FEDERAL COURT OF AUSTRALIA

VNAY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 96

MIGRATION – Appeal from Federal Magistrates Court – appellant applied for a protection visa based on fear of persecution for political opinion – whether knowledge that loaned vehicle was used for political propaganda was capable of constituting political opinion – where relevant fear is of persecution by a non-state political figure – where fear arose from a threat unrelated to Convention grounds and appellant would be afforded State protection – appeal dismissed.

Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476 – followed

Ranwalage v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 173 - distinguished

V v Minister for Immigration and Multicultural Affairs [1999] FCA 428 – referred to

Zheng v Minister for Immigration and Multicultural Affairs [2000] FCA 670 - cited

VNAY v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

V 1245 OF 2004

HILL, FINN & KENNY JJ

13 MAY 2005

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY V 1245 OF 2005

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	VNAY APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	HILL, FINN & KENNY
DATE OF ORDER:	13 MAY 2005
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal from the Federal Magistrate 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.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY V 1245 OF 2005

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BETWEEN:	VNAY APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	HILL, FINN & KENNY
DATE:	13 MAY 2005
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

(Ex tempore – revised)

THE COURT:

1 The appellant appeals against the judgment of a Federal Magistrate dismissing his application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"), refusing to him the grant of a protection visa on the basis that he was not a person to whom Australia owed protection obligations.

2 The appellant is unrepresented before us, although he had the assistance of an interpreter. He was represented in the proceedings before the Federal Magistrate, but has been unable to obtain the assistance of a lawyer on the appeal because, he says, of financial difficulties.

3 Generally speaking, it may be said that Australia owes protection obligations to a person who is a refugee, as defined in the United Nations *Convention Relating to the Status of Refugees* 1951, as amended by the 1967 *Protocol Relating to the Status of Refugees*, (together referred to here as the "Convention").

4 A 'refugee" is defined in the Convention as being a person who:

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

5 The appellant is a citizen of Sri Lanka, who arrived in Australia on 4 February 1996 holding a visitor visa. He lodged an application for a protection visa, which was refused in 1997 on the ground that he had made no claims of persecution. It would seem that application was invalid. Thereafter, he made unsuccessful applications for permanent residence visas of various kinds and finally sought that the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") exercise his discretion to grant to him a visa.

6 When this application was also unsuccessful, the appellant made another application for a protection visa. This too was refused. He sought review of the decision to refuse the visa in the Tribunal. The Tribunal advised the appellant that it would be unable to find in his favour on the documentary material provided and invited him to attend a hearing by the Tribunal on a date that was notified. The appellant did not attend. He advised the Tribunal that he did not want to come to a hearing and that he consented to the Tribunal proceeding to make a decision without taking further action to allow or enable him to appear before it.

The Tribunal's reasons

7 It is perhaps not surprising that the reasons of the Tribunal are brief, given that the appellant had failed to put to the Tribunal any factual matters, other than his statement in his application for the visa and application to the Tribunal for review, and failed to put any argument in favour of his case.

8 The Tribunal set out, in summary form, the facts as claimed by the appellant. These were as follows:

"The Applicant states that he operated a tour business in Sri Lanka, hiring out his vehicles to various businesses. He was helped in developing his business through favourable treatment extended to him by an unnamed former classmate (identified only as 'Mr X') who had contacts with the People's Alliance (PA), the coalition that was, at that time, in government. As a favour to Mr X, he provided a vehicle for the latter's use during the 1994 election campaign. The vehicle was duly returned. In December 1995, the Applicant was taken into custody by police and was questioned about a murder that occurred during the election campaign, in which his vehicle had been identified. He told the police that he had lent it to Mr X at that time and he was released on the condition that he be available to provide further evidence. Fearing that Mr X would attack him, he moved to his wife's parents' house, outside Colombo. Subsequently he was informed by his brothers that Mr X had called at his house and left a warning that he would 'take care' of the Applicant if he provided any information to police. He understood that to be a death threat.

Fearing that he would be tracked down to his wife's parents' house, he fled to another house in the same area. Mr X subsequently visited his wife's parents' house and left a warning that he would destroy the family if the Applicant made any allegations against him. The Applicant decided to leave the country and obtained a visa for Australia through a broker. After his arrival in Australia, his wife returned to the family home in Colombo and was again visited by Mr X. She told him that the

Applicant had fled the country and begged for mercy. He told her that as long as the Applicant remained outside the country he would not harm his family, but he would destroy the family if the Applicant returned.

He claims that Mr X has increased his power and influence and 'is getting stronger daily and is now a highly influential person with political support from the ruling government party.' He fears that he will be murdered if he returns to Sri Lanka."

