FEDERAL COURT OF AUSTRALIA

SFLB v Minister for Immigration& Multicultural & Indigenous Affairs

[2002] FCA 1610

Judiciary Act 1903 (Cth)

Migration Act 1958 (Cth)

Chan Yee Kin v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379

SFLB and SFMB v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

S 220 of 2002

MANSFIELD J

17 DECEMBER 2002

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY	S 220 OF 2002

ON APPEAL FROM A DECISION OF A FEDERAL MAGISTRATE

BETWEEN:	SFLB FIRST APPELLANT SFMB SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	MANSFIELD J
DATE OF ORDER:	17 DECEMBER 2002
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay to the respondent costs of the appeal.

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 220 OF 2002

ON APPEAL FROM A DECISION OF A FEDERAL MAGISTRATE

BETWEEN:	SFLB FIRST APPELLANT SFMB SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	MANSFIELD J
DATE:	17 DECEMBER 2002
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 This is an appeal from a decision of the Federal Magistrates Court given on 14 August 2002. The Federal Magistrates Court declined to order under s 39B of the *Judiciary Act 1903* (Cth) that a decision of the Refugee Review Tribunal (the Tribunal) made on 3 May 2002 should be set aside because the Tribunal had committed jurisdictional error in reaching its decision. By direction of the Chief Justice, the appeal has been heard by a single judge.

2 The appellants are citizens of Afghanistan. They are both young people of Tajik ethnicity and of the Sunni Muslim religion. They married in April 2001. They left Afghanistan in about July 2001 and arrived in Australia the following month. They each applied for a protection visa under the *Migration Act 1958* (Cth) (the Act) on 20 September 2001. In each case a delegate of the respondent on 7 March 2002 refused the application for a protection visa. They each sought review of that decision by the Tribunal which, on 3 May 2002, affirmed the decision of the delegate refusing to grant to each of them a protection visa. The Tribunal's decision on each instance was reviewed by the Federal Magistrates Court. It is the decision of the Federal Magistrates Court which is the subject of the present appeal.

3 The Tribunal was confronted with a series of claims on behalf of the appellants. It is necessary to note, only briefly, its reasons for its decision.

4 The appellants claimed that they fled Afghanistan for fear of the Taliban following particular conduct of the Taliban in relation to the male appellant's father shortly before they left Afghanistan. The Tribunal did not accept that claim. It considered that, if the Taliban had been adversely interested in either the male appellant or his father, because they were Tajiks, or because the Taliban believed they were Communists, it would have acted against them at a much earlier time. It found that aspect of the appellants' claims to have been fabricated.

5 The female appellant also claimed to fear persecution in Afghanistan because of her gender. The Tribunal accepted that her fear of persecution by the Taliban because of her membership of a particular social group, namely, women in Afghanistan - was well-founded at the time they left Afghanistan in July 2001. By reason of the changed circumstances in Afghanistan after that date, however, the Tribunal was satisfied that the Taliban, at the time of its decision, had been effectively eliminated as a political and military force in Afghanistan and so was not satisfied that there was a real chance that the female appellant or the appellants would be persecuted by the Taliban if they were to return to Afghanistan.

6 There were also claims made by the appellants that they feared persecution if returned to Afghanistan because they may be suspected of having Communist affiliations or having been involved in the Mojahedin. The Tribunal concluded:

"Taking the above into account, while the Tribunal accepts that the applicants are genuinely fearful of returning to an Afghanistan in which some elements of the Mujahideen form part of the government because of the violence and destruction they observed when the Mujahideen were previously in power, the Tribunal finds that the applicant husband and wife were not persecuted by the Mujahideen for a Convention reason in the past.

…

The Tribunal finds that there is not a real chance that the applicants would be persecuted for reason of their ethnicity if they were to return to Afghanistan now or in the reasonably foreseeable future. The Tribunal does not accept that if the applicants were to return to Afghanistan that they would be persecuted because they were believed to be Communists.

…

On the information available to it, the Tribunal is satisfied that the applicant wife would not be persecuted if she were to return to Afghanistan because she is a member of a particular social group "Women in Afghanistan.

…

Taking into account all of the above, the Tribunal finds that if the applicants were to return to Afghanistan now or in the reasonably foreseeable future, there is not a real chance that they would be persecuted for reasons of their race, a political opinion imputed to them, their membership of a particular social group or for any Convention reason. The Tribunal finds that the applicants' fears are not well-founded."

As those passages indicate, it did not accept the claims variously made based upon the appellants' political beliefs or their ethnicity or the position of women in Afghanistan (other than in relation to the Taliban) gave rise to a well-founded fear of persecution if they were to return to Afghanistan.

