FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZYID v MINISTER FOR IMMIGRATION & ANOR [2010] FMCA 749

MIGRATION – Alleged jurisdictional errors – Tribunal not properly understanding evidence from applicant's solicitor as to availability of critical witness – writs issued.

Migration Act 1958, ss.425, 426(3)

Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin [2005] FCAFC 118
VAT v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 255
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 73 ALD 1

Applicant:	MZYID
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLG 484 of 2010
Judgment of:	Burchardt FM
Hearing date:	3 September 2010
Date of Last Submission:	3 September 2010
Delivered at:	Melbourne
Delivered on:	8 October 2010

REPRESENTATION

Counsel for the Applicant:	Ms N. Karapanagiotidis
Solicitors for the Applicant:	Asylum Seeker Resource Centre
Counsel for the First Respondent:	Mr K. Walker
Solicitors for the First Respondent:	Clayton Utz Lawyers

ORDERS

(1) A writ of certiorari issue directed to the Second Respondent quashing the decision of the Second Respondent dated 12 March 2010.

(2) A writ of mandamus issue directed to the Second Respondent requiring the Second Respondent to determine the application for review according to law.

(3) The First Respondent pay the Applicant's costs fixed in the sum of $5,865.00.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE

MLG 484 of 2010

MZYID
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant seeks judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 12 March 2010. His amended application concentrates predominantly upon the way in which the Tribunal dealt with evidence from Dr Mustapha, an alleged parliamentarian in Ghana. The applicant's amended application also attacks a number of other aspects of the Tribunal's decision.

2. For the reasons that follow, I think the Tribunal did fall into jurisdictional error in the way that it dealt with the matters pertaining to Dr Mustapha. Orders will be made remitting the matter to the Tribunal.

Introductory

3. The procedural background is not contentious and is set out in a summary way in the first respondent's initial summary of argument

filed on 2 August 2010. It is further augmented by the matters set out in the applicant's contentions of fact and law filed on 18 August 2010. What follows is an amalgam of those two documents.

4. Following an earlier Tribunal hearing which led to a decision that was set aside by consent, a second tribunal hearing was held on 15 December 2009. The applicant was represented at the hearing, and a written submission from the applicant's adviser was received on 9 December 2009.

5. At the hearing, the Tribunal put to the applicant that it had information from the Department concerning the applicant's claim that was inconsistent with what he said. A number of matters were put to the applicant by the Tribunal (see CB314 at paragraphs 51 to 52).

6. At the conclusion of the hearing, the applicant's adviser made various comments in relation to some of the issues raised and requested to be given until 8 January 2010 to provide further submissions. On 12 January 2010 the Tribunal received a further written submission from the applicant's adviser.

7. Critically for these purposes, the letter dealt with the evidence of Dr Mustapha. What was stated was as follows (CB292):

> *"During the hearing the Tribunal indicated that the lack of evidence from Dr Mustapha was concerning. I indicated to the Tribunal that there had been various attempts to obtain more detailed evidence from Ghana, however we had not been able to make contact with Dr Mustapha or the applicant's parents. I confirm that the applicant has managed to get a home phone number for Dr Mustapha and that I spoke with Dr Mustapha on 4 January 2010. Dr Mustapha has indicated that he is willing to give evidence to the Tribunal regarding the applicant's political involvement in Ghana and the risks to his life should he be forced to return to Ghana."*

8. The letter went on to posit arrangements whereby Dr Mustapha could be telephoned (including the telephone number) and a time at which he could be heard.

9. It should be noted that the letter was signed by Chelsea Clark, who identified herself as a lawyer at the Human Rights and Civil Law

Service. It is plain therefore that the letter was prima facie written by an officer of the Court.

Outline of the applicant's claims and the Tribunal's conclusions about them

10. The following paraphrase is taken from the uncontroversial assertions set out in the applicant's contentions of fact and law.

11. The applicant was born and raised in northern Ghana. He claimed to be a supporter and member of the National Democratic Congress ("NDC"), which party was opposed to the Government and the ruling party at the time, the New Patriotic Party ("NPP").

12. The applicant claimed that while working as a porter in Accra he met and became close to Dr Mustapha, a member of Parliament representing the NDC party.

13. The applicant said he first started to have problems in 2002 when he was attacked by a group of Dagbani Tribe with a machete. He claimed to have a scar on his back as a result.

14. He claimed that in 2004 members of the NPP threatened to kill him if he failed to stop working for the NDC, and that in October 2005 NPP people attended his home in the middle of the night.

