

FEDERAL COURT OF AUSTRALIA

NAFP v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 241

**NAFP v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS
AFFAIRS**

N 1330 of 2002

BRANSON J

13 MARCH 2003

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 1330 of 2002

BETWEEN: NAFP

 APPLICANT

AND: MINISTER FOR IMMIGRATION & MULTICULTURAL &
 INDIGENOUS AFFAIRS

 RESPONDENT

JUDGE: BRANSON J

DATE OF ORDER: 13 MARCH 2003

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. the application be dismissed;
2. the applicant pay the respondent's costs of the application.

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JUDGE: BRANSON J

DATE: 13 MARCH 2003

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The applicant arrived in Australia on 13 April 2000 having travelled on an Indian passport. He lodged an application for a protection visa on 16 May 2000 claiming to be a citizen of Bangladesh. A delegate of the respondent refused this application on 23 May 2000. The applicant applied for review of this decision by the Refugee Review Tribunal ('the Tribunal') on 2 June 2000. On 14 November 2002 the Tribunal handed down its decision affirming the decision not to grant the protection visa.

2 The applicant gave evidence before the Tribunal on 19 July 2002. He claimed to fear persecution in Bangladesh by fundamentalist Muslims including fundamentalist members of his own family. He claimed that they would persecute him on two grounds. The first is that he is homosexual and the second that he is involved with western music. The applicant alleges that he was expelled from his family home in 1996 after being discovered having sexual relations with a male servant. He said that he moved to Dhaka in 1998 and worked in a recording studio for two years. There he became involved in a sexual relationship with another homosexual man. He said that people discovered this relationship and he was threatened by his room mates and work mates and eventually lost his job as a result of his homosexuality. He was forced to move from where he was living and moved in with his homosexual partner with whom he lived for two and a half months.

3 The applicant claimed that his family holds fundamentalist Islamic beliefs and hate him because of his homosexuality and love of western music. He said that they have placed significant pressure on him to marry and that his mother has threatened to commit suicide if he does not get married. He said that if he returns to Bangladesh he will be forced to follow Islamic religious customs and to get married.

4 The Tribunal apparently accepted that the applicant is a citizen of Bangladesh. It was prepared to accept that the applicant is homosexual. However, it did not accept many of the applicant's other claims. The Tribunal was not satisfied that the applicant was a reliable witness and said that his evidence contained a number of inconsistencies which were not convincingly explained.

5 In relation to his involvement to western music, the Tribunal stated that although the applicant worked in a recording studio for two years there was nothing to indicate that he experienced any harm from anyone as a result. The Tribunal was not satisfied that the applicant was at risk of harm by Islamic fundamentalists due to his involvement with western music.

6 In relation to his homosexuality, the Tribunal considered the independent country information. It found that that information indicated that while homosexuality is illegal in Bangladesh these laws are not enforced. The Tribunal noted that the applicant had lived in a homosexual relationship for two and half months without experiencing harm or discrimination. The Tribunal did not accept the applicant's account of the termination of his employment.

7 The Tribunal accepted that it may have been upsetting for the applicant to be asked to leave his accommodation by his room mates but did not accept that this amounted to persecution. Similarly, the Tribunal accepted that family disapproval and the threat of suicide made by the applicant's mother would have been upsetting but it also found that these did not amount to persecution. It is not entirely clear whether the Tribunal considered that there was a real chance that the applicant's mother would kill herself if the applicant returned to Bangladesh and persisted in his refusal to marry. The Tribunal noted that the suicide threat was made some four years ago.

8 The Tribunal found that there was no reliable evidence from the applicant that he had ever experienced any serious harm because of his sexuality. It did not accept that there was a real chance that his family or any one else would harm the applicant. The Tribunal was not satisfied that the applicant had a well-founded fear of harm for a Convention reason. For this reason it found that the applicant did not satisfy the criteria for a protection visa.

9 By his amended application to the Court for an order of review the applicant made the following claims:

'1. The Refugee Review Tribunal failed to exercise its jurisdiction.

...

2. The decision involved an error of law.

...

3. The decision was not authorized by the Migration Act 1958.

....'

As to each of these three grounds the particulars given by the amended application raised the issue that the Tribunal failed to consider whether, if the applicant's mother were to carry out her threat to commit suicide, this could constitute persecution within the meaning of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ('the Convention').

10 Written submissions were prepared on the applicant's behalf by a legal adviser. The applicant indicated to the Court that he placed reliance on those submissions. They deal only with the issue of the applicant's mother's threat of suicide. In his oral submissions to the Court the applicant referred to the mental pressure which his mother's threat placed on him. The pressure which, as I understand him, does not impact on him in Sydney as he has had no contact with his mother during his nearly three years in Australia.

