FEDERAL COURT OF AUSTRALIA

Sidhu v Holmes [2000] FCA 776

IMMIGRATION – application for review of Refugee Review Tribunal – jurisdiction under *Migration Act* unchanged on remittal from High Court – error of law may be inferred from Tribunal's reasons notwithstanding that member stated and purported to apply the correct test – review for inferred error of law is apparently theoretically distinct from unreasonableness – whether likely to be any practical difference - whether Tribunal failed to provide adequate reasons – persecution for flag burning – law of general application without evident ulterior purpose or discriminatory enforcement – no error demonstrated

Judiciary Act 1903 (Cth), s 44

Migration Act 1958 (Cth), ss 430, 476(1)(e), 476(2)(b), 485(1), 485(3)

Abebe v Commonwealth (1999) 162 ALR 1, applied

Applicant A v Minister for Immigration & Ethnic Affairs (1997) 142 ALR 331, approved

Avon Downs v Federal Commissioner of Taxation (1949) 78 CLR 353, applied

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 170 ALR 553, approved

Minister for Immigration & Multicultural Affairs v A (1999) 168 ALR 594, applied

Minister for Immigration & Multicultural Affairs v Eshetu (1999) 162 ALR 577, applied

Newall v Minister for Immigration & Multicultural Affairs [1999] FCA 1624, approved

Paramananthan v Minister for Immigration& Multicultural Affairs (1998) 160 ALR 24, cited

Perampalam v Minister for Immigration & Multicultural Affairs [1999] FCA 165, cited

Ram v Minister for Immigration and Ethnic Affairs (1995) 128 ALR 705, cited

SZ v Minister for Immigration & Multicultural Affairs [2000] FCA 458, applied

Wu v Minister for Immigration & Ethnic Affairs (1996) 185 CLR 259, applied

Zuway v Minister for Immigration & Multicultural Affairs (1998) 160 ALR 391, approved

DARSHAN SINGH SIDHU v MARGARET HOLMES & ANOR

N 654 of 1999

MADGWICK J

SYDNEY

9 JUNE 2000

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 654 of 1999

BETWEEN:	DARSHAN SINGH SIDHU APPLICANT
AND:	MARGARET HOLMES FIRST RESPONDENT MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS SECOND RESPONDENT
JUDGE:	MADGWICK J
DATE OF ORDER:	9 JUNE 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The applicant is to pay the respondents' costs.

IN THE FEDERAL COURT OF AUSTRALIA		
NEW SOUTH WALES DISTRICT REGISTRY		N 654 of 1999

BETWEEN:	DARSHAN SINGH SIDHU APPLICANT
AND:	MARGARET HOLMES FIRST RESPONDENT MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS SECOND RESPONDENT

JUDGE:	MADGWICK J
DATE:	9 JUNE 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

HIS HONOUR:

1 In this matter Mr Darshan Singh Sidhu, the applicant, sought prerogative relief in the High Court of Australia under s 75(v) of the *Constitution* against a decision of the Refugee Review Tribunal ("the Tribunal"), constituted by Ms Margaret Holmes, the first respondent, given on 28 September 1998. The Tribunal's decision affirmed the decision of a delegate of the Minister for Immigration and Multicultural Affairs, the second respondent, not to grant the applicant a protection visa. By order of Gummow J, pursuant to s 44 of the *Judiciary Act 1903* (Cth), the application for relief, insofar as it was founded upon grounds 2, 3 and 4 of amended draft order nisi, was remitted to this Court. Those grounds were:

"The Decision involved an error of law, being an error [of] law involving an incorrect interpretation of the applicable law or an incorrect application of law to the facts as found by the person who made the decision…

Procedures that were required by the Migration Act to be observed in the making of the Decision were not observed, namely the requirement imposed by s 420(2)(b) of the Migration Act that the Tribunal, in reviewing a decision by the Minister's delegate that an applicant is not a refugee and or is not entitled to a protection visa, must act according to substantial justice and the merits of the case.

…

Procedures that were required by the Migration Act to be observed in the making of the Decision (namely the procedure required by s 430(1) of the Migration Act) were not observed in that the Tribunal's Reasons for Decision do not set out reasons or proper reasons in respect of crucial elements of the decision".