15. He claimed that in January 2008 his wife was attacked in a car with other NDC wives and there were no survivors. The applicant claimed to have reported the incident to the police the next day but they refused to investigate the matter without being paid a bribe.

16. The applicant claimed to have been arrested and locked at the Kotabadi police station in June 2008 and to have been detained for two months without charge. He alleged that he escaped one night and that he had been detained because of his NDC membership and because of police corruption.

17. The applicant claimed that in September 2008 NPP members stormed the applicant's home town and started shooting and killing families known to be NDC supporters and that his sister and uncle were killed.

18. He claimed that the NPP were looking for him as he had recent death threats and therefore had no choice but to leave.

19. He also claimed that although the NDC won power in Ghana in December 2008, they would not protect him because the people who held the senior positions were the same as those people who were appointed to those positions by the NPP.

20. He also claimed that he feared harm as a member of the Bosanga minority tribe and a sustained attack launched upon them by the Dagbani tribe.

21. The applicant characterised his claims by his advisor (CBA136) as "the applicant's claims were based on his ethnicity, his political opinion and to some degree, his religion."

22. The reference to religion arises because the Dagbani and the Bosanga tribes are of different religious persuasion.

23. The Tribunal did not accept the applicant as a witness of credibility and found that he had contrived his claims for the purposes of his visa application (CB322).

24. The Tribunal also found the applicant's evidence to be inconsistent with evidence accumulated by the Department and as lacking plausibility (CB319).

25. The Tribunal gave no weight to the statutory declarations of claimed colleagues of the applicant (CB320) and the Tribunal did not accept that the applicant had any association with Dr Mustapha (CB321).

26. The Tribunal found that the documents provided by the applicant, including a purported letter from Dr Mustapha, to be not genuine documentation (CB322).

27. The Tribunal made a number of other criticisms of the applicant's case which are summarised in the applicant's submissions at paragraphs 32 to 46. The applicant correctly summarises the Tribunal's rejection of the applicant's claims at CB323, paragraph 76, as follows:

> *"As the Tribunal has found the applicant to be lacking in credibility, it does not accept that he became involved in the*

NDC political party; that he personally knew or had dealings with Dr Mustapha; that he was threatened by members of the NPP; that he has ever been married; that he reported the death of his wife to any police station; that he worked for the Justice Department in Ghana; that he was imprisoned for 2 months at the Kotabadi police station or that there is a real chance of him facing persecution if he returned to Ghana now or in the reasonably foreseeable future because of his ethnicity, religion, membership of a particular social group or his political opinion."

Ground 1 of the application – breach of s.425 of the *Migration Act 1958* (Cth) (These headings are consecutive and do not follow the numbers in the amended application).

28. The applicant's complaint under this ground is that the failure to call Dr Mustapha by the Tribunal constituted breach of s.425 of the *Migration Act 1958* ("the Act") and deprived the applicant of a real and proper hearing.

29. It is clear that the letter from Dr Mustapha (CB43) was strongly corroborative of the applicant's position. It is equally clear that the Tribunal's complete rejection of the allegations concerning Dr Mustapha was a central component of its reasons for decision.

30. It should be noted that the letter from Ms Clark, to which I have already referred, concluded:

> *"I look forward to hearing from the Tribunal regarding how it wishes to proceed in relation to the evidence of Dr Mustapha.*
>
> *If you have any questions or need more information please call me on (telephone number)."*

31. The Tribunal did not actually contact Ms Clark or adopt the posited method of contacting Dr Mustapha by telephone. Rather, the Tribunal sent a letter to Dr Mustapha on 25 January 2010 at the address nominated on Dr Mustapha's parliamentary website by way of express post. The letter stated (CB295):

> *"Would you please advise if you agree to giving evidence in the case, if the telephone number is correct and your suggestions as to how a convenient time can be arranged."*

32. A search of the electronic tracking device indicated that the letter was delivered on 12 February 2010 (CB322) but the Tribunal did not receive a response. Of course it should be noted that it is not known by whom the letter was received.