> 7 The jurisdictional error which was asserted before the Federal Magistrate, and which was rejected by him, was that the Tribunal had failed to address the criteria specified upon which the grant of a protection visa might be granted in accordance with s 65(1) of the Act, because it had misunderstood the test which should be applied to determining whether, at the time of its determination, the appellants or either of them had a well-founded fear of persecution by reason of their ethnicity or political beliefs or their membership of a particular social group.
>
> 8 The Tribunal conventionally applied the criterion for the grant of a protection visa specified in section 36(2) of the Act, in effect as to whether the appellants or either of them were "refugees" as defined in Art 1A(2) of the Refugees Convention.
>
> 9 In substance, the argument as I understood it, was that because the appellants left Afghanistan in July 2001 at a time when they had a well-founded fear of being persecuted for a Convention reason, the test of whether they remained with such a fear at the time of the Tribunal's determination should be determined not simply by reference to Art 1A(2) of the Convention, but having regard to the test expressed in Art 1C(5) of the Convention. It provides:

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

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

…

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

Hathaway, The Law of Refugee Status, Butterworths, 1991, discussed Art 1C(5) of the Convention at pp 199-205. It provides a means whereby an asylum state may divest itself of the protection "burden" when the government of the country of nationality again becomes an appropriate guardian of its expatriate materials. Hence, as the learned author says, the focus is on the magnitude of the charge which should exist before the cessation of protection is warranted. The learned author specifies a three-stage test for determining whether Art 1C(5) of the Convention has been met. The three-stage test is in the following terms:

"First, the change must be of substantial political significance in the sense that the power structure under which persecution was deemed a real possibility no longer exists.

…

Second, there must be reason to believe that the substantial political change is truly effective.

…

Third, the change in circumstances must be shown to be durable."

As can be seen, where Art 1C(5) applies, it contemplates a change of substantial political significance in respect of which there is reason to believe that the change is truly effective and is durable. It is contended that, in determining whether the appellants still had a well-founded fear of persecution at the time of the Tribunal's decision, it did not apply that test but applied a lesser test by reference only to Art 1A(2) of the Convention.

10 The learned Magistrate rejected that argument. After referring to various passages from the decision of the High Court in *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 (*Chan*), he said at [12]-[13]:

"If there are two distinct assessments to be made about refugee status then the suggestion that a test applied to one of those situations ought to be applied to another lacks intellectual rigour. It is perfectly reasonable to ask a Convention country to apply the Hathaway three stage procedure to a decision to deprive someone of a status which has been recognised by that Convention country. But why should those tests be applied when the situation is being looked at originally? Chan is authority for the proposition that although a Tribunal will look at the situation on the day the application is made that it will have regard to the situation when the applicant left his country of domicile. If there has been a change in situation the High Court requires firm proof of it. Why is it necessary to import a test that comes out of the different type of procedure, namely the procedure for the removal of refugee status pursuant to Article 1C(5)? The obligations that the Minister has to satisfy himself of the "well-founded fear of persecution" must include a comprehensive assessment of the country conditions at the time the decision is made and in all probability that consideration will include the matters referred to by Hathaway in his three stage test. But the test itself should not be mandated (see also the discussion of Hathaway in SCAM v MIMIA [2002] FCA 964).

I cannot accept the applicant's contentions as to the requirement to satisfy the Hathaway test, applicable to the removal of refugee status, to an applicant for refugee status. The applicant submitted that if the Tribunal failed to apply the appropriate test then it had made a jurisdictional error of the type found in SBBK v MIMIA [2002] FCA 565 at [44]-[47]. Since this application was heard before me a Full Bench of the Federal Court has determined in NAAV v MIMIA [2002] FCAFC 228 not to approve the decision in SBBK (see von Doussa J at [639] with who Black CJ and Beaumont J (in this regard) agreed). It follows that even if I was to have accepted the applicant's submissions the Tribunal's decision would not be open to review as being one which was contained within the privative clause found in s.474 of the Migration Act."

11 The argument on this appeal is that the Magistrate erred in those passages. As counsel for the appellants, appearing pro bono acknowledged, the argument now advanced is in essence the same argument as was put to the Magistrate at the time of his review.

12 In my judgment the Magistrate properly determined that the Tribunal applied an appropriate legal test in determining whether the appellants satisfied the criteria for the grant of a protection visa at the time of its decision, by reference to Art 1A(2) of the Convention. I do not accept the argument that it was necessary for the Tribunal in applying Art 1A(2) of the Convention, to impose upon itself the three-stage test discussed by Hathaway in relation to Art 1C(5) of the Convention.

