FEDERAL COURT OF AUSTRALIA

Siaw v Minister for Immigration & Multicultural Affairs [2001] FCA 953

Migration Act 1958 (Cth) s 476(1)(e)

Cole v Minister for Immigration and Multicultural Affairs [2000] FCA 1375 considered

Cole v Minister for Immigration and Multicultural Affairs [2001] FCA 76 considered

Ordeniza v Minister for Immigration and Multicultural Affairs [2001] FCA 35 applied

Minister for Immigration and Multicultural Affairs v Kandasamy [2000] FCA 67 applied

Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 169 ALR 515 applied

Randhawa v Minister for Immigration Local Government and Ethnic Affairs (1994) 52 FCR 437 applied

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR 1 cited

Melhem v Minister for Immigration and Multicultural Affairs [2000] FCA 1617 applied

Rajadurai v Minister for Immigration and Multicultural Affairs [2000] FCA 125 applied

Wang v Minister for Immigration and Multicultural Affairs [1999] FCA 1464 applied

MAXWELL SIAW v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 397 OF 2000

SUNDBERG J

23 JULY 2001

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 397 OF 2000

BETWEEN:	MAXWELL SIAW APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	SUNDBERG J
DATE OF ORDER:	23 JULY 2001
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs of the application.

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

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JUDGE:	SUNDBERG J
DATE:	23 JULY 2001
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

BACKGROUND

1 The applicant is a 39 year old male citizen from Sierra Leone who arrived in Australia on 3 June 1999 without any transit documents. On 20 July he lodged an application for a protection visa. His application was refused, and the Refugee Review Tribunal affirmed that refusal. He now applies to the Court under Part 8 of the *Migration Act* 1958 for review of the Tribunal's decision.

THE APPLICANT'S CASE

2 The Tribunal accepted the substance of the applicant's case, and it can be recorded briefly. He was born in Freetown, Sierra Leone. He studied for 15 years in Freetown and then worked as an insurance clerk there between 1982 and 1989. Then he moved to the family farm near Kenema in the east of the country. At some time after 1994 rebels and bandits started to raid local farms. The problem became worse in 1997/1998 when the army began to patrol the area and warn people for helping the rebels. In late 1998 the applicant's father was arrested for assisting the rebels. He was interrogated about his relationship with them and tortured. In early 1999 government

troops again questioned the father about helping the rebels. They then shot him dead and abducted the applicant's mother and sister. He has not seen or heard of them since. After burying his father, he sent his children to Liberia. Though he has looked for them, he has not located them or heard of them. He decided to stay and look after the farm, but after the rebels returned to the area he left. He was detained by the rebels and mistreated, but escaped. He travelled to Liberia, then to Monrovia, and eventually to Australia via the Ivory Coast and South Africa.

3 The applicant said he could not return to his farm because his family is well known, and people would be aware that his father had been accused of helping the rebels from whom the applicant had escaped. He could not go to Freetown because government security officials would find out he was the son of a person who had helped the rebels.

Tribunal's reasons

4 Unlike the Minister's delegate, the Tribunal accepted that the applicant was a national of Sierra Leone. It also accepted that his family members were harmed, and that he came to Australia as he described. The Tribunal noted that when the applicant left Sierra Leone in early 1999 the rebel forces were violently attacking Freetown, where there was street to street fighting. But since then there had been significant changes in the situation, which the Tribunal drew to the applicant's attention. The Tribunal referred to various country reports, newspaper articles and other publications showing that

- the rebels had been driven out of Freetown
- international pressure was building for peace talks between President Kabbah and his enemies, including Foday Sankoh
- a cease fire had been negotiated in May 1997 followed by peace talks
- UN officials had begun arriving in Freetown to assess the situation
- a peace deal had been signed in July 1999 in which the President and Sankoh had agreed to a power-sharing arrangement and a disarmament plan
- also in July the rebels had been granted an amnesty
- the rebel leaders returned to Freetown in October 1999 and held a press conference in which they promised to implement the peace agreement
- in the same month the UN Security Council passed a resolution to establish a 6000 member peace keeping force
- in December the IMF approved a loan to help the government's reconstruction and economic recovery programme
- the UN troops were deployed, and in February 2000 their numbers were increased to 11,000.

