FEDERAL COURT OF AUSTRALIA

NBCA v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCA 844

MIGRATION – proceedings for order to prevent deportation of applicant husband to Cambodia – history of distressing circumstances attending applicant and his family – refugee status declined to applicant subsequently to his wife – separate review applications of applicant and later of his wife dismissed by Refugee Review Tribunal – proceedings dismissed

Migration Act 1958 (Cth) s 49A, 49B, 198(6) and 417(1)
Judiciary Act 1903 (Cth) s 39B

NAAX v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 119 FCR 312
Re Minister for Immigration and Multicultural and Indigenous Affairs and Another: Ex Parte Applicants S134/2002 (2003) 211 CLR 441
Re Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559
SPKB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1116
SAAK v Minister for Immigration and Multicultural and Indigenous Affairs (No 4) [2004] FCA 104

NBCA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 209 OF 2004

CONTI J
29 JUNE 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 209 OF 2004**

BETWEEN:	**NBCA** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGE:	**CONTI J**
DATE OF ORDER:	**29 JUNE 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. Application be dismissed.

2. Applicant to pay the respondent's costs.

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

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NEW SOUTH WALES DISTRICT REGISTRY **N 209 OF 2004**

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AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGE:	**CONTI J**
DATE:	**29 JUNE 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 These proceedings were initiated on the interlocutory basis that the applicant was about to be forthwith removed from Australia pursuant to s 198(6) of the *Migration Act 1958* (Cth) ('the Act'), in circumstances where his wife's application for refugee status was the subject of pending review by the Refugee Review Tribunal ('RRT'). The applicant was represented by a Cambodian born solicitor who has no previous familiarity with refugee law, and who has since applied himself with remarkable energy in an endeavour to maintain the present of this Cambodian husband and wife together in Australia until the resolution of the wife's refugee status as been determined. The theme of the applicant's case is that the reality of oppression of certain underprivileged groups in Cambodia has continued, despite the apparent defeat of the Pol Pot regime. For its part the Department has implicitly extended a seemingly sympathetic understanding of the personal plight of this couple, who appear to have received some measure of support from the Cambodian community living in the west Sydney region.

2 The applicant, a citizen of Cambodia, was born on 15 April 1947 and arrived in Australia on 26 May 1997. There is evidence as to the Department of Immigration, Multicultrual and Indigenous Affairs having granted him a long stay tourist visa on 21 August 1997, and then another visitor's visa on 16 December 1997. On 25 May 1998 the

applicant lodged an application for a protection visa, which was however declined by the Minister's delegate on 4 June 1998. The applicant sought a review of this decision by the RRT on 2 July 1998 which affirmed the decision of the delegate not to grant such a visa on 22 December 1999. The RRT concluded that the applicant's claim of fearing persecution because of his membership to the political party, FUNCINPEC, was unfounded due to a change in the political climate of Cambodia since the applicant had departed Cambodia. No further action was taken by the applicant, save as to what may be inexactly described as joining a class action then pending in the High Court, which was subsequently withdrawn.

3 The applicant was joined by his wife in Australia about one year later, in her case on a Cambodian passport issued in a false name. The applicant's wife, who was born on 19 August 1949, was not included in the applicant's application for a protection visa, which thus resulted in the applicant's claim for refugee status being determined on the basis of the applicant alone. The applicant and his wife have presently two living children, who have remained in Cambodia. Their son, born in 1975, was said to have been murdered as part of a series of political killings in June 2003. A colour photograph of their dead son at his funeral was attached to the affidavit of the applicant sworn 26 February 2004. Further, their eldest daughter, born in 1979 has been missing since mid 1998 and their youngest daughter, born in 1983, was apparently subject to an attempted assassination which left her with a broken wrist. The evidence indicates this daughter is currently in hiding somewhere in Cambodia. All of those distressful events have occurred however after the adverse decision of the RRT.

4 In September 2003 the applicant and his wife were detained by Departmental authority and placed in the Villawood complex. The applicant's wife lodged forthwith an application for a protection visa and was released from detention on a bridging visa. Pursuant to s 48A of the Act, headed 'Non-citizen refused a protection visa may not make further application for protection visa', the applicant was not entitled to make any further protection visa application. Nevertheless, according to the Minister's solicitor, who provided considerable assistance for the Court's understanding of the issues involved, the applicant twice sought intervention by the Minister pursuant to s 417 of the Act, which provides to the Minister a non-compellable discretionary power to substitute a more favourable decision than that of the RRT. It may be thought, on an initial reading of the foregoing history of persistent applications for administrative assistance and intervention that the conduct of the applicant and his wife thereby pursued has bordered on the vexatious. Having been exposed to the

evidence placed before me, I would be most hesitant to draw any such conclusion.