Limitation on this Court's jurisdiction

2 The jurisdiction of this Court, as provided by s 485(1) and (3) of the *Migration Act 1958* (Cth) ("the Act") "however engaged" (as Kirby J put it in *Abebe v Commonwealth* (1999) 162 ALR 1 at para 207), is narrower than that of the High Court, as provided by the *Constitution*. The limitations, in s 476 of the Act, of the grounds on which this Court may judicially review a decision of the Tribunal, have been applied by operation of s 485 to any matter or part of a matter remitted to this Court by the High Court: *Abebe*, *Minister for Immigration & Multicultural Affairs v A* (1999) 168 ALR 594 at paras 107, 123 and 124 and *SZ v Minister for Immigration & Multicultural Affairs* [2000] FCA 458. (These cases are consistent with Gummow J's remarks in *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at paras 154 - 156; the headnote at 162 ALR 578 is, in this respect, misleading).

Background facts

3 The applicant is a national of India, of the Sikh faith, who arrived in Australia on 19 February 1996. He is the Assistant General Secretary of the

International Sikh Youth Federation in Australia (“ISYF”). His claim is that he has a well-founded fear of persecution for reasons of religion and/or of political opinion, that he is therefore a refugee within the meaning of the *Convention Relating to the Status of Refugees 1951* (“the Convention”),and that accordingly he is entitled to a protection visa.

4 It was accepted by the Tribunal that in June 1984 the applicant was detained for a period of two months, during which he was interrogated, that in May 1988 he was detained for a period of one year and four months, during which he was beaten, and that in September 1992 he was detained for a period of three weeks. It was also accepted by the Tribunal that whilst living in Australia the applicant has taken part in demonstrations outside the Indian High Commission in Canberra in which, at least on one occasion, an Indian flag was burned.

5 The applicant claimed before the Tribunal, amongst other things, that there was a real risk that upon return to India he would be identified as a dissident at the airport and would then face extortion by airport officials. If he failed to meet these extortion demands, the applicant claimed that he would be handed to the Punjabi police, who would detain and torture him. The applicant submits in this Court that the Tribunal failed to give proper consideration to the persecution that he may suffer as a result of this “airport scenario,” as it was referred to during the hearing. This was said to amount to a judicially reviewable error in two ways: first, it was said that, in light of the material before the Tribunal, an error of law could be inferred from the ultimate conclusion of the Tribunal, and second, that the Tribunal had failed to set out the reasons for its decision.

The Tribunal’s reasoning

6 The Tribunal:

(a) accepted that the applicant was arrested and detained for varying periods during 1984, 1988-1989 and 1992, and that he was “beaten and hurt during detention”;

(b) found that the applicant “had no further contact with the authorities in the period following October 1992 until he left India in February 1996”;

(c) found that “people who are not high profile militant suspects are … generally not considered to be at risk in the Punjab today”;

(d) concluded that the applicant was not “of continuing interest to the authorities because of his activities in India or because he had been arrested and detained in 1984, 1988-89 and 1992”;

(e) accepted that the applicant was Assistant General Secretary of the ISYF in Australia but was not satisfied that he had been engaged in

subversionary or terrorist activities which could lead a member of that organisation to come to the attention of the Indian authorities;

(f) accepted that the applicant had taken an active part in public demonstrations and rallies including outside the Indian High Commission in Canberra when an Indian flag was burned, but found it highly improbable that this could lead him to face any harm amounting to persecution in India.

7 In her reasons the Tribunal member addressed the applicant's claimed fear of persecution arising from the airport scenario in the following manner:

"The Department of Foreign Affairs and Trade advised in January 1995 that people returning to India who have been deported from another country will come to the attention of the authorities… If a person has political connections which have been the subject of adverse attention by the authorities, then their name will be stored in the immigration police computer. If the person is shown to be of minor significance, then they may be questioned and asked for money to avoid further action. If they are unable to pay or if they are shown to have more significant political connections, then they can face arrest, detention and torture (Department of Foreign Affairs and Trade Cables ND 3735 and ND 3750 India – Sikhs 4 and 6 January 1995 CX4754).

