FEDERAL COURT OF AUSTRALIA

NAWR v Minister for Immigration & Multicultural & indigenous Affairs

[2004] FCAFC 25

MIGRATION – appeal from single Judge of the Federal Court – protections visa – where Tribunal requested further information – where applicant's request for an extension of time was refused – issue regarding failure to seek protection elsewhere not raised before primary Judge – appeal dismissed.

Migration Act 1958 (Cth) s 424, s 425
Judiciary Act 1903 (Cth)

Abebe v Commonwealth (1999) 197 CLR 510 cited

NAWR V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 19 OF 2004

BEAUMONT, LINDGREN & TAMBERLIN JJ
10 FEBRUARY 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 19 OF 2004**

BETWEEN:	**NAWR** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**BEAUMONT, LINDGREN & TAMBERLIN JJ**
DATE OF ORDER:	**10 FEBRUARY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed, with costs.

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

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DATE:	**10 FEBRUARY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 The appellant was born in India on 20 May 1971. He left Chennai Airport on 7 September 2002, travelled to Singapore and then entered Australia on 12 September 2002 on a one month temporary business visa. On 8 October 2002, he lodged an application for a protection visa, indicating in the application that he had tertiary qualifications, that his occupation was that of a 'party worker' and that he had been self-employed from August 1995 to September 2002. He claimed that he had left India 'because of threat to my life'. In a Statutory Declaration which accompanied his application for a protection visa the appellant made various claims, including the following:

- He was the youth secretary of the Dravida Munnetra Kazhagam ('the DMK') party, the opposition political party in Tamil Nadu and was very active politically.

- The general secretary of his party was arrested on 29 June 2001, and strikes and riots then ensued; and the appellant was involved in a strike to protest about the arrest.

- The police were after him, and have issued an arrest warrant; and he is running away from the police.

- Party workers and supporters of the ruling party have also threatened him and tried to kill him by throwing a petrol bomb at him.

- Party workers of the rival party and police searched his home and threatened his family.

- He hid at a friend's place, and was too fearful to go outside – then he got a visitor's visa to Australia and came here.

2 On 22 October 2002, a delegate of the respondent Minister wrote to the appellant seeking further details of various matters mentioned in the application for a protection visa and the statutory declaration. The appellant responded to that letter on 12 November 2002.

3 On 10 December 2002, the delegate telephoned the appellant to obtain further information from him. On the same day the delegate decided to refuse the grant of a protection visa.

4 The appellant lodged an application to the Refugee Review Tribunal ('the Tribunal') on 2 January 2003.

5 The Tribunal wrote to the appellant requesting additional information from him on 4 August 2003. The appellant responded to that letter on 25 August 2003, seeking an extension of time, until 27 October 2003, in which to supply the relevant information.

6 On 26 August 2003, the Tribunal wrote to the appellant refusing the application for an extension of time.

7 The Tribunal handed down a decision on 30 September 2003 in which it affirmed the delegate's decision for, in essence, the following reasons:

> *'Despite being asked to do so, the* [appellant] *has provided no details to flesh out his claims. For example he has not said where or when key events in his statement of claims took place. Though he has had several months in which to*

collate relevant evidence, he has failed to do so. While the Tribunal understands that a person fleeing persecution might not be in a position to bring with him documents which conclusively prove his assertions, the Tribunal considers that, if he were a district level officer of the DMK, he would have been able to contact that party from Australia and seek some form of corroboration from that party. The Tribunal considers that, if the claimed events actually took place, he would be able to tell from his own memory where and when the alleged strike took place and where and when a petrol bomb was hurled at him.

The [appellant] *stated explicitly in his application form that there was no criminal investigation or charges pending against him. This contradicted what he said in his statement. Both statements were in the form of statutory declarations. The Tribunal asked the* [appellant] *to comment on this contradiction but he has failed to do so.*

On the scant information before it, the Tribunal is not prepared to accept the [appellant's] *claims that he was an officer of the DMK, or that police and AIADMK* [All India Anna Dravida Munnetra Kazhagam] *officers have sought to harm him.*

Further, it is clear that the [appellant] *was outside India in July 2002. This is evident from the fact that he applied for a visa in Sri Lanka. The* [appellant] *has withheld the full details of his travel from the Tribunal and from the Department by refusing to submit even copies of all pages of his passport. Since he left India in September 2002, it is obvious that he returned to India at some stage. Given his advice that he has never been deported from any country, the Tribunal infers that his return to India was voluntary. The Tribunal specifically asked the* [appellant] *to explain why, if he feared persecution in India, he returned to that country. He is on notice that his failure to seek protection in either Sri Lanka or Singapore and his voluntary return to India from Sri Lanka calls into question the genuineness of his stated fears of persecution, but he has not responded.*

In all the circumstances, the Tribunal finds that the [appellant's] *stated fears of persecution in India are not genuine. The Tribunal therefore finds that the* [appellant] *does not have a well-founded fear of persecution in India.'*

8 The appellant sought review of the Tribunal's decision under s 39B of the *Judiciary Act 1903* (Cth), but a Judge of the Court dismissed the application.

