FEDERAL COURT OF AUSTRALIA

WADL v Minister for Immigration & Multicultural Affairs [2002] FCAFC 276

MIGRATION – protection visa – appeal from dismissal of application for review under Pt 8 *Migration Act 1958* (Cth) – leave to amend notice of appeal – whether Refugee Review Tribunal based findings on particular facts which did not exist – whether comments or observations by Tribunal "facts" – whether jurisdictional error – whether actual bias – whether error of law

Migration Act 1958 (Cth) s 476(1)(a),(b),(c), (f) and (g) and (4)(b)

Minister for Immigration and Multicultural Affairs v Rajamanikkam [2002] HCA 32 applied

Avesta v Minister for Immigration and Multicultural Affairs [2002] FCAFC 121 applied

WADL OF 2001 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

W590 OF 2001

FRENCH, HEEREY AND MANSFIELD JJ

29 AUGUST 2002

MELBOURNE (HEARD IN PERTH)

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W590 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	WADL OF 2001 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	FRENCH, HEEREY AND MANSFIELD JJ
DATE OF ORDER:	29 AUGUST 2002
WHERE MADE:	MELBOURNE (HEARD IN PERTH)

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant pay the respondent's costs to be taxed.

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

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JUDGE:	FRENCH, HEEREY AND MANSFIELD JJ
DATE:	29 AUGUST 2002
PLACE:	MELBOURNE (HEARD IN PERTH)

REASONS FOR JUDGMENT

THE COURT:

1 The appellant appeals from a decision of a judge of this Court which dismissed an application for review under Pt 8 of the *Migration Act 1958* (Cth) ("the Act") of a decision of the Refugee Review Tribunal ("the Tribunal") made on 14 May 2001 affirming a decision not to grant the appellant a protection

visa. This case is governed by the Act in the form it took prior to the October 2001 amendments.

2 The applicant was unrepresented before his Honour. On appeal counsel for the appellant, who appeared pursuant to the Court's pro bono scheme, argued a case based on an amended notice of appeal. None of the matters raised in the amended notice of appeal were put to his Honour or considered by him. In substance the argument was a de novo attack on the validity of the Tribunal's decision. Counsel for the Minister, while accepting there was discretion to allow the amendments to the notice of appeal, contended that the points raised had no reasonable prospects of success. The practical problem for an appellate court is that, faced with detailed proposed amendments like those in the present case, it is often not easy to determine whether the points have merit without embarking on a hearing little, if any, less extensive than might occur if the points were raised on an appeal regularly instituted. There is of course also the potential for very serious consequences to an appellant if an application for review of a refugee decision is wrong but remains unreversed. In the circumstances we granted leave to amend.

3 The appellant is an Iranian National. He arrived in Australia on 3 November 2000 and on 23 November 2000 lodged an application for a protection visa. This application was refused by a delegate of the Minister on 22 December 2000. On 29 December 2000 the applicant applied to the Tribunal for review of that decision. The Tribunal's decision affirming that decision was given on 14 May 2001. The application for review by the Court was dismissed on 18 September 2001.

4 The appellant's claim asserted a fear of persecution on the ground of imputed political opinion. This was said to arise from (i) a series of events, namely the appellant's involvement in a public demonstration in the town of Abadan on 6 July 2000 and his subsequent arrest, imprisonment and torture and (ii) his uncle being a political activist and his father being arrested after the appellant's departure from Iran.

5 In essence the account given by the appellant in his statement to the Department and as expanded at the Tribunal hearing was:

(1) he travelled to Abadan to visit his sister who worked as a nurse at a hospital;

(2) injured people were being brought to the hospital; he could hear gunfire;

(3) he went to the city centre to see what was going on;

(4) he found a big crowd with people chanting slogans against the government, a lot of damage had been done to mosques and government property;

(5) the demonstration was a protest against salt contamination of the water supply;

(6) police were attempting to arrest demonstrators and were firing into the air;

(7) he “got involved”; he was shouting slogans; people recognised him as a famous sportsman and joined with him in confronting the police;

(8) he got into a scuffle and was arrested;

(9) because people were following him when he was shouting slogans police thought he was one of the leaders;

(10) he did not know of a similar demonstration in Abadan on the previous day;

(11) he was detained for three days in Abadan and then sixteen days in Ahwaz;

(12) he first said to the Tribunal nobody knew of his arrest; later he said his family did know;

(13) when being transferred to court, he was allowed to go to the toilet and his handcuffs were removed for this purpose; on returning there was a conflict going on in the yard; taking advantage of this distraction he overpowered a guard at the door and escaped in a car;

(14) he was in hiding for one and a half months;

(15) he paid a bribe at the airport and departed on a passport in his own name.