More recent advice before the Tribunal is that 'the Canadian High Commission in New Delhi regularly monitors the airport arrivals of people deported from Canada … in the last few years this group has numbered eight or ten and Indian authorities have not pursued any of them' with the exception of one person who was a senior official of the Khalistan Commando Force (India: Information from four specialists on the Punjab 17 February 1997, cited above)."

Then, under the heading of "Findings and Reasons", the Tribunal concluded:

"In light of advice from the Department of Foreign Affairs and Trade and the later Canadian information set out above concerning deportees returning to India, I have concluded that while the applicant may face extortion by corrupt airport or immigration officials he would not be seen to have any significant political profile and therefore would not be a particular target for interrogation or torture. There is a high level of corruption in India and people of all racial and religious backgrounds are victims of it"

8 Although the respondent rightly cautioned against engaging in review on the merits, in order to address the applicant's submissions it is necessary to consider the evidence that was before the Tribunal when making its decision, so as to determine whether or not there was any evidence to support the Tribunal's conclusion.

9 The respondent conceded that most of the material before the Tribunal suggested that there was a real chance that the applicant might be persecuted in the manner claimed. However, importantly, the 1997 Canadian document, apparently relied upon by the Tribunal in the passage set out above, stated:

"The panel broadly agreed that the Sikh militancy in Punjab has been virtually eliminated, and that all or almost all remaining militant leaders appear to have left the state and the country… Brooks stated that many groups like the All India Sikh Students Federation (AISSF) and the Sikh Student Federation (SSF) have in recent years denounced the use of violence and committed themselves to only pursuing a peaceful political agenda.

…

According to Bob Brack, people who are not high profile militant suspects are not at risk in the Punjab today. For Brack, the high-profile suspects might include a perceived leader of a militant organization, or someone suspected of a terrorist attack. Brack as well stated that Sikhs with some slight perceived connection to the militancy – through a family member, for example – would not now be targets of the Punjab police. Laurence Brooks indicated that there were only a few high profile militant suspects left, with virtually none remaining in Punjab or India itself.

Ravi Nair defined a high profile individual as someone suspected of anti-state activities by the Indian authorities. Nair stated that a family member of such a person or someone who was forced to provide shelter for militants during the height of the insurgency would not now be considered a high profile suspect. According to Nair, those without a high profile have much less to fear from the Punjab police, and now have much better access to judicial recourse if they are treated improperly. Nair stated that simply holding a pro-Khalistani opinion, for example, would not make an individual a high profile suspect; one would have to engage in violent anti-state acts.

…

According to Brack, officials from the Canadian High Commission in New Dehli regularly monitor the airport arrivals of individuals deported from Canada. Brack stated that in the last few years this group has numbered 8 or 10, and Indian authorities have not pursued any of them, with the exception of Sarabjit Singh Bhatti, who was arrested by Indian police in September 1996 after being deported from Canada. According to Brack, Bhatti was arrested because he was a senior official of the Khalistan Commando Force (KCF)."

Whether error of law may be inferred from the Tribunal's reasons

10 The applicant submitted that, notwithstanding that the Tribunal member cited and purported to apply the correct test, it should be inferred that the first respondent had in reality failed to apply the proper test under the Convention, because the evidence before the Tribunal had been "all one way" and there was no evidence to support the conclusion reached.

11 The applicant relied upon the familiar passage from the judgment of Dixon J in *Avon Downs v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 to support this proposition:

"it is for the Commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. **If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition.** It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law." (Emphasis added).

12 The second the third sentences of this passage were said by the majority in *Wu v Minister for Immigration & Ethnic Affairs* (1996) 185 CLR 259, at 275, to encapsulate the principles governing the "matters upon which 'satisfaction' could be reviewed" at common law, and there was no criticism of the remainder of the passage. In *Eshetu*, at para 133, Gummow J said:

"In R v Connell; Ex parte The Hetton Bellbird Collieries Ltd, Latham CJ said:

> '[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.'

The Chief Justice added:

> 'It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.'

In Foley v Padley, the passages from the judgment of Latham CJ were approved by Gibbs CJ and Brennan J as correct statements of the law. In particular, Brennan J went on to emphasise that the question for the court is not whether it would have

formed the opinion in question but whether the repository of the power could have formed the opinion reasonably and that an allegation of unreasonableness in the formation of that opinion may often prove to be no more than an impermissible attack upon the merits of the decision then made in purported exercise of the power.

