FEDERAL COURT OF AUSTRALIA

N 44 v Minister for Immigration & Multicultural Affairs [1999] FCA 1127

CONSTITUTIONAL POWER - whether a decision of the Refugee Review Tribunal ("RRT") refusing to grant a protection visa amounts to an exercise of judicial power of the Commonwealth contrary to Chapter III of the Constitution - whether review by the RRT is of an administrative or judicial nature - whether the RRT has power to enforce its decisions

MIGRATION - application for review of decision of RRT to refuse protection visa - whether RRT referred to all evidence or material on which its findings were based - where decision-maker waited 18 months after the hearing before making a decision in order to monitor the situation in Romania - consideration of opportunity to appear, error of law, threshold test for possibility of persecution and actual bias.

WORDS AND PHRASES - *"judicial power", "administrative power"*

Convention Relating to the Status of refugees 1951 as amended by the *1993 Protocol*, Article 1A(2)

The Constitution Chapter III, s 75(v)

Judiciary Act 1901 (Cth) s 78B

Migration Act 1958 (Cth) ss 36, 65, 198, 415, 417, 422, 424-427, 430, 476

The Attorney-General of the Commonwealth v Breckler [1999] HCA 28, followed

Minister for Immigration & Multicultural Affairs v Cho [1999] FCA 946, followed

Chan v Minister for Immigration and Ethnic Affairs [1989] HCA 62*;* (1989) 169 CLR 379, cited

Sun Zhan Qui v Minister for Immigration and Ethic Affairs (1997) 81 FCR 71, applied

N 44, N44(A), N 44(B), N 44(C) v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N 44 OF 1999

TAMBERLIN J

SYDNEY

24 AUGUST 1999

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 44 OF 1999

BETWEEN:	N 44
	First Applicant
	N 44(A)
	Second Applicant
	N 44(B)
	Third Applicant
	N 44(C)
	Fourth Applicant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
	Respondent
JUDGE:	TAMBERLIN J
DATE OF ORDER:	24 AUGUST 1999
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The application for review is granted.

2. The decision of the RRT is set aside.

3. The matter is remitted to the RRT for further consideration in accordance with law.

4. The respondent is to pay the applicants' costs

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 44 OF 1999
BETWEEN: N 44

First Applicant

N 44(A)

Second Applicant

N 44(B)

Third Applicant

N 44(C)

Fourth Applicant
AND: MINISTER FOR IMMIGRATION

AND MULTICULTURAL AFFAIRS

Respondent
JUDGE: TAMBERLIN J
DATE: 24 AUGUST 1999
PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The applicants are citizens of Romania who arrived in Australia in March 1995. Shortly thereafter they lodged an application for protection visas with the Department of Immigration and Multicultural Affairs under the *Migration Act 1958* (Cth) (`the Act"). On 20 June 1996, a delegate of the Minister for Immigration and Multicultural Affairs refused to grant the protection visas and on 19 July 1996 the applicants sought review of that decision in the Refugee Review Tribunal ("the RRT"). The application for review was dismissed by the RRT on 21 December 1998 and the applicants now seek review by this Court under the Act.

2 The application requires consideration of the decision of the RRT in the light of the well-known definition of "refugee", in the *Convention Relating to the Status of Refugees 1951* as amended by the *1993 Protocol*, Article 1A(2), as being a person who:

"... owing to well-founded fear of being persecuted for 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..."

Preliminary issue - judicial power

3 Before considering the "refugee" question, however, it is necessary to resolve a constitutional question raised by the applicants as to whether the decision of the RRT is ineffective because it amounts to an exercise of the judicial power of the Commonwealth which can only be exercised by a court in accordance with Chapter III of the Constitution. The submission is that a decision that a person is not a "refugee", and therefore not entitled to a protection visa, is a judicial decision and cannot be made by the RRT because it is an administrative review body and not a court.