33. The nature of the obligation that arises under s.425 of the Act has been considered in various decisions of the Federal Court including *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* [2005] FCAFC 118 where the Full Court said at [38]:

> *"The Tribunal is obliged to have regard to any notice given by an applicant under subss 361(2) or (2A) of the Act. This means that the Tribunal must genuinely apply its mind to the contents of the notice and, in particular, to the question whether it should take the oral evidence of the nominated individuals in accordance with the applicant's wishes. The Tribunal must not merely go through the motions of considering the applicant's wishes as expressed in the notice. As the respondents' counsel said, the authorities establish that the invitation to appear before the Tribunal must be "real and meaningful and not just an empty gesture": NALQ at [30]; SCAR at [37]; and Mazhar at 188 [31]. It follows that the consideration that the Tribunal gives to the wishes of the applicant concerning the evidence to be taken at the hearing must also be genuine. The Tribunal must not decline to comply with the applicant's wishes capriciously, but must take account of such relevant matters as the relevance and potential importance to the outcome of the review of the evidence that could be given by a nominated witness (compare W360/01A v Minister for Immigration and Multicultural Affairs [2002] FCAFC 211 ("W360/01A") at [2] per Lee and Finkelstein JJ and [30]-[32] per Carr J)), the sufficiency of any written evidence that has already been given by a witness, and the length of time that would afford the applicant a fair opportunity to put his or her case before the Tribunal. These considerations flow from the nature of the Tribunal's overarching objective, which is to provide a review that is "fair, just, economical, informal and quick": see s 353(1). The Tribunal must bear in mind this statutory objective when considering the weight to be given in these matters."*

34. Here the applicant submits that the way in which the Tribunal dealt with the invitation to contact Dr Mustapha shows that it failed to have regard to a relevant consideration, namely the fact of the conversation between the solicitor, Ms Clark, and Dr Mustapha. It is further

submitted that the Tribunal failed properly to consider the very unusual circumstance that an officer of the Court had in fact actually spoken to a person who at least purported to be Dr Mustapha.

35. The first respondent submits by way of contrast that the Tribunal did all that it was required to do. It gave genuine consideration to the applicant's desire to call the evidence of Dr Mustapha and took a step well open to it under its powers to elicit that information.

36. The question as to what constitutes jurisdictional error has been considered likewise many times by the Courts, but is in my respectful view well summarised in the following passage from *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255 where the Full Court of the Federal Court stated:

> *"16 It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description of what constitutes jurisdictional error as it appears in Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness: Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 per Gummow and Hayne JJ at [49], footnote 26 referring to Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82 and Re Minister for Immigration & Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57."*

37. Each case obviously has to be considered in the light of its own particular circumstances. What takes this case altogether out of the ordinary are the following circumstances:

    (a) most exceptionally, the Tribunal had an indication from an officer of the Court, Ms Clark, that she had spoken to Dr Mustapha and that he had agreed to make himself available to give evidence;

(b) Ms Clark had indicated a desire to be informed how the Tribunal intended to proceed in relation to the evidence of Dr Mustapha and had indicated her preparedness to provide any necessary further information.

38. The Tribunal in fact paid no attention to those latter requests but embarked upon another course of action which superficially might seem to have been sensible enough. After all, it might be thought that there would be no guarantee that the person at the other end of the telephone line was indeed Dr Mustapha.

39. Nonetheless, I think that the Tribunal did fall into error. The fact of the conversation between Ms Clark and the person whom she at least felt confident was Dr Mustapha was on any view a relevant and very important piece of information. The Tribunal, in my view, either misunderstood its purport or failed to have proper regard to it. It was, in my view, relevant evidence of itself. Bearing in mind that the Tribunal found that the purported letter from Dr Mustapha was a forgery, and roundly rejected all the applicant's involvement in politics, a matter clearly capable of being well within Dr Mustapha's knowledge given the assertions made in the case, in my opinion the Tribunal fell into jurisdictional error in proceeding in the way that it did.

40. If the Tribunal had heard from Dr Mustapha, and believed him, the outcome would more probably than otherwise have been different. The error was one which, in my view, so clearly distorted the outcome of the proceeding that it is appropriate to make orders remitting the matter to the Tribunal to be re-heard.

Ground 2 – breach of s.426(3) of the Act.

41. In submissions, this ground was dealt with very much in the same terms as the s.425 complaint. (See applicant's written submissions, paragraphs 64 to 66).

42. Section 426(3) of the Act says:

> *"If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice."*

Subsection (2) requires the applicant to give such notification within seven days. I accept the submission of the first respondent that the applicant did not give such notification of the desire to have Dr Mustapha called within seven days of the hearing. The notice given did not nominate Dr Mustapha in terms in any event.

43. I further accept the submissions of the first respondent that even if the Tribunal's obligations under s.426(3) were triggered, the Tribunal did in fact consider the applicant's wish because it clearly wrote to Dr Mustapha.

44. Given, however, that I do not think that the obligation was enlivened because the notice was received late and did not nominate Dr Mustapha (see first respondent's further submissions, paragraphs 9 and 10) it is not necessary to deal further with this ground.

