

# FEDERAL COURT OF AUSTRALIA

## **Applicant M143 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 100**

**MIGRATION** – application for leave to appeal – application for extension of time – protection visa – procedural fairness – where Tribunal rejected applicant’s claims – where no evidence that Tribunal relied on independent country information.

*Migration Act 1958* (Cth)  
*Judiciary Act 1903* (Cth)

*Ayan v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 139  
*Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal*(2002) 190 ALR 601

**APPLICANT M143 OF 2003 V MINISTER FOR IMMIGRATION AND  
MULTICULTURAL AND INDIGENOUS AFFAIRS**

**V 1137 OF 2003**

**BEAUMONT, WEINBERG & CRENNAN JJ  
7 MAY 2004  
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY**

**V 1137 OF 2003**

**APPLICATION FOR LEAVE TO APPEAL FROM A SINGLE JUDGE OF THE FEDERAL  
COURT OF AUSTRALIA**

**BETWEEN:           APPLICANT M143 OF 2003  
                          APPLICANT**

**AND:                 MINISTER FOR IMMIGRATION AND MULTICULTURAL  
                          AND INDIGENOUS AFFAIRS  
                          RESPONDENT**

**JUDGES:            BEAUMONT, WEINBERG & CRENNAN JJ**

**DATE OF ORDER:   7 MAY 2004**

**WHERE MADE:      MELB OURNE**

**THE COURT ORDERS THAT:**

1.     The applications for extension of time and for leave to appeal be refused.
2.     The applicant 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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**DATE:               7 MAY 2004**

**PLACE:             MELBOURNE**

**REASONS FOR JUDGMENT**

**THE COURT:**

**INTRODUCTION**

1           The applicant, his wife and daughter, who are nationals of the Philippines, entered Australia in June 1984. In May 1997, they applied to the Department of Immigration for protection visas. In essence, the applicant's claim for refugee status under the Convention was based on his political activity against President Marcos. The applicant accepts that he is no longer in power, but claims that a number of Marcos' 'cronies' still hold 'important positions', and that 'human rights abuses' are still 'commonplace'. In September 1997, the Minister's delegate refused their application. They then sought review of that decision by the Refugee Review Tribunal ('the Tribunal'), which, in April 1998, affirmed the delegate's decision. The applicant was 'joined in' the 'representative' proceedings of *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* (2002) 190 ALR 601 and subsequently commenced, by seeking an order nisi, proceedings in the High Court, relying on s 39B of the *Judiciary Act 1903* (Cth). The proceedings were remitted to this Court. On 5 December 2003, a Judge of the Court held that no basis existed for the grant of the order nisi. This is an application for leave to appeal and for an extension of time.

## THE TRIBUNAL'S DECISION

### (a) The claims made

2 The Tribunal noted that the applicant made claims essentially to the following effect:

3 He was born in Manila in 1955. After completing his education, he became employed as a radiographer at a university in the city. During this time (1978 – 1981), he became involved with the student movement, and took part in strikes, demonstrations and other protests against President Ferdinand Marcos. He handed out literature at demonstrations, and pasted posters in prominent places around the university and in the city. The demonstrations were invariably broken up by troops using force and violence. On a number of occasions, he was attacked and viciously beaten by the troops. On one occasion, he was beaten and then arrested. He was detained at a police station for two days, during which time he was beaten. He was released through the pleas of his family.

4 A number of the applicant's friends were arrested and detained at around this time, and some disappeared.

5 Since the applicant was afraid, he applied for work in the Middle East, obtaining the position of a truck driver in Saudi Arabia. He left the Philippines on 30 August 1981. Shortly afterwards, he heard that more members of the student movement had been killed or had disappeared.

6 At the expiration of his contract in 1983, he returned to the Philippines to visit his family. However, within a few weeks, the security forces learned that he had returned. They visited his parents' home. When his parents told him of the visit, he was in extreme fear and so returned to Saudi Arabia and renewed his contract there.

7 When his contract expired again in 1984, he returned to the Philippines once more, but, because of his past experiences, he was afraid to remain, and made arrangements to travel to Australia.

8 At the Tribunal hearing, the applicant maintained that he had actually been studying at university from 1975 to 1978, rather than employed. His political activity had occurred, he said, in the period 1975 – 1980. At the time he was detained, he actually lost some teeth due

to being bashed. He said that when he was released, it was not merely because of the pleas of his family, but because they raised money through selling property and paid a bribe.

