FEDERAL COURT OF AUSTRALIA

SBAB v Minister for Immigration & Multicultural Affairs [2002] FCAFC 161

MIGRATION – protection visa - appeal from decision of primary judge dismissing application for review of decision of Refugee Review Tribunal – whether appellant should be given leave to amend notice of appeal to raise a ground of appeal that was not before the primary judge - whether appellant made two discrete claims before the RRT in relation to a well-founded fear of persecution if he was returned to Iran and whether RRT considered and assessed each discrete claim – whether RRT ignored relevant material in a way that affected its power – whether relief should be refused on discretionary grounds – nature of the RRT's processes in assessing claims made before it.

Migration Act 1958 (Cth)

Migration Legislation Amendment (Judicial Review) Act 2001 (Cth)

Federal Court Rules O 52 r 15(2), O 80

Yusuf v Minister for Immigration and Multicultural Affairs (2001) 180 ALR 1, applied

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833, followed

Ramirez v Minister for Immigration and Multicultural Affairs (2000) 176 ALR 514, [2000] FCA 1000, followed

SBAB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

S218 OF 2001

WILCOX, BRANSON AND MARSHALL JJ

ADELAIDE

31 MAY 2002

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S218 OF 2001

ON APPEAL FROM A SINGLE JUDGE OF THE COURT

BETWEEN:	SBAB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	WILCOX, BRANSON & MARSHALL JJ
DATE OF ORDER:	31 MAY 2002
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The appellant be given leave to amend his notice of appeal in accordance with the amended notice of appeal dated 21 May 2002.
2. The appeal be allowed.
3. The order made by O'Loughlin J on 9 May 2001 be set aside and in lieu thereof it be ordered that the application be allowed and that the appellant's application for a protection visa be remitted to the Refugee Review Tribunal, differently constituted, to be determined in accordance with law.
4. The respondent pay the appellant's costs of the appeal.

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

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	APPELLANT

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DATE:	31 MAY 2002
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 This is an appeal from the judgment of a single judge of the Court ("primary judge"), delivered on 9 May 2001. By that judgment, the primary judge dismissed an application for review of a decision of the Refugee Review Tribunal ("the RRT"). On 8 January 2001, the RRT had affirmed a decision of a delegate of the respondent not to grant a protection visa to the appellant.

2 The relevant law on the appeal to this Court is the *Migration Act 1958* (Cth) ("the Act") as it stood prior to the commencement of the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) ("the 2001 Act"). The 2001 Act came into force on 2 October 2001. It applies to applications for judicial review of decisions made under the Act on or after 2 October 2001 and decisions made before that date if an application for judicial review of the decision had not been lodged prior to that date.

Background to the proceedings

3 The appellant was born in Iraq and is Kurdish Faili. In 1970, he and his family were deported to Iran. The appellant remained resident in Iran from 1970 until the year 2000.

4 The appellant arrived in Australia by boat on 28 March 2000. He was interviewed by an immigration official shortly after his arrival. On 29 May 2000, the appellant applied for a protection visa.

5 On 8 November 2000, a delegate of the respondent refused the appellant's application for a protection visa. The appellant applied for review of the delegate's decision by the RRT. On 8 January 2001, following a hearing, the RRT affirmed the delegate's decision.

6 Subsequently, the appellant applied to the Court for judicial review of the RRT's decision. On 9 May 2001, the primary judge dismissed an application for review of the RRT's decision.

7 On 3 December 2001, the appellant filed a notice of appeal from the decision of the primary judge in the South Australia District Registry of the Court. This was subsequent to Mansfield J granting leave to file and serve the notice out of time under O 52 r 15(2) of the Federal Court Rules.

Claims of the appellant before the RRT

8 To obtain the protection visa sought, the appellant needed to satisfy the RRT that he was a person to whom Australia owes protection obligations. The appellant needed to establish that he was 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, 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; …"

9 In a written statement which was before the RRT dated 28 March 2000, the appellant claimed that since his deportation to Iran in 1970, he had been subjected to the following acts of discrimination because he was born in Iraq:

- the military had refused to allow him to do military service;
- he was the object of insults at school;
- he was refused employment by both the Government and employers in the private sector;
- his daughter was refused enrolment at a pre-school; and
- his wife had been treated poorly at a hospital.