6 The Tribunal found there were “significant internal inconsistencies” and that aspects of the appellant’s evidence were “inconsistent with independent evidence or implausible”. It did not find the appellant to be a “credible or reliable witness in relation to various aspects of his claims”. In particular the Tribunal said:

(1) it was implausible that a day visitor to Abadan with no history of political involvement would become, or be seen to become, a “leader” (the Tribunal used inverted commas) or instigator in the first demonstration he ever attended; the Tribunal did not accept that he played the prominent role in the demonstrations that he claimed;

(2) it was implausible he knew nothing of demonstrations on the previous day, even though he was at the hospital noting the arrival of injured people;

(3) it was implausible that an allegedly high profile political person could escape with such ease;

(4) his inconsistent evidence in relation to his family’s knowledge of his detention cast further doubt;

(5) the ease with which he escaped by car was implausible;

(6) his account of departure from the airport was inconsistent with Country Information from the Department of Foreign Affairs and Trade to the effect that there was a computerised "blacklist" of persons of adverse interest to the Iranian authorities and it would be virtually impossible for persons to have their names removed by bribery;

(7) his claim of detention was contrary to Country Information which indicated that only thirty demonstrators, being persons (unlike the appellant) with prior criminal records, were detained and that the other 200 arrested were released.

7 On the appeal counsel for the appellant relied on the grounds set out in s 476(1)(a)(b)(c)(f) and (g) of the Act. The lastmentioned ground is qualified by s 476(4)(b). The terms of these provisions are as follows:

"476 **Application for review**

(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) …

(e) …

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision.

…

(4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) …

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

8 Ground 1 of the amended notice of appeal asserted that the Tribunal made an adverse credit finding about the appellant which formed the basis of the Tribunal's adverse decision on the application but that credit finding was based on particular facts which did not exist and there was no other evidence or material to justify the decision. Section 476(1)(g) and 476(4)(g) (sic, obviously (b)) were relied on. Detailed particulars were given of this ground. It is not necessary for the purposes of this appeal to repeat all of them. They included the following:

(i) the Tribunal found it was implausible that a person in the position of the appellant, who had no political background, would become a "leader" or play the role of instigator in demonstrations about water problems. These are claims the Tribunal wrongly attributed to the appellant and are facts that do not exist.

(ii) the Tribunal found implausible the appellant's claim that he was unaware of the water demonstrations in Abadan the day before he arrived in that city on 6 July 2000. Implausibility is a fact that does not exist.

(iii) the Tribunal found implausible the appellant's claim to have escaped from prison. Implausibility is a fact that does not exist.

(iv) the Tribunal found inconsistency in the appellant's evidence of his family's knowledge of his detention. Inconsistency is a fact that does not exist.

(v) the Tribunal found inconsistency between the appellant's evidence of his detention and the Country Information. Inconsistency is a fact that does not exist.

(vi) the Tribunal's finding that it was not credible that the appellant's father was arrested after his escape because there was no reason to arrest his father and the claim that this was made for the first time at the Tribunal hearing. These are facts that do not exist.

9 Ground 2 asserted that there was a failure to comply with the procedures required by the Act and/or the Tribunal did not have jurisdiction to make the decision and/or the decision was not authorised by the Act or regulations because:

(i) the Tribunal took into account irrelevant considerations and failed to give the appellant the benefit of the doubt by rejecting his claim that he would attract particular attention from Iranian authorities because his uncle was an Iranian activist, the irrelevant considerations being that the appellant had another uncle who was a high ranking official and that he had never before had trouble because of the appellant's activist uncle.

