FEDERAL COURT OF AUSTRALIA

NAGT of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 319

MIGRATION – whether, independently of s 474(1) of the *Migration Act 1958* (Cth), the Refugee Review Tribunal ("RRT") misconstrued the concept of a "well-founded fear of persecution" – whether RRT erroneously limited attention to the applicant's position in Bangladesh during the tenure of the current government.

MIGRATION – privative clause – s 474(1) of the *Migration Act 1958* (Cth) – whether RRT made a *bona fide* attempt to exercise its power notwithstanding an error of law.

Judiciary Act 1903 (Cth), s 39B(1)

Migration Act 1958 (Cth), ss 415, 416, 474(1)

NAAG of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 713, cited.

NADO of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 797, cited.

Muin v Refugee Review Tribunal (2002) 190 ALR 601, distinguished.

Chan v Minister for Immigration and Immigration and Ethnic Affairs (1989) 169 CLR 379, cited.

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, cited.

NAAV v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 228, followed.

NABM of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 294, followed.

Wu v Minister for Immigration & Multicultural Affairs [2002] FCA 1242, cited.

Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation (2001) 184 ALR 576, cited.

NAGT of 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 705 OF 2002

SACKVILLE, ALLSOP & JACOBSON JJ

SYDNEY

23 OCTOBER 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 705 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NAGT of 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	SACKVILLE, ALLSOP & JACOBSON J
DATE OF ORDER:	23 OCTOBER 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs.

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

.

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 705 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NAGT of 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	SACKVILLE, ALLSOP & JACOBSON J
DATE:	23 OCTOBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT:

The Proceedings

1 This is an appeal from a judgment of a Judge of this Court given on 28 June 2002. The primary Judge dismissed the appellant's application for relief in relation to a decision of the Refugee Review Tribunal ("RRT") given on 11 March 2002. The RRT had affirmed a decision of a delegate of the respondent ("the Minister") not to grant the appellant a protection visa.

2 The appellant is a citizen of Bangladesh, who arrived in Australia on 25 July 1999. According to the findings of the RRT, he had previously entered Australia on 10 March 1999, but returned to Bangladesh in late March 1999 for a period of about four months.

3 The appellant lodged an application for a protection (class XA) visa on 20 August 1999. On 28 October 1999, the Minister's delegate refused to grant the appellant a protection visa.

The Appellant's Claims

4 The appellant claimed before the RRT that he was at risk of persecution in Bangladesh because of his membership of the Freedom Party. According to the findings of the RRT, the Freedom Party is a legal political party, which was formed in August 1987 by retired military officers. The founders of the party had been involved in the 1975 military coup which overthrew the Awami League government led by Sheikh Mujibar Rahman, the first president of Bangladesh.

5 The appellant claimed that he had joined the Freedom Party in 1987 while still a student and had become assistant general secretary of the Freedom Party Branch at his college. The appellant did not suggest that he experienced any serious problems because of his Freedom Party membership prior to the election of the Awami League government in June 1996, although he did claim that members of the party had faced harassment from the Bangladeshi National Party ("BNP") government which had held power prior to 1996.

6 The appellant claimed that he had become very fearful after the Awami League came to power in 1996. He said that members of the Awami League had threatened to kill him if he did not pay them money and that he had been subject to false charges, including one of murder. He told the RRT that the murder charge had been laid while he had been in Australia in March 1999, but that he did not find out about it until his return to Bangladesh on 25 March 1999. The appellant said that more charges were filed against him in June 1999 and that it was then that he decided to leave the country.

The RRT's Reasons

7 The RRT considered that the evidence given by the appellant about his involvement in politics and the problems which he faced as a result of that involvement was "vague and unconvincing". The RRT expressed doubt that

he had been a Freedom Party activist and did not accept that he faced false charges for attempted murder or anything else in Bangladesh because of his political opinion. Rather curiously, the RRT went on to say that it was not necessary to make a "firm finding on these matters", since even if it accepted his claims at face value, it did not accept that he had a well-founded fear of persecution in Bangladesh because of his political opinion.