4 Pursuant to the requirements of s 78B of the *Judiciary Act 1901* (Cth), notice of the constitutional question was given to the Attorneys-General of the Commonwealth and the States but no intervention was forthcoming.

5 In the amended Application for judicial review, the constitutional matters raised are expressed as follows:

"Constitutional Grounds

1. Re s.476(1)(b) - **the delegate of the Minister** who purported to make the decision **to refuse** to grant protection visas, **and the Tribunal Member** in affirming that decision, exercised the judicial power of the Commonwealth as neither the delegate nor the Tribunal Member was constituted as a Chapter III Constitutional court.

2. Re s.476(1)(c) - **the decision of the delegate to refuse** to grant protection visas**, and the decision of the Tribunal Member** affirming that decision, were not authorised by the Migration Act 1958 as the purported authority to make such decisions under the Act is void for the reason that the decision of the delegate, and the decision of the Tribunal Member, were judicial decisions and offensive to Chapter III of the Constitution.

3. Re s.476(1)(d) - **the decision of the delegate to refuse** to grant protection visas, **and the decision of the Tribunal Member** affirming that decision, were improper exercises of the power conferred by the Migration Act 1958 as such decisions are judicial decisions and offensive to Chapter III of the Constitution."(Emphasis added)

6 It can be seen that the submissions are that the delegate of the Minister and the RRT member exercised the judicial power of the Commonwealth. In considering these submissions I will approach the question as having regard to the role of the RRT. The same reasoning applies, *a fortiori* to functions of the Ministerial delegate.

7 In relation to these grounds it should be noted that each of the grounds is directed to a situation where the RRT review application is **refused.** The applicants' position appears to be that if the application for review was granted by the RRT there would be no exercise of judicial power. This is a curious consequence to say the least but appears to be premised on the basis that upon dismissal of an application for review, the decision will be **enforced** by way of detention and deportation, whereas if the application is granted no such consequences will follow.

8 The nature of the judicial power of the Commonwealth was recently considered by the High Court in *The Attorney-General of the Commonwealth v Breckler* [1999] HCA 28. The Court, in that case, unanimously held that a determination by the Superannuation Complaints Tribunal under s 37 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) ("the Complaints Act"), was not an exercise of judicial power. The reasons given by the Court discuss the relevant authorities in sufficient detail to make it helpful for present purposes.

9 In the present case the applicants base their submissions on statements made by Kirby J, in his separate judgment in *Breckler,* at par 84, where his Honour said:

"The characterisation of a power as judicial cannot therefore depend only on the use of particular verbal formulae. It must also be derived from: (1) a consideration of what the tribunal in question is authorised to do; (2) whether its functions purport to deprive those affected of access to the courts for the resolution of connected legal controversies; and (3) to what extent the tribunal's decisions, once made, are directly enforceable, as the orders of courts typically are ... Nor is it conclusive that the tribunal which is impugned makes decisions affecting controversies concerned with the property of private citizens or outside the central functions of the Executive Government ... These can be characteristics of administrative bodies as well as of courts."

10 For present purposes it is convenient to approach the submissions in the light of the considerations referred to in the above observations.

11 The applicants' counsel refers to s 65 of the Act which is, for the purposes of the decision under review, in these terms:

"65(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) ***the other criteria*** *for it prescribed by this Act or the*

regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 501 (special power to refuse or cancel) or any other provisions of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, **is to refuse** to grant the visa.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3)." (Emphasis added)

12 The applicant points out that this section requires the Minister, upon being satisfied of certain criteria, to grant a visa, and if not so satisfied to refuse a visa. There is no provision for the exercise of any discretion by the Minister. One of the **other criteria** prescribed by the Act, within s 65(1)(a)(ii), is found in s 36 of the Act, which provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen within Australia to whom Australia has protection obligations under the Refugees Convention as Amended by the Refugees Protocol. It is said that a decision as to whether a person is a "refugee" is one of a judicial nature which gives rise to serious consequences, because under s 198(2) of the Act there is an obligation to remove an unlawful non-citizen as soon as reasonably practicable. On a review application to the RRT under s 415 of the Act, the RRT has all the power of the Minister, and its decision is taken to be the decision of the Minister except for the purpose of appeals from decisions of the RRT.