13 I agree in general terms with the reasons for decision of the Federal Magistrate in that regard. In my judgment s 36(2) of the Act makes it plain that the relevant test to be applied when determining whether to grant a protection visa, is for practical purposes whether the appellants were "refugees" as defined in Art 1A(2) of the Convention. In particular, in *Chan*, Toohey J said at 405:

"… the appellant submitted that his status as a refugee must be determined in the light of facts existing when he left China. In effect the appellant was saying: 'Once a refugee, always a refugee', subject to the cessation provisions in Art. 1c of the Convention.

There is support for the appellant's submission in the literature: see, for example, the handbook issued by the Office of the United Nations High Commissioner for Refugees under the title Handbook on Procedures and Criteria for Determining Refugee Status (1979), par. 28; Grahl-Madsen, The Status of Refugees in International Law (1966), vol. 1, p. 157. But the language of the Convention itself tells against such a construction. In particular, the cessation provisions in Art. 1c(5) and (6) mention that 'the circumstances in connexion with which he has been recognized as a refugee have ceased to exist'. The emphasis is on recognition as a refugee and that, in context, means recognition by the State party which has accorded protection as a refugee. The structure of Art. 1 implies that status as a refugee is to be determined when recognition by the State party is sought and that, if granted, the status may thereafter be lost because the circumstances giving rises to recognition have ceased to exist."

There are other passages in *Chan* to the same general effect, including the remarks of Mason J at 386-387 and 391, of Dawson J at 396-397, and of McHugh J at 432.

> 14 In addition, in my judgment, the criterion imposed by cl 866.221 of Schedule 2 to the Migration Regulations operates to the same effect. Section 31 provides for the prescription of classes of visas in addition, inter alia, to the protection visa created by s 36(1) of the Act. Section 31(3) then provides that the Regulations may prescribe criteria for a visa of a specified class, including the class specified in s 36(1). Regulation 2.03 provides that for the purposes of s 31(3) of the Act, the prescribed criteria for the grant to a person of a visa of a particular class include the primary criteria set out in the relevant part of Schedule 2 to the Regulations. Schedule 2 to the Regulations includes subclass 866 dealing with protection visas.
>
> 15 The primary criteria include criteria to be satisfied at the time of the decision. Clause 866.221 provides that one of the criteria to be satisfied at the time of the decision is that the Minister (and on review the Tribunal) is to be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. In my judgment, consistent with the decision in *Chan*, that criterion requires the Tribunal inter alia to consider whether the appellants met the definition of "refugee" in Art 1A(2) of the Convention at the time of its decision.
>
> 16 My reference to the Tribunal's reasons for decision indicates that it addressed that question as at that point in time. Until that point in time, the appellants had not been accepted as refugees under the Convention. That is consistent, in my view, with the terms of Art 1C(5) of the Convention. It provides that the Convention ceases to apply to a person "falling under the terms of section A" if that person can no longer "because the circumstances in connection with which *he has been recognised as a refugee* have ceased to exist," return to the country of former habitual residence (emphasis added). It

specifically refers to the previous *recognition* of a person as a refugee, rather than to that person potentially having the status of refugee at the time that person left the country of nationality, but not having been so recognised. The conception of recognition involves some external entity, namely the authorised entity in the country of refuge, or the asylum state, having formed an official view that the person in question is a refugee. In *Chan*, McHugh J at 432 made the point in the following terms:

"It seems natural to construe the words of Art. 1C(5) as meaning recognition as a refugee by the State party which has given him protection as a refugee. This gives rise to the inference that the Convention applies to a person when a State party recognizes him as a refugee and ceases to apply to him when the circumstances which gave rise to that recognition cease to exist. This view is supported by the use of the present tense in Art. 1A(2) – 'is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself'. It is supported also by the fact that a State party does not have to determine whether it has any obligation to a person until he makes application to it to be recognized as a refugee."

17 In this matter neither the delegate of the respondent, nor the Tribunal, the appropriate decision-makers on the application for a protection visa under the Act, recognised either of the appellants as refugees because, in accordance with s 65(1) of the Act, neither the delegate nor, on review, the Tribunal were satisfied that the criterion prescribed by the Act and by reg 866.221 of the Regulations were met when they respectively considered the applications for the visa. Consequently s 65(1) of the Act directed them not to grant the visa.

18 In my judgment, Art 1C(5) of the Convention did not come into play in those circumstances. I accordingly consider that the appeal should be dismissed. I also order that the appellants pay to the respondent costs of the appeal.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 20 December 2002

Counsel for the Applicant:	Mr PC Charman
Solicitor for the Applicant:	Refugee Advocacy Service of SA Inc.
Counsel for the Respondent:	Mr K Tredrea
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	17 December 2002
Date of Judgment:	17 December 2002