Ground 3 – failure to consider the nature or content of the evidence which Dr Mustapha was prepared to provide to the Tribunal

45. This matter was simply put as an adjunct or a corollary of ground 1 and it is not necessary to deal with it further.

Ground 4 – Tribunal's failure to consider country information as to widespread police corruption in Ghana

46. This matter, in my opinion, can also be dealt with in relatively short terms. I accept the submissions of the first respondent at paragraphs 24 to 26 of the further written submissions. To summarise:

    a) it is a matter for the Tribunal to determine what weight to give country information – all that is required of the Tribunal is in fact to consider it;

    b) the Tribunal did indeed express reference to the material provided by the applicant including the country information relied upon (see CB309, paragraph 21, CB317, paragraph 63 and CB320, paragraph 69).

47. While I confess that my own assessment of the information provided by the Australian Government officers who visited the various police

stations in Ghana would have been rather different to that of the Tribunal, I think it was open to the Tribunal to form the conclusions that it did and that the Tribunal gave appropriate regard to the country information as to police corruption in Ghana.

Ground 5 – the applicant's first interview with the Department of Immigration

48. Once again, I think this matter can be dealt with in a summary way. In my opinion, the Tribunal's rejection of this part of the applicant's evidence was well open to it on the materials as they stood and does not constitute jurisdictional error.

49. While it is true that on one view the applicant had no formal opportunity to dispute the integrity of his initial interview until the hearing on 15 December 2009, it was open nonetheless to the applicant to do so through his advisers before then. Furthermore, in my opinion it would have been open to the Tribunal in any event simply to accept that what the applicant said at his first interview was correct and to not accept his subsequent contradiction of it.

Ground 6 – the supporting witness statutory declarations

50. At CB323, at paragraph 74, the Tribunal stated:

> *"The Tribunal has given consideration to the statutory declarations from Lukman Laary, Manaak Kadir, Sumaila Chaanis, Yakubu Braama and Sheikh Hassan Suala. Given that the Tribunal does not accept that the documentation provided by the applicant as indicated above to be genuine, it has not given them any weight."*

51. The first respondent drew the Court's attention to the observations of Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 73 ALD 1 at [12]:

> *"It is not necessarily irrational, or illogical, for a finder of fact, who is convinced that a principal witness is fabricating a story, which is considered to be inherently implausible, to reject corroborative evidence, even though there is no separate or independent ground for its rejection, apart from the reasons given for disbelieving the principal witness."*

52. Leaving aside the issues as to the evidence of Dr Mustapha, with which I have already dealt, I think that his Honour's observations are entirely applicable to what the Tribunal did in this case. This ground is not made out.

Ground 7 - failure to deal with an integer of the applicant's claim

53. Here the applicant's case is that the Tribunal fell into error in failing to deal with the positive claim made by the applicant that the police could "be unhappy with the applicant for sending an Australian official to check on their practices" (CB317).

54. The applicant submits that that claim was discrete and required consideration in the light of extensive country information on police corruption and brutality in Ghana.

55. The first respondent submitted that this sur place claim was considered by the Tribunal. At CB324, paragraph 79, the Tribunal said:

> *"The tribunal does not accept this proposition for two reasons. Firstly, having found that the applicant's story is without credibility and contrived for the purposes of his protection visa application there is no basis for the police at either station to have any interest in him or to recognise him if he were to return to Ghana. Secondly, the NDC party is now in power and there is no stated reason as to why the applicant should face persecution by the government or its agencies."*

56. I accept the first respondent's submission that the Tribunal was clearly aware of the sur place claim and characterised it correctly. While it is true that the applicant was complaining that the visits by Australian Government officials would of themselves be likely to give rise to a risk of harm from police officers irritated by the revelation of their unlawful detention of the applicant, the Tribunal's finding that there was no basis for the police at either station to have any interest in the applicant or to recognise him if he were to return to Ghana seems to me to be an entirely common sense response.

57. In any event the Tribunal did indeed deal with the sur place claim in a fashion which in my view shows that it properly understood what the

applicant was saying and came to a conclusion which was open to it in the circumstances and does not reveal jurisdictional error.

Conclusion

58. For the reasons I have expressed, all the grounds of the application save for the s.425 ground are not made out.

59. Because the s.425 ground has been made out, however, the matter must be remitted for further consideration. I will make orders accordingly.

I certify that the preceding fifty-nine (59) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate:

Date: 8 October 2010