…

Later, in Buck v Bavone, Gibbs J observed, in the course of construing the powers conferred upon a board established under the Potato Marketing Act 1948 (SA), that it was not uncommon for statutes to provide that a decision-maker shall or may take certain action if satisfied of the existence of certain specified matters. His Honour noted that the nature of the matters of which the authority is required to be satisfied often largely will indicate whether the decision of the authority can be effectively reviewed by the courts. His Honour continued:

> 'In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached.'

This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way.

It is here that the crucial question arises. On the one hand, where the issue concerns an alleged error of law not going to the fulfilment of a statutory precondition to the existence of jurisdiction, it is said in this Court that there is no error of law simply in making a wrong finding of fact, although the making of findings and the drawing of inferences in the absence of evidence is an error of law. Mason CJ referred to the authorities for these propositions in Australian Broadcasting Tribunal v Bond. His Honour went on to observe that the approach taken in some English authorities that findings and inferences are reviewable for error of law on the ground that they could not reasonably be made out on the evidence or reasonably be drawn from the primary facts had not so far been accepted in this Court." (Emphasis added).

> 13 As a matter of theoretical analysis, if it is enough to ground judicial reviewupon an inference, drawn from the result, that the administrator has not correctly applied several necessary legal precepts, then there is no logical reason why a similar conclusion as to a single necessary legal precept will not

also suffice. As a matter of authority, also, it seems to me clearly enough to flow, from *Avon Downs* and from what Gummow J in *Eshetu* demonstrated as to the continuing significance of *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1960) 105 CLR 208, that inferred misunderstanding of the law may be an independent ground of review apart from unreasonableness in the *Wednesbury* sense. This Court would nevertheless need to look to s 476 for power. Subsection (2) of course puts *Wednesbury* unreasonableness beyond the reach of the Court. A decision marred by inferred error of law, on the other hand, would presumably, be reviewable under s 476(1)(e). However, it seems difficult to imagine a case where the facts would support one of these grounds but not the other. If inferred error of law is an acceptable ground of review under the Act, then there is much to be said for the caution urged by counsel for the respondent that the search for such an inferred misunderstanding should not permit, as in some applications based upon reasonableness, what is in truth an invitation to merits review: *Newall v Minister for Immigration & Multicultural Affairs* [1999] FCA 1624 at paras 25 – 29 and *Zuway v Minister for Immigration & Multicultural Affairs* (1998) 160 ALR 391 at 399.

14 In any case there are difficulties in the application of such a doctrine to this case. The evidence was not "all one way". There was material which enabled an inference to be drawn, that, following changes in the treatment of and approach to Sikh activism in Punjab, the applicant did not have a political profile apt now to put him at any real risk of persecution. This, reading the Tribunal member's reasons for decision without nit-picking, is what she found. Specifically, there was evidence that "people who are not high profile militant suspects are generally not considered to be at risk in the Punjab today". There was material to render supportable the Tribunal's conclusions that "I am not satisfied on the evidence before me that the applicant has been in recent years suspected of any involvement in subversionary or terrorist activities which information from the Department of Foreign Affairs and Trade indicates could lead an ISYF member to come to the attention of the authorities", and that "there would be little interest by the authorities in [the applicant's Australian] activity".

15 However, the applicant submitted that, upon a proper understanding of it, there was nothing in the material before the Tribunal which could be called in aid of the Tribunal's conclusion that the applicant did not face a real risk of persecution as a result of the airport scenario. It was argued that the Canadian material only established that persons of high profile *and* military involvement (the senior official referred to in the evidentiary material extracted above) were likely to be arrested, but that the material did not indicate whether somebody with a high profile but *without* military involvement, such as the applicant, might face a real risk of arrest. The fact that a small number of persons who were refused refugee status in Canada were not detained did not bear directly on the case of the applicant, since it was entirely unclear whether these persons had any police profile whatsoever. For this reason, the Canadian evidence could not be said to eliminate the reality of the risk of the airport scenario put forward by the applicant. Therefore, the evidence supporting the applicant's claim that high profile dissidents may face extortion at the airport was all one way.