13 Counsel for the applicants also submits that there is no procedure for merits review of the RRT decision and that the RRT decision operates to deprive the applicants of access to the courts for the resolution of a controversy. Although some review is available it is limited to s 476 of the Act and s 75(v) of the Constitution.

14 Finally, it is submitted that the Minister's decision is directly enforceable in the same way as an order of the Court. It is said that the consequence of a refusal by the RRT of a review application is that the applicant is subjected to detention, deportation and persecution when returned to the country of nationality.

15 In my view none of the above submissions can be accepted.

16 As to the first, the function and powers of the RRT are set out in s 415 of the Act. Its function is to review administrative decisions made by the Minister and for that purpose it can exercise all the powers of the Minister or his delegate. A decision of the RRT can be substituted by the Minister with another decision, if the Minister thinks that it is in the public interest to do so, and where the decision is more favourable to the applicant, regardless of whether the RRT had the power to make the substituted decision: see s 417. These considerations lend both colour and support to the view that the function performed by the RRT is one of administrative and not judicial review.

17 Other matters which indicate that the power exercised by the RRT is administrative and not judicial is found in s 420 of the Act, which provides that the RRT in reviewing a decision is not bound by technicalities, legal forms or rules of evidence. There is also provision for reconstitution of the Tribunal where a member, during the course of a review, ceases to be a member or is not available for the purposes of the review, so that the newly appointed member can constitute the Tribunal for the purpose of finishing the review: see s 422. There is provision in the legislation, as applicable at the time of the decision, for a review "on the papers": see s 424. Where a hearing takes place, the only obligation on the RRT is to give the applicant an opportunity to appear before it to give evidence, and to notify the applicant of that entitlement: see ss 425(1)(a) and 426(1)(a). However, the Tribunal is not required to

obtain evidence from any person whom the applicant may seek to call: see s 426(3). There is no provision for examination or cross-examination of any other person as of right: see s 427(6)(b). Nor is there any right of oral address: see ss 425(2) . In addition, the Tribunal has power to obtain such other evidence as it considers necessary: see s 425(1)(b). These features of the way in which the RRT is permitted to conduct its proceedings are not found in the procedures of a Chapter III Court.

18 These considerations, in my view, cumulatively lend support to the conclusion that the RRT is an administrative body and serve to characterise its function as being administrative rather then judicial.

19 It is true that the RRT can determine whether certain statutory criteria exist in its view and that such a determination will lead to the consequence that statutory enforcement powers will be enlivened, but this does not necessarily point to the existence of judicial power.

20 As the majority judgment in *Breckler* points out in par 45:

"A determination which `constitutes the factum by reference to which' legislation operates to confer curially enforceable rights and liabilities does not necessarily involve the exercise of judicial power ... The provisions we have discussed would involve ... `an independent exercise of judicial power' to give effect in this way to a determination by the Tribunal."

21 In the present case, the determination that a person is or is not a refugee and is not entitled to a protection visa is not final or conclusive. In reaching a conclusion on this question it is deciding administratively whether a criterion exists which in turn activates statutory enforcement powers contained in the legislation unless the Minister intervenes under s 417. In addition, the decision of the RRT is subject to review by the Federal Court under the Act and the High Court has jurisdiction to review the decision under s 75(v) of the Australian Constitution. Most importantly, the RRT simply does not have power to enforce its decisions or carry them into effect. Its decisions must ultimately be enforced by Court order if the statutory powers are enlivened as a consequence of the determination. Any "enforcement" consequences which flow from RRT decisions arise as a consequence of the provisions of the Act being enlivened. The RRT has no power, for example, to punish for contempt or to sequestrate property or to exercise any other enforcement measure which is normally found in the armoury of a court. Because this essential attribute of judicial power is lacking, it follows that the Act does not confer Chapter III judicial power on the Tribunal. Accordingly, the submissions as to the conferral of judicial power of the Commonwealth on the RRT have not been made out.

