FEDERAL COURT OF AUSTRALIA

Tesfamichael v Minister for Immigration & Multicultural Affairs [1999] FCA 1661

MIGRATION – application for review under s 476(1)(e) of the *Migration Act 1958* (Cth) – Ethiopian citizen feared expulsion to Eritrea by reason of Eritrean ethnicity – Tribunal found 'reasonable to believe' that cease-fire may occur and expulsion policy terminate – whether proper application of "real chance" test – whether Tribunal should have asked: 'What if I am wrong?'

MIGRATION – application for review under s 476(1)(g) – finding that only Ethiopians in a mixed Ethiopian/Eritrean marriage may be persecuted in Ethiopia – finding that applicant as an Eritrean would be perceived as Ethiopian by Ethiopians – finding that there was an imminent cease-fire in Ethiopian/Eritrean conflict – whether particular findings of fact which were links in chain of reasoning to conclude there was no real chance of persecution – whether the particular facts did not exist.

MIGRATION – application for review under s 476(1)(a) – requirement to give reasons under s 430 – whether the Tribunal failed to give reasons for not taking account of particular significant evidence supporting opposite finding – whether Tribunal obliged to give reasons for preferring certain cogent evidence over other cogent evidence.

MIGRATION –meaning of persecution under the Refugees' Convention – Ethiopian of Eritrean ethnicity – whether the real chance of expulsion to Eritrea may constitute persecution under the Convention.

MIGRATION – whether the Tribunal failed to determine whether the applicant had a subjective fear of being persecuted if he returned.

Migration Act 1958 (Cth)ss 414(1), 425, 426, 427, 428, 430, 476(1)(a), 476(1)(g), 476(4)(a) and 476(4)(b)

Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5(1)(h)

Administrative Appeals Tribunal Act 1975 (Cth) s 43(2B)

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 considered

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 considered

Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212 applied

Ratnayake v Minister for Immigration and Ethnic Affairs (1997) 74 FCR 542 applied

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 applied

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 applied

Muralidharan v Minister for Immigration and Ethnic Affairs (1996) 62 FCR 602 applied

Han v Minister for Immigration and Multicultural Affairs [1999] FCA 376 applied

Voitenko v Minister for Immigration and Multicultural Affairs (Moore J, 27 August 1998, unreported) applied

Singh v Minister for Immigration and Multicultural Affairs [1999] FCA 1234 applied

Ahmed v Minister for Immigration and Multicultural Affairs [1999] FCA 811 followed

Borsa v Minister for Immigration and Multicultural Affairs [1999] FCA 348 considered

Baljit Kaur Singh v Minister for Immigration and Multicultural Affairs [1999] FCA 1126 considered

Yue v Minister for Immigration and Multicultural Affairs [1999] FCA 1404 considered

Thevendram v Minister for Immigration and Multicultural Affairs [1999] FCA 182 applied

Calado v Minister for Immigration and Multicultural Affairs (Full Court, 2 December 1998, unreported) applied

Buljeta v Minister for Immigration and Multicultural Affairs (Katz J, 4 December 1998, unreported) applied

Logenthiran v Minister for Immigration and Multicultural Affairs (Full Court, 21 December 1998, unreported) applied

ZEROM GEBREMICHAEL TESFAMICHAEL v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 588 OF 1999

MANSFIELD J

2 DECEMBER 1999

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 588 OF 1999

BETWEEN:	ZEROM GEBREMICHAEL TESFAMICHAEL Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	MANSFIELD J

DATE OF ORDER:	2 DECEMBER 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. Application allowed.

2. Applicant's claim for review to the Refugee Review Tribunal remitted to the Refugee Review Tribunal, differently constituted, for rehearing.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 588 OF 1999

BETWEEN:	ZEROM GEBREMICHAEL TESFAMICHAEL Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE:	MANSFIELD J
DATE:	2 DECEMBER 1999
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 The applicant is an Ethiopian citizen. He was born on 19 December 1940. He is married, and has eleven children, one of whom is an Australian citizen.

2 On 5 February 1998, he obtained a valid Ethiopian passport, and on 10 May 1998 left Ethiopia legally to visit Australia to see his daughter. He arrived in Australia on 13 May 1998.

3 On 7 August 1998 he applied for a protection visa under the *Migration Act 1958* (Cth) ("the Act"). It was necessary for him to satisfy the respondent that he was a person to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol ("the Convention"). I use those terms as they are described in the Act. Article 1A(2) of the Convention defines a refugee as any person who:

> *"owing to 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; …"*

4 The application for a protection visa was refused by a delegate of the respondent on 29 January 1999. The applicant applied for review of that decision to the Refugee Review Tribunal ("the Tribunal") on 11 February 1999. The Tribunal conducted a hearing on 23 April 1999. On 25 May 1999 the Tribunal decided not to grant the protection visa and affirmed the decision of the delegate of the respondent.

5 On 17 June 1999 this application for review was instituted, inviting review of the decision of the Tribunal on grounds identified in the application and enlarged in written and oral submissions made on behalf of the applicant. Those grounds are as follows:

(1) Procedures required by the Act to be observed in connection with the making of the decision were not observed: s 476(1)(a), in particular in that the Tribunal failed to prepare and provide a written statement setting out the reasons for its decision, setting out its findings on all material questions of fact, and referring to the evidence or other material on which those findings were based, contrary to s 430 of the Act.

