

FEDERAL COURT OF AUSTRALIA

NBKE v Minister for Immigration & Citizenship [2007] FCA 126

MIGRATION – protection visa – nationality of visa applicant – Tribunal determined nationality on the basis that visa applicant held an Indonesian passport – claim that bogus marriage in Indonesia did not result in the acquisition of Indonesian nationality and the loss of Chinese nationality – claim that Indonesian passport was obtained under false pretences – whether Tribunal considered all the visa applicant’s claims

Migration Act 1958 (Cth) s 424A(1), s 427(1)(d)

Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244

Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184

Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 16

**NBKE v MINISTER FOR IMMIGRATION & CITIZENSHIP AND
REFUGEE REVIEW TRIBUNAL
NSD 1234 OF 2006**

**SIOPIS J
15 FEBRUARY 2007
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 1234 OF 2006

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: NBKE
Appellant**

**AND: MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent**

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: SIOPIS J

DATE OF ORDER: 15 FEBRUARY 2007

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

- 1 The name of the first respondent is varied to 'Minister for Immigration & Citizenship'.
- 2 The appeal is allowed.
- 3 The decision of the Federal Magistrate dated 15 June 2006 is set aside.
- 4 The appellant's application for review of the decision of the delegate of the first respondent is remitted to the Refugee Review Tribunal to be determined according to law.

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

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DATE: 15 FEBRUARY 2007

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 This is an appeal against a judgment of a Federal Magistrate dated 15 June 2006 dismissing an application for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal') made on 8 November 2004 and handed down on 1 December 2004. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration & Citizenship to refuse to grant a protection visa to the appellant.

Background

2 The appellant is a thirty-two year old woman who was born in the Peoples Republic of China ('China'). In her application for a protection visa, the appellant included, as an annexure, a typed document which stated the grounds upon which she claimed a protection visa. The grounds were that the appellant was a member of an underground Christian group called the 'Shouters' in China, whose members had been arrested and 'tormented cruelly' by the Chinese authorities. The appellant became concerned about her safety and left China in March 2004. The appellant then travelled to Indonesia where she

suffered discrimination because of her Chinese ethnicity. The appellant arrived in Australia on 24 April 2004 on an Indonesian passport. The appellant applied for a protection visa on 20 May 2004 which was refused on 17 June 2004. On 20 July 2004, the appellant applied to the Tribunal for a review of that decision.

The Tribunal

3 The appellant attended the scheduled Tribunal hearing on 2 November 2004 and gave oral evidence. Before the Tribunal the appellant stated that she was not an Indonesian national and that, in effect, no reliance could be placed on the information contained in her Indonesian passport, which she presented on arrival in Australia, because the passport had been obtained falsely in Indonesia by a people smuggler, based on a bogus marriage. She said that she remained a Chinese citizen.

4 On 9 November 2004, the Tribunal notified the appellant that it had made its decision and invited the appellant to the handing down on 1 December 2004. On 15 November 2004, after the Tribunal decision was signed but before it was handed down, the Tribunal received a statutory declaration made by the appellant.

5 The statutory declaration stated as follows:

'Because of my religious activities, I suffered persecution from the Chinese government, and I had to leave China to come to Australia for protection. The whole trip was arranged by person smugglers.

When I passed by Indonesia, in order to make me arrive in Australia successfully, without discussing with me, without my approval, they arranged me to get married falsely with an Indonesian man. The smuggler told me that it was the only way I could do, otherwise, I would have to return to China where I would have to face the cruel persecution from the Chinese Communist Party. ...

I took a bus from Shenzhen to leave China on 7th March 2004. On 8th March 2004, I passed Hong Kong custom. I took a plan [sic] to arrive in Jakarta in the evening. I saw the smuggler at the custom; he took my passport and took me out of the custom. He then took me to his home. On 9th March 2004, I became to know that I had to take photo with an Indonesian man whom I had not seen before nor talked. After taking photo, he left. The Smuggler took me home. About one week later, the Smuggler took me to sign my name. I saw that Indonesian man; he signed his name together with me and left. I returned

to the Smuggler's home. On 26th March 2004, the Smuggler took an Indonesian passport and air ticket to me and asked me to follow a lady to Singapore and Malaysia for sightseeing. At night on 28th March 2004, we returned to Jakarta, the Smuggler picked us up and took away my passport. In the evening of 22nd April 2004, the Smuggler told me that the next day afternoon; I would take plan [sic] to Australia. I saw that Indonesian man outside the airport. The Smuggler told me that the man would go to Australia with me, and then he would return to Indonesia.'