5 The application placed before the court was implicitly adduced as part of a bid to allow the applicant to remain in Australia until his wife's application for review to the RRT had been determined. A delegate of the Minister had previously refused her application for a protection visa. It was the apparent aspiration of the applicant that, given the death of his son in 2003 and the recent attempted murder of his daughter, his wife would be granted a protection visa on political grounds being a circumstance which would in turn give the Minister more substantial reason to exercise her discretion in his favour pursuant to either s 48B or s 417 of the Act. However the solicitor for the applicant subsequently informed my Associate, prior to the delivery of these reasons, that the RRT had affirmed the decision of the Minister's delegate, though an appeal to this Court from that decision was foreshadowed.

6 The solicitor for the Minister (Mr Markus) who provided considerable assistance to the Court in this complex matter, submitted that the present application had no prospect of success and should therefore be dealt with immediately. I suggested to the solicitor for the applicant that he discuss with the applicant and his wife the prospect of them both returning to Cambodia together, given that the prospects of the husband (applicant) gaining any further visa or other status in Australia had seemingly become remote. On that basis, I adjourned the hearing for a period of one week. On 27 February 2004 the solicitor for the applicant informed the court of his instructions that should the applicant be unsuccessful in the present application for relief, the applicant's wife would not accompany him back to Cambodia but would remain in Australia alone. Apparently the view had been taken that if the wife was successful in her pending RRT review application, the prospect of the Minister's favourable reconsideration of the applicant's asserted refugee status might be favourable.

7 The application for injunction filed in Court on 20 February 2004, under the heading 'Claim for Interlocutory Relief', reads (literally) as follows:

> *'1. That the Respondent be restrained from deporting the Applicant who is currently being held in Villawood Detention Centre*
>
> *2. That the Applicant be allowed to remain in Australia until such time that the Applicant's refugee [wife's] application currently before the Refugee Review Tribunal is determined. In light of the new evidence received from the Applicant's daughter in Cambodia that there was an attempt to kill the daughter, clearly indicates that there is a stronger*

case in favour of the refugee status granted to the Applicant's wife. Referred hereto in the applicant's affidavit as annexure [A].

3. That the Respondent is to re-examine the further evidence pursuant to sections 417 and 48B of the Migration Act (Cth) *1958, as submitted by Marion Le, the Migration Consultant, referred hereto in the affidavit of Chea Kong as annexure [B].*

4. That the Applicant be released from Villawood Detention Centre as the Applicant has medical conditions including diabetics and head injuries sustained as the result of political persecution by the Hun Sen regime in Cambodia prior to coming to Australia in 1996.

5. That the matter be considered as a matter of urgency.'

8 In support of the above orders sought, affidavits were filed by the applicant, the applicant's wife and the solicitor acting for the applicant. Further very detailed written submissions were provided by the applicant. The respondent did not provide written submissions, but relied on the precisely framed oral submissions of Mr Markus. It is appropriate that I reproduce literally below par 3 of the applicant's affidavit, which is headed 'Reasons Against Removal':

'(a) My wife and I were married in 1970 in Cambodia.

(b) Throughout lives together we experienced a lot of turmoil, in particular in Vietnam War which took place in Cambodia since 1970 until 1975, when Pol Pot took over.

(c) During Pol Pot regime, like others we were forced into extreme physical labour and were subject to extreme hardship. Nonetheless we survived.

(d) My son, named Chea Ratha was born in 1975, during Pol Pot regime. Although we were starved and had nothing to eat, my wife and I would keep some of the porridge we were given by the State to our son.

(e) We lived though the many regimes together including in 1979, when Cambodia was invaded by the Vietnamese.

(f) The following years in 1979, we had another daughter and in 1983 and 1985, we had two more daughters.

(g) In 1993 I took the opportunity to voice my political concern the current leadership by joining the FUNCIPEC party, after the United Nations were involved in a peace transition in Cambodia.

(h) Because of my political involvement, I was physically beaten twice,

once in 1993 and the most severe beaten was in 1996.

(i) Both of the time my wife was always there to care for me.

(j) In May 1997 I left Cambodia to come to Australia and my wife followed me April 1998.

(k) In 1998, after my wife arrived in Australia, we were told that my daughter who was born in 1979 had gone missing. Up to the present time, her whereabouts is still unknown.

(l) Since then we lived together until September 2003 when I was detained in Villawood.

(m) We shared our many griefs together, including the recent death of my eldest son and the missing of my second daughter in 1998.

(n) Because of those hard experiences and the time we struggled together to be alive, prove that my wife and I care and love each other.