(2) The decision of the Tribunal involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the Tribunal: s 476(1)(e). This ground involved two separate and alternate propositions. The first was that the Tribunal erred in its application of s 430 for the same reasons as apply in respect of ground (1) above. The second was that the Tribunal erred in the application of the test to determine whether or not the applicant was a refugee as prescribed by *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (*"Chan"*).

(3) There was no evidence or other material to justify the making of the decision in that the Tribunal based the decision on the existence of two particular facts which did not exist: s 476(1)(g) and s 476(4)(b). Those particular facts were

(a) that the applicant was not in a mixed Ethiopian/Eritrean marriage as, in effect, he would be perceived by other Ethiopians to be Ethiopian and his wife was Ethiopian by birth, and

(b) that there was an imminent cease-fire in the conflict between Ethiopia and Eritrea.

The applicant's claims

6 The applicant was born in Eritrea. Eritrea had been under Italian rule from about the end of the nineteenth century. Following the second World War, in 1952 the United Nations established an Eritrean-Ethiopian Federation. In 1962, Haile Selassi unilaterally abolished the federation and imposed his Ethiopian imperial rule throughout Eritrea. From that time, there was a strong movement towards Eritrean independence, including an armed struggle to that end waged by the Eritrean Liberation Front. The struggle for independence lasted for many years. In 1993 Eritrea gained its formal independence from Ethiopia. That occurred after a series of military defeats of the Ethiopian army up to 1991 by the Eritrean Peoples' Liberation Front, which then controlled effectively all of Eritrea. There was, however, persistent animosity between the two countries.

7 So much is a matter of history.

8 The applicant is an Ethiopian national, although he is of Eritrean ethnicity. He is a supporter of the integration of Eritrea into Ethiopia. He is therefore opposed to the aims of the Eritrean liberation movement. Prior to his departure to Australia his address was Addis Ababa in Ethiopia.

9 The applicant served in the Ethiopian army between 1960 and 1994. He reached the rank of colonel. In 1973–1978 and again in 1980 he served two tours of duty in Eritrea as an officer of the Ethiopian military seeking to suppress Eritrean rebel groups fighting for a separate Eritrea. He was known by those groups to be of Eritrean ethnicity, and they sought to solicit him to leave the military and to support them. He refused. Apart from fulfilling his military duty, he remained a steadfast supporter of the integration of Ethiopia and Eritrea.

10 In 1991, a coup occurred in Ethiopia when the regime of Dr Mengistu was overthrown. The applicant, along with all other high ranking members of the Ethiopian defence forces, were arrested and imprisoned for some two years or more. Then, in 1994, those officers who were perceived as non-political members of the military were released. The applicant was released at that time. Between 1994 and 1999, the applicant and his family (other than the children who had left to live overseas) remained in Ethiopia. There was a time after 1994 when he was not permitted to leave Ethiopia, but recently that restriction became relaxed and he obtained his passport. He was able to leave Ethiopia legally.

11 On 6 May 1998, after a period of simmering hostility or animosity for some months, conflict again broke out between Ethiopia and Eritrea.

12 The applicant's claim is that, having arrived in Australia, he shortly afterwards learnt of that conflict and, after a time, he learnt that Ethiopians of Eritrean ethnicity were being sent back to Eritrea by Ethiopia. He fears that, if he returns to Ethiopia, that will happen to him. He also fears that, because of his previous military involvement fighting what were then the rebels in Eritrea, upon his return to Eritrea he will be imprisoned and suffer significant personal detriment, if not be killed.

13 The factual issue which he raised seems to be a simple one, namely if the applicant returns to Ethiopia, is there a real chance that he will be expelled by Ethiopia to Eritrea because of his Eritrean ethnicity (a Convention reason), notwithstanding his Ethiopian nationality? He also claimed that if he were to be expelled to Eritrea, he would be persecuted by those now in control in Eritrea for a Convention reason, in practical terms because of his political beliefs that Eritrea should not be separate from Ethiopia or because of his past expression of those beliefs and his conduct as a member of the Ethiopian military during the two tours of duty in Eritrea when he fought for the Ethiopian army opposing Eritrean independence. It is not necessary, in my judgment, to address that latter issue.

The Tribunal's reasons

14 The Tribunal referred at some length both to the applicant's handwritten statement in his original application for a protection visa, and to his subsequent statutory declaration signed on 6 October 1998. It also referred to other material which he presented, and to evidence which he gave at the hearing before the Tribunal. In particular, it referred to a number of matters which the Tribunal drew to his attention in the course of his evidence

which, it was suggested, indicated that his version of certain events was implausible or which indicated that the risk of which he complained was unlikely to occur. One such event was the prospect that the present conflict between Ethiopia and Eritrea is about to die down.

15 It then turned to its findings and reasons.

16 The Tribunal obviously took an adverse view of the applicant's credibility, expressing the view that:

> *"Some of his testimony and some of his claims were simply not plausible or were exaggerated. Some of his key claims were at odds with the independent evidence. There were a number of major contradictions between his testimony before the Tribunal and his previous statements, which were not explained to its satisfaction. In these circumstances, for the following reasons the Tribunal finds that his claims are not credible and does not accept them."*

17 It said that it had considered only the more serious inconsistencies and difficulties with the applicant's evidence. There is then an extensive section of the Tribunal's reasons endeavouring to explain those inconsistencies and difficulties. They were as follows.

