FEDERAL COURT OF AUSTRALIA

Sidhu v Holmes [2000] FCA 1653

IMMIGRATION – application for a protection visa – Full Court appeal – appeal from Refugee Review Tribunal – not appeal by way of rehearing – whether evidence "all one way".

Coulton v Holcombe (1986) 162 CLR 1 referred to

Minister for Immigration, Local Government& Ethnic Affairs v Hamsher (1992) 35 FCR 359 referred to

DARSHAN SINGH SIDHU v MARGARET HOLMES AND MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 690 OF 2000

HEEREY, MOORE & GOLDBERG JJ

28 NOVEMBER 2000

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 690 OF 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	DARSHAN SINGH SIDHU
	APPELLANT

AND:	MARGARET HOLMES FIRST RESPONDENT MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS SECOND RESPONDENT
JUDGES:	HEEREY, MOORE AND GOLDBERG JJ
DATE OF ORDER:	28 NOVEMBER 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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

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DATE:	28 NOVEMBER 2000
PLACE:	SYDNEY

REASONS FOR JUDGMENT

The Court:

1 On 28 September 1998 the Refugee Review Tribunal constituted by the first respondent ("the Tribunal") affirmed the decision of a delegate of the Minister for Immigration and Multicultural Affairs, the second respondent, refusing to grant a protection visa to the appellant pursuant to the provisions of the *Migration Act* 1958 (Cth) ("the Act"). On 28 October 1998 the appellant filed an affidavit in the High Court of Australia seeking prerogative relief under s 75(v) of the Constitution in respect of the decision of the Tribunal. On 28 April 1999 Gummow J, pursuant to s 44 of the *Judiciary Act* 1983 (Cth), remitted to the Federal Court so much of the application as was founded upon the following grounds:

"2. 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 …

3. 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.

…

4. 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 ..."

Each of the grounds was particularised in detail.

2 On 9 June 2000 Madgwick J dismissed the appellant's application.

3 The appellant appeals against the decision of Madgwick J and relies upon the following errors of law said to fall within the ground of review in s 476(1)(e) of the Act:

- his Honour failed to find that there should be inferred an error of law on the part of the Tribunal in relation to the finding that the appellant was not likely to be at risk of persecution when he arrived at the airport in India if he was deported to India;

- his Honour failed to find that there should be inferred an error of law by the Tribunal in respect of its failure to regard the appellant's prospect of prosecution for the offence of flag burning as a prospect of persecution on the ground of political opinion;

- his Honour failed to find that the Tribunal had failed to give reasons for its conclusion that it was unable to accept that the appellant's involvement in the demonstration in Australia could lead the appellant to be harmed in India.

4 Counsel for the appellant, in the course of his oral submissions, sought to make good the grounds of appeal by substantial reference to the reasoning of the Tribunal. Less attention was paid to the reasoning of Madgwick J.

5 It has been said time and again, but it bears repeating, that an appeal from a decision of a judge of the Court to the Full Court is an appeal in the strict sense of the term "appeal" and not an appeal by way of

rehearing: *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122 at 129; *White v Minister for Immigration & Multicultural Affairs* [2000] FCA 232; *H v Minister for Immigration & Multicultural Affairs* [2000] FCA 1348 per Branson and Katz JJ at [6].

6 It is also important, when entertaining an appeal, to bear in mind that in *Coulton v Holcombe* (1986) 162 CLR 1 the majority of the Court (Gibbs CJ, Wilson, Brennan and Dawson JJ) said at 7:

"It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

There is a tendency for this prescription to be overlooked when parties seek to challenge on appeal the reasoning of the trial judge who has reviewed the decision of an administrative tribunal, such as the Refugee Review Tribunal. Although it is necessary in order to analyse the reasoning of a trial judge to consider the reasoning of the Tribunal, it must not be forgotten that the primary focus on an appeal is on the reasoning of the trial judge.

7 This is an important consideration in the present case where the main thrust of the appellant's argument is that there should be inferred an error of law on the part of the Tribunal, having regard to the state of the evidence before it.