9 The Tribunal then summarised various matters relating to the definition of "refugee" in an unexceptionable way. In the "discussion and findings" section of its reasons, the Tribunal noted that it had doubts about the veracity of the appellant's claims but had been unable to pursue further explanations from him. However, on the assumption that what he said was true, the Tribunal held that there was no nexus between the fear of persecution (attacks on his life), which the appellant said he had, and any Convention reason. The Tribunal noted that there was no nexus to suggest that Mr X wanted to harm the appellant for reasons of his race, religion, nationality, membership of a particular social group or political opinion. Despite Mr X's political opinion or affiliations, his actions vis-a-vis the appellant, were not Convention related. The Tribunal continued:

"Further, as also pointed out by the delegate, there is no reason to doubt that the Applicant can reasonably anticipate state protection. The police have already questioned him and released him on the basis he was telling the truth. There is no reason to suspect that if he is a witness in a murder prosecution brought by the State, they would not do their utmost to protect him."

The reasons of the Federal Magistrate

10 The appellant then sought judicial review of the decision of the Tribunal in the Federal Magistrates Court. He was then represented. To succeed, the appellant needed to show that the Tribunal had made a jurisdictional error with the consequence that the Tribunal's decision, being no decision at all, could not be a privative clause decision: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

11 It was submitted on behalf of the appellant that the Tribunal had made no reference to the fact that during the presidential election in 1994, Mr X had used the motor vehicle which the appellant lent to him for propaganda and election preparation activities, or that, through his political connections, which were apparently considerable, Mr X wielded significant power through his control of "thugs" and "gangs". It was submitted that the fear of persecution, which the appellant had, arose by virtue of political opinion. The Sri Lankan officials were aware, it was said, that the car had been used for propaganda and election preparation activities and were also aware that the appellant knew this. His knowledge was, it was submitted, capable of constituting "political opinion". So, it was submitted, the Tribunal had fallen into jurisdictional error by not considering the appellant's case as one of persecution for political opinion. It might be added here that at no time does it appear that the appellant ever mentioned political opinion in the context of his

claimed fear of persecution. Nevertheless, if it was necessarily implicit in what he said that there would be a fear of persecution by reason of his political opinion, it might not be necessary to spell that out.

12 Before the Magistrate and before us, the appellant relied upon *Ranwalage v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 173. In that case too, the applicant had been a citizen of Sri Lanka. His brother had been a security guard for the late President Premadasa and had been killed when the President was assassinated. The applicant had been told by his brother that a previous assassination, which had been blamed upon the LTTE (Tamil Tigers), was in fact the work of a Mr Cooray, a minister in the United National Party government, an underworld figure and a person of great influence in Sri Lanka. The applicant and his wife had been the subject of threats and claimed to fear persecution by reason of political opinion. The Tribunal, which found no well founded fear of persecution for political opinion, had drawn a distinction between assertions and opinion. In this Court, Heerey J rejected that distinction. His Honour said that the accusations which the applicant was perceived as wishing to ventilate concerning Mr Cooray necessarily involved an opinion that Mr Cooray was unfit for public life in Sri Lanka. There was a further element that, even if the applicant wished to keep his dangerous knowledge to himself, the present authorities in Sri Lanka might insist that he become involved in proceedings against Mr Cooray.

13 In overturning the decision of the Tribunal in *Ranwalage*, his Honour had regard to two decisions of Davies J to which he made reference, both given on 15 May 1998. In the first, the applicant had witnessed a policeman shoot and possibly kill one of a group of youths being assaulted and had reported the police to the authorities, as a result of which, he had been abducted and assaulted. In the second, the applicant had been a police officer and had given information to the authorities concerning corrupt activities. In both cases, Davies J rejected the argument that the respective applicant's fear was of harm from corrupt and criminal individuals rather than the State and hence not a matter of "political opinion" within the meaning of the Convention. As Heerey J said at 178:

"…it is implicit in his Honour's reasoning that knowledge of a fact – that police had been involved in criminal activity – could be just as much 'political opinion' as views on political, economic or philosophical issues."

14 The learned Magistrate was of the view that the reliance upon *Ranwalage* was misplaced for the reasons given by Merkel J in *Zheng v Minister for Immigration & Multicultural Affairs* [2000] FCA 670 where at [39] his Honour had said:

"The difficulty with the applicant's claims is that although he might have viewed his acts as 'political' there was no material that suggested that the authorities had viewed, or might view, his acts in exposing Mr He as having any political aspect. In particular, the material and evidence provided by the applicant was bereft of any basis upon which the authorities might perceive his exposure of his superior's corruption as a political act in any of the senses described in the cases to which I

have referred. Thus there was no material or evidence before the RRT that suggested that the Chinese authorities or for that matter, anyone else, perceived the conduct of the applicant to be resistance to, defiance of, or any threat to the authorities or the State or to have any other political aspect to it." (emphasis in original)

15 The learned Magistrate said at [18]:

"I am satisfied in the present case that likewise there is a difficulty in the applicant's claim as the material does not suggest that the authorities had viewed or might view the applicant as being exposed to risk on the basis of any political matter and further, having released him, it was open to the RRT to make the finding in relation to protection of the applicant in the future."

The appellant's submissions

16 As already noted, the appellant was not represented before us on the appeal. However, he had the advantage of a notice of appeal prepared by counsel, which set out the basis of the argument of why it was said that the learned Magistrate fell into error.

