[2003] HCATrans 535

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S435 of 2002

B e t w e e n -

APPLICANT NADB OF 2001

Applicant

and

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Respondent

Application for special leave to appeal

GUMMOW J
KIRBY J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 12 DECEMBER 2003, AT 9.24 AM

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MR M.I. BOZIC, SC: If it please your Honours, I appear with my learned friend, **MS E. FRIZELL**, for the applicant. (instructed by the applicant)

MR S.B. LLOYD: I appear for the Minister, your Honour. (instructed by Clayton Utz)

GUMMOW J: Yes, Mr Bozic.

MR BOZIC: Your Honour, yesterday we put in a supplementary submission indicating that the only leave question which we wish to agitate was the question of whether in considering Article 1F(b) of the Convention a balancing exercise is required whereby one balances the gravity of the crime against the degree of persecution feared.

KIRBY J: That is still caught up with your proposition that the duty is first to determine whether there is a refugee and then determine the crime in order to do the balancing. That submission runs into the authority of a number of final courts in the world and obiter dicta of this Court.

MR BOZIC: In terms of the balancing test.

KIRBY J: You cannot do the balancing unless you are obliged, first, to determine whether the person otherwise qualifies as a refugee which, as I understand it, is your proposition, and I can understand the argument. It just does not happen to have gathered support in any final court that has looked at this issue.

MR BOZIC: I accept the proposition that courts that have looked at this issue and have looked at the question of the balancing test have all come down in one way and have - - -

KIRBY J: It is very important that we should not, unless there are very good reasons, go out on a limb in interpreting the International Convention on Refugees. It is very important that that should receive consistent interpretations unless there is a manifest error in the common interpretation in so many countries.

MR BOZIC: Again, I understand the proposition about the need for consistency and that has been one of the considerations that has influenced some courts in the way that they have approached this question of whether there ought to be a balancing test.

KIRBY J: You can, of course, get consistent error, and then it is necessary to intervene, but you would think there would be a few hints.

MR BOZIC: Your Honour, the way we put the argument is this, that, yes - - -

GUMMOW J: Your argument does not look too good textually though, does it?

MR BOZIC: It does not. It has not found favour - - -

GUMMOW J: If you look at the Convention, there it is at the end and it is a sharp sword that it seems to bring down.

MR BOZIC: It is, and the way that the courts have approached it is to look at the wording and to say there is no scope here for any implication. There is no scope for implying or bringing into that test a balancing test. Now, the way we approach it is to say yes, the courts have adopted that particular approach and, as your Honour Justice Kirby says, have done so consistently. We acknowledge that.

What we say is that there is another view as to how one can approach it and that is the view that has been advocated by the academic writers and they are set out in the various judgments.

KIRBY J: I think in *Singh* I acknowledged that, and I really do understand the argument that you should get, as it were, the gravity of the fear and the terror and the impossibility of sending a person back to a country, and then have a look at the serious crime which can be of a whole order of magnitude, from terrible mass murder to something much more modest. I do understand that argument but it is difficult in the face of so much consistent decision-making in so many countries.

MR BOZIC: Your Honour, when one looks at what has been advocated by the various academic writers, we say that the way in which one can arrive at a balancing test - notwithstanding the approach that has been taken by courts – is to start with the proposition that when one looks at the wording of Article 1F(b), there is a relatively low threshold test, particularly when one compares it, for example, with Article 33. What has to be satisfied here or what the delegate has to be satisfied of is that they have serious concerns that a serious non-political crime has been committed.

KIRBY J: The theory of it is that if you are seeking refugee status in a receptor country, such a country should not have to take people, and they are excluded from the protection of the Convention if they are people who have committed serious crimes, and here, the crime was that of supplying heroin which is, you would know, a crime that in Australia is regarded as a very serious offence.

MR BOZIC: Indeed. Our response is to say that in the context of a relatively low threshold having to be achieved that where someone arrives on these shores who would otherwise fit within the category of a refugee - and let us assume they have a very well-founded fear of persecution involving, for example, death or torture - - -

KIRBY J: This was Iran, was not it, in this case?

MR BOZIC: Yes, it was. In considering whether a serious crime has been committed, that involves balancing up a number of factors, and how one does that exercise and the sorts of factors that one brings into account depends on the context in which the exercise is required to be carried out.

Now, here, we say that the exercise is required to be carried out in the context of the Convention, in the context of a Convention which affords protection to those who would otherwise be considered refugees, and therefore, when one considers the question which is the ultimate question which is being considered in relation to an applicant for a protection visa, is this person a person to whom Australia owes protection obligations, in my submission, one can arrive at a point where in the context of the balancing decision being made for the Convention purposes one can bring to account questions of the gravity of the persecution fear, and that that is done in the context of considering whether the crime, for the purposes of preadmission exclusion of a person, is a serious crime.

Now, that ultimately is the simple point. That method of interpreting, I accept, has been consistently rejected by courts. The highest I can put it is that there is perhaps some transient ambivalence been expressed by one Canadian judge but, nevertheless - - -

KIRBY J: I think I had a few hints of transient ambivalence too, but it is difficult in international - - -

GUMMOW J: Transit has to finish.

MR BOZIC: We were hoping to pick up on that - - -

KIRBY J: It is all that academic writing that was very impressive. I can understand very well the principle that you cannot really make the ultimate decision in the structure of the Convention without having regard to the peril that the person faces in different cases, but it is just not the way it has been interpreted uniformly everywhere.

MR BOZIC: I know that it is not the way it has been uniformly interpreted, but for the very reasons that your Honour has just identified - - -

KIRBY J: I was repeating your reasons.