(a) It was implausible that if the Ethiopian authorities were interested in him and wanted to imprison and deport him to Eritrea, that he would have been allowed legally to leave Ethiopia. The war between Ethiopia and Eritrea broke out on 6 May 1998, four days before his departure. He is alleged to have stated in his application that the war broke out eleven days after his arrival in Australia, and that this was "a major and substantive contradiction", especially as those two dates "originated in August 1998" that is in recent times, and because he "must have been very attentive to matters of detail, including dates" because of his having been a high level officer in the Ethiopian army. In his oral evidence to the Tribunal, he said that the war really happened after his arrival in Australia, although there was some conflict before that time, and that he really only heard about the conflict after his arrival in Australia.

(b) It is recorded in the original application that the applicant had travelled to the USSR and to the USA on occasions for military training. His statutory declaration was that he had never travelled to those countries, but had instruction from officers of those countries in Ethiopia as part of military training. He said the original claim written on his behalf was a mistake. He said that he had simply said that those persons had been his instructors.

(c) In the original application, the applicant did not mention that he was imprisoned between 1991 and 1994. The Tribunal found as a fact that he had been so imprisoned. It therefore regarded it as "implausible that the applicant or his assistant would not regard it as an important claim to set out."

(d) It was implausible that the applicant's wife, still in Ethiopia, had been constantly visited by the security authorities since he left the country. It found that that evidence was an exaggeration, fabricated to create a refugee profile. At the hearing, the applicant had said those visits had commenced only six months after his departure, but the Tribunal found it implausible that those authorities would have waited for six months before staring to harass his wife, especially since the war broke out on 6 May 1998 and "according to his evidence the authorities were interested in him". The applicant said also that his wife had also been threatened with deportation because of her marriage to the applicant, and the fact that the children are half Eritrean. The Tribunal found that implausible, because there was no credible evidence that any Ethiopian (his wife was not Eritrean) had been deported since the outbreak of war with Eritrea. The applicant had said to the Tribunal that the Ethiopian authorities were sending everybody relating to Eritrea back, but it found that that statement was "fabricated by the applicant in order to create a refugee profile". Independent evidence did indicate that some Eritreans had been deported to Ethiopia, but the Tribunal said:

> *"… there is no credible evidence that **all** ethnic Eritreans or Eritreans in Ethiopia have been deported."* (The Tribunal's emphasis).

18 The Tribunal concluded that part of its reasons as follows:

> *"Taken as a whole, in the light of the implausibility of a number of the key aspects of the applicant's claims as well as a number of major and substantive contradictions, and in light of the fact that a number of the applicant's claims are at odds with the above cited independent evidence or are exaggerations, the Tribunal can only come to the conclusion that the applicant's testimony is not credible and therefore that he is not a credible witness. Accordingly, since the Tribunal finds that the applicant's claims are not credible, there is no evidence on which it can be satisfied that he has a well-founded fear of persecution due to political opinion or race, or for any other Convention reason."*

19 The Tribunal also approached the claim in an alternative way, on the assumption that its conclusion about the applicant's credibility was wrong. It found that he did not face a well-founded fear of persecution for a Convention reason in any event. He was able to leave Ethiopia legally, at a time when the authorities were obviously not interested in him even though the war with Eritrea had then broken out. The authorities waited for more than six months before beginning to visit his wife. From his release in 1994 until his departure from Ethiopia, he effectively had no harassment or persecution at the hands of the Ethiopian authorities. His imprisonment in 1991 was not for a Convention reason.

20 All of that is correct. It is consistent with his case.

21 The Tribunal then referred to independent evidence of November 1998 that a small minority of people in mixed Ethiopian/Eritrean marriages may have some claims of fear of persecution due to race. It found:

> *"… the applicant was not in a mixed Ethiopian/Eritrean marriage since he held Ethiopian citizenship since he was a small child, was married to an Ethiopian citizen at birth and his children are Ethiopian. As a result, the applicant had all the trappings and characteristics of Ethiopian citizenship, and he would be perceived to be Ethiopian by other Ethiopians, especially since he speaks fluent Amharic, one of the main Ethiopian languages, as was evidenced during the hearing before the Tribunal."*

It found that his chance of persecution on this ground was remote in the reasonably foreseeable future, notwithstanding independent evidence (which it relied on) that Ethiopian nationals of Eritrean ethnicity are selectively expelled from Ethiopia. It observed that the applicant is a retired senior military officer, was not working in a "security sensitive" position targeted by Ethiopian authorities, and that there is no evidence that until his departure he was not "living peacefully" in Ethiopia. Those army officers arrested in 1991 and not released in 1994 because they were considered "political" had been released in 1998. Those matters led the Tribunal to conclude that the chance that the applicant would be deported from Ethiopia to Eritrea in the reasonably foreseeable future was remote.

22 The Tribunal gave one further reason why, even on the assumption that its assessment of the applicant's credibility was wrong, it considered that his claim must fail. It referred to a report of 14 April 1999 that peace may be forthcoming in the Ethiopian/Eritrean conflict. It said:

> *"On the basis of this CNN report, the fact that the war has now been dragging on for over a year, the OAU has arranged for a peace agreement between the two countries, international or independent peacekeepers might be sent to Ethiopia and a cease-fire has been seriously considered by both sides for some months, the Tribunal finds that a cease-fire is imminent and possible in the reasonably foreseeable future. If such a cease-fire were declared it is reasonable to believe that the Ethiopian authorities would no longer harass or expel ethnic Eritreans, since such expulsions only began after the outbreak of the war between the two countries, and in that context the applicant's chance of persecution would be remote."*

Consideration of contentions

23 In the first instance, it is convenient to review the Tribunal's reasons upon the basis that its rejection of the applicant's "claims" was correct. I express "claims" in that way as it is not clear what the Tribunal did not accept. It certainly did not reject all of his claims, despite that general assessment of his credibility. It has made certain findings about his position which are based on his evidence and the other material before it.