5 The Tribunal then noted material showing that the peace agreement had not been a complete success, and continued:

> "On the other hand, it is equally clear that Freetown and its surrounding areas have been secured by the government and UN forces and that the UN has strongly committed itself to keeping the peace in those areas while it seeks to spread that peace by persuading the rebels to take advantage of the amnesty offered under the peace agreement and give up their arms. Freetown has not been attacked since government forces regained control there in early 1999. The UN has made a strong moral and financial commitment to securing the peace in Sierra Leone and has longer term plans to increase its military and civil presence to achieve its resolutions. The Tribunal recognises that there may have been failed peace attempts in Sierra Leone on previous occasions and that some UN missions have failed. However, the Tribunal is satisfied that, at least for the reasonably foreseeable future, Freetown and the surrounding will remain under the control of the peacekeeping forces and people in those areas can go about their daily lives without a real chance of being persecuted."

6 The Tribunal accepted that it was unsafe for the applicant to return to that part of the country where his farm was located, because that area was still under the control of the rebels. It then dealt with his claim that he could not return to Freetown because the peace agreement had not been successful, and that his name was on a list of targets because of his father's perceived association with the rebels:

> "… he was born and raised in Freetown and studied and worked there for many years and it is appropriate that his connection with that area be taken into account in assessing his claims to be a refugee. Given the Applicant's history, skills and life experience, it is reasonable that he relocates to and lives in Freetown if he cannot return to the family farm ….."

The Tribunal went on to reject the applicant's claim that rebels continue to kill people in Freetown. It was not borne out by the information before the Tribunal, which showed that Freetown and its environs had been secured by the UN and government forces. The Tribunal did not accept that the applicant faced any real risk of persecution at the hands of the rebels in Freetown. The presence of the UN in Sierra Leone, particularly in and around Freetown, and its commitment to implementing the peace agreement, made it safe for the applicant to return without a real chance of facing persecution. The Tribunal concluded its reasons by saying:

> "The Tribunal has considered his claims that he will be associated with the rebels. While his father was killed for siding with the rebels because he provided them with food and shelter, neither he nor the Applicant joined the rebels. In any event, under the current peace agreement the rebels have been offered an amnesty and many of them have taken that option and surrendered their arms to the UN. Many leading rebels are also part of the new coalition government and, as mentioned above, there is no evidence to indicate that rebels or former

rebels, let alone people with a vicarious connection to such people, face a real chance of persecution in Freetown and its environs. In all of the circumstances, the Tribunal finds that the Applicant's slim contacts with the rebels, via the assistance his father rendered to them under duress, will not lead to a real chance of persecution should he return to Sierra Leone. Even in the unlikely event that his name is on a list, as he claims, the Tribunal is satisfied that the current combination of UN and government security forces will provide adequate protection against persecution should it be threatened."

GROUNDS OF REVIEW

Error of law in applying "relocation principle"

7 The applicant submitted that the Tribunal erred in holding that the "relocation principle" is applicable where the protection available is provided by an armed international force and not by an applicant's own State. The Tribunal did not so hold. The Tribunal twice noted that *government forces* had regained control of Freetown in early 1999. Later it said that the *government* controlled Freetown and surrounding areas and had disarmed about one third of the combatants it had aimed to disarm by December 1999. Then it referred to the fact that Freetown and its surrounding areas had been secured by the *government and UN forces*. Yet again it referred to Freetown and its environs having been secured by the *UN and government forces*. In announcing its conclusion that the applicant did not face a real chance of persecution in Freetown and its environs, the Tribunal attributed this to the fact that the "current *combination of UN and government security forces*" would provide adequate protection. At no stage did the Tribunal attribute the applicant's safety solely to the UN forces. Although the Tribunal's formulation of its holding varied from place to place, a fair reading of its reasons is that it was a combination of UN and government forces that would provide adequate protection. For the Tribunal to have erred in relation to the "relocation principle", the applicant would have to establish that it was in error in accepting that protection could be provided by forces that were to any extent international in character. In any event, the applicant's submission, whether as formulated or as it must in my view be formulated, misunderstands the Tribunal's course of reasoning. As a result of cl 866.221 of Schedule 2 of the *Migration Regulations* 1994, Australia has protection obligations under the Refugees Convention to an applicant who:

"… 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 …."