MR BOZIC: In my submission, there are powerful reasons for coming to a different interpretation, and they are the reasons that have moved virtually all the academic commentators who have looked at it to arrive at a different conclusion. Now, one accepts that the methodology adopted by academics to reach that conclusion does not perhaps involve strict construction in the way that courts are obliged to do.

KIRBY J: It also perhaps reflects the different approach that courts take. The tradition of the common law is pragmatic. It is very practical, it solves problems, and it is not at all unusual, as you well know, for courts to go straight to the critical issue and to bypass all the other issues that are around it.

MR BOZIC: Your Honour, what we say has been bypassed in this process is to stand back and to pay some recognition to the context in which this evaluation is to be made. That is a context where, for example, someone who may otherwise fit within the category of a refugee, who has very well-grounded fears of quite serious persecution, can be excluded at the outset on the basis of serious concerns held by the appropriate delegate without any balancing at all. In my submission, that is a powerful consideration as to why one would look at some balancing test at that point.

KIRBY J: Does the High Commissioner's handbook say anything on this point?

MR BOZIC: Yes, it does, your Honour. The extract from the handbook is set out in the appeal book at page 33 at the very top where the relevant paragraph is 156, and it is set out at the top.

KIRBY J: It would give you some support then?

MR BOZIC: It does, your Honour, again in the context - and I know that comments have been made about the extent to which one can use the UNHCR Handbook, but - - -

GUMMOW J: The problem is the next paragraph of the judgment, is not it, the last sentence:

> explicitly abandoned in . . . United Kingdom, Australia, Canada, New Zealand and the United States.

MR BOZIC: That is a problem that I acknowledge, and I acknowledge that in asking this Court to examine the question of whether there is a balancing test, judicial authority everywhere is against me.

GUMMOW J: Even if we thought there was something in it perhaps, there is an enormous consideration there in those other countries. We are asked to be the odd one out.

MR BOZIC: I accept that the weight of judicial authority is obviously persuasive against a fresh look at it except, in my submission, of the importance of the issue and of the – there are very powerful reasons why one would adopt a different approach.

KIRBY J: I would add to what Justice Gummow said that if you were going to, as it were, risk being the odd person out – because Justice Isaacs once said it is more important ultimately to be right than to be consistently wrong – you would want, one would think, an extremely powerful case, as it were, that by the facts challenged the doctrine and explained why the Court went behind its earlier dicta and behind the authority of so many other courts and looked at the issue as a matter of principle afresh. Now, there is an arguable issue, but it does not seem to be such a case that cries out to re-examine the issue.

MR BOZIC: Your Honour, except for this, that we know what the crime was, and it was a serious crime, but what was never explored and what the applicant never had the opportunity of fully exploring was what was the degree of persecution feared upon the return to Iran? The Tribunal took the view that to enter into those sorts of questions is to enter into the very balancing exercise that is prohibited. So that issue and the facts which would underpin that issue were never ventilated in the Tribunal.

So that putting it altogether and perhaps concluding with trying to draw it together, what we say is this, that the reason we would submit this is a case for special leave is simply that in a context where there is a difference and a strong difference between academic writers and judicial opinion, where - - -

KIRBY J: I would not refer to the High Commissioner's handbook as academic writers. They are dealing with thousands and thousands of cases over there in Geneva and they are not academic. They are very practical. They are putting up tents, they are looking for water, and they are looking after people's lives, so they are not academics.

MR BOZIC: Your Honour, the simple point, I suppose, in this, that yes, we acknowledge that the application of standard principles of interpretation of treaties has persuaded courts to adopt what I might call a narrow approach. We say that one can apply those standard principles of interpretation, together with just the slightest touch of early 21st century judicial creativity, and one can reach a different result.

KIRBY J: I do not know that that is a good argument.

MR BOZIC: That is what I am asking for ultimately in the face of worldwide judicial authority against me, your Honour. If it please the Court.

KIRBY J: Yes, you put your arguments very attractively.

GUMMOW J: We do not need to hear from you, Mr Lloyd.

The applicant claims refugee status on the basis of his political beliefs and his actions in his country of nationality, which is Iran. His application for a protection visa was rejected on the basis of his admitted participation in Indonesia in the supply of heroin. The Minister's delegate concluded on this basis that the applicant was excluded from entitlements under the Refugees Convention (and thus under the *Migration Act*) by reason of Article 1F(b). That provision disentitles persons who have committed serious non-political crimes from refugee rights.

The Administrative Appeals Tribunal affirmed this decision. The Federal Court of Australia at first instance and then on appeal denied judicial review. The applicant seeks to argue that the decision-makers were obliged, first, to consider the claim to refugee status and then only to weigh the disentitlements provided for by Article 1F(b). This approach was rejected by the Federal Court. It has been rejected by individual members of this Court in obiter remarks. We refer to *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at paragraphs 5, 61 and 87. That approach was consistent with the interpretation of the Convention adopted in other countries, and we refer to the United States, *INS v Aguirre-Aguirre* 526 US 415 (1999); the United Kingdom, *T v Secretary of State for the Home Department* [1996] AC 742 at 768, 769; New Zealand, *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 at 297 to 300; and Canada, *Gil v Canada* (1994) 119 DLR (4^{th}) 497 at 517.

There are strong reasons of principle for observing a consistent interpretation of such an international convention as this. In the absence of the existence of a contrary interpretation, that urged by the applicant does not enjoy reasonable prospects of success in this Court. None of the other grounds, which, in any event, are not now pressed, would warrant a grant of special leave. Accordingly, special leave is refused and with costs.

AT 9.42 AM THE MATTER WAS CONCLUDED