8 The substance of the RRT's reasoning is contained in a single paragraph:

"Since [the appellant] left Bangladesh there has been a change in government…. [T]he BNP, which is now in power, has had good relations with the Freedom Party in [the] past. There is nothing in the evidence before me which suggested the BNP government has any interest pursuing or harming past or present members of the Freedom Party because of their political opinions. According to [the appellant] he has personal friends in the current BNP government in Bangladesh…. [W]hile there are some problems in the lower courts in Bangladesh, according to sources such as the US Department of State, the higher courts act fairly and independently. This view is supported by information from other sources. For example, according to an article in the Daily Star [of 8 September 2000] 99% of those detained under the Special Powers Act by successive governments since 1974 have been released by order of the High Court which found the detentions to be unlawful. In these circumstances I believe that if charges are pending against [the appellant], they will be dealt with fairly and appropriately by the Bangladeshi courts [and] that he will not be wrongly convicted or imprisoned because of his political opinion."

9 For these reasons, the RRT was not satisfied that the appellant had a well-founded fear of persecution in Bangladesh for reasons of political opinion or any other *Convention* reason.

The Primary Judgment

10 The primary Judge expressed the view that the RRT's decision was "unsatisfactory" in as much as it did not directly address the appellant's claims. As his Honour pointed out, the expression of "a doubt" that the appellant was a Freedom Party activist did not amount to rejection of his claim that he was. Nor did the RRT's reasons "come to grips" with documents which seemed to support the appellant's contentions in this respect. The RRT had asserted that it did not accept that the appellant faced charges for attempted murder or anything else in Bangladesh because of his political opinion, yet had simultaneously asserted that it was not necessary to make a "firm finding" on these matters.

11 The primary Judge also pointed out that the RRT's reasons did not examine the frequency with which elections are held in Bangladesh, nor the likelihood of the Awami League being returned to power or otherwise assuming power. The RRT had apparently considered that the fact that the BNP had gained power in October 2001 and that it had had good relations with the Freedom Party in the past made it unnecessary to decide whether or

not the RRT accepted the appellant's claims as to his past treatment at the hands of the Awami League.

12 Since the appellant was unrepresented at the hearing, his Honour raised with counsel for the Minister whether there might be grounds for the Court intervening in the exercise of its jurisdiction under s 39B(1) of the *Judiciary Act 1903* (Cth) ("*Judiciary Act*"). On reflection, his Honour did not think that there was a basis for the Court to intervene. In his view, the RRT had not failed to consider the substantial claims made by the appellant. Rather, it had assumed the truth of the appellant's claims, but had nonetheless come to the conclusion that it was not satisfied that he had a well-founded fear of persecution in Bangladesh by reason of his political opinion. In his Honour's view, the RRT was entitled to proceed on the basis which it had, by taking into account the change of government in Bangladesh, the attitude of the government to persons in the position of the appellant and the independence of the higher courts in that country. Accordingly, his Honour was not satisfied that the RRT had committed a jurisdictional error such as would enliven the operation of s 39B(1) of the *Judiciary Act.*

13 The primary Judge said that, when account was taken of s 474(1) of the *Migration Act 1958* (Cth) ("*Migration Act*"), the appellant's position became "all the more untenable". His Honour noted that, at the date of the hearing before him, a Full Court of five Judges had been assembled to address the validity and construction of s 474(1). Pending that decision, his Honour considered it appropriate to follow the decisions of Allsop J in *NAAG of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 713, and of Gyles J in *NADO of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 797. Those decisions meant that, for all practical purposes, a decision to refuse a protection visa was not amenable to review under s 39B of the *Judiciary Act,* unless the decision was not made in a *bona fide* attempt to exercise the powers of review conferred by ss 414 and 415 of the *Migration Act.*

14 The primary Judge considered that it was evident on the face of the RRT's decision that it was attempting to exercise the jurisdiction conferred on it by the *Migration Act.* It had addressed the question which was committed to its determination and gave its reasons for its finding upon that question. In his Honour's view, in administrative decision-making, bad faith is a serious matter involving personal fault on the part of the decision-maker, going beyond the errors of fact or law which are inevitable in any such process.

15 The primary Judge concluded that there was no warrant for holding that the RRT was doing anything other than honestly attempting to reach a decision on the matter committed to its determination. The practical effect of s 474(1) of the *Migration Act,* therefore, was to immunise its decision from challenges pursuant to the jurisdiction conferred by s 39B(1) of the *Judiciary Act.*

Reasoning

16 The notice of appeal filed by the appellant does not identify any error of law on the part of the primary Judge. A letter to the Court, which is apparently intended to contain the appellant's written submissions, raises a number of complaints about the RRT's decision. The letter complains in particular that the RRT ignored relevant evidence and displayed actual bias. The letter also suggests that the RRT denied the appellant procedural fairness, although it does not indicate in which way the RRT did so.

