

FEDERAL COURT OF AUSTRALIA

Prashar v Minister for Immigration & Multicultural Affairs [2001] FCA 57

IMMIGRATION – application for review of decision of Refugee Review Tribunal – well-founded fear of being persecuted for reasons of religion under the Convention is not limited to people holding a religious belief but extends also to those persecuted because they do not hold a religious belief.

Shahzad Gul Awan v Minister for Immigration & Multicultural Affairs [1998] FCA 435, doubted

POOJA PRASHAR & ORS v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS

N1165 of 2000

MADGWICK J

7 FEBRUARY 2001

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N1165 of 2000

BETWEEN: POOJA PRASHAR, VIKAS PRASHAR & KARAN PRASHAR
APPLICANTS

AND: MINISTER FOR IMMIGRATION & MULTICULTURAL
AFFAIRS
RESPONDENT

JUDGE: MADGWICK J

DATE OF ORDER: 7 FEBRUARY 2001

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicants pay the respondent's costs.

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REASONS FOR JUDGMENT

(revised from transcript)

HIS HONOUR:

1 This is an application for the limited form of judicial review available under s 476 of the *Migration Act 1958* (Cth) (“the Act”) in respect of a decision of the Refugee Review Tribunal (“the Tribunal”). By that decision the Tribunal affirmed a decision of a delegate of the respondent Minister not to grant protection visas to the applicants who are husband, wife and an infant child. No separate case was mounted before the Tribunal or before me based on the circumstances of the applicant who is the infant child. It is convenient therefore, to refer to the husband and wife as the applicants or, as the case may be, as the husband or the wife.

2 The case ultimately depends upon whether the applicants, or any of them, fall within Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* as amended by the *1967 Protocol Relating to the Status of Refugees* (“the Convention”) which provides that a person is a refugee if:

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.”

Factual background and applicants’ claims

3 The applicants are nationals of India who adhere, although apparently with no immense level of devotion, to the Hindu religion and are of the Brahmin cast. The applicants had before their marriage the same ancestral name, "Prashar". They both come from the city of Jalandhar which is in the state of Punjab. The parents of each of the husband and wife are apparently observant Hindus. The applicants are in their late 20s and both are university educated. The husband has run his own business and is apparently a renowned motor cyclist, having held and attempted various records for motor cycle riding feats, including the time taken to cross Europe by motor cycle.

4 The applicants claim that they struck trouble in India from two sources. Firstly, the husband was an active adherent of the Congress Party, though more active, it would seem, in respect of social welfare activities carried out by or in the name of, or connected with, the local organisation of his party than through anything to do with the actual electoral process. As a leading sportsman he was apparently courted by political figures. He fell foul

of a conservative BJP politician in his home area and, when he refused to cooperate with that politician, the latter set about inciting trouble for him.

5 The second way in which the applicants say that they found trouble arose from their marriage. Sharing a common ancestral name, they are within a segment of their cast in relation to which both cast custom and, apparently, the Hindu religion as practiced in their area prohibits inter-marriage. When the respective families became aware of their love affair, they were each cast out and they lived, as if man and wife, with friends in their home city and then went through an informal marriage-like ceremony. As a result, they considered themselves sufficiently married, although, as I understand it, this ceremony would not qualify as a marriage ceremony under Indian law. Indian law provides for different kinds of marriages dependent on one's religion or, I assume, lack of it.

6 It seems that in Jalandhar their religiously observant co-believers, other members of their cast and perhaps other people regard the pair as having behaved immorally and regard the child that they had as illegitimate, referring to the child as a "bastard". It seems that the BJP politician fanned trouble for them on the basis of their religious and cast rule infractions. The trouble was serious. The husband was badly beaten and a bad time given to the wife and the child.

7 The Tribunal member was prepared to assume that there was a social group constituted by those who disobeyed cast rules. On this apparently generous assumption the harm that they suffered in Jalandhar would amount to harm by non-state agents. The harm in Jalandhar culminated in a letter from a "guru" being posted on the noticeboard of a local temple. According to the applicants, this banned them "from entering any Hindu temple in India". The Tribunal member accepted evidence that there was no practice like that of the Muslim "fatwa" which operated in Hinduism in India and rejected the claim that this letter would, in fact, make them an outcast from their religion throughout India.