(ii) the Tribunal considered it implausible that the appellant would not have known about the water demonstrations the day before his arrest.

(iii) the Tribunal considered the appellant had given inconsistent evidence about whether his family knew he had been arrested and detained.

(iv) the Tribunal did not put these matters to the appellant.

(v) the Tribunal failed to take into account relevant considerations, namely that people do leave Iran illegally and by bribery and that many persons have evaded the authorities.

(vi) generally the Tribunal engaged in "absurd, illogical and implausible reasoning".

(vii) the Tribunal had failed to seek evidence from the appellant's brother who had been also involved in the demonstrations and was detained in Curtin Detention Centre.

10 Ground 3 alleged actual bias in that the Tribunal's reasons demonstrated that it had a closed mind to, or prejudged, the issues raised, and was not open to persuasion or any proper evaluation of the materials and claims before it. Particulars of this ground included allegations that there was no evidence that the appellant was engaged in criminal, unlawful or destructive activity or that he was arrested for violation of a criminal law or a law of general application in Iran.

11 Ground 4 alleged an error of law being an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the Tribunal. Particulars of this ground asserted that the Tribunal was wrong in approaching the appellant's case "with the preconceived and unwaivering (sic) false belief that the appellant was not persecuted for Convention reasons".

Ground 1

12 The "no evidence" ground has recently been considered by the High Court in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32. That case was quite similar to the present one. The Tribunal found the applicant not to be a credible witness and listed eight factors which led it to that conclusion. The Full Court of the Federal Court found there was what it considered to be relevant error in two of those factors. In respect of each there was said to be error in attributing to the applicant a representation which the Tribunal regarded as misleading, but which the Full Court found had not been made.

13 A majority of the High Court (Gleeson CJ, Gaudron, McHugh and Callinan JJ, Kirby JJ dissenting) reversed this decision. Gleeson CJ (at [36]) pointed out that the Tribunal's decision to refuse a visa was the consequence of the legal operation of s 65 of the Act upon the conclusion that the Tribunal was not satisfied that the applicant satisfied the criteria for refugee status, relevantly that he had a well-founded fear of persecution in Sri Lanka. The

reason why the Tribunal was not so satisfied involved a number of elements, including the Tribunal's lack of belief in his story about being arrested in Trincomalee. That disbelief in turn was based on eight cumulative reasons, two of which were found to involve error. The Tribunal's decision to refuse a visa was not, in his Honour's view, "based upon" a finding that the applicant had not been arrested at Trincomalee. His Honour (at [40]) stressed that the applicant had to show why the case fell within s 476(1)(g). Subsection (4) qualifies par 1(g). It does not add to it. It limits it. His Honour said (at [42]):

" The Act required the Tribunal to decide that visas should be refused if it was not satisfied that the first respondent satisfied the criteria for refugee status. The Tribunal's lack of satisfaction related to whether he could return to Sri Lanka without being persecuted. There was nothing in the evidence or other material that compelled a conclusion that the first respondent would be persecuted if he returned to Sri Lanka. There may be cases in which it could be said that there is no evidence or other material to warrant a lack of satisfaction that a person will be persecuted if returned to a particular country. It might depend upon the country, and the person. But this Tribunal was not satisfied that an elderly, respected, medical practitioner, who had many years of government service, and who was in receipt of a government pension, would be persecuted if he returned to Sri Lanka. It gave a number of reasons for that, which included, but were not limited to, reasons for not accepting him as a credible witness. Most of those reasons were plausible, and have not been shown to involve error. I find it impossible to conclude that there was no evidence or other material to justify the decision which was required by law in the event of such lack of satisfaction."

14 Gaudron and McHugh JJ (at [56]) emphasised the significance of the word "particular" in s 476(4)(b). This was in their Honour's view:

"… to be understood as referring to a finding of fact without which the decision in question either could not or would not have been reached."

15 Their Honours then said (at [58]):

"… unless it is possible to say on a proper analysis of the decision, the reasons for decision or the decision making process that, had a particular finding not been made, the decision in question would not have been reached, it is, in our view, impossible to say that the decision was based on that finding."