(o) Therefore I do not want to be removed without being with my wife.'

The apparent reference in (f) above in effect to three daughters of the applicant, instead of two, would appear to be inadvertent.

9 The first two asserted basis for interlocutory relief were interrelated, and may be dealt with together. In his written submissions, the solicitor for the applicant submitted in relation thereto as follows:

> *'This case is about seeking the court to exercise its discretionary power to ensure that the Department acts fairly and legally in accordance with its powers. It is about seeking a prohibition order so that the Applicant is not removed out of Australia until his wife's refugee case is determined.'*

In this context, it was stated that s 39B of the *Judiciary Act 1903* (Cth) provides the Federal Court with original jurisdiction with respect to any matter in which 'a writ of mandamus or prohibition… is sought against an officer or officers of the Commonwealth', but that this stipulation must be interpreted in light of s474(1) of the Act. As such, the applicant submitted, the relationship between the two statutory provisions was aptly described by the primary judge (Gyles J) in *NAAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 119 FCR 312, when he observed at 324: 'Prohibition does not lie save for jurisdictional error. Anything less than jurisdictional error will not found prohibition'.

10 The applicant's submission continued under the heading 'Is there jurisdictional error which warrants the prohibition?', to the effect that he would be entitled to remain in Australia 'if he can demonstrate that he is a "unit of a family member of an applicant" (that is, a unit of himself and his wife) in accordance with the Convention 1951, and that the failure to correctly identify this Convention on the part of the decision-maker amounts to jurisdictional error'. In support of this assertion, reliance was placed on *Re Minister for Immigration and Multicultural and Indigenous Affairs and Another: Ex Parte Applicants S134/2002* (2003) 211 CLR 441 and *Re Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343. In the context of those authorities taken together, the applicant submitted that the latter stands for the proposition that 'applicants for judicial review [are] refugees and [are] entitled to appropriate entry visas' (*dicta* in *Thiyagarajah* cited in the High Court decision of *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559), while the former 'ties into this' and supports the applicant's case in that 'there is a specific claim made through the wife's application… as he is part of the family unit of the wife'.

11 The submission appears to boil down to the proposition that because the applicant's wife, on an interpretation of a principle to be deduced from *Thiyagarajah*, is deemed to be a refugee during such time as her application for a protection visa remains on foot, the applicant falls within the auspices of that application 'as he is part of the family unit of the wife'. Consequently, so the proposition evolved, any attempt on the part of the Minister to remove the applicant while his wife was thus of refugee status, amounted to jurisdictional error. This submission is plainly misconceived. As was pointed out by the Minister's solicitor, if any *dictum* in *S134/2002* was interpreted in this way, the applicant's wife would be unable herself to apply for a protection visa. That would be because the applicant's claim for a protection visa has been already refused (see [2] above), and the applicant's wife would form part of the applicant's 'family unit', and be *ex hyposesi* barred herself from pursuing an application for a protection visa pursuant to s 48A of the Act (see [4] above).

12 Furthermore, the submissions of the applicant in support of his first two claims for interlocutory relief, in the words of the solicitor for the Minister, implicitly '[fly] in the face of sub-sec 198(6) [of the Act] which imposes a positive duty on persons who are described as officers… to remove persons from Australia in certain circumstances.' I will elaborate further upon the Minister's responses to the applicant's submissions.

13 For ease of reference, sub-sec 198(6) of the Act provides as follows:

> *'An officer must remove as soon as reasonably practicable an unlawful non-citizen if:*
>
> *(a) the non-citizen is a detainee; and*
>
> *(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and*
>
> *(c) one of the following applies:*
>
> *(i) the grant of the visa has been refused and the application has been finally determined;*
>
> *(ii) the visa cannot be granted; and*
>
> *(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.'*

The applicant is clearly an 'unlawful non-citizen' within the subsection because he is 'a person who is not an Australian citizen' (see s 5 of the Act), and does not hold a visa of any type. Paras (a) and (b) of s198(6) are satisfied as the applicant is in detention at Villawood, and is thus a 'detainee' who had previously lodged an application for a protection visa (see [2] above). In the context of para (c) of sub-sec 198(6) of the Act, Lander J, in dealing with a similar issue in *SPKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1116, said at [110]:

> *'The applicant's claim to be entitled to a protection visa was finally determined, for the purposes of s 198(6) of the Act, when the RRT affirmed the delegate's decision (s 5(9) of the Act) and the applicant abandoned his application for judicial review from that decision. Section 48A of the Act precludes the applicant from making a further application for a protection visa.'*

It follows that the applicant's application for a protection visa has been 'finally determined', and pursuant to s 48A of the Act, he is unable to make another valid application for a substantive visa, the circumstances of the applicant thereby satisfying the requirements of para (d) of sub-sec 198(6). Even where an applicant has sought the Minister's intervention pursuant to either s 48B or sub-sec 417(1) of the Act, and has not received a response to same, his unsuccessful application for a protection visa has nevertheless been 'finally determined': *SAAK v Minister for Immigration and Multicultural and Indigenous Affairs (No 4)* [2004] FCA 104.