8 The applicants moved from Jalandhar, travelling to New Delhi where they stayed for 10 days. They say that in the marketplace there they were recognised by two men from the BJP party who abused them and physically assaulted them in frightening but not otherwise serious ways.

9 They then moved to Guwahati "a place that was very far from north India" and where the husband had a friend. The wife worked there in a tea plantation picking tea leaves. Her husband left to attempt to break the record for riding a motorcycle across Europe. During his absence, the wife struck trouble of a third kind. In Jalandhar they had been treated kindly by some members of a Christian church and had toyed with the idea of becoming Christians. One day the wife was reading a Christian Bible during her lunch break. She was apparently taken as asserting that she was a Christian and she remarked that "[t]he Christian religion was best for love and charity." Her co-workers regarded their own religion as having been insulted by this and

became enraged. Physical violence broke out and another woman hit the wife who, so she says, responded in kind. The police were called.

10 The police told the applicant wife that they would teach her a lesson. At the police station, where they took her, she told them her whole story. They asked whether she had any link with Punjab militant extremists (it is of course notorious that these are Sikhs rather than Hindus) and interrogated her about that. She was locked in a police officer's room and allegedly raped by a police inspector. She was then imprisoned for a week with other women.

11 She then claims that she was handed over to the Punjab police who had traveled a great distance to get her and take her back to the Punjab, where she was "gang raped" by members of the police force. She was released on condition that when her husband returned she would bring him to the police. No charge was laid against her.

12 The applicants' case is that the BJP politician "was behind all of this for political motives."

13 The husband returned on 10 June 1997 and, in effect, as soon as they could they made their way to Australia on tourist visas. They each had passports arising out of a need to travel for reasons associated with the husband's motor cycle endeavours. The applicants applied for refugee status within a month of arriving in Australia.

14 An unfortunate aspect of the proceedings is that the applicant wife had indicated that through fear of her husband's reaction she had not told her husband of the sexual assaults by police. However, the Tribunal member seems to have overlooked this aspect of the matter and referred in insufficiently guarded terms to what had happened. Consequently, any damage that may have been done has been done, and counsel for the applicant says that there is no need for inhibition on my part in mentioning it.

The findings of the Tribunal

15 The case was variously analysed by the Tribunal member. He went to great lengths to consult independent materials which he summarised along with other evidence in his reasons for decision which run to nearly 40 pages.

16 He considered whether the applicants or either of them might be refugees within the meaning of the Convention for reasons of political opinion and, in short, concluded that the husband was only ever at risk of any harm from the particular BJP politician and a small group of cronies and that the husband's lack of a general political profile negated any reasonable prospect of that group having any future interest in harming either of the applicants. The Tribunal member referred to the fact that the husband had the support of politicians and other government officials in arranging his attempts at motor cycle records.

The Tribunal rejected the proposition that the Punjab police had any interest in the husband on account of any political reason.

17 The Tribunal member then considered whether the applicants were refugees for reasons of religion. He said:

“The applicants' evidence makes it clear that they are now ambivalent about their religion and religion generally. It is their evidence that neither of them has pursued their Hindu religion in Australia with any significant interest.”

He rejected the claim that the applicants were banned from practising the Hindu religion anywhere in India as a result of entering into their relationship and took the view generally that in India:

“...the Constitution provides for freedom of religion [and] the Government respects this right in practice. India is a secular state in which all faiths generally enjoy freedom of worship and government policy does not favour any religious group. I acknowledge that there are religious tensions in India but I am not satisfied that such tensions, which are primarily between minority Muslim or Christian communities and the majority Hindu give rise to a fear of persecution for the applicants who are ambivalent towards their religious practice.

It may well be that as a result of their serious breach of caste rules the applicants are not permitted to practice the Hindu religion in particular temples in India ... I am satisfied on the basis of the evidence referred to above that, even if not permitted to attend some temples in India the applicants are not prevented from entering every temple. This does not amount to persecution in the sense of the Convention in their particular circumstances, as they do not desire to publicly practice Hinduism ... I am satisfied that each applicant will be able to practice their religion to the same extent as they have in Australia upon return to India and that if some restrictions are imposed [they] do not amount to persecution in the convention sense.”

