FEDERAL COURT OF AUSTRALIA

MZQAP v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 35

MIGRATION – protection visa – where appellant may be prosecuted under law of general application – whether enforcement of law appropriate and adapted to achieve legitimate objective of government – whether prosecution under law may expose appellant to persecution for a Convention reason

Migration Act 1958 (Cth) s 36

Applicant A101/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 556 considered

Applicant S v Minister for Immigration and Multicultural Affairs (2004) 77 ALD 541 applied

NAGV and NAGW v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 6 applied

Weheliye v Minister for Immigration and Multicultural Affairs [2001] FCA 1222 considered

MZQAP v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

VID 1154 of 2004

BRANSON, MARSHALL AND HELY JJ

15 MARCH 2005

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VID 1154 of 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MZQAP APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	BRANSON, MARSHALL AND HELY JJ
DATE OF ORDER:	15 MARCH 2005
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of the respondent.

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PLACE:	MELBOURNE

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 This appeal from a judgment of the Federal Magistrates Court calls for consideration of the meaning of the phrase *'being persecuted'* in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees ('the Convention'). In particular the appeal calls for consideration of the circumstances in which conduct undertaken pursuant to a law of the country of nationality of the putative refugee may constitute persecution within the meaning of Article 1A(2) of the Convention.

background

2 The appellant, who is a citizen of India of Tamil ethnicity, arrived in Australia on 5 September 2001. A month later he applied for a protection visa. A protection visa is a class of visa prescribed by subs 36(1) of the *Migration Act 1958* (Cth) ('the Act'). A criterion for the grant of a protection visa is relevantly that the applicant for this visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Convention (par 36(2)(a)).

3 In *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [27] observed:

'Section 36(2) is awkwardly drawn. Australia owes obligations under the Convention to the other Contracting States, … . Section 36(2) assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals.'

Their Honours dealt with the awkward way in which subs 36(2) is drawn by proceeding on the basis that the subs 36(2) criterion should be understood as requiring the applicant to be a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Convention. We must proceed on the same basis.

4 The appellant has consistently claimed to fear persecution in India because of his support, in Tamil Nadu in the south of India, of Sri Lankan Tamil refugees and of LTTE cadres. In his statement in support of his application for a protection visa the appellant claimed to have joined the Revolutionary DMK (which is also known as the MDMK) in 1998 and to have worked closely with the party's hierarchy. He asserted that by late 1999 he was one of the front line members of the Revolutionary DMK.

5 The appellant claimed that the situation for him in Tamil Nadu became *'horrendous'* following political change in Tamil Nadu in 2001. He said that the political parties that openly supported the LTTE were warned by the authorities not to indulge in any activities, and some members, like him, were openly man-handled and tortured by the authorities.

6 The appellant's statement in support of his application for a protection visa refers to an incident that he claims precipitated his decision to leave India. The relevant paragraphs of the statement are in the following terms:

'The disaster struck my life in August 2001. My residence was surrounded by the Tamil Nadu police in the early hours of the morning and I was fast asleep at that time, I was put up by mother and was told that the police have surrounded the residence. I immediately fled from my home and took refuge at the residence of my friend. I did not want to go to my brother-in-law's residence since it will be easy for forces to

arrest me there as they know that used to stay with him. The police searched my residence and inquired about my whereabouts since they did not divulge any information my parents were brutally manhandled by the police.

I realised the danger lying ahead of me and in the event of my arrest by the police I will be subjected to torture and possibly be killed by the forces. Then I decided to leave the country and my friend organised every thing through an agent to get a visa to Australia. He made the payment to the agent for all arrangements to obtain the visa and also to leave the country. Accordingly I left my country and arrived in Australia on 5th September 2001 and seeking the protection of the Australian government I am unable to return to my country of origin and in the event of my return to my country of origin I will be arrested, detained and tortured by the authorities and the State will not give any protection to my life. … .'

decision of the tribunal

7 The Refugee Review Tribunal ('the Tribunal') formed the view that the appellant was knowledgeable about the formation of the MDMK and some of its policies and activities in general terms. However, due to the appellant's lack of knowledge of some aspects of the MDMK, the Tribunal found that he was not a high level member but rather a supporter or low level member.

