

FEDERAL COURT OF AUSTRALIA

WAFZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 292

MIGRATION – Refugee Review Tribunal – appellant citizen of Iran who was a musician and owner of a music shop – claimed to have been persecuted for playing inappropriate music and for possessing anti-regime tapes and CDs – RRT refused to accept critical aspects of appellant’s claims – whether RRT’s decision was not sustained by country information on which it was based – whether the playing of inappropriate music brings the appellant within the Refugees Convention – no error of law

Migration Act 1958 (Cth) s 476

Soe v Minister for Immigration & Multicultural Affairs [2001] FCA 1575 applied

Minister for Immigration & Multicultural Affairs v Rajalingam (1999) 93 FCR 220 applied

WAFZ OF 2002 v MINISTER FOR IMMIGRATION& MULTICULTURAL & INDIGENOUS AFFAIRS

W 103 OF 2002

LEE, HILL & HELY JJ

16 SEPTEMBER 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIAN DISTRICT REGISTRY

W 103 OF 2002

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: WAFZ OF 2002

APPELLANT

AND: MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS

RESPONDENT

JUDGE: LEE, HILL & HELY JJ

DATE OF ORDER: 16 SEPTEMBER 2002

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

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DATE: 16 SEPTEMBER 2002

PLACE: PERTH

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from the order of a Judge of this Court that the appellant's application under s 476 of the *Migration Act 1958* (Cth) ("the Act") for review of a decision of the Refugee Review Tribunal ("the RRT") be dismissed.

2 The appellant is a citizen of Iran who arrived in Australia on 22 December 2000. Whilst in Iran his occupation was that of a singer and musician. He earned his living by teaching, selling and playing music and from time to time he performed at weddings. He began his activities as a singer and musician in 1987, and was able to pursue them without any problems until 1999.

3 The RRT found that playing music and being a singer is not illegal in Iran, although the RRT accepted that a person may be punished for playing “inappropriate music”. “Inappropriate music” includes sensuous or Western music, such music being played on occasions when more acceptable music should have been played, although the RRT stated that country information indicates that the authorities turn a blind eye to music played at private parties. The RRT accepted that the appellant might be punished if he were to play “inappropriate music”, but the RRT did not consider that such punishment would be serious enough to amount to persecution. The likely penalty would be confiscation of the music and perhaps a fine. The RRT also found that as the rules about music are rules of general application, any such punishment would not, in any event, be persecution for a Convention reason.

4 The appellant relied upon a number of specific incidents which he claimed to have occurred during 1999 as establishing that he had been persecuted in the past by reason of anti-government opinions which were imputed to him, and as providing the foundation for a well-founded fear of persecution for a Convention reason if he were to be returned to Iran.

5 First, the appellant claimed that on 23 March 1999 he was singing at a wedding when a number of police entered the wedding party to arrest him. He said he escaped out the back door to a neighbour’s house. The next day he went home and was later told that the groom had been arrested. He said the police had given a warning that the groom would be detained until the appellant presented himself to the police. He also claimed that another order had been given that he not sing elsewhere. He said he went to the police station and the groom was released, but the appellant was detained until the New Year holiday had finished. He said that he was taken to court and was sentenced to 50 lashes and ordered to pay a fine.

6 The RRT did not accept this claim because, in its view, it was not consistent with the country information that the authorities turned a blind eye to private performances of music and, in any event, if the authorities were really after the appellant they would have been able to find him without difficulty, as he went home the next day. The RRT also did not accept that the groom was held until the appellant surrendered himself to the authorities. The finding that the police did not raid the wedding at which the appellant was singing and that the appellant did not surrender himself to the authorities so as to allow the release of the groom, imports a finding that the appellant did not receive the punishment which was said to be consequential upon the occurrence of those events, even though the RRT did not make a specific finding to that effect.

7 The RRT also found that even if the appellant’s claims in relation to the wedding were accepted, any harm to which he was subjected on that account was not Convention related. The songs which he was singing at the wedding, whilst “not ethical”, were songs “to make people happy”. The RRT was of the view that they were not “against the regime as such”. On the appellant’s own story (which the RRT did not accept), the appellant was not punished because of any political opinion attributed to him, or because he was

a member of a particular social group; he was, on this hypothesis, punished for playing inappropriate music.