9 The appellant now appeals from that judgment.

THE GROUNDS OF APPEAL

10 In his grounds of appeal, the appellant propounds a general claim for appellate intervention as follows:

> *'1. The* [Appellant] *seeks relief pursuant to S39B of the Judiciary Act* [and] *different sections of the Migration Act due to:*
>
> *(a) The Decision Maker had identified wrong issue, asking himself a wrong question, ignoring relevant material, making erroneous finding and reaching a mistaken conclusion, thereby committing an error of law constituting jurisdictional error.*
>
> *(b) The Decision Maker has exceeded his purported exercise of power in a way, thereby committing an error of law, thereby a constrictive failure to exercise jurisdiction along with procedural fairness.*
>
> *(c) The Decision Maker was not acting in good faith in making the decision.'*

11 Specifically, the appellant advances what follows as grounds. We will consider them in turn.

12 By par 2, the appellant contends:

> *'2. In this connection the* [appellant] ... *strongly feels that the Tribunal Member had taken his visa being stamped from Sri Lanka, as though, he had been to Sri Lanka and accordingly he has come to a conclu sion that since he has returned to India from Sri Lanka, voluntarily, and not stopped at the Airport, he does not have any persecution. But the fact is that at that* [time] *due to India Pakistan likely war situation, Australian Embassy was closed and all Indian visa applications were only processed from Colombo, Sri Lanka and not from India. Hence the visa for Australia bore the place of issue as Colombo and not because the* [appellant] *had been to Sri Lanka and* [returned] *back safely. This can be vouched from the pages of the passport. …'*

13 We cannot accept the submission.

14 The appellant's temporary business visa was issued in Colombo. In his application for a visa, he stated against 'place of application' the word 'Colombo' in his own handwriting. The Tribunal formed the view that the appellant had applied for it while in Sri Lanka. In its 4 August 2003 letter, the Tribunal asked the appellant, amongst other things, for:

> *'An explanation of why you did not seek protection in Sri Lanka or Singapore, and why you returned voluntarily to India from Sri Lanka if you were genuinely in fear of persecution.'*

15 In his Reasons for Decision, the Tribunal member adverted to ' ... the fact that [the appellant] applied for a visa in Sri Lanka'.

16 The appellant submitted to the primary Judge that he had made his visa application in New Delhi, but that it had been processed in Sri Lanka. His Honour examined the appellant's passport and finding no indication in it that the appellant had entered or departed Sri Lanka, his Honour accepted the appellant's assertion. His Honour then considered whether the Tribunal's factual error constituted a jurisdictional error and concluded that it did not, citing *Abebe v Commonwealth* (1999) 197 CLR 510 at 560.

17 The appellant has now revisited the issue of his alleged presence in Sri Lanka in par 2 of his written submissions, and has added further details to explain why his visa application was processed in Colombo. However, as the respondent submits, those details do not disclose any reason for doubting the correctness of his Honour's conclusion that there was no jurisdictional error.

18 In par 3 of his submissions, the appellant contends:

> '3. *Similarly the* [appellant], *due to lack of knowledge of English and the understanding of English, he had under the column 59 (CB page 15) which asks for – do you have a right to enter or reside had written as Australia and Singapore, because he had a visa to come to Australia and while coming to Australia he came through Singapore and had a right to enter and stay temporarily for a few days and this he mistook it while filling the application form (as no one was there to guide him) and hence said that he had a right to enter Singapore and Australia. The Tribunal member and the Primary judge had mistook these, thinking that he has a Permanent Residency Status like the local people here. Again unfortunately due to lack of knowledge and understanding of the questions asked and therefore the reply in English has disadvantaged the* [appellant]. *Again this was taken as the main issue by the Tribunal member and the Primary judge as though the* [appellant] *had a Permanent Residency, which they would like to see in the visa. Again this should have been clarified earlier and again lack of understanding of English has caused this problem.'*

19 In his application for a protection visa, the appellant replied to the question: 'Do you have a right to enter or reside in, whether temporarily or permanently, any country(s) other than your country(s) of nationality or your former country(s) of habitual residence' by ticking

'Yes' and inserting the words 'Australia, Singapore'. He also indicated that he had been in Singapore between 7 September 2002 and 11 September 2002.