11 The submissions made on the applicant's behalf call for consideration to be given to the meaning of the term '*persecution*' in Article 1A(2) of the Convention. Article 1A(2) of the Convention is effectively incorporated into the *Migration Act 1958* (Cth) ('the Migration Act') by s 36 of that Act. In *Hellman v Minister for Immigration & Multicultural Affairs* [2000] FCA 645; 175 ALR 149 at [18]-[21] I said:

'The object and purpose of international refugee law, which presently has the Convention at its heart, has been described by Professor Hathaway in *The Law of Refugee Status*, at p 124 as follows:

“... refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore ‘substitute protection’ in the sense that it is a response to disenfranchisement from the usual benefits of nationality.’ As Guy Goodwin-Gill puts it, ‘... the degree of protection normally to be expected of the government is either lacking or denied.’”

It is in the light of the object and purpose of the Convention, which are fairly summarised in the above paragraph, that the ordinary meaning of the words in Article 1A(2) of the Convention is to be determined. That light suggests that Article 1A(2) is concerned with persecution in the sense discussed by Mr Atle Grahl-Madsen in *The Status of Refugees in International Law* AW Sijthoff-Leyden, 1966, vol I at p 189:

“.... The label ‘persecution’ may, as a rule, only be attached to acts or circumstances for which the government (or, in appropriate cases, the ruling party) is responsible, that is to say: acts committed by the government (or the party) or organs at its disposal, or behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State.”

The above approach to the interpretation of the word “persecuted” in Article 1A(2) of the Convention is supported by Australian jurisprudence. Brennan CJ stated in *Applicant A* (at CLR 233; ALR 334):

“The feared ‘persecution’ of which Article 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to ‘the country of his nationality’ for protection of his fundamental rights and freedoms but, if ‘a well-founded fear of being persecuted’ makes a person ‘unwilling to avail himself of the protection of [the country of his nationality]’, that fear must be a fear of persecution by the country of the putative refugee’s nationality or persecution which that country is unable or unwilling to prevent.”

Although the Chief Justice was in dissent in *Applicant A*, there is nothing in the majority judgments which suggests disagreement with the above paragraph (see also *Islam v Secretary of State for The Home Department* [1999] 2 WLR 1015, considered in *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190).

It is thus strictly speaking incorrect to speak of a person who has a well-founded fear of being persecuted within the meaning of Article 1A(2) of the Convention nonetheless having available to him or her the protection of the country of his or her nationality. A person who has available to him or her the protection of his or her country of nationality may have a well-founded fear of being harmed in a discriminatory way (see per McHugh J in *Applicant A* at CLR 258) but that feared harm will not amount to persecution within the meaning of Article 1A(2) of the Convention. Persecution in the Convention sense involves discriminatory harm which the putative refugee’s country of nationality is not willing or not able to prevent to the degree that is normally to be expected of a country sensibly concerned with the human rights of its citizens.’

12 In *Minister for Immigration & Multicultural Affairs v Khawar* [2002] HCA 14; 187 ALR 574 Gleeson CJ at [18] referred to the passage from the judgment of Brennan CJ in *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 233 referred to above with apparent approval. Gleeson CJ at [19] observed:

‘The relationship between persecution as the inflicting of serious harm in violation of fundamental rights and freedoms, and the responsibility of a country of nationality, or state, as the primary protector of fundamental rights and freedoms, has been taken up in the interpretation of the Convention. It is reflected in what was said by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department*:

“I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word ‘persecution’ implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme.” (citations omitted)

13 The harm to the applicant involved in the applicant’s mother’s threat to commit suicide and, indeed, in her carrying out that threat should she regrettably decide to do so, would not amount to persecution within the meaning of the Convention. That harm involves no element of persecution by the state of Bangladesh or its agents. No complaint has, or perhaps could be, made that the state, by reason of a Convention ground, would not provide protection to the applicant against his mother’s threat of suicide or, should it come to that, her actual suicide.

14 For the above reasons it was not open to the Tribunal to find that the applicant’s mother’s threat of suicide could have amounted to persecution of the applicant within the meaning of the Migration Act.

15 The application for review of the decision of the Tribunal must be dismissed.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 24 March 2003

Counsel for the Applicant:	The applicant appeared in person
Counsel for the Respondent:	Mr T Reilly
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	13 March 2003
Date of Judgment:	13 March 2003