6 The Tribunal said 'in light of [the appellant] holding a valid Indonesian passport, the Tribunal has assessed her claims in relation to Indonesia'. In coming to that view, the Tribunal relied upon information recorded in that passport that the appellant had married an Indonesian citizen on 11 March 2004, that she divested herself of her Chinese citizenship and gained Indonesian citizenship on 18 March 2004. After carrying out an extensive review of country information, the Tribunal found that as an Indonesian national of Chinese descent, the appellant did not have a well-founded fear of persecution.

7 The Tribunal recognised in its reasons, that the appellant claimed that she was not an Indonesian national and that the Indonesian passport contained false information. At one point in its reasons the Tribunal said:

'The Tribunal accepts that the applicant had no idea that the actions of others in acquiring for her an Indonesian passport has meant that she has effectively put herself under the protection of the Indonesian government. The Tribunal accepts that the applicant has no relationship to Indonesia, has no friends or acquaintances there, and does not speak the language.'

However, the Tribunal's role is limited to determining whether the applicant satisfies the criteria for the grant of a protection visa. Any consideration of her circumstances on humanitarian grounds is a matter solely within the Minister's discretion.'

The decision of the Federal Magistrates Court

8 On 21 December 2004, the appellant applied for judicial review of the Tribunal's decision in the Federal Court and her application was transferred to the Federal Magistrates Court.

9 Before the Federal Magistrate, the appellant submitted, in effect, that the Tribunal had erred because it had assessed her claim on the basis that she was an Indonesian national and

not on the basis that she was a Chinese national. The appellant said that the Indonesian passport had been falsely obtained, she was not an Indonesian national and she remained a Chinese national.

10 The Federal Magistrate noted that the Tribunal had considered the information in the appellant's statutory declaration of 15 November 2004, because the Court Book recorded a note saying that the Tribunal had not recalled its decision because 'the details provided were already made known to me at the hearing'. The Federal Magistrate found that on the material, it was open to the Tribunal to reach the opinion that Indonesia was the appellant's country of nationality within the meaning of that reference in Article 1A(2) of the Convention definition. The Federal Magistrate said he was unable to identify jurisdictional error.

11 The Federal Magistrate said that the passage from the reasons of the Tribunal referred to at [7] above:

'...shows that it was aware of the applicant's claims that she, in fact, had no real connection with Indonesia and that she had acquired her Indonesian passport and nationality under a mistaken impression as to the significance of this.'

12 The Federal Magistrate stated that the determination of the appellant's country of nationality did not arise in the course of reviewing whether the Tribunal's decision was affected by jurisdictional error since it was enough that he was satisfied that the Tribunal had not made a jurisdictional error in finding the appellant could claim the protection of Indonesia.

The appeal

13 The appellant appeared before me in person. She required, and was given, the assistance of an interpreter.

14 There was one ground of appeal in the appellant's notice of appeal. This was that the Federal Magistrate erred in failing to find the Tribunal made a jurisdictional error by not complying with s 424A(1) of the *Migration Act 1958* (Cth) ('the Act'), because the Tribunal relied on inconsistencies between the appellant's statutory declaration and protection visa

application, without first seeking the appellant's comment in writing. However, during the course of the hearing it became apparent that the appellant exhibited no understanding of the ground of appeal in the notice of appeal and did not advance any argument in support of it. Rather, the appellant advanced the same argument that she had made before the Tribunal and the Federal Magistrate, which was, in effect, that the issuance to her of the Indonesian passport did not provide a sufficient basis to conclude that her nationality was Indonesian, because the Indonesian passport was issued on the basis that she had entered a genuine marriage, when, in fact, the marriage was bogus, and would not have resulted in her becoming entitled to Indonesian nationality, nor losing her Chinese nationality. I, accordingly, granted the appellant leave to amend her grounds of appeal by substituting the following ground for the existing ground:

'The Federal Magistrate erred by failing to find that the Tribunal did not address the claim made by the Appellant before the Tribunal that albeit she entered Australia on an Indonesian passport, the Indonesian passport had been obtained by false pretences by a third party and that she was not an Indonesian national and should not be treated as such.'