16 Callinan J (at [155]) said that for s 476(4)(b) to apply, "based on"… certainly implies something more than "had regard to" or "took into account". The Tribunal must have used the non-existent fact as a base for, or, if a synonym be required, as a foundation for the decision.

17 Another relevant point for present purposes is to be found in the decision of a Full Court of this Court (Spender, O'Loughlin and Gyles JJ) in *Avesta v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 121. Again that case involved a decision of the Tribunal based on inconsistency and implausibility findings and an assertion by the appellant that

there were in fact no significant inconsistencies or implausibilities. Their Honours said (at [16]):

"There is a further matter which is fatal to this appeal, and that is that the 'facts' alleged in this case to be non-existent are, in our judgment, not 'facts' of the kind referred to in s 476(4)(b) of the Act. They are assessments reached by the Tribunal after a consideration of the appellant's evidence and the claims he advanced. The Tribunal rejected the appellant's account because it did not believe him. The reasons for that disbelief were the Tribunal's assessment that the appellant had been inconsistent in significant ways in his recounting of particular matters and the Tribunal's determination that particular features of his account were inherently improbable. These reasons are not 'particular fact(s)' for the purpose of s 476(4)(b) of the Act. An attack on the correctness of the reasons for finding that the appellant was not believable is a challenge to the correctness and rationality of the reasoning process, and does not provide an available basis for review of the decision reached as a result of that reasoning."

18 In the light of these authorities, the appellant's argument on the "no evidence" ground must be rejected. Once the allegedly non-existent "fact" is properly to be seen as a matter of inference or comment on the part of the Tribunal, or where there is other evidence or material to justify a decision that the Tribunal is not satisfied that the applicant satisfies the Convention definition of refugee, the s 476(1)(g) ground must fail. In such event, it is not necessary for the Court to review the merits of the implausibility or inconsistency which the Tribunal has found.

19 In any event, we are far from persuaded that there was any wrongful inflating by the Tribunal of the claims that the appellant made. For example, his account of arriving at the demonstration, being recognised as a famous sportsperson and, upon his shouting slogans, the demonstrators rallying to his spontaneous inspiration, is not unfairly characterised as a claim to have been a "leader" of the demonstration. This is especially so when inserted commas are used, thus conveying that the term is used in a special or perhaps extended sense. Likewise, if the appellant saw injured people being brought to the hospital and heard gunfire and tried to find out what was going on, it seems not at all unlikely that someone at the hospital would have told him that there had been a similar disturbance the previous day. This was something of which residents of Abadan would be aware, and particularly those who worked in a hospital. It was open to the Tribunal to characterise the appellant's alleged lack of knowledge as implausible.

Ground 2

20 Essentially the argument under this ground rested on assertions of wrongful finding of implausibility. In the words of Gleeson CJ in *Rajamanikkam* (at [26]):

"The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an

administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence, which is part of the legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts."

21 The appellant's case did not advance beyond asserting a different view as to the plausibility of various elements of the appellant's claims.

Ground 3

22 There is no substance in this ground. The fact that the Tribunal, after considering the evidence, reached a firm decision and expressed that its reasons for that decision in terms critical of the appellant's credibility does not begin to support an assertion that the Tribunal commenced its enquiry with a closed mind.

Ground 4

23 This ground is largely based on an assertion that the Tribunal wrongly found that, if the appellant was arrested, he faced prosecution under laws of general application. Of course this was an additional ground, the Tribunal's primary conclusion being that the appellant's account of his arrest was a concoction. But in any event it was clearly open to the Tribunal to characterise a law providing arrest for people engaged in violent demonstrations with damage to property and loss of life as a law of general application. On the appellant's account, whether or not he personally damaged any property, he was taking an active role in the rioting.

Orders

24 The appeal will be dismissed with costs.

I certify that the preceding twenty four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices French, Heerey and Mansfield .

Associate:

Dated: 28 August 2002

Counsel for the Appellant:	M Cox
Solicitor for the Appellant	Slater & Gordon
Counsel for the Respondent:	L B Price
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14 August 2002
Date of Judgment:	29 August 2002