22 I now turn to consider the matters raised in relation to the RRT decision under consideration.

Grounds for review of RRT decision under the Act

23 The first grounds of review claimed under the Act are that the RRT failed to observe procedures laid down by the Act: see s 476(1)(a).

24 It is pointed out for the applicants that the hearing before the RRT concluded on 4 June 1997. The decision, however, was not given until 21 December 1998, some eighteen months later. This was a result of a choice by the decision-maker who said in his reasons for decision (at p 29):

"After the Tribunal hearing I considered the deteriorating situations in countries bordering on Romania and, in hindsight, took the unnecessary precaution with a view to provide the most favourable consideration to the Applicants to monitor the situation to see if the situation in the neighbouring countries of former Yugoslavia and the former USSR would have any influence on Romania such that the positive changes were threatened. This did not happen and Romania's slow but consistent moves away from the Romania of 1989 lead me to conclude that the changes in the last seven years have been substantial and positive.

As there have been substantial and sustained improvements in Romania since the Applicants' departure, many of the causes for their past grievances have been effectively removed. While more progress needs to be made to eradicate fundamental human right abuses of Roma, in particular, and other groups there is no evidence that people in the applicants' situation face any `real chance' of persecution for the former role of N 44 in the Securitate."

25 The delay in delivery of reasons must be considered in the context of correspondence which took place in October 1998. On 1 October 1998, a Deputy Registrar of the RRT wrote to N44 stating that the member who heard the case would finalise the matter by 23 October 1998. The Registrar stated that the reason for the delay had been the need to consider the substantial changes which had occurred in eastern Europe in recent years. It was stated that in the hearing the member put independent advice to the applicants concerning the situation in Romania, however, the situation in Eastern Europe had become unstable in countries neighbouring Romania throughout 1997. The letter conveys the opinion of the member that before a decision could be made in their case, it was necessary to be satisfied that any changes in Romania were lasting changes so that their particular circumstances could be considered fairly against those changes. The letter notified that the member was now in a position to finalise the matter. Although the letter was addressed to N 44 he was directed to tell all the applicants about the letter and, if they wished, reply to the RRT for them.

26 On 9 October 1998 N 44(A) replied stating:

"I understood that the Member considered necessary to wait another fifteen months after the initially proposed deadline in order to finalise our application. I have been given an explanation: it was necessary to be satisfied that any changes in Romania were lasting changes. It also appears to me that new investigations started in the meantime and that there is new information I am not aware of. New information could be as well the fact that the RRT does not have new evidence which would contradict the independent evidence put to us by the Member in our hearing.

*If this is the case**, could I please be sent all new informations which have been considered in relation to our application and which may be adverse to our case and***

***also be given sufficient time to consider these informations and eventually comment on them**." (Emphasis added)*

27 The Deputy Registrar replied on 16 October 1998 stating:

"In regard to your letter of 9 October 1998 the Member has instructed me to inform you that he took into consideration the deterioration of the former USSR and former Yugoslavia.

Both of these have common borders with Romania and, because of the instability and deterioration in both of these regions following the hearing he was of the opinion that should this spill over into Romania or result in changes in the government in Romania this would be relevant to your case.

The Member monitored these changes through Human Rights Reports following the hearing.

However, despite the dramatic and tragic circumstances of both the former Yugoslavia and parts of the former USSR there is no evidence of any serious effects of this on Romania or that it has influenced any changes to the government there.

Since that was the case there was no further material which would be relevant to add to your file and, since there is now no indication that the turmoil in those countries will affect the situation in Romania the Member is confident that he can make a decision based on the material you presented and that which he put to you in the hearing."