18 Further, the Tribunal member did not accept that the applicants would face persecution “as a result of their decision to renounce their religion”, that is, by choosing to ignore the cast rules and “marry” into a prohibited relationship. The family rejection was not regarded as amounting to persecution, and if they were facing persecution because of living together, their choice of a lifestyle in this regard could not “be characterised as an expression of a religious belief”.

19 I interpolate that there may well be an error in the way this matter was approached. The Convention speaks of a “well-founded fear of being persecuted for reasons of ... religion ...”. In my opinion, if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves. If there is anything in *Shahzad Gul Awan v Minister for Immigration & Multicultural Affairs* [1998] FCA 435 to the contrary, with respect I disagree with it, believe it to be clearly wrong and would not follow it.

20 As I have indicated, the Tribunal was prepared to accept, generously I think, that persons who breach caste rules may form a particular social group in India in the Convention sense. The Tribunal member rejected persecution for reasons of membership of such a social group because ostracism from family members did not amount to persecution, nor did ostracism by some friends. The Tribunal also rejected the allegation that they could not find a house to rent because they were an unmarried couple and de facto relationships were not accepted in India.

21 There may be, with respect, some confusion of concepts in the exposition of the Tribunal’s reasons on this issue and there seems to have been a failure to make positive findings one way or the other about whether the applicants were physically assaulted on account of their flouting caste mores. However, as will appear, it is not necessary for me to consider these matters further.

22 The Tribunal member went on to consider the applicants' claims “cumulatively as the claims are inter-woven and cannot be readily categorised within just one of the reasons raised in the Convention”. However, the claim was rejected on this basis as well. Reference was made to the facts that in late 1996 and early 1997 the applicants evidently had no fear of persecution in India and that the husband had the support of senior government Ministers and officials for his sporting endeavours.

23 The Tribunal member accepted evidence, though I think there was evidence to the contrary, that they were free under Indian law to marry, so that there was no persecution of them in that regard.

24 The Tribunal member then considered whether the wife might be a refugee for reasons of her membership of the social group defined as “women in India”. The Tribunal member rejected the claim that she was “assaulted by police in Convention related circumstances in Guwahati and Punjab”. The basis of the rejection of this claim was that the applicant's evidence was implausible. The reason for implausibility given was that it was extremely unlikely that the Punjab police would be brought into the matter and that they would arrange for three to four police officers to travel for several days to collect her and return her to the Punjab where they would assault and then release her. In rejecting this claim, the Tribunal member said:

“... I am satisfied the applicant has not been truthful in giving evidence in relation to this aspect of her claim. I am satisfied that the applicant is not at risk of persecution because she is a woman.”

However, the Tribunal member did say:

“I am also aware that there is evidence to indicate that police have often misused their power and sexually assaulted women in Indian prisons.”

25 As a matter of fact, this process of reasoning may not have been followed by everyone. Certainly it would be logically possible that the applicant wife may have been raped by police on two occasions in two locations even if police from the latter location did not travel across India to bring her back. It was submitted that the Tribunal had misapprehended that the applicable test was whether there was a "a real chance" that the applicant wife might be persecuted and that relevant to that question, was whether there was a real chance that her story as to rape by officials had some credibility, and that it was unreasonable to reject her story. There may or may not be anything in this submission but to my mind it is quite clear from s 476(2)(b) that the matter is not reviewable before me upon that basis.

26 Finally, before dealing with the issue of relocation, the Tribunal member rejected a claim of *sur place* issues of persecution arising out of an attempt to bribe the applicants in relation to the process of having their claims considered in Australia. No more I think need be said about the matter than that. The Tribunal's approach was plainly correct.

27 Very importantly, the Tribunal member dealt with the question of relocation. The Tribunal member applied the approach enunciated in *Randawa v Minister for Immigration Local Government and Ethnic Affairs* (1994) 52 FCR 437 by Black CJ (with whom Whitlam J agreed) and referred also to remarks of Mansfield J in *Singh v Minister for Immigration & Multicultural Affairs* (2000) 98 FCR 469 at para 30. The Tribunal member noted that the applicant husband had carried on an established business, had access to financial resources through friends and sponsors and had a quite vast amount of travel experience both in India and other countries. There were therefore "no logistical barriers to his finding a part of India in which to settle".