8 In the appellant's submissions to this Court, he criticised the RRT's findings that the country information before the RRT established that playing music and being a singer is not illegal in Iran, and that the authorities turn a blind eye to private performances of sensuous or Western music. There is some force in the criticisms made by the appellant in this respect.

9 Whilst it is true that the Department of Foreign Affairs & Trade, in its Country Profile on Iran of March 1996, states that musical performances in general are not expressly forbidden under Iranian law, it also states that sensuous music is prohibited under religious dictates as sinful, and those who perform such music could be apprehended by the "morals" police, and be subjected to various penalties, including flogging. The report continues:

"In practice, however, the authorities **tend to** turn a blind eye to private performances of such music, which are common-place at weddings, parties etc. The authorities will be more vigilant on religious mourning days, when it is considered disrespectful to hold celebrations of any description."

(Our emphasis.)

10 The country information before the RRT also included a Reuters article of 13 January 2001 which stated that Tehran's police chief had decided to crack down on music tapes and CDs which had not received official approval. Few Western-made CDs receive that approval. The article asserts that the proposed crack down "comes after more than 300 people were arrested in raids on two New Year's Eve parties. The party-goers were obliged to pay heavy fines or receive lashes before being released".

11 Whilst it may be true to say that it is not illegal to sing and to play music in Iran, that is not a complete or a sufficient statement of the country information on this topic. The "morals" police nonetheless punish the playing of sensuous music whether unlawful or not, and whilst the authorities may "tend to" turn a blind eye to the private performance of that music, that does not mean that the authorities invariably do so, as is illustrated by the arrest and punishment of 300 people in raids on two New Year's Eve parties at the end of the year 2000.

12 Thus it would not be a logical process of reasoning for the RRT to conclude, on the country information before it, that police always turn a blind eye to performances of sensuous or Western music at weddings.

13 A factual mistake does not of itself mean that there has been an error of law giving rise to a ground of review under the Act: *Soe v Minister for Immigration & Multicultural Affairs* [2001] FCA 1575. No doubt there may be circumstances in which the adoption of an illogical reasoning process may indicate that the RRT had misunderstood the applicable law, or asked the wrong question. But this is not such a case.

14 Moreover, this was not the only factor on which the RRT relied in coming to the conclusion that it “[did] not accept” the appellant’s account of events at the wedding on 23 March 1999. The RRT did not believe that the appellant could have returned to his home without being apprehended by the authorities if they were seeking to arrest him.

15 The second incident on which the appellant relied was that on 7 October 2000 the Iranian intelligence closed the appellant’s music shop. The RRT dealt with this claim as follows:

“The Tribunal also accepts that the applicant has a music shop in Iran. Having had a music shop for some time indicates that they are tolerated. If the authorities took action to close it down then **it must be that** the applicant was in some way breaching the norms generally prescribed for the playing of music. For example if there were complaints that the applicant was playing unsuitable music from his shop it is conceivable that the authorities would move to close it down. However the applicant does not allege that anything else stemmed from this and the applicant as a musician and teacher was able to earn a living singing and teaching. As a result closing down his shop has not deprived him of a livelihood such that it could be said to have amounted to persecution.”

(Our emphasis.)

16 The RRT does not state why the only possible explanation for the music shop being closed down was that the appellant was in some way breaching the norms generally prescribed for the playing of music. It cannot be logically true to say that the only possible explanation for this event was the playing of inappropriate music. However, the appellant’s complaint was that the intelligence kept hassling him, accusing him of playing music in his shop and that the neighbours did not like to hear it. In that context, the passage which we have quoted may simply reflect the RRT’s assessment of that complaint. The RRT’s findings on this incident do not expose reviewable error.

17 The third incident upon which the appellant relied was that 10 days before his departure from Iran the intelligence authorities raided another wedding party at which he was singing, but he managed to escape. The authorities then raided his house, and confiscated political songs and tapes and CDs of anti-regime music. The RRT did not accept the appellant’s claim that the authorities raided this wedding party at which he was singing, upon the basis that the country information established that the authorities turn a blind eye to the playing of music at private parties. The RRT went on to hold that even if it were wrong about this, playing music at a wedding that is deemed sensuous or Western does not bring the appellant within the Refugees Convention. This is an alternative reason given by the RRT for its conclusion, rather than an indicator that the RRT was in doubt as to the basic facts, and was therefore embarking on an enquiry as to “what if I am wrong”: see *Minister for Immigration & Multicultural Affairs v Rajalingam* (1999) 93 FCR 220.