28 The applicants complain that the course adopted by the member was in breach of s 430(1)(d) of the Act, which requires the RRT to refer to evidence on which it makes its findings of fact, and that such material was not referred to in the RRT reasons in this case.

29 Section 430(1)(d) provides:

"430(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based."

30 The applicants rely on the submission that the RRT did not give details of the information relied on, and did not invite the applicants to reappear before it to present evidence and arguments relating to issues arising from the material considered after the hearing concluded.

31 The course adopted by the decision-maker in the present case was quite inappropriate. I fully accept that it was done in complete good faith with a view to possibly ascertaining material favourable to the applicants. However, the function of the RRT is to decide review applications placed before it and not to monitor the ongoing international political or social circumstances in countries over a period of years. It is not to the point to submit that the underlying purpose was to benefit the applicants by ensuring a comprehensive consideration of developments in adjoining countries and their possible destabilising impact on Romania. Nor is it to the point to suggest that in hindsight the precaution taken was unnecessary. The simple fact is that there is no reference to the evidence which was considered in concluding that the situation had not deteriorated.

32 In my view, the unusual course adopted by the decision-maker in assuming the role of ongoing monitor after the hearing resulted in a breach of s 430(1)(d) of the Act. There is no reference in the decision to any specific country information concerning Yugoslavia or the USSR which was considered after the hearing had been completed. There is a vague allusion to monitoring the situation and looking at "the situation in the neighbouring countries of former Yugoslavia and the former USSR". But unlike other references to country information in the decision, there is no reference to any specific documentation or intelligence. The material was clearly considered important by the decision-maker because it served to reinforce his conclusions from the evidence at the hearing. In my view, the indeterminate reference to the material taken into account in monitoring the situation, was not a reference for the purposes of s 430(1)(d) to the evidence on which, at least in part, the finding of fact was based. There is no reference or indication in the October 1998 correspondence as to what intelligence was considered after the hearing and was used to support the finding of fact.

33 For this reason I consider that the decision of the RRT should be set aside.

34 It is, strictly, unnecessary for me to deal with the remaining submissions but I think it appropriate to briefly express my conclusions.

35 There are two further submissions claiming that the RRT failed to observe proceedings laid down by the Act: see s 476(1)(a). First, it is submitted that the RRT did not set out its findings on the material question of the fear held by the applicants, specifically N 44. The RRT found that N 44 had "a genuine subjective fear", but the applicants complain that that fear was not identified. I find that in the context of the claims of persecution and feared persecution, which were set out in the reasons, there is no substance to this submission and I reject it. The claimed lack of identification of the applicants' fear is the basis of another submission claiming an error of law; this submission is also rejected.

36 Second, the applicants claim that contrary to the requirements of s 425(1) of the Act, the RRT did not invite the applicants to give evidence and present arguments in relation to the evidence and/or issues considered by the RRT member between the hearing and the date of the decision. Section 425 of the Act, as in operation at the time of the RRT hearing, provides:

"425 (1) Where section 424 does not apply, the Tribunal:

(a) must give the applicant an opportunity to appear before it to give evidence; and

(b) may obtain such other evidence as it considers necessary.

(2) Subject to paragraph (1)(a), the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review."

37 The effect of s 425 was recently considered by the Full Court in *Minister for Immigration & Multicultural Affairs v Cho* [1999] FCA 946. The Court there found (at p 18):

"Section 425(1)(a) does not require that ***all*** *evidence on which the RRT relies or considers must be presented to an applicant. The rights given are carefully delineated. There is no provision in the section for cross-examination by an applicant with respect to any evidence obtained by the RRT [see s 425(1)(b)], and this aspect of what is accepted as procedural fairness is therefore excluded from consideration by s 476(2)(a)."*

38 In the current matter, the applicants were clearly given an opportunity to appear before the RRT and give evidence. There is no complaint that it was not a real opportunity to be heard, for example because of poor or insufficient notice. As stated in *Cho*, there is no requirement that all the evidence on which the RRT relies or considers must be presented to the applicants. The material examined by the RRT was not specifically or particularly directed to the circumstances of the applicants. It was of a generalised country intelligence nature. With respect to any further "issues" which the RRT may have considered after the hearing, in my view, any requirements for a further hearing on these issues is likewise excluded by the Act as interpreted in *Cho*.