10 In addition, the appellant claimed that the authorities had refused to investigate a car accident in which he was involved as a child; that he was exploited by his employer because of his nationality and place of birth; and that he faced difficulties in arranging his marriage because he had neither a completion nor an exemption certificate for Military Service, such service which he had been prevented from doing. Further, he was detained by police following his marriage ceremony.

11 The appellant also claimed at paragraph 14 of his written statement that:

"If I were forced to return to Iran it would be discovered that I had left illegally because the records would reveal that I had never owned a passport. I would then be considered to have committed a crime. Although they unofficially allow Kurdish Faili to leave on false passports, they don't allow them to return. Compounding this problem would be the fact that my citizenship is not recognized. At best I would be

refused entry, at worst I would be arrested and imprisoned and treated as a traitor, especially given my Iraqi birthplace. If I was deported from Australia and travelling on an Australian travel document it would be concluded that I had applied for refugee status in Australia. They would perceive this as an act of treason and I would be imprisoned and probably killed. It is well known that the Iranian Regime acts in an arbitrary way against minority religions and ethnic groups and I honestly believe that I would not survive if I were forced back to Iran."

12 During the RRT hearing, the appellant and his adviser encouraged the RRT to consider Iraq as the country of reference in relation to the appellant's application for a protection visa – that is, that he had a well-founded fear of being persecuted if returned to Iraq – for reason that he was born in Iraq. To support this assertion, the appellant informed the RRT that the identity document upon which the delegate of the respondent had decided that he was a citizen of Iran was a false document. The appellant's adviser also provided the RRT with a written submission after the hearing. The RRT stated at page 10 of its reasons for decision that the submission, "essentially reiterated what was said at the hearing, namely that the applicant is an Iraqi citizen and the Tribunal should decide this case based on this fact".

Reasons of the Tribunal

13 The RRT found the appellant to be a citizen of Iran by virtue of the application of Article 976 of the Iranian Civil Code (CX39767) being a person born "in Iran or outside" whose father is Iranian. The RRT did not accept the appellant's explanation in relation to the authenticity of the identity document. The RRT stated that it would consider Iran as the country of reference in relation to the appellant's claims that he was a person to whom Australia owed protection obligations.

14 In relation to the appellant's claims of discrimination in Iran, the RRT said at p 12 of its reasons for decision as follows:

"The Tribunal notes that the applicant has worked with the same employer for the last nine years and during his whole time in Teheran. The Tribunal accepts that the applicant may have been subjected to acts of discrimination from time to time but on the evidence before it, is not satisfied that these acts of discrimination were of a nature or severity to constitute Convention persecution. The Tribunal also finds that the instances of discrimination taken cumulatively do not constitute Convention persecution."

15 In relation to the appellant's particular claim of discrimination by the military, the RRT stated that the appellant had "responded to a general call to arms in the newspapers rather than being conscripted". The RRT then quoted country information about military service in Iran which it said confirmed, in its view, that liability for military service by males 18 years and older does not necessarily involve immediate conscription but rather is dependent on a direct call up by the authorities. The RRT then concluded that the claimed actions of the military did not constitute treatment which may be considered persecution under the Refugees Convention. Furthermore, the RRT said that it was

"implausible" that the appellant "would report to the Military Commission to volunteer, given the claimed difficulties with general discrimination in the first place".

16 In the context of the appellant's claim about penalties for illegal departure from Iran, the RRT stated that the country information document from which it had quoted in relation to military service, showed that the most likely penalty for illegal departure is a fine. This was so even though Iranian law provides for penalties of up to twelve months imprisonment. In this regard, the RRT said that the information indicates that prison sentences are rarely used and where they are, it is usually in cases where the illegal departure was prompted by a wish to evade justice. In this case, the RRT said that the appellant "has not claimed that he left Iran to evade justice".

17 Finally, the RRT referred to an additional country information document which stated that all Kurds from Iran who hold identity documents proving Iranian birth or citizenship have the right of return, should they leave Iran. It concluded that there was no "real chance" that the appellant would face persecution for illegal departure should he return to Iran.

Reasons of the primary judge

18 The appellant was unrepresented before the primary judge.

19 In dismissing the application for review, the primary judge noted that while he was "prepared to make (his) decision on an assumption in favour of the applicant that he may not be an Iranian citizen", he considered that it did not make a difference to his view that the application should be dismissed. This was for reason that the treatment complained of by the appellant, while it may be considered discriminatory, did not amount to persecution within the meaning of the Refugees Convention.