8 In a situation such as this, where the primary fact finding by the Tribunal is not challenged, and is found in the reasoning of the Tribunal, an appellate court is, no doubt, in as a good a position as the trial judge to decide the proper inferences to be drawn from that evidence. However, it is not for an appellate court to disregard the inferences drawn from the evidence by the trial judge. Not only is it appropriate to give respect and weight to the decision of the trial judge in deciding what inferences should be drawn from the evidence: *Warren v Coombes* (1979) 142 CLR 531, but such a decision should not be interfered with if the trial judge has reached a conclusion based upon competing inferences. The trial judge's decision on the appropriate inferences to be drawn will only be the subject of interference by an appellate court if the trial judge failed to draw inferences that should have been drawn on the evidence. In *Minister for Immigration, Local Government & Ethnic Affairs v Hamsher* (1992) 35 FCR 359 Beaumont and Lee JJ observed at 369:

"The court must be satisfied that the judgment of the trial judge is erroneous and it may be so satisfied if it reaches the conclusion that the trial judge failed to draw inferences that should have been drawn from the facts established by the evidence. The court is unlikely to be so satisfied if all that is shown is that the trial

judge made a choice between competing inferences, being a choice the court may not have been inclined to make but not a choice the trial judge should not have made. Where the majority judgment in Warren v Coombes (supra) (at 552-553) states that an appellate court must not shrink from giving effect to its own conclusion, it is speaking of a conclusion that the decision of the trial judge is wrong and it should be corrected."

In the present case little attention was paid to the reasoning of the trial judge, which may have been dictated by the difficult task confronting counsel for the appellant. Counsel accepted that he could not undertake a merits review or challenge the decision of the Tribunal on the grounds of *Wednesbury* unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Nevertheless he submitted that although the Tribunal identified the relevant principles of law the Court should still infer that the Tribunal made an error of law in reaching its conclusion as the evidence was "all one way" against that conclusion.

9 There were two factual issues before Madgwick J which were said by the appellant to give rise to error. These were:

- the "airport scenario";
- the flag burning incident outside the Indian High Commission in Canberra.

10 The factual background giving rise to these issues is as follows. The appellant, an Indian national of the Sikh faith, arrived in Australia on 19 February 1996. Three days later he lodged an application for a protection visa on the ground that he had a well-founded fear of persecution for reasons of religion and/or of political opinion which qualified him as a refugee within Article 1(a)(ii) of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees ("the Convention"). The Tribunal accepted that the appellant had been arrested and detained, interrogated and beaten for varying periods in 1984, 1988-1989 and 1992. The Tribunal also accepted that whilst living in Australia the appellant had taken part in demonstrations outside the Indian High Commission in Canberra and on at least one occasion an Indian flag was burned.

11 The "airport scenario" arose from the appellant's claim that there was a real risk that upon his return to India he would be identified at the airport as a dissident and would then face extortion by airport officials. If he failed to meet the extortion demands the appellant claimed he would be handed to the Punjabi police who would detain him and torture him.

12 The Tribunal:

- found that the appellant had no further contact with the authorities in the period following October 1992 until he left India in February 1996;
- found that people who were not high profile militant suspects are generally not considered to be at risk in the Punjab today;
- concluded that the appellant was not of continuing interest to the authorities because of his activities in India or because he had been arrested and detained in 1984, 1988-1989 and 1992;
- accepted that the appellant was Assistant General Secretary of the International Sikh Youth Federation 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;
- accepted that the appellant had taken an active part in public demonstrations and rallies, including outside the Indian High Commission in Canberra where an Indian flag was burned, but found it highly improbable that this could lead him to face any harm amounting to persecution in India.

13 Madgwick J analysed the manner in which the Tribunal addressed the appellant's fear of persecution arising from the airport scenario and noted, in particular, information from the Department of Foreign Affairs and Trade and from the Documentation, Information and Research Branch of the Immigration and Refugee Board in Ottawa, Canada.

14 Madgwick J then addressed the submission that although the Tribunal cited and purported to apply the correct test as to whether the appellant's claimed fear of persecution arising from the airport scenario was warranted, it should be inferred that the Tribunal had failed to apply the proper test. This is because the evidence before the Tribunal had been "all one way" and because there was no evidence to support the conclusion that the appellant's fear of persecution was well-founded.

15 Madgwick J referred to the observations of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 and of Gummow J in *Minister for Immigration& Multicultural Affairs v Eshetu* (1999) 162 ALR 577 at 608-609 upon which the appellant relied to support the proposition that in certain circumstances the Court should infer an error of law.

16 Madgwick J then reasoned:

"As a matter of theoretical analysis, if it is enough to ground judicial review upon 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."

17 However, Madgwick J found difficulties in the application of the doctrine to the evidence before him. His Honour said at par 14:

"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."

His Honour noted that there was evidence before the Tribunal from which it was open to draw this inference, namely the information from the Department of Foreign Affairs and Trade and from the Information and Refugee Board in Ottawa, Canada.

18 The appellant submitted that this material was not probative of the finding against the appellant as it did not deal with his particular situation, namely a person who would be called up on the police computer, because of a flag burning incident, at the time of arrival at an airport in India. It was said that the Canadian document did not say anything at all about this situation so that it was not relevant to the issue facing the appellant.

