FEDERAL COURT OF AUSTRALIA

NAAV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 391

APPLICANT NAAV of 2002 & ORS v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

N 370 of 2002

WHITLAM, SACKVILLE & CONTI JJ

SYDNEY

3 DECEMBER 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 370 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	APPLICANT NAAV OF 2002 FIRST APPELLANT
	APPLICANT NAAW OF 2002 SECOND APPELLANT
	APPLICANT NAAX OF 2002

	THIRD APPELLANT APPLICANT NAAY OF 2002 FOURTH APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	WHITLAM, SACKVILLE AND CONTI JJ
DATE OF ORDER:	29 NOVEMBER 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The first, second and third appellants pay the respondent'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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AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	WHITLAM, SACKVILLE & CONTI JJ
DATE:	3 DECEMBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

the court:

1 The appellants are all members of the one family, and are all citizens of India. The conduct of these proceedings has essentially been in the hands of the father. We shall refer to him as "the appellant" and, where appropriate, that term will be used to refer to all four appellants collectively.

2 The appellant arrived in Australia on 27 September 1999, and shortly thereafter on 15 October 1999 made an application for a protection visa. A delegate of the Minister refused the application on 11 December 1999. The appellant thereafter applied for a review of that decision, which review was determined adversely to the appellant by a decision of the Refugee Review Tribunal ("the Tribunal") given on 29 November 2001. The appellant thereafter made application for review of the Tribunal decision, pursuant to s 39B of the *Judiciary Act 1903* (Cth). The application was heard by a Judge of this Court (Hill J) and was dismissed on 10 April 2002. The appellant filed a notice of appeal on 30 April 2002.

3 It is unnecessary for the purposes of these reasons for judgment to detail at any length the nature of the appellant's claims made before the Tribunal. Those claims have been fully documented and explained in the Tribunal's decision, and also in the reasons of Hill J. It suffices to say that the appellant's claim related to a well-founded fear of persecution for a *Convention* reason by reason of his adherence to the Sikh minority religion in India. In particular, the appellant claimed to fear persecution as a member of that minority religion at the hands of Hindu extremists. The appellant stated that the family feared violence from those Hindus belonging to the Shiv Sena political party which has been headed by its leader Bal Thackeray. More specifically, the appellant claimed to have suffered harassment and physical harm in India at the hands of "Bal Thackeray's men", being a group of Hindu extremists He claimed that he would continue to be subjected to that experience if he returned to India. Ultimately, the Tribunal rejected the appellant's case, finding that he did not have a well-founded fear of persecution in India for a *Convention* reason.

4 At the hearing before Hill J, the appellant was represented by counsel who identified two jurisdictional errors said to have been committed by the Tribunal in the course of arriving at its conclusions, as follows:

(i) The Tribunal had taken into account an irrelevant consideration by relying on the fact that the appellant had chosen to return to India on numerous occasions since 1992 (which was the year in which the appellant claimed harm to have commenced at the hands of "Bal Thackeray's men"). The Tribunal considered that the appellant had had the opportunity to settle, and start a new life, in countries such as Kenya, Dubai, Malaysia and Singapore and his failure to take advantage of that opportunity cast doubt

on his claims to fear persecution in India. The appellant argued that none of these matters should have been taken into account.

(ii) The Tribunal did not afford the appellant procedural fairness in relation to the appellant's so-called *sur place* claim, which was based on the appellant's participation in an anti-Hindu demonstration by the International Sikh Youth Federation outside the Indian embassy in Canberra in March 2000. The appellant argued that the Tribunal should have inquired further into his claim, which was made after the initial Tribunal hearing. In essence, the submission was that the Tribunal should have made additional inquiries to determine whether the appellant's participation in the demonstration would further increase the risk of he and his family being persecuted for political reasons, if they were to return to India.

5 Hill J rejected both of these submissions at paras [11] – [19] of his reasons for judgment. In relation to the first submission, his Honour found that "it was open to the Tribunal to conclude from the fact that the applicant returned on a number of occasions to India that the professed fear which the applicant had was not genuine".