24 The Tribunal found that the applicant is an Ethiopian citizen. It found he was an ethnic Eritrean. It clearly accepted that he left Ethiopia legally, and on a validly issued passport. It found that he was not of interest to the authorities when he left Ethiopia. It accepted that he was a high level officer in the Ethiopian army for over three decades, and had fought against Eritrea in the war of independence. It also clearly accepted that the applicant had been imprisoned for a lengthy period following the downfall of the Mengistee regime in 1991. (I interpose that the Tribunal's assessment that this was "an important claim to set out" misconceives the nature of the applicant's claim. It was not that that imprisonment was in any way related to the fear which he asserted. His claim was as a refugee sur place, that is that soon after his arrival in Australia he learnt that following the resumption of hostilities between Ethiopia and Eritrea, Ethiopia was expelling those of Eritrean ethnicity.)

25 The Tribunal accepted that another person had helped the applicant complete the application for a protection visa, and that that person had some difficulties in the English language.

26 Even merely taking the findings that the Tribunal accepted, namely that the applicant is an Ethiopian national of Eritrean ethnicity, in my judgment the applicant must succeed. The fact that he was able to live in Ethiopia peacefully up to May 1998, and to leave Ethiopia legally, does not affect the claim he made. It was for the Tribunal to determine whether he had a well-founded fear of persecution by the Ethiopian authorities at the time of his application, and at the time of the determination of his application, by reason of his Eritrean ethnicity. He claimed that the persecution would be his expulsion to Eritrea, and additionally the harm he would then suffer in Eritrea.

27 The Tribunal noted independent evidence in a November 1998 Country Information Service ("CIS") Report that

> *"a small minority of people in mixed Ethiopian/Eritrean marriages may have some claims of fear of persecution due to race"*

and it found (in the passage quoted in par 21 above) that he would be perceived as Ethiopian by Ethiopians in any event. It also found (as noted in the passage quoted in par 22 above) that, due to the prospects of a cease-fire, "it is reasonable to believe" that ethnic Eritreans such as the applicant being persecuted by expulsion would no longer occur, and "in that context the applicant's chance of persecution was remote."

28 The CIS Report referred to has been misunderstood by the Tribunal. The relevant part of that document reads:

> *"There have been enquiries from Eritreans expelled from Ethiopia claiming to be refugees. In the main, these people have no claims. While they may have been mistreated and summarily expelled from Ethiopia, they are free to return to Eritrea, and will face no persecution there. However, a small minority of people (eg. people in mixed Ethiopian/Eritrean marriages) may have some claims.*

29 The passage refers to persecution in Eritrea of Eritreans who have been expelled from Ethiopia. It does not provide evidence that only a small minority of Ethiopian citizens of Eritrean ethnicity, and being those in mixed Ethiopian/Eritrean marriages, are at risk of expulsion from Ethiopia. It does not provide evidence to support the Tribunal's finding. Earlier in that document, it touches upon expulsions:

> *"Both countries are rounding up and expelling nationals of the other. While the policy of expelling Eritreans in sensitive positions in Ethiopia is understandable and the number expelled as a proportion of the total Eritrean population small, the methods employed by the Ethiopian authorities have been unnecessarily harsh."*

30 That passage does not directly refer to Ethiopian nationals of Eritrean ethnicity. However, the other country material before the Tribunal touched on that topic. Some of it was provided by the applicant, but it is of the same general character as that to which the Tribunal referred. It was as follows:

- An Ethiopian Travel Warning of 29 July 1998 referred to the United States State Department recording that American citizens of Eritrean origin, even those with valid Ethiopian visas, have been detained and deported to Eritrea, and it referred to Ethiopia's detention and deportation of people of Eritrean origin.

- A CNN Internet Report dated 2 August 1998 reported of claims that Ethiopian officials are detaining and deporting Eritreans, and of expelling thousands of Eritreans.

- Human Rights Watch Report on Ethiopia, published 6 December 1998, reports

> *"Compelling evidence pointed to a deliberate campaign by the Ethiopian authorities to expel Eritreans and Ethiopians of Eritrean origin to Eritrea. By late October, an estimated thirty thousand, most of them Ethiopian citizens who had not taken up Eritrean nationality in the aftermath of Eritrea's 1991 secession from Ethiopia, were deported after experiencing systematic denial of their human rights. The campaign swiftly degenerated from selective targeting to indiscriminate deportations. A government "policy" statement on June 11 said the "550,000 Eritreans residing in Ethiopia" could continue to live and work peacefully there. However, as a "precautionary measure," the statement ordered members of Eritrean political and community organizations to leave the country on account of their suspected support of the Eritrean war effort, and gave a mandatory leave of absence of one month to Eritreans occupying "sensitive" jobs. While authorities initially suggested an option of voluntary departure for the targeted categories, they later began rounding*

up people on the sole basis of their being Eritrean or of Eritrean extraction, and apparently without making an effort to distinguish between the two categories. Not all who fell in the dragnet were deported. Those of military age were sent to detention camps where an unknown number remained held by late October without charge or trial. Others were trucked, after brief detentions, to remote border posts and ordered to cross into Eritrea on foot. Those detained and expelled included many elderly retired citizens of Ethiopia, mainly businessmen who had lived most of their lives and raised their children in other provinces of Ethiopia while Eritrea fought for its independence. The government ordered the freezing of their assets and revoked their business licenses, stripping them and their families of their livelihood. Many families were separated during the deportations from underage children who were not allowed to leave with them, or, in a few cases, from children who were deported unaccompanied."