19 Madgwick J concluded that there was material upon which the Tribunal could make the findings it did and that it provided adequate reasons both explicitly and implicitly for reaching the conclusion it did in relation to the airport scenario.

20 We do not consider that Madgwick J erred in the manner in which he considered the Tribunal's reasoning. Although there was material before the Tribunal which suggested that there was a real chance that the appellant might be persecuted in the manner contemplated by the "airport scenario", his

Honour did not err in concluding that the evidence was not "all one way". There was evidence from which it was open to the Tribunal to conclude that it was now only high profile militant suspects who are at risk in the Punjab today. This evidence was found in the Canadian document and was in terms that:

"… people who are not high profile militant suspects are not at risk in the Punjab today".

21 This evidence was the subject of elaboration in the Canadian document:

"… officials from the Canadian High Commission in New Delhi 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)."

The Canadian document is the report of an interview on 23 January 1997 with four specialists in Indian affairs, an immigration official at the Canadian High Commission in New Delhi, a Canadian Security Intelligence Service officer familiar with the situation of militants in the Punjab, an academic from Columbia University in New York who has written extensively on Sikhism and the Executive Director of the South Asia Human Rights Documentation Centre. The passage just quoted comes from a section of the document headed "Groups at Risk" in which the interviewers assert, amongst other things, that only people who are "high profile militant suspects" are now at risk in the Punjab. Such persons might include "a perceived leader of a militant organization or someone suspected of a terrorist attack", but not someone who simply held a pro-Khalistani opinion. There is also reference to lists of habitual offenders whose names are kept on a centralised computer network and it is said that "the Indian security network remains loose, but can become effective when the police want it to be".

22 Madgwick J was in our view plainly correct in holding that this was material on which the Tribunal could act in reaching the conclusion it did. Moreover the quoted passage, read in context, is obviously speaking of Indian nationals who have come under police notice and who are deported back to India. The meaning conveyed by the Canadian document is that such returnees are not likely to be persecuted unless they are high profile militant suspects.

23 Madgwick J was right to reject the argument that the experience of the eight or ten Canadian deportees could not be considered as probative material by the Tribunal unless their circumstances precisely mirrored those of the appellant.

24 Madgwick J's conclusion in relation to the flag burning incident discloses no error of law in the manner in which he considered the Tribunal's reasoning. The appellant submitted that the Indian flag burning legislation was persecutory because it was political dissidents who might wish to burn a flag. However, as Madgwick J correctly pointed out, a general law outlawing flag burning had a perfectly legitimate purpose, namely preventing defacing national symbols and there was no material before the Court to indicate that the law was applied in a politically discriminatory fashion. Although it was submitted that a political dissident burning a flag might be subjected to a more severe penalty, there was no evidence on this point before the Tribunal.

25 Associated with the flag burning issue was the appellant's criticism of the following passage in the Tribunal's reasoning:

"I note that burning the Indian flag is a crime under Indian law but I consider it highly improbable that the applicant could face harm amounting to persecution upon return to India because he has taken part in this action in Australia and I am similarly unable to accept that his involvement in a demonstration in Australia could lead him to be harmed in India."

The appellant submitted that no reasons were given for this latter conclusion. Madgwick J found that the context of the last finding in this passage made it clear that "harm" involved "harm amounting to persecution". In our view, his Honour was correct in finding that the Tribunal found:

"… 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 worse 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."

26 The orders sought by the notice of appeal are that the appeal be allowed, that the orders made by Madgwick J on 9 June 2000 be set aside, that the decision of the Tribunal under review be set aside and that consequential orders be made. These orders fail to recognise that only part of the matter before the High Court was remitted to the Federal Court for determination. Although the order made by Madgwick J was that "the application is dismissed" with a consequential order as to costs, that order must be understood against the background that it was only part of the application for relief under s 75(v) of the *Constitution* which was remitted by

Gummow J. Accordingly the order made by Madgwick J was an order dismissing so much of that application as had been remitted to the Federal Court. There still remains the balance of the matter presently before the High Court. Insofar as we are dismissing the appeal from the order made by Madgwick J, we are only dealing with that part of the matter remitted to the Federal Court and we are not touching upon the balance of the matter pending in the High Court.

27 The appeal will be dismissed with costs.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Heerey, Moore and Goldberg.

Associate:

Dated: 28 November 2000

Counsel for the Appellant:	M J Lawler
Solicitor for the Appellant:	Dianne Burn & Yvonne Swift
Counsel for the Second Respondent:	S J Gageler
Solicitor for the Second Respondent:	Australian Government Solicitor
Date of Hearing:	6 November 2000
Date of Judgment:	28 November 2000