17 In essence, the appellant's appeal to this Court claims that the learned Magistrate failed correctly to apply *Ranwalage.* It is said that it followed from that case and the two decisions of Davies J referred to in it, that knowledge of a fact involving criminal activity would be political opinion because it was capable of adversely impacting on the reputation of a political figure. It is said that *Zheng,* upon which the Magistrate relied is distinguishable, or alternatively, that the application of it to the facts of the case involved a misconstruction of the appellant's claims. This is said to be the case because the appellant did not claim to be at risk of further persecution for a Convention reason by the State, or even that there was a possible failure of State protection for a Convention reason. The appellant's claim relied instead, it is said, on the political motivation of the non-State agent, "Mr X", who he had described as being "severely involved" in the political activities of the present party. It is said to be this motivation, being the motivation of a political figure protecting his interest, which provided the necessary Convention nexus in this case, as it had in *Ranwalage.*

Discussion

18 It is obvious that the words "political opinion", as they appear in the definition of "refugee" in the Convention, are capable of a wide meaning and may extend to matters such as criticising corruption in the society (as in *V v Minister for Immigration and Multicultural* Affairs [1999] FCA 428) or, criticising a corrupt politician (as in *Ranwalage*) and that a person may be a refugee if that person, on the facts of the case, has a well founded fear of persecution because of what has happened. However, one must be careful not to move from a discussion of a particular issue in a case such as *Ranwalage* to a finding that the discussion is relevant, or may have relevance, in a particular case divorced from the facts, either as claimed or found.

19 In *V,* a dichotomy was sought to be drawn between criminal activity and persecution on account of political opinion. That dichotomy was rejected by the Full Court of this Court (Wilcox, Hill and Whitlam JJ). Justice Wilcox accepted that an attitude of resistance to systemic corruption of, and criminal activity by, government officers, could fall within the description "political opinion" but that whether particular resistance amounted to an attitude having a political dimension, or whether it was simply a product of other causes, was a question of fact for determination.

20 Hill J said at [33]:

"It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in Minister for Immigration& Ethnic Affairs v Y [1998] FCA (unreported 15 May 1998, No 515 of 98) that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. **Whether they do so will depend upon the facts of the particular case.**" (emphasis added)

21 Justice Whitlam, in the same case, also referred to what Davies J had said in *Y* with apparent approval. His Honour eschewed entering into a discussion of the meaning of "political opinion", noting only that the words "political opinion" could be shown by repeated conduct "which is never (or rarely) converted into articulate political protest of the kind familiar to Australian society".

22 It is unnecessary also, for the purposes of the present case, to attempt an exhaustive definition of "political opinion". Rather, to see why the cases relied upon on behalf of the appellant do not assist the appellant here, it is necessary to note just what he claimed. His case is set out in a document annexed "A" in his original application for a visa. The essence of that has already been summarised. However, the appellant made the point that Mr X was a "heavily influential person", that the vehicle lent to Mr X had been used for political purposes, but that it had also been involved in a murder case. The involvement had resulted in the appellant being bashed and questioned by the police, but then released. However, Mr X had political influence, which could result in the appellant being killed. This was demonstrated by threats on the appellant's life, said to have been made. The appellant claimed that the authorities did not, or would not, intervene and Mr X could not be brought to justice because of the influence he wielded. Indeed, he was said to be highly influential with political support from the ruling government party. The fear the

appellant claimed to have was not, however, a fear engendered by exposing or seeking to expose Mr X as a politician. It was a fear which emanated from the threats which Mr X made and which, apparently, he was capable of carrying out, or ensuring that they would be carried out, both because he wielded power and because he associated with "thugs" and criminals.

23 In our opinion, the present case was not one in which persecution was alleged for political reasons, whether those reasons were based on some opinion held, or whether they involved an act, or were a belief imputed to the appellant by reason of some act. To the extent that it was any part of the appellant's case that he feared that Mr X controlled the police, that was dealt with adversely to the appellant by the Tribunal finding that the police would do what was necessary to safeguard the appellant.

24 In summary, the Tribunal rejected the appellant's claim for two reasons, neither of which involved the meaning of the words "political opinion". The first was that the appellant's fear arose from a threat of murder, unrelated to a convention ground. The second was that the appellant had no reason to fear the authorities in Sri Lanka because the police would protect him from any interference by Mr X. In reaching the latter conclusion, the Tribunal was aware of and had indeed stated the appellant's claim that Mr X was influential and politically significant.

25 In our opinion, the Tribunal addressed the appellant's claim, it did not err in its understanding of the meaning of political opinion, so far as that expression related to the facts of the case, and made no jurisdictional error. It follows that the Tribunal's decision was a privative clause decision and that the decision of the learned Magistrate dismissing the application for judicial review should be affirmed. The appellant should pay the respondent Minister's costs of the appeal.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Hill, Finn & Kenny.

Associate:

Dated: 25 May 2005

The appellant appeared in person

Counsel for the respondent:	J MacDonnell
Solicitor for the respondent:	Clayton Utz
Date of Hearing:	13 May 2005
Date of Judgment:	13 May 2005