15 In *The Law of Refugee Status*, Butterworths Canada Ltd, 1991, Professor James C Hathaway says at pp 56-57:

'In most cases, the claimant's nationality can be discerned from her own testimony, buttressed by documentary evidence such as a passport, visa or transportation ticket. In some cases, however, it will have been necessary for the refugee to secure false documentation in order to successfully exit her country or in order to circumvent the visa controls imposed by some asylum states on the nationals of refugee-producing countries. In these cases of conflict between the claimant's assertion and the corroborative evidence of nationality, primary regard should be had to the characterization of the claimant's status by the country whose travel document the individual holds, or which was her immediate point of departure for the asylum state. Because international law allows each state to determine for itself those persons who are its nationals, a nationality cannot be attributed to a refugee claimant where the authorities of that state take a contrary position.'

Thus, where the refugee claimant alleges that documentary or other indicia of nationality are inaccurate, the authorities of the asylum country have a duty to consult the apparent state of origin in an effort to verify the claimant's status. If the country that issued the documentation cannot confirm the status of the claimant as its national, the need for protection should be determined with reference to the state which the claimant asserts to be her country of origin.' (footnotes excluded)

16 It was an essential integer of the appellant's claim that because her marriage was bogus, she did not acquire Indonesian nationality, nor lose her Chinese nationality. It also followed, according to the appellant, that statements in the Indonesian passport, to the effect, that she had lost her Chinese nationality and acquired Indonesian nationality, did not conclusively establish those facts because they were founded on the assumption that the marriage was a genuine marriage. In other words, the appellant claimed that, in her circumstances, the existence of a passport which on its face was validly issued did not, in fact, establish that she was an Indonesian national, and that Indonesia would, on the true facts being revealed, accept her as an Indonesian national and accord her the protection accorded its nationals.

17 In my view, the Tribunal acknowledged the claim by the appellant that her Indonesian passport did not evidence her true nationality because it had been obtained falsely. However, the Tribunal did not consider the claim. The Tribunal acted on the evidence of the passport at face value, and concluded that it was 'validly' issued and, therefore, that it established conclusively that the appellant was an Indonesian national, and implicitly, a person to whom Indonesia would offer the protection that it would offer its nationals. It did not deal with the appellant's claim, in effect, that because she had entered a bogus marriage she would not have acquired Indonesian nationality, nor lost Chinese nationality; and that because the passport was issued on the assumption that the marriage was genuine, the passport contained inaccurate information insofar as it stated that the appellant was an Indonesian national and had lost her Chinese nationality.

18 In *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at 259, at [42], Allsop J (with whom Spender J agreed) said:

'The requirement to review the decision under s 414 of the Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration.'

19 The appellant's claim went to a basal element of a claim for protection made under Article 1(A) of the Convention. There was, as the Tribunal acknowledged, cogent evidence to support the claim. In my view, the failure to deal with the claim amounted to a

constructive failure by the Tribunal to carry out the review function and there was jurisdictional error on the part of the Tribunal (*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184).

20 The failure of the Tribunal to address the appellant's contention meant that the Tribunal did not consider whether this was an occasion when it should exercise its powers of inquiry under s 427(1)(d) of the Act to ascertain from the Indonesian authorities whether in the appellant's circumstances, the appellant would be entitled to Indonesian nationality, and whether she would qualify for protection by the Indonesian state (*Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16).

21 The Federal Magistrate erred in not concluding that the Tribunal had fallen into jurisdictional error.

22 The appeal should be allowed and the matter remitted to the Tribunal to be determined according to law.

I certify that the preceding
twenty-two (22) numbered
paragraphs are a true copy of the
Reasons for Judgment herein of the
Honourable Justice Siopis.

Associate:

Dated: 15 February 2007

The appellant appeared in person.

Counsel for the Respondent: Ms E Palmer

Solicitor for the Respondent: Clayton Utz

Date of Hearing: 14 November 2006 and 17 November 2006

Date of Final Submissions: 24 November 2006

Date of Judgment: 15 February 2007