28 The Tribunal member said:

“In this case having regard to a broad range of issues I am satisfied relocation is a real option and the applicants have genuine access to meaningful protection in their country of origin. I must look at the genuineness of the domestic protection, the quality of internal protection to be satisfied that it meets basic norms of civil, political, and socio-economic human rights, which internal safety is not illusory or unpredictable and state accountability for the harm is established.”

29 The Tribunal member noted that both applicants had managed to obtain employment in Australia; that they had the resilience and flexibility to be

able to re-settle themselves in a foreign milieu; that they were both well-educated, having university degrees recognised in India, and that the husband had been able to establish a successful and profitable business and sell himself to sponsors before and after marriage. In particular, the Tribunal member noted that India was a country with a population of over a billion people and he accepted a description of India as:

“a democratic country which holds regular elections in which Governments do change and which has independent courts of integrity which strive to fulfil their role as honest arbiters between the citizen and the state.”

30 The Tribunal member also referred to the fact that the applicants speak three languages, would have no difficulty communicating and are young and healthy. The Tribunal member concluded:

“I am satisfied that the practical realities are such that they are able to relocate without difficulty. Their abilities are such that the applicants could relocate to many parts of India far from their former home and not expect to encounter any Convention difficulty. I [recognised] that safety is clearly one of the prime factors. I am satisfied that they will have the same level of protection [as] all other Indians.”

31 The Tribunal member rejected a submission of the applicants that "relocation has been tried and failed". He pointed out that the difficulty in Guwahati, if the applicant wife actually had suffered any, was not directly related to the earlier matters. In this regard the Tribunal member said:

“While it is not necessary for me to identify a particular place to which the applicants may relocate looking realistically and sensibly at the possibility [ies] I am satisfied that the south of India where in some parts [the] majority are not Hindu is a reasonable alternative and an area where they are not at risk.”

32 With the exception of one matter to which I will come in a moment, these findings about relocation appear to me to be decisive of the case and, if there were other errors involving any failure to properly consider whether the applicants may be refugees pursuant to the Convention, they are legally irrelevant if the findings as to relocation are legally unassailable. In my opinion, such findings are legally unassailable.

33 It may be that in another country, in other circumstances, if a putative refugee had for Convention reasons suffered serious social insult and assaults in one place and moved to another and suffered similar harm, to insist that the applicant should try a third or a fourth place might indicate legal error in considering the question of reasonableness of relocation. Relocation, it must be remembered, is relevant to the actual Convention test of whether the putative refugee has a "well-founded fear" of persecution in their country of nationality. However, that is hardly the case here. Although the Tribunal member did not expressly articulate it, it is inherent in the references to the vastness of India's population (and is, I think, notorious) that India is a country of immense social diversity. The conclusion to which the Tribunal member came, having regard to the various factors to which he quite properly referred,

seems to me not only legally unassailable but, if I may say so, factually unavoidable.

Bias

34 The remaining matter to which I should refer is the question of supposed actual bias on the part of the Tribunal member. In support of this ground it was suggested that the Tribunal member had, in relation to the female applicant's claims of rape, failed to keep the proceedings confidential. Further, the circumstances of the attempted bribery of the applicants indicated that the would-be extortionist knew the Tribunal member's name before the applicants had received notification of the hearing. Neither matter betokens any bias on the part of the Tribunal member, however unfortunate the circumstances otherwise were.

35 The submissions go on to confuse a necessity for justice to be seen to be done with a supposed necessity that the Tribunal member should have disqualified himself from the hearing for the actual bias. At best what might have been involved was apprehended bias, which is not reviewable in this Court. It was finally submitted that the Tribunal member had closed his mind to the issues raised in relation to the bribery matter but in my opinion, with respect, this is a confusion of ideas and there is nothing in it.

36 The written submissions deal with a good many other matters but, in view of my conclusions about the relocation questions, I need not refer to them as they could not overcome that matter.

Disposition

37 The application for judicial review will be dismissed. The applicants are to pay the respondent's costs of the proceeding.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 5 March 2001

Counsel for the Applicant: I N Asuzu

Solicitor for the Applicant:	Coelho & Coelho
Counsel for the Respondent:	M J Leeming
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	7 February 2001
Date of Judgment:	7 February 2001