- Reuters report of 4 March 1999 reported that a particular person of Ethiopian nationality and Eritrean ethnicity had been expelled to Eritrea, as an example of "more than 50,000 people expelled by Ethiopia". The report noted

  "Ethiopia says it has expelled only Eritreans with links to the government but dozens of deportees told Reuters stories of how they were expelled just because of Eritrean ethnicity."

- Amnesty International Report, Ethiopia, 29 January 1999 reported

  "Amnesty International representatives returning from investigations in Ethiopia and Eritrea warned today that forced mass deportation now threatens everyone of Eritrean origin in Ethiopia, causing untold suffering to thousands of families every week.

  Last week in Eritrea, Amnesty International's representatives witnessed the arrival of some 1,280 women, men and children of Eritrean origin who had been rounded up and deported by the Ethiopian authorities. Most of those Amnesty International spoke to either had Ethiopian passports, or had been born or spent their entire working lives there, and considered themselves Ethiopians.

  Ethiopia's policy of deporting people of Eritrean origin after war between the two countries broke out in May 1998 has now developed into a systematic, country-wide operation to arrest and deport anyone of full or part Eritrean descent. Fifty-two thousand Eritreans have been arbitrarily deported from Ethiopia over the last seven months, 6,300 so far in January 1999.

  …

Deportees have had to abandon their homes, possessions, businesses and other property with no guarantee of ever recovering them. Individuals who have protested have been threatened or beaten. The deportees were arbitrarily stripped of their Ethiopian citizenship without any warning, legal process or right of appeal."

Significantly, also, the country information provided soon after hostilities broke out on 6 May 1998 shows that the Ethiopian policy of deporting Eritreans did not commence until some time later. That is consistent with the applicant's claim. It does not support one major reason given by the Tribunal for rejecting the applicant's claims on the ground of a lack of credibility.

- The San Diego Union-Tribune article of 14 June 1998 (which the Tribunal identified as a source it relied upon to determine when hostilities broke out) reported that the expulsion policy, then selective, commenced on 12 June 1998. It recorded claims by Eritrea, but disputed by Ethiopia, that the expulsions were generalised.

- Agence France Presse report of 13 June 1998 also indicated that a "new security crackdown" by Ethiopia against Eritreans in Ethiopia had only just begun, and was initially targeted at Eritreans who had received military training.

- Amnesty International Report on Ethiopia referred to above also reported:

  "The deportations of Eritreans from Ethiopia began on 12 June, one month after war broke out in May 1998 between the former close allies who fought together as guerrilla movements to overthrow the Dergue government in Ethiopia in 1991, when Eritrea became a separate independent state. What began as a border conflict led to some ground fighting, then air attacks by both sides, and occasional artillery firing along the border."

31 For the sake of completeness, I note also that an undated CIS response to the Tribunal, to which it also referred in its reasons, referred to Ethiopia having deported Eritreans for security reasons, including in some cases after suffering detention and confiscation of property. It suggested the expulsions were selective. It indicated that more than 23,000 Eritreans had been expelled, but that there was a much larger number then still in Ethiopia. It referred to both the Agence France Presse and the San Diego Union-Tribune articles as sources. It does not suggest, as the Tribunal seems to infer, that it is only those Eritreans in "security sensitive" positions in Ethiopia who are being targeted.

32 The Tribunal also referred to a Department of Foreign Affairs and Trade report of 11 March 1999 that "[a]n Ethiopian who returns to the country as a failed refugee applicant is unlikely to be of any interest to the Ethiopian authorities." It tied that to a report of the release of the remaining high ranking military officers in the former regime's army, as together somehow leading to

the conclusion that the chance of the applicant being persecuted upon his return to Ethiopia is remote.

33 That report did not concern ethnic Eritreans living in, and nationals of, Ethiopia. It concerned another Ethiopian ethnic group. The applicant did not assert that the fact of a failed refugee application might lead to his persecution. Nor does the release of those army officers relate in any way to the applicant's claim. There is nothing to indicate that any of those persons were of Eritrean ethnicity.

34 Upon that review of the material before the Tribunal, in my judgment the Tribunal's composite decision that the applicant did not have a real chance of persecution by Ethiopia despite his Eritrean ethnicity was based upon two particular findings of fact by the Tribunal upon which there was no evidence or other material to justify the making of the decision: s 476(1)(g). Section 476(1)(g) is informed and limited by s 476(4). I have had regard to decisions about the proper scope and operation of those provisions, in particular *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 327 and *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 (each concerning the analogue in s 5(1)(h) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Goldberg J in *Ratnayake v Minister for Immigration and Ethnic Affairs* (1997) 74 FCR 542 stressed that those provisions do not provide any warrant for a review of the Tribunal's decision on the merits. I am mindful of that stricture.