17 If the RRT's decision is considered independently of s 474(1) of the *Migration Act,* none of the appellants' complaints is made out. To the extent that the appellant contends that the RRT misapprehended evidence or underestimated the dangers facing him in Bangladesh, the contention seeks to canvass the merits of the RRT's decision and cannot establish a jurisdictional error such as would justify the grant of relief under s 39B(1) of the *Judiciary Act.*

18 Nor is there any substance in the complaint that the RRT denied the appellant procedural fairness. The appellant's letter refers to the decision of the High Court in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601. In that case, it was found that the RRT had taken into account documentation adverse to the plaintiff's case of which the plaintiff had been unaware. The Court also found that the plaintiff, had he known of the RRT's intention, would have made further submissions and adduced additional evidence.

19 In the present case, there is nothing to indicate that the RRT took into account documentation adverse to the appellant of which he was unaware. Even if the RRT had taken any such documentation into account, there is nothing to indicate that the appellant would have conducted his application before the RRT any differently.

20 There is, however, a plausible argument, although it is not expressed by the appellant, that the RRT committed an error of law by misconstruing the *Convention* definition of "refugee". As the primary Judge pointed out, the RRT did not examine the frequency with which elections are held in Bangladesh nor the likelihood of the Awami League being returned to or otherwise assuming power in the country. This might suggest that the RRT assumed that the question of whether the applicant had a well-founded fear of persecution had to be assessed by reference to a relatively short period following his return to Bangladesh. In other words, the RRT may have interpreted the *Convention* definition as precluding the possibility that the applicant might have a well-founded fear of being persecuted in Bangladesh at some time *after* the current BNP government loses power.

21 The RRT's own recital of the elements of the definition of "refugee" in the *Convention Relating to the Status of Refugees* explains the notion of a "well-founded" fear of persecution for a *Convention* reason as follows:

"an applicant's fear[of] persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the

Convention if they have genuine fear founded upon a 'real chance' of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent."

This explanation is consistent with the authorities: *Chan v Minister for Immigration and Immigration and Ethnic Affairs* (1989) 169 CLR 379, at 389, per Mason CJ; at 429, per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, at 571-574.

> 22 There is nothing in the RRT's analysis or in the authorities which suggests that a fear of persecution can be "well-founded" only if it relates to events which might occur (if at all) immediately upon or soon after the applicant's return to his or her country of nationality. As the joint judgment in *Minister for Immigration and Ethnic Affairs v Guo* points out (at 572), the task of the RRT includes making findings as to whether particular events "might or might not occur in the future". It is true that a finding that there is no real chance that an applicant will suffer persecution for some time after his or her return to the country of nationality may make it difficult to persuade the RRT that there is a real chance that the applicant will suffer persecution in the more distant future. But if the RRT is to apply the correct test – that is, whether an applicant has a well-founded fear of persecution for a *Convention* reason – it may be necessary to consider whether the applicant's fear of being persecuted in the more distant future (and not merely in the period shortly after his or her return) is well-founded.
>
> 23 As we understood Mr Kennett, who appeared for the Minister, he did not dispute that the RRT would have erred if it had construed the *Convention* definition of "refugee" to limit consideration of the applicant's fear of persecution to a relatively short period following his return to Bangladesh. Mr Kennett submitted, however, that the RRT's reasons, properly understood, showed that it had not misconstrued the definition. He pointed out that the RRT had concluded its reasons by recording that it was not satisfied that the appellant had a well-founded fear of persecution in Bangladesh for a *Convention* reason. Mr Kennett acknowledged that the RRT had not expressly considered whether the appellant's fear of persecution might prove to be well-founded should the BNP lose power at some stage. Nonetheless, so he argued, the RRT must be taken to have implicitly found either that there was no real chance that the appellant would be persecuted even if the Awami League regained power, or that the BNP could be expected to remain in power more or less indefinitely.
>
> 24 It is by no means clear that the RRT's reasons, even if given a benevolent construction, can be read this way. In the critical paragraph (extracted at [8] above), the RRT gave as the reasons for rejecting the appellant's claims the advent of the BNP government, its lack of interest in harming Freedom Party members, and the independence of Bangladesh's judiciary. The RRT simply did not advert to the question of whether the

