FEDERAL COURT OF AUSTRALIA

WAEW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 260

MIGRATION – appeal dismissed – no error disclosed.

Kord v Minister for Immigration and Multicultural Affairs [2001] FCA 1163, referred to

Gersten v Minister for Immigration & Multicultural Affairs [2000] FCA 855, referred to

Minister for Immigration & Multicultural Affairs v Ibrahim (2000) 204 CLR 1, referred to

Ahwazi v Minister for Immigration and Multicultural Affairs [2001] FCA 1818, referred to

Minister for Immigration & Multicultural Affairs v Kord [2002] FCAFC 77, referred to

Wang v Minister for Immigration and Multicultural Affairs (2000) 105 FCR 548, referred to

WAEW OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

W 52 OF 2002

MARSHALL, WEINBERG AND JACOBSON JJ

22 AUGUST 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W52 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE

FEDERAL COURT OF AUSTRALIA

BETWEEN:	WAEW OF 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	MARSHALL, WEINBERG AND JACOBSON JJ
DATE OF ORDER:	22 AUGUST 2002
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

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

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DATE:	22 AUGUST 2002
PLACE:	PERTH

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a judgment of R D Nicholson J of 5 February 2002 in which his Honour dismissed the appellant's application to review a decision of the Refugee Review Tribunal ("the RRT"). The RRT decided that the appellant was not entitled to a protection visa.

2 The legislation relevant to this appeal is the *Migration Act 1958* (Cth) ("the Act"), in the form which it took prior to the amendments effected by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth). This appeal, consequently, does not raise for consideration the effect of the

"privative clause" provisions inserted into the Act operative from 2 October 2001.

Factual background

3 The appellant is a citizen of Iran. He entered Australia on 20 December 2000. On 7 January 2001 he lodged an application for a protection visa. The basis of his claim was that he feared persecution, on account of his political beliefs and those of his family, if returned to Iran. Put shortly he relied on the following matters in support of his application:

- one brother was imprisoned in Iran for being a member of the Mojahedin Khalgh Organisation ("the MKO"). On release that brother was mentally incapacitated as a result of torture;
- two of his relatives were executed for being MKO members;
- members of his family were blacklisted from government employment because of their political background;
- he too was denied government employment for the same reason;
- his nephew was refused entry to a PhD program because of his family's background; and
- he feared persecution because he was a non-Muslim.

4 On 28 February 2001 the appellant's application for a protection visa was refused by a delegate of the respondent. On 1 June 2001 the RRT affirmed the decision of the delegate.

The RRT decision

5 The RRT observed that the appellant had never participated in any political activity, or been a member of any political organisation, or taken part in any activity against the government. It found that the appellant's relatives had been punished by reason of their membership of the MKO, and not because of their links to family members, or for any other reason. It noted that the incidents involving his relatives had occurred a long time ago. Importantly, the appellant had suffered no adverse consequences thereafter as a result of his association with family members.

6 The RRT found that, although the appellant believed in God, he did not follow any particular religion. He did not disclose that he was a non-Muslim. His beliefs were "private and hidden" and, accordingly, there was no risk that he would be persecuted because of them.

7 The RRT noted that the appellant had previously left Iran to seek asylum in Norway. He had not suffered significant harm after he returned to Iran, apart from having his passport temporarily withdrawn. It did not accept his claim that he had been detained without food for four days, primarily because he had not mentioned that claim at any stage prior to the RRT hearing.

8 The RRT concluded, for the reasons set out above, that the appellant faced "no prospective chance" of persecution in the reasonably foreseeable future**.**

The reasoning of the primary judge

9 R D Nicholson J dismissed the application for judicial review. His Honour referred to the meaning of "persecution" under the Refugees Convention. He referred to the judgment of Hely J in *Kord v Minister for Immigration & Multicultural Affairs* [2001] FCA 1163 in which his Honour followed the judgment of a Full Court in *Gersten v Minister for Immigration & Multicultural Affairs* [2000] FCA 855in preference to the judgment of McHugh J in *Minister for Immigration & Multicultural Affairs v Ibrahim* (2000) 204 CLR 1; at [55], with regard to the degree of harm required to constitute persecution. He also referred to the judgment of Carr J in *Ahwazi v Minister for Immigration & Multicultural Affairs* [2001] FCA 1818 in which a different approach to that concept was taken.

10 His Honour did not find it necessary to resolve the conflict between the views of Hely J and Carr J because, in his view, the issues of fact in the present case were "clearly determinative". It should be noted, however, that the judgment of Hely J in *Kord* was reversed on appeal in *Minister for Immigration & Multicultural Affairs v Kord* [2002] FCAFC 77, after the judgment presently under appeal was published.