35 The Tribunal's conclusion was based upon the existence of two particular facts, namely

- a small minority of people in mixed Ethiopian/Eritrean marriages may have some claims of fear of persecution in Ethiopia due to race, as a finding of the extent of such persecution, and
- the applicant would be perceived to be Ethiopian by other Ethiopians.

36 In my judgment neither of those particular facts existed: s 476(4)(b). I have set out above the material before the Tribunal. I have not referred to the applicant's own evidence. All that material is one way, and could only lead to findings of fact contrary to those two findings. It does not demonstrate that only a small minority of Ethiopians of mixed Ethiopian/Eritrean marriages are vulnerable to persecution in Ethiopia. The material apparently relied on by the Tribunal for that finding was misread by it; it does not touch that finding. As to the second of those two matters, all the material shows that there is identification of Ethiopians of Eritrean ethnicity, or some of them. There is nothing upon which an opposite conclusion could have been reached. I have not taken account of the fact that the applicant's Ethiopian passport identifies his birthplace as Eritra in Eritrea. That document, however, also contradicts the finding that the applicant would be perceived as Ethiopian.

37 If it were necessary to do so (and subject to consideration of the Tribunal's independent reason for concluding that the applicant does not have

a real chance of being deported to Eritrea if he is returned to Ethiopia because Ethiopian policy has changed), I would also conclude that the Tribunal's finding that the prospect of the applicant being deported to Eritrea was remote was also one upon which there was no evidence or other material from which the Tribunal could reasonably be satisfied that that matter was established: s 476(1)(g) and (4)(a). It was necessary for the Tribunal to reach its decision only if it were established that there was no real chance of him being persecuted by Ethiopia if he were to return to Ethiopia. The material referred to, and available to the Tribunal, in my judgment is incapable of leading the Tribunal to a state of reasonable satisfaction on that matter. I have treated the word "established" in a neutral way, that is as reflecting the Tribunal's obligation to be satisfied that the applicant is a person to whom Australia owes protection obligations under the Convention upon the whole of the material before it and without there being any particular onus of proof.

38 In fact, the Tribunal has expressed itself as positively finding that no real chance of persecution existed if the applicant were returned to Ethiopia.

39 The Tribunal gave an independent reason for that conclusion, namely that the Ethiopian policy of expelling ethnic Eritreans would soon no longer exist. Its reasons are reflected in the passage set out in par 22 above.

40 In my judgment, that conclusion is also in error. It does not reflect the proper application of the "real chance" test as explained in *Chan* in relation to the requirement for a well-founded fear of persecution: see per Mason CJ at 389, Dawson J at 397-398, Toohey J at 407, Gaudron J at 412-413, and McHugh J at 429. In expressing my conclusion in that way, I have borne in mind the reasons of the High Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-573 (*"Guo"*). In my view, the Tribunal has not asked whether there is a "real substantial basis" for the fear of persecution, having regard to the prospect of a cease-fire and a change of policy. The evidence need not show that persecution is more likely than not to eventuate.

41 The Tribunal found that a "cease-fire is imminent and possible in the reasonably foreseeable future". The expressions "imminent" and "possible in the reasonably foreseeable future" are contradictory. Be that as it may, the Tribunal then said that if such a cease-fire were declared, it is "reasonable to believe" that any Ethiopian policy or practice of expelling ethnic Eritreans would not continue, and "in that context the applicant's chance of persecution would be remote".

42 In my judgment, putting aside the contradiction in the finding about timing of any cease-fire, the Tribunal has erred in determining that the chance of persecution by expulsion would be remote from a finding that "it is reasonable to believe" that the expulsion policy or practice would change. I am mindful of the fact that I should not construe the Tribunal's reasons over critically: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (*"Wu"*). The error is perhaps an illustration of the failure to ask "what if I am wrong?" as explained by Kirby J in *Wu* at 293. His Honour said:

"… the decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material. Evaluation of chance, as required by Chan, cannot be reduced to scientific persecution".

43 The Tribunal has reasoned from a finding that "a cease fire is imminent and possible in the reasonably foreseeable future" to the finding that "**If** (my emphasis) such a cease fire were declared, it is reasonable to believe" that the expulsion of ethnic Eritreans would no longer be maintained. It is noteworthy that the Tribunal's latter observation is expressed only as a reasonable belief rather than an affirmative finding. There is, on one view of its reasons, a possible cease-fire and so a possible change of policy regarding expulsion. To conclude from such observations (ie. "in that context") that the applicant's chance of persecution would be remote is to fail to address the question of whether the fear of persecution is well-founded, as directed by the High Court in *Chan* and *Guo*.

44 It is not necessary, in the light of that conclusion, to address in detail the argument that the Tribunal's finding that "a cease-fire is imminent and possible in the reasonably foreseeable future" is one which reflects compliance with the procedures required by s 430 of the Act: s 476(1)(a). I shall therefore only briefly state my reasons for decision on that question. Decisions of this Court concerning s 430 and its predecessor s 166E(1) indicate that the failure to comply with the statutory obligation imposed by s 430 can constitute a failure to observe a procedure that is required by the Act to be observed in connection with the making of a decision in *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 602, and recently *Han v Minister for Immigration and Multicultural Affairs* [1999] FCA 376 and *Voitenko v Minister for Immigration and Multicultural Affairs* (Moore J, 27 August 1998, unreported) (*"Voitenko"*) have discussed many of those decisions. A similar conclusion has been reached in respect of s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth). Moore J in *Voitenko* also refers to many of those decisions.