16 However, properly understood, there was in my view material on which the Tribunal could act as it did. That material is referred to below, in the context of considering whether the Tribunal met its obligation under s 430 adequately to give "reasons for the decision". In the result, there is no basis for inferring that the Tribunal misunderstood the legal tests it had to apply.

Whether the Tribunal failed to provide adequate reasons

17 The Tribunal's treatment of the airport scenario is set out in para 7 above. I agree that an important question of fact was involved in this conclusion. The question is whether any reason was given for the conclusion. In my opinion, both explicit and implicit reasons were given. The explicit reasons call in aid the approach sanctioned in *Ram v Minister for Immigration & Ethnic Affairs* (1995) 57 FCR 565 where it was said at 569 by Burchett J, that "extortionists are not implementing a policy: they are simply extracting money from a suitable victim". Yet, the explicit reasons did not adequately deal with the important caveat imposed upon that approach expressed in *Perampalam v Minister for Immigration & Multicultural Affairs* (1999) 84 FCR 274, applying the principle enunciated in *Paramananthan v Minister for Immigration & Multicultural Affairs* (1998) 160 ALR 24 to circumstances of extortion, to the effect that even a pragmatic instance of extortion may constitute persecution where the victim of the extortion was selected for a Convention reason. However, implicitly this was dealt with. The implicit reason is made clear by the reference to "the later Canadian information". That material tended to confirm other information that it was now only "high profile militant suspects" who are "at risk in the Punjab today". This was the reason for the assessment that the applicant, who had lain low in India since 1992 and who had, in Australia, done no more than, as an official of the ISYF, promote (and participate in) demonstrations and flag-burning, was not in that category. Hence, he was unlikely to be of interest to the authorities and targeted at the airport for more than extortion. Further, it is clear that the Tribunal member regarded extortion in this instance as harm of a lesser degree than persecution. That was a judgment of fact open to the Tribunal.

18 It was also argued that no reason was given for the equally important intermediate factual conclusion: "I am similarly unable to accept that his involvement in a demonstration in Australia could lead him to be harmed in India". The context makes it clear that "harmed" involved "harm amounting to persecution" (the word "similarly" refers to harm of that kind). Reading the reasons with due respect for the Tribunal, that is really trying to understand what the reasoning was, the essence of the reasoning is clearly enough revealed: the Tribunal member took the view that merely demonstrating in Australia was insufficient to provoke a real risk of serious harm upon the applicant's deportation back to India. That judgment is, in my opinion, at worst an intermediate conclusion which contains its own justification. There was material from which an inference of the comparative potency of potentially provocative conduct directed against the Indian authorities could be drawn. It was not necessary repeatedly to refer to all of that material.

Flag burning

19 Finally, the applicant challenged the Tribunal's finding that the potential prosecution of the applicant for his involvement in the flag burning outside the Indian High Commission would not amount to persecution. The Tribunal regarded such a possibility as being merely the enforcement of a law of general application. The applicant argued that although the law was general in that it applied, on its face, to all Indian citizens it was in its effect persecutory because it is political dissidents who might wish to burn a flag. However, this submission must fail for two reasons. First, a general law outlawing flag burning would appear, on its face, to have a perfectly legitimate purpose, namely the prevention of defacing national symbols. Second, there was no material before the Court to indicate that the law was in fact intended to achieve any other purpose and nor was there any evidence to establish that the law was, or would be, applied in a politically discriminatory fashion: in most countries mere hooligans as well as political dissidents are apt to deface public symbols, including symbols of national identity. See generally *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 240, 258 and 284, and more recently *Chen Shi Hai v Minister for Immigration& Multicultural Affairs* [2000] HCA 19.

Disposition

20 For these reasons the application is dismissed and the applicant is to pay the respondents' costs.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 9 June 2000

Counsel for the Applicant:	M Lawler
Solicitor for the Applicant:	Diane Burn & Yvonne Swift
Counsel for the Respondent:	S Gageler
Solicitor for the Respondent:	Australian Government Solicitor

Date of Hearing:	15 December 1999 & 1 February 2000
Date of Judgment:	9 June 2000