18 The appellant had told the RRT that the authorities had told him that they took the view that playing music was corrupting as it tended to “Westernise the young”. That is to say, it is music which leads the young away from Islam. At some times, and in some places, music has been part of the language of political dissent, and it may be too broad a generalisation to assert that the playing of Western music at a wedding in Islamic Iran is necessarily outside the scope of the Convention.

19 But whether this be so or not, the RRT did not accept that the appellant escaped from this wedding when it was raided by the authorities. If, as appears to be the case, that finding was based upon the proposition that country information establishes that the authorities always turn a blind eye to the playing of sensuous or Western music at private parties, then the conclusion is not necessarily sustained by the country information on which it is purportedly based.

20 However, as we have set out above, even if the RRT’s findings involved an exaggeration of the effect of the country information on which they purport to be based, that would not, in itself, involve reviewable error.

21 The final matter on which the appellant relied was a claim that after the second wedding the authorities raided his house and found musical tapes, political songs and CDs which were against government policy, which were confiscated.

22 The RRT noted that the possession of rock tapes and Western music is common in Iran. The appellant submits, correctly, that this observation by the RRT does not meet, let alone answer, the appellant’s claim that he was found in possession of tapes with political songs on them, even if it be assumed that the CDs which were against government policy, consisted only of rock music or Western music.

23 However, the RRT continued:

“The Tribunal does not accept that any tapes that were found if indeed his house was raided were so specifically anti-regime that he would get into trouble for this reason. The applicant is a musician who as far as the Tribunal can tell has not been involved in politics but has been earning his living teaching, selling and playing music. In these circumstances whilst it is possible although not likely that his house was searched for CDs and cassettes because of a crackdown such as the one referred to in the newspaper article above, the Tribunal does not accept that such a discovery led to the applicant being considered to be anti-regime and considers that the penalty would most likely be confiscation and then perhaps a fine. The Tribunal does not accept that such a penalty would be serious enough to amount to persecution.”

24 Accordingly, the appellant’s submission that the RRT disregarded his complaint about writing and singing anti-government songs is not made out. As the foregoing passage discloses the RRT rejected the appellant’s account, in particular, the claim that “anti-regime” tapes were discovered.

25 The appellant left Iran legally, travelling on his own passport. That provided another indication to the RRT that the appellant was not of interest to the authorities at the time of his departure from Iran, otherwise he would not have been permitted to leave. The checks on leaving appear to be rigorous and the RRT did not accept that the appellant paid a bribe in order to leave.

26 The ultimate issue for the RRT was whether there was a real chance that the appellant would face Convention-related persecution if returned to Iran. The RRT expressed its conclusion as follows:

“In the Tribunal’s view the applicant could return to Iran and continue to play music. If he misreads the situation and plays inappropriate music such as sensuous or western music on occasions when he should have played more acceptable music, then he might be punished but the Tribunal does not consider that such punishment would be serious enough to amount to persecution. The Tribunal also considers that the rules about music are rules of general application which also means that if the applicant is punished pursuant to such rules it would not be persecution for a Convention reason.”

As we have indicated above the views expressed by the RRT in the final sentence of the extracted paragraph may have raised the question whether the RRT misinterpreted the relevant law if that statement were the ground on which the RRT’s decision was made. However, the RRT did not rely on that ground for its finding that no real risk of persecution faced the appellant if he were returned to Iran, and it is neither necessary nor appropriate for us to express a view on the correctness of the Tribunal’s view as to what may constitute persecution for a Convention reason.

27 The appellant also submitted that the RRT disregarded statements made by the appellant at the hearing before the RRT and disregarded explanations given to the RRT as to why and how the appellant was able to play music since 1987. The transcript of the hearing before the RRT was not in evidence at first instance, hence we cannot assess whether there is any substance in these complaints. In any event, these complaints, even if true, would involve a merits review of the RRT’s decision and not judicial review under s 476 of the Act

28 The appeal should be dismissed with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 16 September 2002

	The appellant appeared in person
Counsel for the Respondent:	A A Jenshel
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	21 August 2002
Date of Judgment:	16 September 2002