45 In *Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1234, I expressed my concurrence with the views of Branson J in the Full Court in *Ahmed v Minister for Immigration and Multicultural Affairs* [1999] FCA 811, and her Honour's reasons for those views, that s 430 requires the Tribunal's reasons to expose the reasoning process undertaken and a justification of its findings of fact. In some circumstances, that will require the Tribunal to explain why it has paid no heed to apparently cogent material pointing to a different finding of fact. Where there is, for example, apparently cogent material to show fact A and other equally cogent material to show fact non-A, it may be insufficient for the Tribunal simply to say it finds fact A by reference only to the material supporting that fact. It is, of course, a matter to

be considered in the particular circumstances of the case. That conclusion is also consistent with the views of the Full Court (see Carr and Merkel JJ in *Borsa v Minister for Immigration and Multicultural Affairs* [1999] FCA 348 in relation to s 368 of that Act as it applied to the Immigration Review Tribunal, and with the views of Drummond J in *Baljit Kaur Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1126 and of Moore J in *Yue v Minister for Immigration and Multicultural Affairs* [1999] FCA 1404.

46 I do not consider that the Tribunal's reasons for its finding that a cease-fire "is imminent and possible in the reasonably foreseeable future" satisfy s 430. That finding, used as a foundation to conclude that the applicant would not be expelled to Eritrea if he were to return to Ethiopia, is a critical one to the Tribunal's reasoning process on that alternative approach to the applicant's claim. The Tribunal's reasons for that finding were:

> *"… the Tribunal notes the above cited 14 April 1999 CNN report, which suggests otherwise. On the basis of the CNN report, the fact that the war has now been dragging on for over a year, the OAU has arranged for a peace agreement between the two countries, international and independent peace-keepers might be sent to Ethiopia and a cease-fire has been seriously considered by both sides …"*

47 It is apparent that the Tribunal's observations are drawn from the CNN report of 14 April 1999. It refers to the Organisation of African Unity plan to mediate the dispute and for international monitors. It refers to comments attributed to Ethiopia that a cease-fire was possible. The only additional fact the Tribunal refers to is that the conflict has lasted for over a year.

48 The CNN report of 14 April 1999 also refers to a problem for the proposed peace plan of procuring the cease-fire, and the condition imposed by Ethiopia that Eritrea agree to withdraw to the boundaries at 6 May 1998 before Ethiopia would give effect to the proposed peace plan. The material does not suggest Eritrea would agree to do so.

49 The Tribunal does not refer to a CNN report of 16 May 1999, in the independent country information before it, that peace talks had stalled, and bombing was continuing. It does not explain why an AFP report of 28 April 1999 (provided by the applicant) that the Eritreans had not agreed to the withdrawal of its troops, the precondition of Ethiopia for a cease-fire, should not be accepted. The same information is contained in a Reuters report of 29 April 1999, (also provided by the applicant). The Tribunal does not refer to that material, except to note its receipt.

50 It was of course open to the Tribunal to accept some of that material only. In my judgment, however, its reasons do not explain at all why it accepted the CNN report of 14 April 1999 and did not accept the later and different information from the same source of 16 May 1999, nor why it did not

accept the apparently cogent and later material from apparently reputable sources.

51 It is necessary to return to the Tribunal's finding about the applicant's credibility. As noted earlier, the Tribunal has in fact accepted a number of the matters about which the applicant gave evidence. In particular, it found that he was of Eritrean ethnicity and an Ethiopian national. It made a number of other findings based on his evidence. It is by no means clear what he said which was found not to be credible. The Tribunal said:

> *"Taken as a whole, in the light of the implausibility of a number of the key aspects of the applicant's claims as well as a number of major and substantive contradictions, and in light of the fact that a number of the applicant's claims are at odds with the above cited independent evidence or are exaggerations, the Tribunal can only come to the conclusion that the applicant's testimony is not credible and therefore finds that he is not a credible witness. Accordingly, since the Tribunal finds that the applicant's claims are not credible, there is no evidence on which it can be satisfied that he has a well-founded fear of persecution due to political opinion or race, or for any other Convention reason."*

52 It is possible to criticise the Tribunal's reasons for reaching that conclusion. Indeed, in my view, in a number of respects those reasons are unconvincing. I shall refer to those matters later in those reasons. However, the Court's role is not to review the Tribunal's decision on the merits. It is not to substitute its view as to the better decision, or to form its own view on matters such as the applicant's credibility. It is limited to determining whether the Tribunal has erred in a manner identified ins 476(1) of the Act.

53 In my judgment, the Tribunal has failed to determine whether the applicant has a subjective fear of being expelled to Eritrea were he to return to Ethiopia. That is a central issue which it was required to address in the light of the applicant's claim. That obligation exists by the cumulative effect of ss 414(1), 425, 426, 427, 428 and 430 as identified by the Full Court in *Thevendram v Minister for Immigration and Multicultural Affairs* [1999] FCA 182 at par 37. It is an obligation which has also been recognised by *Calado v Minister for Immigration and Multicultural Affairs* (Full Court, 2 December 1998, unreported), *Buljeta v Minister for Immigration and Multicultural Affairs* (Katz J, 4 December 1998, unreported) and *Logenthiran v Minister for Immigration and Multicultural Affairs* (Full Court, 21 December 1998, unreported). I do not consider that the Tribunal has addressed that central issue. That is, I suspect, because of the view it took that in any event the applicant would not be at risk of expulsion to Eritrea if he were to return to Ethiopia. I have found its conclusion on that matter was reached in error. In my view, the general conclusions of the Tribunal about the applicant's credibility do not address that issue, especially having regard to its acceptance of his evidence that he is an Ethiopian national of Eritrean ethnicity. If, allied to those findings, it were to be accepted that there was a real chance that the

applicant would be expelled from Ethiopia to Eritrea, it is hard to imagine that he would not have a genuine fear of that occurring, especially as the Tribunal also accepted his evidence that he fought for the Ethiopian army against Eritrea.