Accordingly, the Tribunal's initial task was to determine whether or not the applicant had a well-founded fear of persecution for a Convention reason. If such a fear existed, it was then required to decide whether the applicant's state of nationality was or was not able to offer protection to him. On the first part of its task, after assessing the material before it, the Tribunal found that Freetown and its environs were secure,

that the applicant would be able to live there safely, and that he did not have a well-founded fear of persecution "at least for the reasonably foreseeable future". The political composition of those who are keeping the peace and making an area secure is not relevant to the assessment of whether an applicant has a well-founded fear. In this connection I see no difference between cases where adequate protection is provided

- entirely by government forces
- by a combination of government forces and friendly forces
- by forces from a neighbouring country or ally
- by mercenaries (alone or paid to assist government forces)
- by United Nations forces invited to assist government forces.

8 Although the submission at present under consideration does not appear to have been put to Heerey J in *Cole v Minister for Immigration and Multicultural Affairs* [2000] FCA 1375 or to the Full Court on appeal [2001] FCA 76, that case supports the view that so long as an area is safe for an applicant to return to, the consequence of which is that any fear of return he may have is not well-founded, it does not matter that that safety is brought about by UN as well as government forces. *Cole* is relevantly indistinguishable from the present case. The Tribunal's findings in that case, based on the same country and other information about Sierra Leone, were substantially the same as those made by the Tribunal in the present case. The Tribunal in *Cole* found that the presence of the UN in Sierra Leone, particularly in and around Freetown, and its commitment to implementing the peace agreement, made it safe for the applicant to return without a real chance of facing persecution in the reasonably foreseeable future. Heerey J rejected various attacks on the Tribunal's decision and dismissed the application for review. On appeal the Full Court upheld Tribunal findings in substantially the same terms as those made by the Tribunal in the present case, concluding on that basis that there was no real chance of the applicant being persecuted on his return and that accordingly, any fear of persecution he may have was not well-founded.

9 In *Ordeniza v Minister for Immigration and Multicultural Affairs* [2001] FCA 35 Katz J (at [22]-[24]), summarising the effect of the Full Court's decision in *Minister for Immigration and Multicultural Affairs v Kandasamy* [2000] FCA 67, observed that

"a finding by the Tribunal of the availability of effective protection in a refugee claimant's country of nationality had two consequences.

One was that any fear on the refugee claimant's part of being persecuted for a Convention reason could not be treated as being well-founded. That in turn meant (among other things) that any unwillingness on the part of the refugee claimant to avail himself or

herself of the protection of his or her country of nationality could not be said to be owing to a well-founded fear on the refugee claimant's part of being persecuted for a Convention reason.

Another consequence was that the refugee claimant could not be said to be unable to avail himself or herself of the protection of his or her country of nationality. The refugee claimant would have a realistic choice of availing himself or herself of the protection of his or her country of nationality and reliance on that country would be of practical utility."

Because of its finding that the applicant did not have a well-founded fear of persecution, the Tribunal was not required to make a separate finding as to the ability or otherwise of Sierra Leone to offer protection to the applicant. If it had made an error of law in the assessment of state protection, it would not have been an error that affected the decision to affirm the refusal to grant a protection visa. The error would not have had any impact on the ultimate decision of the Tribunal to affirm the delegate's decision. See *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 169 ALR 515 at 519-520.

