

FEDERAL COURT OF AUSTRALIA

NAEU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002]
FCAFC 259

MIGRATION – protection visa – appeal from single judge affirming decision of Refugee Review Tribunal to refuse to grant protection visa – claim of persecution arising from appellant’s desertion from Sri Lankan police force – appellant deserted because of fear for his life and because of human rights abuses committed by some members of the police force towards local Tamil community - appellant did not advise authorities of the reasons for his desertion – whether knowledge of appellant’s political opinion on part of persecutor is required.

Migration Act 1958 (Cth)

Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559, followed

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, considered

Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814, referred to

Wang v Minister for Immigration & Multicultural Affairs (2000) 105 FCR 548, referred to

Win v Minister for Immigration & Multicultural Affairs [2001] FCA 132, considered

Muin v Refugee Review Tribunal [2002] HCA 30, referred to

NAEU OF 2002 v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

N 218 of 2002

MADGWICK, MERKEL & CONTI JJ

24 OCTOBER 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 218 OF 2002

BETWEEN: NAEU OF 2002
 APPELLANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 RESPONDENT

JUDGE: MADGWICK, MERKEL AND CONTI JJ

DATE OF ORDER: 24 OCTOBER 2002

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

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NEW SOUTH WALES DISTRICT REGISTRY

N 218 OF 2002

BETWEEN: NAEU OF 2002

APPELLANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS

RESPONDENT

JUDGE: MADGWICK, MERKEL AND CONTI JJ

DATE: 24 OCTOBER 2002

PLACE: SYDNEY

REASONS FOR JUDGMENT

madgwick J

1 This is an appeal from a decision of Gyles J, given on 27 February 2002, dismissing the appellant's application for judicial review of an adverse decision of the Refugee Review Tribunal ("the Tribunal") made on 29 June 2001.

Background

2 The appellant is a citizen of Sri Lanka. He is a Tamil speaking Muslim. He arrived in Australia on a student visa issued in his own name on 24 July 1994. The appellant remained in Australia on a series of temporary visas (sub class 435 (Sri Lanka temporary) visas) until mid-1997. He applied for a protection visa on 25 July 1997.

3 Central to his claim for refugee status are the circumstances relating to his employment and desertion from the Sri Lankan police force in

1993. The appellant claims that he joined the police force in July 1993, fulfilling a long held ambition of his. However, contrary to his expectations of being posted to his own area and serving as a village police officer, in November 1993 he was posted, after attending the Sri Lankan Special Task Forces Training School, to a Tamil area; he was stationed at a police station at Mannar Island. At that time the Sri Lankan government and the LTTE were running parallel administrations in the area. The appellant claims that the police deployment there was to fill a military void left by army preoccupation elsewhere and that, as he was a Tamil speaker and Muslim, he along with other officers of a similar ethnic and religious background, were sent to this region.

4 The appellant claims that he deserted nine days later and returned home on 13 November 1993. He claims he did this for two reasons; firstly, he was warned by an LTTE informer that he was being targeted by the LTTE and secondly, he did not wish to be involved in killing Tamil civilians or be associated with human rights abuses including the torture and rape of Tamil civilians. Following his desertion from the police force, he claims to have stayed in Colombo until he was able to leave the country and travel to Australia. Since his arrival in Australia in 1994, he has returned to Sri Lanka on two occasions; firstly, in 1996 for a six week period and again in May 1997 when he returned to Sri Lanka as he believed his visa was not going to be extended and to see if he could take advantage of the government's amnesty for deserters. He claims that if he had accepted the amnesty he would have been sent to a similar posting as the one he had left, namely a Tamil area. He also claims that whilst in Sri Lanka he had to hide as the security forces were searching for him.