39 It is further submitted that the RRT wrongly applied the law to the facts, because the threshold test which was applied to the determination of whether the applicants were refugees was too onerous.

40 In setting out the legal principles at the commencement of his reasons, the RRT member said:

"A person can have a well-founded fear of persecution even though the possibility of the persecution is well below 50 per cent."

41 The submission is that this statement is in conflict with the reference in *Chan v Minister for Immigration and Ethnic Affairs [1989] HCA 62;* (1989) 169 CLR 379 *("Chan")* at 429 where McHugh referred to a "well-founded fear of persecution even though there is only a 10 per cent chance that he will be ... persecuted".

42 The claimed difference is in my view semantic. *Chan* did not lay down any universal rule that 10 per cent or anything like it is the appropriate standard: it stated a possibility dependent on particular circumstances. Even taken on a literal basis, there is no necessary conflict between the notion of being "well below 50 per cent" and the concept of a "10 per cent chance" as being sufficient. The underlying concept is

substantially the same, namely; that "a far-fetched possibility of persecution must be excluded": see *Chan* per McHugh J at 429. The submission is not accepted.

43 There were a number of other submissions as to misapplication of the law to the facts but I am not satisfied that any of them have been made out. They concerned questions of fact and degree and upon the evidence the findings were open to the RRT. One of those submissions, by way of example, was that the RRT failed to consider the application and claims of the female applicant in her own right. I do not consider that on a fair reading of the reasons for decision as a whole that this ground can be made out. It is apparent that considerable attention was devoted to the particular circumstances and fears of N 44(A) set out in her written statement. Specific reference was made to the bombing incident which led to N 44(A) suffering severe burns. It is true that the member referred to her claims as relying on her husband's profile and her association with him, but specific findings were made that any fears she held were not well-founded. In my view, the decision-maker gave sufficient consideration to the situation of N 44(A).

44 Finally, counsel for the applicants submitted at the hearing that the RRT decision-maker was clearly biased against the applicants in not pursuing a line of inquiry and satisfying himself in a proper way as to whether there was a real chance of persecution. Counsel put forward each of his other submissions, concerning misapplication of the law to the facts and failure to apply the real chance test, as cumulatively establishing "actual bias" in accordance with the test set down in *Sun Zhan Qui v Minister for Immigration and Ethic Affairs* (1997) 81 FCR 71: see s 476(1)(f) of the Act. However, as was accepted in that case, a finding of "actual bias" cannot be made lightly. It is something more than unreasonableness, error, or lack of logic, and more than an "apprehension of bias". Essentially, it must be established that the decision-maker had prejudged the case and was not open to persuasion by the applicant's case, though they need not be aware of their own bias.

45 In the present matter, the basis of the claim of **actual bias** as discussed above was based on previous submissions which I have rejected. Far from supporting a claim of **actual bias** the material demonstrates that the decision-maker was concerned to ensure that there was a careful consideration of the merits of the applicants' case, rather than being biased against them. I find nothing in the material to support such a finding and accordingly I reject the submission.

Conclusion

46 For the foregoing reasons I consider that the application for review should be granted. The decision of the RRT should be set aside. The matter should be remitted to the RRT for further consideration in accordance with law. The respondent should pay the applicants' costs.

Counsel for the Applicants: R Killalea

Solicitor for the Applicant: Tzovaras Yandell

Counsel for the Respondent: D Jordan

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 12 July 1999

Date of Judgment: 24 August 1999