appellant's fear of persecution would be well-founded if the BNP lost power in Bangladesh. It is difficult to interpret the RRT as doing anything other than approaching the appellant's case on the basis that it was required only to consider whether he had a well-founded fear of persecution for such time as the BNP government remained in power. It must be remembered that the appellant claimed that members of the Awami League had not only laid false criminal charges against him, but had threatened to kill him. While the RRT had serious doubts about the veracity of the appellant's claims, it proceeded on the basis that they were true. An independent judiciary could hardly protect the appellant against the threat to kill him if those making the threat acquire the means to carry it out.

25 It is not, however, necessary to express a final view on this question, because s 474(1) of the *Migration Act* protects the RRT's decision from the consequences of what would otherwise be irregularities such as errors of law. Section 474(1) provides as follows:

"474(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

26 The effect of s 474(1) was considered by a five member Full Court in *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 228. The approach of the majority in *NAAV v Minister* was summarised by another Full Court in *NABM of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 294, at [24], as follows:

"In NAAV v Minister, von Doussa J (with whom, on this point, Black CJ and Beaumont J agreed) stated (at [635]) that the Migration Act contained a hierarchy of provisions of which, in relation to privative clause decisions, s 474(1) was intended by Parliament to be the leading provision. His Honour held that "apparently inconsistent provisions of the Act" are to be construed as subject to the restrictions in s 474(1). Consequently, the effect of s 474(1) is to expand the jurisdiction of the relevant decision makers including the Tribunal so that a decision that is affected by irregularities that would, in the absence of s 474(1), amount to jurisdictional error will be within power, subject to satisfying the so-called "Hickman conditions. The Hickman conditions require that the decision

- be a bona fide attempt to exercise the power which the Act reposes in the decision maker;

- relate to the subject matter of the Act;

- be reasonably capable of reference to the power.

In addition, it follows from the reasons of the majority in NAAV v Minister that a decision will not be protected from judicial review if it contravenes what is variously described as an "inviolable" condition, "jurisdictional factor" or "structural elements" found in the legislation: at [12], per Black CJ; at [619], per von Doussa J."

> 27 There is no doubt, in our view, that the second and third of the *Hickman* conditions were satisfied in the present case. However, we interpret the appellant's submissions as intended to argue that the RRT did not make a *bona fide* attempt to exercise the powers conferred on it by the *Migration Act.* In *Wu v Minister for Immigration & Multicultural Affairs* [2002] FCA 1242, Sackville J summarised the approach taken in *NAAV v Minister* to the first of the *Hickman* conditions, in terms (at [59]) with which we agree:

"the touchstone that emerges from the judgment in NAAV [v Minister] is that a decision of the MRT will satisfy the first Hickman condition if it is the consequence of an honest attempt to act in pursuance of the powers of the tribunal. There may be cases where the disregard of statutory requirements or, indeed, of the evidence, is so 'blatant' (to use von Doussa J's word) that an inference can be drawn that the decision-maker has not honestly attempted to exercise the relevant statutory power. There may also be cases where the decision-maker has knowingly exercised a power for an improper purpose: Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation (2001) 184 ALR 576, at 587, per Finn J. But the fact that the tribunal has misconstrued the legislation or committed procedural errors will not, of itself, ordinarily establish that it has not honestly attempted to exercise its power: Daihatsu v FCT, at 590."

> 28 There is no basis, in our view, for concluding that the RRT did not make a *bona fide* attempt to exercise its powers. The fact that the RRT may have misconstrued the *Convention* definition of "refugee" does not demonstrate either bias or lack of good faith. The RRT plainly attempted to discharge its functions honestly and it did not attempt to exercise its powers for any improper purpose.

> 29 The RRT clearly satisfied the *Hickman* conditions, and there can be no suggestion that the RRT contravened an inviolable statutory requirement.

> 30 Accordingly, the appeal must be dismissed, with costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Sackville, Allsop & Jacobson.

Associate:

Dated: 23 October 2002

The appellant appeared in person.

Counsel for the Respondent:	Mr G Kennett
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	11 October 2002
Date of Judgment:	23 October 2002