8 The Tribunal noted that the MDMK is a legal political party, has members in the Parliament and is part of the ruling coalition.

9 The Tribunal did not accept that the MDMK will be banned in the foreseeable future. It found that the leader of the MDMK, together with other leaders of the party, has been arrested under the *Prevention of Terrorism Act* ('the POTA') for pro-LTTE activities but not because of their membership of the MDMK. The Tribunal concluded that there is no real chance that the applicant will be persecuted merely because of his support and involvement in activities of the MDMK as a legal political party.

10 The Tribunal noted that the LTTE is banned as a terrorist organisation in India, as it is in Australia, Canada and the United States of America. It also noted that, under the POTA, membership or support of a terrorist organisation can attract a jail term of 10 years and fundraising for such an organisation can attract a jail term of 14 years. However, the Tribunal rejected the appellant's claim to be entitled to a protection visa because of his support for the LTTE for the following reasons. First, it observed that the POTA is applicable to all persons in India and concluded that the fear of harm arising from the enforcement in a non-discriminatory way of a law of general application is not a fear of persecution within the meaning of Article 1A(2) of the Convention. The Tribunal concluded that there was no evidence that the POTA is being, or will be, selectively enforced for a Convention reason.

11 The Tribunal further concluded that the appellant's account of being wanted by the police was vague and implausible. It noted that the appellant was able to leave India with a passport in his own name, which suggested that

the police were not interested in him at the time that he left India. The Tribunal did not accept that the police came to the appellant's home in August 2001 to arrest him or that the police currently have an interest in the appellant.

12 The Tribunal found that there was no real chance that the appellant will be persecuted for reasons of his political opinions, or for an imputed political opinion, in the reasonably foreseeable future if he were to return to India. It thus concluded that his fear of persecution was not well-founded and he therefore did not satisfy the criterion specified by subs 36(2) of the Act.

decision of the federal magistrate

13 The appellant sought judicial review of the decision of the Tribunal by the Federal Magistrates Court on a number of grounds. On this appeal it is only necessary to give consideration to the decision of the learned Federal Magistrate to the extent that his Honour's decision is challenged on this appeal.

14 The reasons for decision of the Federal Magistrate noted that the Tribunal's decision was criticised on the basis of its failure to make a finding on, or interpret correctly the law in relation to, whether the appellant had a well-founded fear of persecution. The alleged failure was identified by his Honour as being a failure to find that the POTA was applied selectively or enforced selectively so as to constitute persecution for a Convention reason.

15 After reviewing relevant authorities, the Federal Magistrate concluded:

'Having regard to the analysis of the facts by the RRT and the principles of law set out in its findings and reasons, it is clear to me and I accept the respondent's submission that the RRT has applied the correct law in considering the matter. In particular, it has applied the correct principle of law in relation to the issue of whether or not the applicant had a well-founded fear of persecution. It has correctly identified and applied the relevant principles cited in Applicant A v Minister for Immigration and Ethnic Affairs (1996-1997) 190 CLR 225 and has further applied correctly, in my view, the principles of law as set out by Katz J in the unreported decision of Z v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 51. It is noted that that decision has been followed in a number of subsequent decisions identified by the RRT.

The RRT then proceeds to make significant findings of fact which on a proper and careful reading of all the material before this court would appear to me to be open to it in the circumstances of this case. Specifically, after considering the role of the applicant and the circumstances of his claimed arrest, the RRT was entitled to consider surrounding circumstances now claimed to be relied upon by the applicant as providing evidence of selective enforcement of the POTA. It was claimed before this court, and indeed before the RRT, that the arrest of one of the leaders of the political group, namely Mr Vaiko, and the conduct of the chief minister of the relevant state were matters which the RRT ought to have taken into account in reaching a conclusion that whilst the POTA may have been a legitimate exercise of the country's

power to introduce legislation, the enforcement of that legislation was undertaken in a selective manner.

