribunal which would have enabled it to assess whether or not any of the evidence the appellant gave was reliable. Having (wrongly) diagnosed that the appellant was suffering from PTSD it was an error of law for the Tribunal then to proceed to make credibility findings in relation to the appellant's evidence without evidence as to what effect the PTSD might have on the appellant's capacity to give evidence.

17 The third problem is directly related to the second. Having found that the appellant was suffering from PTSD there was no evidence before the Tribunal which would enable the Tribunal to determine whether the appellant could properly take part in the proceedings. Having found that the appellant was suffering from a disease which affected his capacity to give evidence it was then incumbent upon the Tribunal to satisfy itself that the appellant could take part in the proceedings. The failure to do so was also an error of law.

18 In my view these errors were jurisdictional errors. The Federal Magistrate dealt with it in the following way:

The RRT accepted that the applicant suffers from PTSD, on the basis of a psychologist's report obtained by the RRT. Having accepted the disability suffered by the applicant there was no need for the RRT to further prolong proceedings to obtain a further medical assessment. His legal advisers were apparently satisfied that they could obtain instructions from him and represent him. Persons suffering from PTSD commonly conduct legal proceedings without particular difficulty. The RRT took into account that the answers given by the applicant may be confused, consistent with his PTSD and adjourned proceedings early when it became apparent that the proceedings had become unproductive. The RRT took the precaution of submitting further questions in writing and obtain(sic) written answers from the applicant's legal representatives. This was, in my view, a proper approach for the RRT to take."

However, the psychologist did not diagnose PTSD. As referred to above it seems to have first been mentioned in the submissions of the appellant's advisers. Any diagnosis seems to have been made by the Tribunal member. Further, the assumption made by the Federal Magistrate that many people with PTSD commonly conduct legal proceedings, does not deal with the problem of the capacity of this appellant to do so. This is particularly so when the Tribunal has accepted that the PTSD has affected the appellant's capacity to give evidence.

> 19 In my view the learned Federal Magistrate was in error in concluding that there were no errors of law in the reasoning of the Tribunal. In my view the relevant errors were jurisdictional errors.
>
> 20 It is not my role or function to engage in any merit review in this case. Having found jurisdictional error which could have affected the ultimate decision reached by the Tribunal there is little choice but to quash the decision reached by the Tribunal on 13 August 2002. Notwithstanding the long history of this matter and notwithstanding that, on one view of it, the errors by the Tribunal arose out of an understandable desire both to progress the matter and to concede an argument raised by the appellant, I order mandamus to the Refugee Tribunal to reconsider the appellant's application for a protection visa in accordance with law.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Selway.

Associate:

Dated: 11 March 2003

Counsel for the Appellant:	The Appellant appeared in person
	Ms D Billich appears Amicus Curiae Refugee Advocacy Service of South Australia
Counsel for the Respondent:	Mr S Stretton
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	11 March 2003
Date of Judgment:	11 March 2003