10 The applicant's alternative submission, that he was entitled to choose one form of international protection (a protection visa in Australia) over another (the protection of an armed peacekeeping force in Sierra Leone) depending on which was reasonably accessible to him, falls for the reasons given for rejecting his primary submission.

11 The contention that the Tribunal had not given adequate reasons for its decision as required by s 430 of the Act, and had thereby failed to comply with a procedure for the purposes of s 476(1)(a), was abandoned in the light of *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1. However it was pointed out that the requirements in s 430 remain important in that they entitle the Court to infer that any matter not mentioned by the Tribunal was not considered by it to be material. This may reveal that it made some error of law of the kind mentioned in s 476(1)(e), such as incorrectly applying the law to the facts as found: *Yusuf* at [69]. The applicant claimed the Tribunal had failed to mention the following matters, and thus erred in law:

- the applicant's subjective state of mind on the question of relocation and effective protection
- the applicant's subjective fear of persecution and the specific nature of the mistreatment that had befallen him and his family.

As to the second matter it was said that while in assessing relocation the Tribunal referred to the applicant's "history, skills and life experiences", it made no reference to his history of persecution. This, it was submitted, showed that the Tribunal approached relocation without giving consideration to past persecution, and this was an error in the interpretation and application of the law: *Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at [70].

12 The applicant has not satisfied me that the Tribunal failed to mention the above matters so as to justify the inference that it did not regard them as

material. As to the second matter, the Tribunal did not fail to record the specific nature of the mistreatment that had been suffered by the applicant and his family. It noted the shooting of his father, the abduction of his mother and sister, the disappearance of his children, the burning of his farmhouse, his mistreatment by the rebels and the sexual assault of his daughter by the rebels. It accepted his account of those incidents, described them as serious, and proceeded to examine the merits of his claim on that basis. As to the first matter, in the events that happened the Tribunal was not required to make a finding as to the applicant's subjective state of mind on relocation and protection. Having found that he could access effective State protection and accordingly did not have a well-founded fear of persecution, the existence of any subjective fear was no longer material. See, for example, *Melhem v Minister for Immigration and Multicultural Affairs* [2000] FCA 1617 at [22]; *Rajadurai v Minister for Immigration and Multicultural Affairs* [1999] FCA 125; *Wang v Minister for Immigration and Multicultural Affairs* [1999] FCA 1464 at [14]. In any event the Tribunal did not fail to refer to the applicant's subjective state of mind on relocation and protection. It noted his claim that he could not return to Freetown "because the peace agreement was still in its infancy and has not been successful and cannot be said to have brought about substantial changes in the situation in Sierra Leone" (pages 12 and 13). Not only did the Tribunal refer to the applicant's subjective state of mind, it recorded his reasons for that state - the failure of the peace agreement and the fact that Freetown would in any event not be safe for him because his name was on a list of targets because of his father's assistance to the rebels.

13 The final error of law relied on assumed that the Tribunal correctly held that the applicant could reasonably relocate to Freetown, but claimed that it had failed to consider whether he was willing to avail himself of effective protection. The words of art 1A of the Convention are "owing to such fear, is unwilling to avail himself of the protection of that country". The fear referred to is a well-founded fear of persecution, and the "country" is the country of his nationality. Since the Tribunal found that the applicant did not have a well-founded fear, there was no need for it to deal with the applicant's unwillingness to avail himself of the protection of Sierra Leone. See *Ordeniza* at [23]. In any event, it did deal with the matter. It is quite clear that the Tribunal proceeded on the basis that the applicant was unwilling to return to Sierra Leone. Thus it recorded his claims that

- he could not return to his farm because he feared the rebels and Kabbah's soldiers
- he could not return to Freetown because rebels killed people there
- he would be killed on return because his name is known and is on a list.

Thus this alleged error has no substance.

CONCLUSION

14 The application must be dismissed with costs.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg.

Associate:

Dated: 23 July 2001

Counsel for the Applicant:	R Niall
Counsel for the Respondent:	C Fairfield
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	17 July 2001
Date of Judgment:	23 July 2001