6 In relation to the second submission, his Honour reasoned as follows:

"In my view, the Tribunal did not fail to accord to the applicant natural justice in reaching the conclusions it did from the submission that was put by the migration agent to it and which I have set out above. The submission did not suggest that the applicant had participated in any ISYF activities. It did not suggest he had suffered any consequence for participating in demonstrations. Indeed, to the contrary, the submission made it clear he had not. Thirdly the submission did not suggest that he had been contacted by the Embassy and, finally, there was nothing in the submission that suggested that any relatives of his in India had been contacted.

In my view it was open to the Tribunal to conclude as it did that none of these matters had happened and that the submission did not advance the case that there was a real chance that the applicant would be persecuted for convention reasons were he to return to India.

…

The question of whether natural justice has been afforded will depend upon all the circumstances of a particular case. Nevertheless, in my view, the Tribunal was entitled to accept or reject the sur place claim on the basis of the material which the applicant, through the Migration Agent, provided and to reach a conclusion that the claim should not succeed. The present is not a case where the Tribunal had regard to information outside that provided by the applicant where natural justice may require the applicant to be given the opportunity to refute the material relied upon by the Tribunal. The present is merely a case where the material provided by the applicant is regarded by the Tribunal member as inadequate to sustain the claim that the applicant was a refugee."

7 There is no appellable error alleged in the appellant's notice of appeal filed in the Court on 30 April 2002 from the decision of the primary Judge. That document merely asserts that "the judgment is not correct". That observation is not intended to be critical of the appellant, who is of course not a qualified lawyer, and who at the time the notice of appeal was filed no longer had the benefit of legal counsel.

8 The appellant also filed written submissions in support of the appeal. Those submissions, however, merely seek to canvass factual matters that could neither establish a basis for review of the Tribunal's decision nor for finding error in the approach of the primary Judge. The submissions attached three annexures. These comprised, respectively, a police report lodged by the appellant in relation to goods apparently stolen from him in August 2000; a medical report setting out medical ailments of the appellant's wife; and a character reference prepared by a friend of the appellant. A tender of these documents was rejected as irrelevant to the appeal.

9 The appellant subsequently filed in Court further documents. These included material downloaded from the internet, in the nature of country information pertaining to the plight of the Sikh people in India. The documents also included further character references, apparently provided by friends of the appellant in the particular Australian community in which the family now resides. Again, this material is not relevant to an appeal from a decision of a Judge of this Court originating in an application for a review of a Tribunal decision. The tender was accordingly rejected.

10 The appellant made some oral submissions to the Court but they did not identify any error in the reasoning of Hill J.

11 We have considered for ourselves the two issues addressed by Hill J, even though the appellant's submissions on the appeal did not refer to them. We can discern no error in his Honour's approach.

12 We should add a further comment. His Honour found it unnecessary to consider whether, if the appellant had established what would otherwise have been a jurisdictional error, s 474(1) of the *Migration Act* operates, in effect, to give the Tribunal's decision conclusive force. His Honour nonetheless expressed the view that s 474(1) precluded the appellant from obtaining relief under s 39B of the *Judiciary Act* in respect of a failure to afford natural justice.

13 Since Hill J delivered judgment in the present case, a majority of the Full Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228, has supported the approach taken by his Honour on the natural justice question. It follows from *NAAV v Minister* that relief could be granted to the appellant if he could show that the Tribunal did not perform its functions in good faith, its decision did not relate to the subject matter of the *Migration Act* or the decision was not reasonably referable to the statutory power given to the Tribunal. However, on any view, none of those conditions has been made out in this case. In particular, there is plainly

nothing in the material before this Court to suggest that the Tribunal approached its task otherwise than in good faith.

14 For these reasons, the appeal was dismissed.

15 The respondent presses for an order for costs of the appeal. That being the case, the adult appellants must pay the respondent's costs of this appeal.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Whitlam, Sackville & Conti JJ.

Associate:

Dated: 3 December 2002

The appellants appeared in person.

Counsel for the Respondent:	M A Wigney
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	29 November 2002
Date of Judgment:	29 November 2002
Date of Publication of Reasons:	3 December 2002