20 In her letter to the appellant dated 22 October 2002 the respondent's delegate asked, amongst other matters for: 'Full details and documentary evidence of the right to reside (either temporarily or permanently) in Australia and in Singapore, as stated by you in your application.'

21 The appellant responded, in his letter dated 12 November 2002: 'I have provided the documentary evidence of the right to reside in Singapore and Australia as in the copy of my passport where the Visa for the above mentioned countries are stamped.' (The passport does not record any reference to Singapore.)

22 As stated in [13] and [14] above, in his 4 August 2003 letter the Tribunal member asked the appellant, amongst other things, for:

> *'An explanation of why you did not seek protection in Sri Lanka or Singapore, and why you returned voluntarily to India from Sri Lanka if you were genuinely in fear of persecution.'*

23 In his Reasons for Decision, the Tribunal member adverted to the appellant being '... on notice that his failure to seek protection in either Sri Lanka or Singapore ... calls into question the genuineness of his stated fears of persecution, but he has not responded.'

24 The appellant did not make reference to the Tribunal's finding regarding Singapore in the written submissions filed in the proceedings before his Honour, so that his Honour did not advert to that matter in his judgment.

25 In our view, the appellant should not, in the present circumstances, now be allowed to place reliance on a matter not raised in the proceedings below. In any event, the Tribunal's reference to failure to seek protection in Singapore is not, in our opinion, indicative of any jurisdictional error on the Tribunal's part. Before making that finding, the Tribunal sought an explanation from the appellant. In the absence of any explanation from him, it was entitled to draw the conclusion which it drew.

26 In par 4 of his submissions, the appellant contends:

> '*4*. *If the* [appellant] *had been called for an interview this could have been more clarified and the misconception could have been avoided. Unfortunately again due to his not being called for an interview to explain, has caused problems for him to his disadvantage.'*

27 The appellant contended before his Honour that he had been improperly denied an oral hearing before the Tribunal.

28 Section 425(1) of the *Migration Act 1958* ('the Act') provides that the Tribunal must invite an applicant to appear before it and present arguments. However, s 425(2) removes that obligation in any case where s 424C(1) applies to an applicant, that is to say, where an applicant has been invited to give additional information and does not give it before the time for providing the information has passed.

29 His Honour examined the correspondence forwarded by the Tribunal to the appellant on 4 August 2003 and concluded that the terms of the statutory scheme relating to requests for additional information had been duly observed. It follows, in our view, that the appellant was a person to whom s 424C(1) of the Act applied, with the result that he was not entitled to be invited to a hearing before the Tribunal.

30 The appellant's comments at par 3 of his written submissions do not identify any error in his Honour's judgment on this issue.

31 In pars 5 and 6 of his submissions, the appellant says:

> '*5*. *The* [appellant] *also wanted more time to bring the supporting documents from India. Unfortunately to gather the documents while staying in Australia, unnoticed is a great problem for the* [appellant]. *This was also not granted for the* [appellant].
>
> *6*. *The Country information relied by the Tribunal member had clearly stated about Karunanidhi, the DMK party chief's arrest and consequent harassment and arrest of party workers indefinitely, of which the* [appellant] *is one. Unfortunately, the* [appellant] *was not able to produce the documents on time. This has added the suspicion of the Tribunal Member to think that the claims are not true, whereas the fact is that they are true. The Honourable Court can understand the plight of refugees to gather documents from the home country under hostile atmosphere. This has compounded the difficulty for the* [appellant]*.'*

32 In his response to the Tribunal's letter dated 4 August 2003, by letter dated 25 August 2003, the appellant stated:

> *'As you can appreciate, since collecting the relevant information as asked for, from India, under difficult circumstances, is a time consuming affair, I pray and request that I be granted extension of time to submit the documents until 27th October 2003.'*

33 The application was refused by letter dated 26 August 2003, but the Tribunal waited for a further week (3 September 2003) before deciding to finalise the case.

34 The Tribunal observed in its Reasons that the appellant '... has had ample opportunity to provide details to support his claims for recognition as a refugee from India' and that the appellant had failed to provide information requested by both the Department and the Tribunal.

35 His Honour held that the Tribunal did not err by refusing the extension of time, noting that the appellant was not entitled to assume that his request for an extension of time, made just before the deadline for providing information ended, would be granted.

36 In our view, the appellant has failed to identify any appellable error in his Honour's conclusion on this issue.

ORDERS

1. It must follow that the appeal should be dismissed. The appellant should be ordered to pay the respondent's costs.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 18 February 2004

Solicitor for the Appellant:	The appellant appeared in person
Counsel for the Respondent:	Miss L Henderson
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	10 February 2004
Date of Judgment:	10 February 2004