14 As was further emphasised by the Minister's solicitor, there is no basis within the first two claims of the applicant for interlocutory relief for negating the application of sub-sec 198(6) of the Act. This sub-section clearly applies and an 'officer', as defined in s 5 of the Act, has a positive duty to remove an 'unlawful non-citizen' if the requisite statutory conditions are satisfied. This sub-sec applies to the applicant and the submissions put on his behalf, which misconceive the High Court authority on which they purportedly rely, must be rejected.

15 The applicant's third basis for interlocutory relief will next be addressed. The applicant in effect thereby seeks relief by way of mandamus requiring the Minister to either exercise her discretion under s 48B or s 417(1) of the Act. The exercise of such discretion under the former section would in effect enable the applicant to lodge another application for a protection visa which would then rely upon the asserted murder of the applicant's son in 2003 and the further asserted circumstance that his younger daughter is said to be in hiding, presumably somewhere in Cambodia or nearby, following upon an apparent attempted assassination of a political leader. Under the latter sub-sec, the Minister is empowered to substitute a more favourable decision than that of the RRT where 'it is in the public interest to do so'.

16 In his written submissions in support of this basis of claim, the pro-bono solicitor for the applicant stated (literally):

> *'It is therefore submitted that, if this Court finds that it has the relevant jurisdiction to grant the interlocutory relief, the order that the Respondent to re-examine the further evidence pursuant to section s 417 and s 48B of the* Migration Act 1958 *(Cth)*.
>
> …
>
> *In this case it is extremely difficult to ascertain as to why the Minister refused to give consideration in light of the overwhelming, and grafic evidence which go to the heart of the claim of refugee application by the Applicant. Thus if the death of the applicant's son is not considered as a new piece of evidence, then the question must be asked: what kind of evidence is it that the Minister must be satisfied to exercise her discretion in s417.*
>
> *Therefore it is submitted that this is a case which warrants the call for proper justice to exercise and failure to ignore this new evidence compounded with the relevant authorities cited, clearly indicates that this Court must intervene*

in order to afford the Applicant proper justice.'

The reference in this last paragraph to 'the relevant authorities cited' was asserted to be the dicta of the minority joint judgment of Gaudron and Kirby JJ in *S134/2002* at 474. That dicta is of no assistance to the applicant's case, as their Honours emphatically stated they expressed no opinion as to whether 'the Minister's refusal to exercise his power under s 417(1) of the Act involved jurisdictional error'.

17 Moreover, as was submitted to me by the Minister's solicitor the majority of the High Court in that same case (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ) stated essentially to the contrary at 461 as follows:

> *'There is a further point to be made. On the footing that prohibition or injunction and certiorari issue, directed to the Minister, the prosecutors seek mandamus requiring the Minister to reconsider the exercise of his power under s 417(1). However, s 417(7) states in terms that the Minister does not have a duty to consider whether to exercise the power conferred by s 417(1). That gives rise to a fatal conundrum. In the express absence of duty, mandamus would not issue without an order that the earlier decision of the Minister be set aside. Further, in that regard, there would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.'*

Accordingly I have no authority to grant the applicant's third claim for interlocutory relief.

18 In the alternative, the solicitor for the applicant submitted in his written submissions (recorded literally):

> *'Alternatively we would submit that if the Minister is not obliged to exercise her discretion under s417, we submit this is a special case where this Court has the jurisdiction to grant power based not on legislative provision but base on the conscience of the Court, i.e. there is injustice done if the Court chooses to follow the strict regime of the legislative provisions.'*

In response, I observe merely that the court has no such jurisdiction, but must rather apply the relevant provisions of the Act. Pursuant to sub-sec 198(6) thereof, any such interlocutory relief is clearly not available to the applicant in the circumstances of his case.

19 Likewise, in terms of the fourth claim for interlocutory relief relief, no power is conferred on the Court to grant the same. Moreover, no evidence, medical or otherwise, has been tendered to support any such claim.

20 It follows that the application must be dismissed.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Conti.

Associate:

Dated: 29 June 2004

Solicitor for the Applicant:	Eric Hong & Associates
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	20 & 27 February 2004
Date of Judgment:	29 June 2004