54 In my judgment, the expulsion of an Ethiopian national from the country of origin to Eritrea would itself constitute persecution: see the discussion of what constitutes persecution in *Chan* per McHugh J at 429-431; and of the Full Court in *Guo* at 570. It is not a term which is defined in the Convention or in the Act. To expel a national from that person's country of nationality, perhaps leaving behind family and property, would fall within the category of harm sufficient to constitute persecution. That conclusion is also consistent with the views of Goodwill-Gill *"The Refugee in International Law"* (Clarendon Press, Oxford, 1983 at 38-41) and the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* (pars 51-53).

55 I add some brief observations about the Tribunal's reasons for finding the applicant was not a credible witness.

56 The applicant's original application dated 6 August 1998 said that "Eleven days after I arrived in Australia, fighting started between Eritrea and Ethiopia. I got a phone call from my wife and friends telling me not to return to Ethiopia because people of Eritrean background are being imprisoned and expelled from Ethiopia". He received help in filling out the form. On 17 October 1998, the Refugee Advice and Casework Service (Australia) Inc wrote to the respondent. They said that the applicant had visited their service for assistance, and that they had discerned that his statement was incomplete. They enclosed a detailed statutory declaration, correcting in some respects his earlier brief statement in his application. He explained that his earlier statement had been translated from his statement in Ethiopian. It was not apparently prompted by any criticism of his earlier statement, and was unsolicited. The corrections generally do not relate to matters which might have affected the consideration of his application. On the particular matter of when fighting broke out, he said:

> *"When I visited Australia it was only to see my daughter but I heard that the fighting had again broken out. I heard that I would be in danger if I returned. The Eritreans had been ordered to leave the country and this is verified by the Internet report attached. This would include me and I would have to leave or be deported. Having served in the Ethiopian Army I will be at risk in Eritrea."*

57 As the applicant's claim was that his fear of persecution arose from the forced expulsion of ethnic Eritreans which commenced (or of which he learned) after he arrived in Australia, the inconsistency in his statements about when fighting broke out is not the critical fact. The Tribunal appears to have reasoned from its conclusions that the outbreak of hostilities on 6 May 1998 was both notorious and coincided with the commencement of the expulsion policy. Neither of those matters seems evident from the independent country

information before the Tribunal. Having regard to my reasons above, it is not necessary to determine whether those two conclusions are made without foundation, but I note that an Amnesty International Report of 29 January 1999 stated that the deportations commenced on 12 June 1998, one month after the war broke out, and both the Agence France Presse report of 13 June 1998 and The San Diego Union-Tribune report of 14 June 1998 report that the security crackdown on Eritrean nationals in Ethiopia had only just been announced. It is also consistent with that material that visits from the Ethiopian authorities enquiring as to the applicant's whereabouts commenced only some time after he left Ethiopia.

58 The significance of whether the applicant had received USA and USSR military training overseas or in Ethiopia before 1991 is not apparent to me, even if the Tribunal did not accept the explanation that the initial claim was made through an interpreting misunderstanding. It would be a different matter if the material on this topic might be relevant to the applicant's claim. But it is not. Whatever the fact of that matter, it could have no bearing on his claim to refugee status by reason of the claimed risk of expulsion from Ethiopia due to his Eritrean ethnicity.

59 It is also hard to see why his failure to mention his imprisonment between 1991 and 1994 in his initial application, when that information was volunteered soon afterwards, is of any moment to his credibility. Again, it is material which was not advanced to enhance his claim, but simply as a matter of personal history. Moreover, the Tribunal has found that that imprisonment occurred. It is not, as is sometimes the case, a fabricated claim to make a claim to refugee status more compelling. It is unrelated to the nature of his claim.

60 As I have observed, it is not for the Court to substitute its views on the merits of the applicant's claim for those of the Tribunal. Those matters have been pointed out because they may reflect a misapprehension as to the nature of the applicant's claim, and perhaps a misapprehension reflected also in the initial decision of the delegate of the respondent whose reasons are in many respects similar to those of the Tribunal. In view of the decision I have reached, I also do not need to address the contentions of the applicant that the Tribunal failed to comply with s 430 of the Act in respect of the particular findings it made on matters relevant to his credibility.

61 In my judgment the application should be allowed and the applicant's claim for review to the Tribunal should be remitted to the Tribunal, differently constituted, for rehearing.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:
Dated: 2 December 1999

Counsel for the Applicant:	Mr M Buscombe
Solicitors for the Applicant:	Ron Kessels
Counsel for the Respondent:	Ms R Henderson
Solicitors for the Respondent:	Australian Government solicitor
Date of Hearing:	27 October 1999
Date of Judgment:	2 December 1999