20 On the issue of the appellant's claim that if he was forced to return to Iran, it would be discovered that he had left illegally and he would be persecuted, the primary judge made reference to the fact that the RRT had discussed this matter in its reasons for decision. The RRT had also obtained information indicating that the most likely penalty for illegal departure was a fine. Therefore, according to the primary judge, the RRT was "correct when it said that there is not a real chance that the applicant would face persecution for illegal departure should he return to Iran".

The appellant's contentions on appeal

21 The appellant's handwritten notice of appeal filed on 3 December 2001, stated as follows:

"The decision did not consider the discriminations brought to me, as a Kurdish Faili ethnicity, in Iran will amount to persecution for a Convention reason.

The decision also did not consider my explanations regarding the place of birth of my father which is Iraq".

22 Pro bono counsel for the appellant, Mr Gibson, who was appointed pursuant to O 80 of the Federal Court Rules, sought leave on behalf of the appellant to amend his notice of appeal. The amended notice of appeal, dated 21 May 2002, states that the appeal is from the whole of judgment of the primary judge and seeks leave to raise an additional ground of appeal based upon s 476(1)(b), s 476(1)(c) and s 476(1)(e) of the Act.

23 In essence, Mr Gibson contended that the primary judge should have held that the RRT failed to consider the appellant's claim of persecution on account of imputed political opinion by reason of the appellant having made an application for a protection visa in Australia. It was said that the making of such an application in Australia would be viewed by the Iranian authorities as an act of treason, given the appellant's ethnicity, country of birth and his experiences of discrimination in Iran.

24 The point raised by Mr Gibson is based on the claims made by the appellant which are quoted at [11] above. It was contended by counsel that those claims included a discrete claim that the appellant feared persecution on account of the Iranian authorities discovering that he had applied for refugee status in Australia – in particular, that the authorities would view such an application by the appellant as an act of treason. In this way, the appellant stated:

"If I was deported from Australia and travelling on an Australian travel document it would be concluded that I had applied for refugee status in Australia. They would perceive this as an act of treason and I would be imprisoned and probably killed. It is well known that the Iranian Regime acts in an arbitrary way against minority religions and ethnic groups and I honestly believe that I would not survive if I were forced back to Iran."

25 It was submitted on behalf of the appellant that the RRT did not deal with that specific claim in its reasons for decision.

26 Consequentially, it was submitted that the RRT ignored relevant material in a way that affected the exercise of its power; see *Yusuf v Minister for Immigration and Multicultural Affairs* (2001) 180 ALR 1 at [82] to [84].

Should leave be given to raise the new point?

27 The appellant did not have the benefit of any legal assistance with respect to the proceedings below nor with respect to the preparation of his notice of appeal. We consider that the interests of justice dictate that the appellant be permitted to rely on his newly advanced ground of appeal. This is not a case where the new matter raised could have been dealt with by evidence being given before the primary judge; see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833 at [34] to [38] per Allsop J (with whom Drummond and Mansfield JJ agreed). We consider, in the words of Allsop J in *Branir* at [38], that the raising of the new point "could work no

injustice to the other party and is otherwise in the interests of justice". For this reason we grant leave to the appellant to amend his notice of appeal in accordance with the document referred to at [22].

Merits of new point

28 The claims of the appellant quoted at [11] above amounted to claims that the appellant had a well founded fear of persecution on account of imputed political opinion and race and that his fear was two fold, that is:

- a fear that if he were returned to Iran he would be punished for his illegal departure; and
- a fear that if he were returned to Iran he would be persecuted because of his application for refugee status in Australia.

29 The RRT dealt with the first claim referred to in the preceding paragraph under the heading "Sur place claims". It said at pp 14-15 of its reasons for decision that:

"The applicant claims that he left Iran on a substituted Iraqi passport; he destroyed this passport during the crossing from Indonesia to Australia. He claims that on return it would be discovered that he had never had a passport and therefore that he departed illegally. Irrespective of the fact that there is no independent evidence before the Tribunal to indicate that the applicant left Iran using a photosubstituted Iraqi passport, the penalties for illegal departure from Iran, sourced from the same DFAT Country profile document quoted above, indicates that the most likely penalty for illegal departure is a fine, even though the law provides for penalties of up to 12 months imprisonment. The document specifies that prison sentences are rarely used and mostly in cases where the illegal departure was prompted by a wish to evade justice. In addition the following provides further relevant information:

COUNTRY INFORMATION REPORT NO.507/00 (CX44951) Citizenship and return right of Kurds from Iran. DFAT 26 September 2000:

UNHCR advised the following:

A1. All Kurds from Iran who hold Iranian ID cards or other documents of identity proving Iranian birth or citizenship are recognised as Iranian citizens by the Iranian government.