9           The Tribunal noted that no claims had been made by or on behalf of the applicant's wife or child. The wife confirmed at the hearing that her husband had been involved in political activity in the period 1975–1980. The child was born in Australia, on 26 May 1988.

**(b)    The Tribunal's assessment**

10           With respect to credibility, the Tribunal said that the claims raised questions as to the applicant's credibility. There were variations between the account as given in the application form and as recounted at the hearing, already apparent. Further, the applicant has an adult son whose 1978 birth certificate records the applicant as being, at that time, a labourer, not a student or a radiographer. The applicant did not explain this satisfactorily.

11           The claim that money was paid for the applicant's release from detention was not credible, since it was not mentioned at first instance. It was also not credible that the security forces were seriously looking for the applicant in 1983, for, if so, they would not limit their search to one abortive visit to his parents' house and would not allow the applicant to enter and leave the country unmolested.

12           Turning next to the prospect of persecution, the Tribunal found that the case 'lacks substance' for, in essence, these reasons:

- Much change has taken place in the Philippines since the applicant left there. Ferdinand Marcos lost power in 1986, and died in exile in 1989. His party, the KBL, has not held power nationally since Marcos was ousted.
  
- Although some associates of Marcos are still in positions of power in the Philippines, it is not true that those who once opposed or criticized Marcos are now in any danger. There were no reports of persecution or mistreatment of such persons at any time since 1986. Indeed, some of the most vocal opponents of Marcos, including Corazon Aquino, have come to high office.

- It is now 18 years since the applicant had any political involvement in the Philippines. Even then, such involvement as he had was of a very minor and low profile nature. He was released after only a brief detention without even a bribe being necessary. If his last political activity was in 1980 (as he said at the hearing) then he remained in the country for about another year thereafter without encountering any problems. He obtained a passport in his own name without difficulty in 1981, and it was extended for him in 1983. He was able to enter and leave the Philippines twice without encountering any problems, even while Marcos was still in power. In the circumstances, there is not even a remote chance that he would now suffer persecution because of this activity.
- While there are still human rights abuses in the Philippines, this is not sufficient to show that the applicant faces a real chance of persecution for a Convention reason. An applicant must be able to relate potential abuses to his or her own situation. Human rights abuses in the Philippines are not directed against former Marcos opponents.

13 As mentioned, the application for judicial review under s39B of the *Judiciary Act* was dealt with in this Court on 5 December 2003.

#### **THE DECISION OF THE PRIMARY JUDGE**

14 In dismissing the application for an order nisi for prohibition and certiorari, the primary Judge said that the applicant's arguments, written and oral, were (a) expressed 'in the most general terms'; and (b) did not disclose 'any real grounds' for the relief sought.

15 His Honour added ([2003] FCA 1536 at [5]):

*'Although the applicant was a party to the Muin proceedings his contentions of fact and law do not raise, let alone satisfy, the factual bases for making out the grounds in Muin that must be satisfied before a court finds that procedural fairness has been denied. Rather, the applicant claims that the Tribunal failed to accord him procedural fairness in that it relied on a document ("United States Department of State Country Reports on Human Rights 1996, Philippines Report on Human Rights Practices for 1996") containing country information without providing the applicant with an opportunity to respond to that document. There are a number of difficulties with that claim, which are set out in detail in the respondents' submissions. The document to which the applicant points was not referred to in the*

*Tribunal's decision and there is no basis for concluding that it was relied upon by the Tribunal or treated by it as relevant to the decision. Nor has it been established that the applicant was denied procedural fairness in relation to that document. It has not even been stated by him that the document was adverse to the case he was putting to the Tribunal. Accordingly, there is no basis for the grant of the relief that the applicant is seeking.'*

16 The respondents' submissions mentioned by the Judge included the following:

- The Tribunal did not rely on country information in rejecting the claims made by the applicant.
- The Tribunal's decision was based principally upon the credibility problems with the application.
- The Tribunal rejected the applicant's claims as lacking substance, finding that:
  - It was eighteen years since the applicant had any political involvement in the Philippines and, even then, such involvement as he had was of a very minor and low profile nature.
  - If the applicant's last political activity was in 1980 (as he claimed at the hearing) he remained in the country for about another year thereafter without encountering any problems.
  - The applicant obtained a passport in his own name without difficulty in 1981, and it was extended for him in 1983.
  - The applicant was able to leave and enter the Philippines twice without encountering any problems, even while former President Marcos was in power.
- There is no evidence in the Tribunal's decision that it referred to, or relied on, this document. The only document referred to by the Tribunal was the *'Far East and Australasia 1996'* for a history of the relevant period (page 7 of the decision).