11 The primary judge considered that, on the facts of the appellant's case, no persecution had been demonstrated. His Honour noted that the RRT had made no finding as to whether the appellant's inability to secure a government job amounted to persecution. However, his Honour said at [26] that:

"The finding of the Tribunal that the applicant was not, and would not in the future be persecuted because of his association with relatives who had affiliations with the MKO, precluded a finding in favour of the applicant that any failure to obtain employment in government would be for a Convention reason. To put [it] another way, the finding by the Tribunal that the applicant did not have a political profile, and did not suffer discrimination because of certain family members' association either with the MKO and the Fadayeian Khalq, rendered otiose the making of a finding on the specific issue of whether the applicant was denied government employment, and if so, whether this denial of employment amounted to persecution."

12 His Honour concluded that the claims made by the appellant did not amount to claims of persecution under the Refugees Convention.

13 The primary judge concluded that there was evidence to support the finding of the RRT that the appellant had not suffered persecution upon his return to Iran from Norway. His Honour said at [33]:

"In relation to the applicant's position after his return from Norway, he contended that the Tribunal member had failed to mention particular evidence in the decision and had disregarded other evidence. However, there was no obligation on the Tribunal to refer to every particular piece of evidence. There was clearly evidence to support the findings of the Tribunal in respect of the position post-Norway."

14 Finally, his Honour considered that the RRT was correct to dismiss the appellant's claim based on his contention that he had a well-founded fear of persecution by reason of the fact that he was a non-Muslim. He referred in that regard to *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 which held that the term "religion" in Art 1A(2) of the Refugees Convention required the element of manifestation or practice of a religious faith in community with others. Absent any such manifestation or practice, there was no basis on which the appellant could be found to have a well-founded fear of persecution by reason of religion.

Issues on appeal

15 The appellant represented himself on the appeal. His grounds of appeal restated two of the grounds that were raised before the primary judge ie. the "error of law" and "no evidence" grounds contained in s 476(1)(e) and (g) of the Act.

16 During the course of his oral submissions the appellant sought to raise several other matters. He claimed that the RRT had failed to have regard to a document written in Farsi which had been filed, but not translated into English. That document concerned his inability to obtain employment by reason of his family background. He also claimed that the primary judge had denied him a fair hearing by limiting his right to reply to submissions made on behalf of the respondent. Finally he submitted that a claim which he had made to the RRT had not been dealt with by that body. That claim related to his inability to obtain employment by reason of imputed political opinion.

17 We are unable to discern any error in the reasoning of the RRT or, more importantly, in the reasoning of R D Nicholson J. In our view, the matters relied upon before the RRT did not demonstrate that the appellant had suffered persecution.

18 In *Minister for Immigration and Multicultural Affairs v Kord* [2002] FCA 334 Marshall and Dowsett JJ said at [53] that:

"The Tribunal was not, in our view, seeking to create its own succinct test for determining whether or not particular conduct amounted to persecution. It was rather

adopting the various descriptions used from time to time in the authorities and so informing itself as to the nature of the concept of persecution. It follows that the Tribunal's decision was informed by its consideration of these descriptions. Having so directed itself as to the law, the Tribunal recorded its conclusion that any fear of persecution on the respondent's part was not well-founded. When one looks at the facts of the case it is not difficult to see why the Tribunal came to that conclusion. Although the respondent complained of difficulty in obtaining some forms of employment, it seems that he generally enjoyed regular employment while in Iran. His difficulties were relevant matters for consideration by the Tribunal, but they were not conclusive. Had he not been able to find employment at all, or if the differences between the conditions of the employment open to him and of that not open to him were significant, those matters would also have been relevant, but they seem not to have been in issue."

19 In this case, although the appellant complained that he was unable to practise his chosen profession as an accountant because he could not obtain government employment, the RRT found that he had always held employment in Iran. That was a finding which the appellant sought to challenge before this Court, but which was plainly open. At least by implication, it concluded that although his inability to practice as an accountant was relevant to the issue of whether he faced persecution, it was not conclusive. In accordance with a well established body of authority dealing with the circumstances in which denial of access to employment may constitute persecution (referred to by his Honour at [16] of his judgment), there was nothing oppressive about his inability to obtain employment within the government sector, even assuming that fact, given that he was capable of finding other employment. His employment history revealed that he had qualified in Business Management, and that accountancy was merely one field open to him. Importantly, the foundation upon which his claim of discrimination was based was a refusal to hire him as a Human Resource Officer, and not a refusal to employ him as an accountant. His Honour correctly found that it was open to the RRT to find that any employment difficulties confronting him did not amount to persecution.

20 The other points raised by the appellant were entirely devoid of merit. It is plain from a reading of the RRT 's reasons for decision that it dealt with every claim made by the appellant, including the claim that related to his inability to obtain employment as an accountant. There is no basis for the suggestion that he was denied a fair hearing, and a reasonable opportunity to address any issues relevant to the proceeding before the primary judge.

Disposition

21 Having regard to the reasons set out above, it is our view that the appeal should be dismissed, with costs.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the

Reasons for Judgment herein of the Honourable Justices Marshall, Weinberg and Jacobson .

Associate:

Dated: 22 August 2002

The appellant represented himself.

Counsel for the Respondent:	Mr R Lindsay
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	21 August 2002
Date of Judgment:	22 August 2002