FEDERAL COURT OF AUSTRALIA

Perchine v Minister for Immigration & Multicultural Affairs [2001] FCA 1254

ANDREI PERCHINE v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

N 271 of 2001

WHITLAM, MADGWICK & DOWSETT JJ

29 AUGUST 2001

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 271 of 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	ANDREI PERCHINE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	WHITLAM, MADGWICK & DOWSETT JJ
DATE OF ORDER:	29 AUGUST 2001
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 271 of 2001

ON APPEAL FROM A SINGLE JUDGE OF THE

FEDERAL COURT OF AUSTRALIA

BETWEEN:	ANDREI PERCHINE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	WHITLAM, MADGWICK & DOWSETT JJ
DATE:	29 AUGUST 2001
PLACE:	SYDNEY

REASONS FOR JUDGMENT

WHITLAM J

1 This is an appeal from a judgment of Mathews J dismissing with costs an application to review a decision of the Refugee Review Tribunal ("the Tribunal") made on 26 September 2000. The appellant is a Russian national who was unrepresented at the hearing before the primary judge and has also conducted his own appeal today. He utilized the services of an interpreter of the Russian language.

2 The grounds of appeal under s 476(1) of the *Migration Act 1958* (Cth) mirror the grounds of review in the original application. The appellant has the misfortune of being a layperson in a difficult area of law. He has spoken courteously and carefully and with obvious sincerity. However, he has been unable to articulate and expose any error in the primary judge's approach or any error of law on the part of the Tribunal. Mathews J remarked that, in view of the appellant being unrepresented before her, she had critically examined the Tribunal's decision in order to discern whether there was any error of law.

3 It is apparent from his address today that the appellant does not understand the limited nature of judicial review in the present case. The background to the proceeding and the grounds of challenge are set out and

developed in the primary judge's reasons, with which I respectfully agree. Accordingly, the order I propose is that the appeal be dismissed with costs.

MADGWICK J

4 I agree with what has been said by Whitlam J and with the orders that he proposes. I do however add some comments.

5 Like Whitlam J, because the appellant has been without legal representation, I have examined the material myself to see whether, quite apart from the matters so limitedly put in his notice of appeal, there is any other reviewable error that might appear. I had some debate with counsel for the respondent Minister about two matters. The first is that I have not seen a case where so much of what an applicant asserted before the Tribunal was disbelieved, and I have seen many cases where there were very striking and plain instances of lying by applicants exposed.

6 Certainly, the Tribunal was entitled to find the appellant not generally a person of credibility for reasons that the Tribunal member gave. However, apart from one matter, the Tribunal member reasoned that, because in the half page statement that accompanied the application for review by the Tribunal, the appellant had raised claims additional to those in the two page poorly translated statement that the appellant had originally favoured the respondent Minister's delegate with and because there was some further evaluation of what was in the second document at the inquisitional hearing before the Tribunal, the appellant was a person of no credit whatsoever.

7 Had one seen such a process in a judgment of a trial judge, it seems to me that an appellate court might very possibly conclude that the trial judge had palpably misused the advantages available to him or her, by reason of the opportunity to observe the demeanour of a witness. This case comes close to inviting the conclusion that so extreme was the approach to the appellant's credit that the Tribunal member must have misunderstood his function. What saves it from that is that there is another matter, which might reasonably excite deep disbelief of the appellant's story. That is that he did not apply for refugee status on a trip to Finland where, on his account of matters, such would have been the expected thing to do and the explanation he tendered to the Tribunal member could reasonably be regarded as very unpersuasive. By a narrow margin, therefore, there is no basis for this Court to intervene on that score.

8 The second matter, expressed briefly, is that it follows from the fact that there will be a well founded fear of persecution if there is a "real chance" of it, as enunciated in *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 and explained in subsequent cases, that there will be some cases where, although an applicant is disbelieved, or indeed the Tribunal might be positively satisfied on the balance of probabilities that the applicant's account of events did not occur, nevertheless an inquiry ought to be made as to whether there is a real and substantial possibility that something like what the applicant is saying, may have occurred in his or her

case. A positive conclusion on that question may bear on the conclusion as to whether there is a real chance of future persecution. An approach such as was taken here, as to credit, without in terms, investigating whether, nevertheless, there was a real and substantial possibility that matters may have occurred as put by the appellant could invite judicial interference on review in this Court.

9 However, as Mr Wigney, counsel for the respondent Minister, capably and without notice answered: it is not enough to have to speculate about this; the applicant would need to make out a positive case that there was such a failure, and there is a passage in the Tribunal member's reasons which, by implication at least, answers the concerns that I have mentioned. This passage is capable of indicating that, even if there were such a substantial possibility, there is no reasonable prospect that the appellant has been persecuted *by reason of political opinion*, actual or imputed, that would have been evidenced by the events in question or would be so persecuted, either now or in the reasonably foreseeable future. Again, this conclusion, in the case of an alleged "whistle blower", may be surprising but it does seem to fall within the realm of the merits which are not open for review in this Court.

DOWSETT J

10 The appellant has not demonstrated any error in the way in which the learned primary judge disposed of the matter. In those circumstances I agree with the proposed order.

WHITLAM J

11 The orders of the Court are that the appeal be dismissed and the appellant pay the respondent's costs.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Whitlam, Madgwick & Dowsett.

Associate:

Dated: 2 October 2001

The appellant appeared in person	
Counsel for the respondent:	M A Wigney
Solicitor for the respondent:	Clayton Utz
Date of hearing:	29 August 2001
Date of judgment:	29 August 2001