Earlier proceedings

5 Prior to the current proceedings before the Court, the Tribunal had earlier found, on 13 August 1999, that the appellant was a person to whom Australia owed protection obligations thereby overturning a decision of a delegate of the respondent Minister to refuse his application for a protection visa. The respondent Minister successfully appealed that decision and on 10 May 2000 Lindgren J ordered that the matter be remitted to the Tribunal for further consideration. Upon further consideration, the Tribunal, differently constituted, on 29 June 2001 affirmed the decision not to grant a protection visa to the appellant. It is from this decision that the appellant filed a further application for judicial review, which was dismissed by Gyles J and which is the decision currently under review before this Court.

Decision of Tribunal

6 The Tribunal, giving the appellant "the benefit of some doubt", was satisfied that his fear of harm if he returns to Sri Lanka was genuine and that there was a real chance, being a less than remote chance, that the appellant may face the consequences of his desertion if he returns to Sri Lanka. However, the Tribunal member was not satisfied that any punishment for desertion from a police post would be selectively enforced against Muslims

or any other group. The Tribunal member considered that any harm suffered by the appellant as punishment for his desertion would be because of his breach of the law.

7 In addition to this, the Tribunal did not accept that the appellant's fear for his life if he returned to active service amounted to Convention-related persecution, and in any event, observed that the appellant was not obliged to accept the government's amnesty, albeit that the likely alternative would be a prison sentence. The Tribunal member did not consider that it was unreasonable or inappropriate that, if the appellant accepted the amnesty, he would be required to return to the same or similar post as the one he had left. Such would not amount to selective or discriminatory treatment. The Tribunal also did not accept the appellant's claims that he would be persecuted by the LTTE because he had been a police officer; that there was general persecution of Muslims in Sri Lanka or that he would attract persecution because he had sought asylum in Australia.

Decision of primary judge

8 The questions raised by the application before Gyles J were:

- (i) whether his desertion from the Sri Lankan police was in part motivated by a political opinion, being to the effect that Sri Lankan police should not rape and torture civilians;
- (ii) whether any lawful punishment he received would result in part from the expression of that opinion; and
- (iii) whether in the circumstances, the imposition of such punishment would amount to persecution.

The appellant also claimed that the Tribunal did not have jurisdiction and that the decision was not authorised by the *Migration Act 1958* (Cth) ("the Act") because the Tribunal had failed to take into account relevant considerations.

9 Gyles J accepted, for argument's sake, that opposition to criminal acts by certain Sri Lankan police officers against Tamils may be a political opinion and that the appellant's desertion was subjectively motivated, in part, by his political opinion. However, Gyles J rejected the submission that lawful punishment for desertion in this case, would result, in part, from expression of his political opinion as there was no evidence to support that his desertion was or would be objectively considered by the Sri Lankan authorities as an expression of his political opinion. The appellant's only action was to desert his post on Mannar Island, which Gyles J considered was a "politically neutral" act. His Honour observed at [7]:

"In my opinion, desertion from a police post in dangerous territory in itself is politically neutral in the same way that departure from a country is politically neutral. In the abstract, it can be accounted for by a variety of personal reasons, with political opinion not high on the list."

10 As Gyles J noted, counsel for the appellant could not point to any material that was before the Tribunal that would have properly raised the issue. Further, counsel for the appellant had conceded that there was no evidence that the appellant had disclosed to the Sri Lankan authorities his real reasons for deserting. Indeed, Gyles J observed that the transcript from the first Tribunal hearing, which was material before the second Tribunal, was inconsistent with any such claim as the appellant had explained that he was able to leave his post because he had lied at the checkpoint by saying he was unwell and was going on leave.