A2. If Kurds leave Iran and hold documents proving Iranian birth or Iranian citizenship they have the right of return.

The Tribunal finds that there is not a real chance that the applicant would face persecution for illegal departure, should he return to Iran."

30 It is clear from the RRT's reasons for decision that it did not deal with the second aspect of the claim of the appellant identified at [28] of these reasons for judgment, that is, his fear that if he were returned to Iran he would

be persecuted because of his application for refugee status in Australia. In our view, the RRT thereby erred in law. The RRT is under a duty to consider and assess each claim made by an applicant for a protection visa. It is not entitled to ignore a claim as if it had not been made. In our view, a failure to deal with a claim of persecution for a Convention reason amounts to the RRT "ignoring relevant material … in a way that affects the exercise of power"; see *Yusuf* at [82]. Accordingly, the RRT has made an error of law and its decision is reviewable as one which involved a jurisdictional error under s 476(1)(b) of the Act.

31 It was contended by counsel for the respondent that the two so-called sur place claims made by the appellant were "inextricably bound together" and that those claims could not logically be considered in isolation. We do not see why this is so. The claims are discrete ones and each required the attention of the RRT. We consider that the RRT focused entirely in this aspect of its reasons for decision upon the consequences of the appellant's illegal departure per se. The RRT failed to consider the difficulties which may be faced by the appellant as someone who was a Kurd, who was born in Iraq, who had fled Iran illegally and who had made an application for a protection visa in Australia.

32 It was further contended by counsel for the respondent that the country information relied upon by the RRT referred to the risks faced by persons who had departed Iran illegally and those who had done so and applied for protection visas. Whilst the country information may have referred to those two issues, the part of it which was relevant to the second issue was not quoted from or identified by the RRT in its reasons for decision. Rather the RRT focused exclusively on the first issue. Moreover, the RRT did not give consideration to whether the country information, which was of a general nature, was applicable to the circumstances of the appellant who, as the RRT found, came from a class of persons subjected to discriminatory treatment in Iran. To put the matter another way, in giving consideration to whether the appellant had a well-founded fear of persecution should he return to Iran, the RRT was required to give consideration not only to the likelihood of his past experiences of discrimination in Iran being repeated but also to whether the severity of that past discriminatory treatment might significantly increase were he returned to Iran after having claimed refugee status in Australia.

Disposition

33 Having regard to the foregoing, it will be ordered that the appeal be allowed, the decision of the primary judge be set aside and that the matter be remitted to the RRT, differently constituted, for further consideration. In so doing, we wish to emphasise that the point upon which the appellant succeeded was not one which was raised before the primary judge.

34 We were invited by counsel for the respondent to exercise our discretion not to grant relief to the appellant. It was submitted that we should do so because of an alleged absence of evidence to support the appellant's assertion that the Iranian authorities would regard his act of applying for

asylum as an act of treason. We reject that approach. The RRT's processes are inquisitorial as distinct from adversarial. It is not a matter of absence of evidence but rather whether the RRT could or would have been satisfied of an absence of a real risk of persecution on the claimed basis. That is a matter on which we have no information at all. The appellant has made a claim, whether supported by evidence or otherwise, and the RRT has not addressed it; see *Ramirez v Minister for Immigration and Multicultural Affairs* (2000) 176 ALR 514, 525, [2000] FCA 1000 at [29]. The appellant should not be denied an order in his favour.

35 Further it cannot be assumed that, when remitted to the RRT, the appellant's claim will be determined on the basis of the same material that was before the RRT as previously constituted. Additional, new or updated material may be available to the RRT when the appellant's matter is further considered. This may include updated information concerning the fate of returnees to Iran (including those from minority groups) who have made application for refugee status in other countries.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Dated: 31 May 2002

Counsel for the Appellant:	Mr J Gibson (who appeared pro bono)
Counsel for the Respondent:	Mr M J Roder
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	29 May 2002
Date of Judgment:	31 May 2002