In my view, a proper reading of the RRT's decision indicates that it did take into account the relevant material and reached a conclusion of fact reasonably open to it in all the circumstances.'

16 The Federal Magistrate concluded that there was no basis upon which the application for judicial review could be upheld. He dismissed the application with costs.

consideration

17 By an amended notice of appeal the appellant claims that the Federal Magistrate erred in not finding that the Tribunal had failed to give effect to the Convention because it misunderstood the nature of persecution and, in effect, mischaracterised the POTA as a law of general application and failed to consider whether the enforcement of the POTA could give rise to persecution.

18 Both the appellant and the respondent place reliance on the judgment of Goldberg J in *Weheliye v Minister for Immigration and Multicultural Affairs* [2001] FCA 1222. His Honour at [51] observed:

'There are two aspects to a consideration of whether punishment under a law of general application may constitute persecution for a Convention reason because it is discriminatory. The first aspect is to determine whether the law is in fact of general application and is not a law which targets or applies only to a particular section or group of the population. The second aspect is to determine whether, if the law is of general application to the whole of the population, it is nevertheless applied and administered in a discriminatory manner.'

19 In *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25; 77 ALD 541 (*'Applicant S'*) the joint judgment of Gleeson CJ, Gummow and Kirby JJ at [42] recognises that a law of general application is capable of being implemented or enforced in a discriminatory way such that implementation of the law can amount to persecution. At [43] their Honours stated:

'The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen. As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in Israelian. Namely, that

enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.' (citations omitted)

20 Determination of whether discriminatory treatment is *'appropriate and adapted to achieving some legitimate objective of the country* [concerned]*'* is ultimately a matter of judgment. The nature of the judgments involved was elucidated by Finn J in *Applicant A101/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 556 at [24]-[25] where his Honour observed:

'When it is alleged that the enforcement or manner of enforcement of a generally applicable law is discriminatory by reference to political opinion, a complex inquiry may need to be engaged in. Where such a law is, or is said to be, one having the purpose of protecting a State or its institutions (i.e. it has a "political" purpose), the nature and reach of the law itself and the actual manner of its application will require consideration for the reason that its reach or use in suppressing political opinion may go beyond, or be inconsistent with, what is appropriate to achieve a legitimate government object according to the standards of civil societies: cf WAEZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 341 at [32]. It is not unheard of, for example, for a State to utilise sedition-like and public security offences to silence its opponents.

The less such a law has an overtly political character (as where for example, its concern is with ordinary criminal acts in a society), the more attention will turn on the integrity of the enforcement process itself and on the risks to which a person might be exposed, e.g. ill-treatment or torture, in the course of that process. Is that process used selectively against critics of the State or against the advocates of particular political views? Is it fraudulently invoked for punitive purposes? Does its improper use expose a person to adverse consequences, e.g. torture in detention, even if that person is not later charged or tried with an offence?'

21 The appellant had the benefit of representation by a legally qualified migration agent in preparing his application to the Tribunal. The migration agent prepared and signed an outline of submissions to the Tribunal although it appears that the migration agent may not have accompanied the appellant to the Tribunal hearing. Attached to the outline of submissions were copies of ten news items apparently printed from the internet. The majority of the news items came from Indian press outlets. They included reports of individuals, including the MDMK leader and eight of his associates, being detained in India under the POTA. None of these news items suggests that individuals detained under the POTA had suffered torture or otherwise been mistreated in detention.

22 A copy of the POTA was not placed before the Tribunal. The written reasons for decision of the Tribunal reproduce a portion of an article, apparently accessed from the internet on 14 February 2003, which purports to reproduce certain critical sections of the POTA. No challenge has been made to the accuracy of this purported reproduction. A purported copy of the entire POTA was tendered to this Court by counsel for the appellant. We declined to accept the purported copy in evidence for two reasons. First, it was not

material before the Tribunal. Secondly, no proof was offered that the purported copy represented the law of India as at any particular date, or indeed at all.