11 Gyles J rejected the appellant's argument that it is sufficient if there be a nexus between feared persecution and a Convention ground and that that nexus may be present without any conscious "motivation" on the part of the alleged persecutors. His Honour agreed with submissions for the respondent that, in the absence of evidence that the authorities knew of the appellant's motives for desertion, namely his political opinion, there was "no room for any unknown persecution by punishment for desertion". His Honour referred (at [11]) to:

"the judgment of Beaumont J (agreed in by Foster J) in *Guo v Minister for Immigration & Ethnic Affairs* (1996) 64 FCR 151 at 158-165, on this point is not affected by the subsequent decision of the High Court (*Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559) and makes clear that it is the perception of the activities of the applicant for refugee status by the persecutor which is critical. To the same effect, see Wilcox J at [14], Hill J at [33] and Whitlam J at [36] in *V v Minister for Immigration & Multicultural Affairs*. In *Minister for Immigration & Ethnic Affairs v Y*, Davies J said at p 4:

'A person may be regarded as an enemy of the State by virtue of holding **and propounding** views which are contrary to the views of the State or its Government ...'" (emphasis added by Gyles J)

Having found no ground on which the tribunal had erred, Gyles J dismissed the application. He did not go on to consider whether the October 2001 amendments to the Act should be taken into account.

Grounds of appeal

12 The grounds set out in the appellant's notice of appeal were:

1. His Honour erred in holding that it is necessary for persecutors to be motivated by a political opinion held or perceived to be held by their victim if their conduct is to constitute persecution for reason of political opinion in the terms of the Refugees Convention.

2. His Honour should have found that it is only necessary that there be a sufficient causal nexus between the persecution feared and the appellant's political opinion, for there to exist persecution for reason of political opinion in the terms of the Refugees Convention.

13 Leave was also granted to allow the appellant to amend his notice of appeal so as to include the following ground:

3. His Honour erred in failing to hold that the Tribunal failed to consider an issue arising from the evidence and material before it, that being whether the appellant's revelation of his objection to the torture and murder of Tamil civilians and rape of Tamil women would result in his being persecuted for reason of his political opinion.

Connection between fear of persecution and persecutor's knowledge of political opinion

14 In my opinion, it is not sufficient, as submitted by counsel for the appellant, that the appellant need only establish that there was a fear of harm and a Convention reason (in this case, his political opinion) for that harm to qualify for protection under the Convention. The appellant was also required to establish that his persecutors had actual or imputed knowledge of his political opinion and would exact punishment at least partly because of that political opinion. In *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559, a case involving a fear of persecution because of the respondents membership to a particular social group of Chinese citizens who opposed the government's "one child policy", the following comments were made by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (at 570-71):

"An applicant for refugee status who has established a fear of persecution must also show that the persecution which he or she fears is for one of the reasons enumerated in Art 1A(2) of the Convention. The first respondents claimed before the Tribunal that they feared persecution in the form of punishment for contravening the PRC government's 'one child policy' and for their illegal departures and that such persecution would be inflicted for the Convention reason of 'political opinion' and/or 'membership of a particular social group'.

For the purposes of the Convention, a political opinion need not be an opinion that is actually held by the refugee. It is sufficient for those purposes that such an opinion is imputed to him or her **by** the persecutor. In Chan Gaudron J said:

'persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief.'

In the same case, McHugh J said that:

“It is irrelevant that the appellant may not have held the opinions attributed to him. What matters is that the **authorities identified [Mr Chan] with those opinions** and, in consequence, restricted his liberty for a long and indeterminate period.” (emphasis added)

15 Counsel for the appellant, correctly in my view, conceded that the act of desertion per se is politically neutral, that is, no inference of any particular political opinion should be drawn from it. Thus, to establish that the appellant was a person to whom Australia owed protection obligations, it was necessary for the appellant to point to evidence that would establish that any punishment for his desertion would be exacted, in part or in whole, because of his political opinion. This required that there be material showing that the Sri Lankan authorities (the alleged persecutors) were aware of the applicant’s claimed political opinion or had imputed such an opinion to him. There simply is no evidence to support the existence of such knowledge or imputation.

16 Counsel for the respondent submitted that *Guo* does not support the proposition that it is sufficient for protection as a refugee simply to show that there is a real chance that an applicant will be subjected to harm because he or she has broken a law of general application in circumstances where it is not established that the persecutors are aware that he or she has done so for reasons of political opinion (or other Convention related reason).