- Even if the applicant could show that the Tribunal relied on country information, the Tribunal's failure to disclose that information did not constitute a breach of procedural fairness because none of the information was 'decisive' or 'crucial' to the Decision (see *Muin v Refugee Review Tribunal* (2002) 190 ALR 601).
- The applicant has not advanced any evidence that, had the country information about which he now complains been drawn to his attention, he would have advanced any further material or submissions. In *Muin*, it was an agreed fact that that would have occurred. There is no such agreement in this case. In the absence of such evidence, the applicant has failed to show that he suffered any unfairness as a result of the breach of procedural fairness alleged (see *Ayan v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 139; [20]).

#### **THE APPLICANT'S GROUNDS OF APPEAL**

17 By his notice of appeal, filed on 19 December 2003, the applicant stated the following as grounds of appeal:

'2. *GROUNDS OF APPEAL*

*The grounds on which the Appellant seeks orders under section 39 B of the Judiciary Act, in relation to the decision are as follows:*

- A. *There was an error of law in the Court's decision constituting a jurisdictional error.*

*PARTICULARS*

*I disagree with the decision of the Federal Court. I will provide further particulars when I am provided with a copy of the decision of the Federal Court.*

- B. *There was procedural error in the Court's decision constituting an absence of natural justice which was also a jurisdictional error.*

*PARTICULARS*

*I repeat the particulars as above.'*



**THE APPLICANT'S LETTER TO THE COURT DATED 21 APRIL 2004**

18

By letter addressed to the Court, the applicant has stated:

*'It is easy for some to conclude my claim that I am not a genuine refugee, but if you lived in the Philippines, you will understand where I am coming from. The Philippines is undeniably one of the worlds most dangerous and notorious countries and it continues to get worse. Most of my friends and colleagues have been either killed or tortured and I still feel that it is not safe for me to return.*

*I came to Australia because it is a country where I can seek refuge away from all the violence and danger in the Philippines. Originally I came here as a tourist, but I have never been a burden to the country. I have worked hard on every job to support my family and have always paid my taxes. I am a law abiding resident of this country and in some ways already feel like a citizen through my contributions. I have had my business for over a decade and have created a lot of jobs for many Australians.*

*Apart from what I have already mentioned above, another important reason why I am fighting to stay in Australia is because my fifteen year old daughter who is an Australian Citizen will be disadvantaged greatly. If I was forced to return to the Philippines she will not have a father and mother available to give her the emotional and financial support she needs at her stage in life. My son does not have the means to look after her and cannot see how it will be reasonable for him to take on a mother and father role to a fifteen year old. At the same time, my daughter cannot start a new life in the Philippines, if we were to go back, not only will she be out of place and not understand the language, but it is not a way of life suitable for her amongst all the danger. We no longer have a home in the Philippines, there is nothing there for us to return to. We have established our lives here in Australia, we are a very tight family unit and regard Australia as our home. I am asking for a fair decision for my daughter's sake, she is an Australian Citizen and cannot see how going back to the Philippines or losing a mother and father can be fair on her. Enclosed with this letter is a copy of the decision from the Administrative Appeals Tribunal regarding my case. Please feel free to read through it and hope that you will come to more of an understanding of our very difficult situation.'*

**CONCLUSIONS ON THE PRESENT APPLICATION**

19           In our opinion, for the reasons given by the respondent to his Honour, summarised at [16] above, the decision of the primary Judge was obviously correct; there is no arguable basis for the grant of judicial review here.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Beaumont, Weinberg & Crennan.

Associate:

Dated:           7 May 2004

Solicitor for the Applicant:    No appearance

Counsel for the Respondent:    Mr C Fairfield

Solicitor for the Respondent:   Australian Government Solicitor

Date of Hearing:                 7 May 2004

Date of Judgment:               7 May 2004