23 The appellant contended that the learned Federal Magistrate should have found that the Tribunal's decision was affected by jurisdictional error because the Tribunal failed to ask itself two critical questions:

(a) whether the enforcement of the POTA was appropriate and adapted to achieve a legitimate objective of the Indian Government?

and

(b) would the appellant, if prosecuted under the POTA, be exposed to persecutory harm because of his support of the LTTE?

24 Question (a) above may be seen to have two aspects. The first aspect involves consideration of whether (a) legislation banning terrorist organisations, and (b) the banning of the LTTE under such legislation, are appropriate and adapted to achieve legitimate government objectives. In our view the Tribunal gave consideration to these two questions when it referred to the fact that the LTTE is a banned organisation not only in India but also in Australia, Canada and the United States of America under the Charter of the United Nations (Anti Terrorism Measures) Regulations 2001. No further consideration of these two questions was, we consider, required.

25 The second aspect of question (a) above involves consideration of whether the POTA is being enforced in India in a way that is not appropriate and adapted to achieve a legitimate government objective. The Tribunal expressly found that there was no evidence that the POTA is being selectively enforced for a Convention reason. The appellant accepts that there was no evidence before the Tribunal that the POTA is being selectively enforced, whether for a Convention reason or otherwise. He contended, however, that evidence tending to show that the POTA is being selectively enforced in India would be able to be placed before the Tribunal if this matter were remitted for rehearing. As the appellant conceded, evidence not placed before the Tribunal does not, in the circumstances of this appeal, assist in establishing that the decision of the Tribunal was affected by jurisdictional error. Its significance, if any, is limited to whether, should jurisdictional error be established, relief that is discretionary in nature should follow.

26 We reject the contention that the decision of the Tribunal was affected by jurisdictional error because it failed to ask itself the first of the questions identified in [23] above. We conclude that it did ask itself the appropriate questions concerning the POTA and its enforcement and answered those questions adversely to the appellant.

27 We turn to question (b) above. The claim that the appellant would, if prosecuted under the POTA, be exposed to persecutory harm because of his support of the LTTE was not expressly put to the Tribunal. The appellant did, however, advance a claim that he, and other supporters of the LTTE, had

been tortured by the authorities in Tamil Nadu. He further claimed that he had fled India to escape arrest by the authorities. The Tribunal appears to have accepted that the appellant might have been arrested and detained in 1991 in the wake of the assassination of Prime Minister Rajiv Gandi. However, it concluded that the circumstances that prevailed in 1991 do not continue in India and that there is no real chance that the appellant will be persecuted, as opposed to prosecuted, for reason of his support of the LTTE. The Tribunal rejected the appellant's claims to be presently wanted by the authorities in India and to have fled India to escape arrest.

28 We accept that the Tribunal's finding that there is no real chance that the appellant will be persecuted, as opposed to prosecuted, for reason of his support of the LTTE involves implicit recognition that the appellant may face a real chance of prosecution under the POTA. Nonetheless, the finding that there is no real chance that the appellant will be persecuted for reasons of his support of the LTTE involves, in our view, a finding that there is no real chance of the appellant suffering persecutory harm as a consequence of being prosecuted under the POTA. This finding is, we note, consistent with the Tribunal's conclusion that the authorities in India have no present interest in the appellant notwithstanding his support of the LTTE.

29 We therefore also reject the contention that the decision of the Tribunal was affected by jurisdictional error because it failed to ask itself the second of the questions identified in [23] above. Again we find that the Tribunal did ask itself this question and answered it adversely to the appellant.

30 The only ground of appeal from the decision of the Federal Magistrate has not been sustained. The appeal will therefore be dismissed with costs.

31 The Court is grateful for the assistance of counsel in this matter. We mention particularly the assistance provided by counsel for the appellant who appeared pro bono pursuant to Order 80 of the Federal Court Rules.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Branson, Marshall and Hely.

Associate:

Dated: 15 March 2005

Counsel for the Appellant	J Batrouney SC and S Burchell (pro bono)
Counsel for the Respondent:	C Horan
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	3 March 2005
Date of Judgment:	15 March 2005