17 I agree. The persecution must be “for reasons of” a Convention related ground of persecution. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 Brennan CJ (at 233) considered that this excluded persecution that is no more than:

“punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of ‘refugee’ ”

Dawson J said (at 240):

“The words ‘for reasons of’ require a causal nexus between actual or perceived membership of a particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared because of the person’s membership or perceived membership of the particular social group.”

Likewise, McHugh J said (at 257):

“When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned

has a particular race, religion, nationality, political opinion or membership of a particular social group.”

18 In this case, the appellant has failed to establish that there is a nexus between the harm feared and persecution for a Convention reason. There simply is no evidence to support that the authorities would exact punishment for his desertion, in whole or in part, because of his political opinion. The decision in *Erduran v Minister for Immigration & Multicultural Affairs* [2002] FCA 814 does not assist the appellant. In that case, those imposing the punishment were doing so on the basis that the individuals concerned were being punished as conscientious objectors to compulsory military service; that is, on the basis of their political or religious opinion. Nor does *Wang v Minister for Immigration & Multicultural Affairs* (2000) 105 FCR 548 assist. That case involved a law that was itself persecutory (the law made practising in an unregistered church in China a crime). The appellant here will not be treated any differently from anyone else for his desertion.

Claim of persecution because of denial to express political opinion in the future

19 In oral argument before the Court, there was discussion of whether the Tribunal had erred in failing to consider whether there was a real chance of persecution, should the appellant return to Sri Lanka, because he would not be able to *express* his political opinion, namely opposition to the conduct of certain police officers towards the Tamil community. Reference was made to *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132. In that case I held that the Tribunal had erred because it had failed to consider the applicants’ claim on the basis that, if they returned to Burma, they would be denied the freedom of expressing their political opinion and this could amount to persecution in circumstances where “that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can fairly be said to be integral to his or her human dignity”. In *Win*, there was evidence which could show that the applicants had demonstrated a high degree of recent political commitment and action against the Burmese government.

20 However, the circumstances in this case are very different from those in *Win* and, whilst it is not essential that the applicant exhibit “a capacity for martyrdom” (*Win* at [20]) there nevertheless must at least be *some* evidence to establish a serious affront to human dignity. There was no evidence in this case to suggest the appellant would wish to assert his opposition to the conduct of the police upon his return to Sri Lanka nor that his conscience would be seriously affronted if he felt unable to do so.

21 Accordingly, there can have been no error of law based on this claim.

Muin v Refugee Review Tribunal

22 The Court was also concerned to ensure that this proceeding was not one which might be affected by the decision of the High Court in *Muin v*

Refugee Review Tribunal [2002] HCA 30, a case in which some of the relevant materials before the primary decision maker were not forwarded to the Tribunal. After consideration, counsel for the appellant did not seek to rely on *Muin*.

Conclusion

23 The appeal must be dismissed with costs.

I certify that the preceding twenty three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 24 October 2002

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 218 OF 2002

BETWEEN: NAEU OF 2002
APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
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RESPONDENT

JUDGES: MADGWICK, MERKEL AND CONTI JJ

DATE: 24 OCTOBER 2002

PLACE: SYDNEY

REASONS FOR JUDGMENT

MERKEL J

24 I agree with the orders proposed by Madgwick J and with the reasons his Honour has given for making those orders.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel.

Associate:

Dated: 24 October 2002

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 218 OF 2002

BETWEEN: NAEU OF 2002

APPLICANT

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RESPONDENT

JUDGES: MADGWICK, MERKEL AND CONTI JJ

DATE: 24 OCTOBER 2002

PLACE: SYDNEY

REASONS FOR JUDGMENT

CONTI J

25 I also agree with the proposed orders and accompanying reasons of Madgwick J.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Conti.

Associate:

Dated: 24 October 2002

Counsel for the Appellant: Mr L Karp

Counsel for the Respondent: Mr S Lloyd

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 9 August 2002

Date of Judgment: 24 October 2002