FEDERAL COURT OF AUSTRALIA

NBEI v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 171

MIGRATION – appeal from Refugee Review Tribunal – where applicant held temporary protection visa – where new claims made in application for protection visa – whether Tribunal failed to address a new claim

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) s 474
Migration Regulations 1994 Sch 2 cl 866.228

NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 6 referred to
NBGM v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1373 considered

NBEI v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL OF THE COMMONWEALTH OF AUSTRALIA

N 664 of 2004

BRANSON J
11 MARCH 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 664 of 2004**

BETWEEN:	**NBEI** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL OF THE COMMONWEALTH OF AUSTRALIA **SECOND RESPONDENT**
JUDGE:	**BRANSON J**
DATE OF ORDER:	**11 MARCH 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. A writ of certiorari issue to quash the decision of the second respondent made on 16 March 2004.
2. A writ of mandamus issue directing the second respondent to determine the applicant's application to it according to law.
3. The first respondent pay the costs of the applicant.

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 664 of 2004**

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APPLICANT

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

REFUGEE REVIEW TRIBUNAL OF THE COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT

JUDGE: **BRANSON J**
DATE: **11 MARCH 2005**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 By an amended application under s 39B of the *Judiciary Act 1903* (Cth) the applicant seeks review of a decision of the Refugee Review Tribunal ('the Tribunal') made on 16 March 2004. The Tribunal by its decision affirmed an earlier decision of a delegate of the first respondent ('the Minister') that the applicant is not entitled to a protection visa.

FACTUAL BACKGROUND

2 The applicant's application for a protection visa was made while he held a temporary protection visa. On 3 November 1999 a delegate of the Minister had been satisfied that the applicant, an Afghan national of Hazara ethnicity, had a well-founded fear of persecution at the hands of the Taliban. The applicant was granted a three-year temporary protection visa on 26 January 2000.

3 Shortly thereafter the applicant applied for a permanent protection visa. He was advised that his application could not be considered immediately but that a decision on the application would be made when the criterion specified in clause 866.228 of the Migration Regulations was met. Clause 866.228 provides that the holder of a Subclass 785 (Temporary Protection)

visa cannot be granted a Subclass 866 (Protection) visa unless he or she has held the temporary visa for a continuous period of 30 months or a shorter period specified by the Minister.

4 On 2 October 2003 a delegate of the Minister refused to grant the applicant a protection visa. The delegate's decision record reveals that the delegate was satisfied that the applicant is not a person to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees ('the Convention').

5 The applicant applied to the Tribunal for review of the decision made by the Minister's delegate on 22 October 2003. The decision of the Tribunal on this application is the subject of the present application to this Court.

DECISION OF THE TRIBUNAL

6 The reasons for decision of the Tribunal record that the applicant is a 20-year old Afghani citizen from the Oruzgan Province of Afghanistan who is of Hazara ethnicity and is a Shi'a Muslim. The Tribunal's reasons note that the applicant claims that his father is dead and that he does not know the whereabouts of other members of his family.

7 The claims that had been made by the applicant before the Tribunal hearing was conducted included that he would face danger in Afghanistan from Pashtun war-lords who would persecute him as a Hazara. They also included that he would be targeted as wealthy because he was returning from a western country and he would lack communal protection.

8 At a hearing before the Tribunal there was an exchange between the Tribunal and the applicant that is recorded in the Tribunal's reasons for decision. The exchange concerned the lawlessness and insecurity that prevailed in the southern part of Oruzgan from which the applicant claimed to come. The Tribunal noted that this unsatisfactory state of affairs was the result of criminal activity by Hazara Shi'a militia. It is convenient to set out the following extract from the Tribunal's reasons:

> *'The applicant was asked why he thought he would be targeted by the Hazara militia when he was a Hazara himself. He replied it was because of his father who was with the Wahadat Party, which the applicant stated did not exist any*

> *more. The Tribunal agreed there* [are] *a number of Hazara political groups currently in the area but that these were dominated by things commercial and criminal and that there was much factional infighting amongst them involving the poppy crop (the drug trade), extortion and the illegal imposition of taxes. There was no reply.*
>
> *The Tribunal asked the applicant what he feared if he returned to Afghanistan. He replied there was no life and that he could be caught by the Taliban or because he had money and would be adversely targeted.*
>
> *When asked if he wished to add anything he replied his father belonged to a particular Hazara political party, that there were other political groups and that there were disputes amongst them. He continued that there was also the Taliban and they continued to loot. The applicant added that he did not know where his mother and four brothers were.'*

It is not disputed by the respondent that the applicant had not at any earlier time claimed to fear harm because of his now deceased father's affiliation with the Wahdat party.

9 The Tribunal identified its task on review of the decision of the delegate of the Minister as being to consider whether, in accordance with Article 1C(5) of the Convention, the applicant can no longer continue to refuse to avail himself of the protection of his country of nationality because circumstances in connection with which he was recognised as a refugee have ceased to exist. I am inclined to doubt that this was the task of the Tribunal in the circumstances. In *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1373 (*NBGM v MIMIA*) Emmett J observed:

> *'… The scheme of the Act in requiring a fresh application following the expiration of a temporary protection visa does not necessarily sit comfortably with the framework of the Refugees Convention. Nevertheless, the scheme of the Act is unambiguous in requiring a fresh application for a protection visa on the part of a person who wishes to remain in Australia after the expiration of a temporary protection visa.*
>
> *The Tribunal was not considering the revocation of a protection visa. Nor was the Tribunal considering an application for the extension of a* ***temporary*** *protection visa. The Tribunal was considering a fresh application for the grant of a* ***permanent*** *protection visa. That required, under s 36(2), that the Tribunal, standing in the shoes of the Minister be satisfied, that the applicant is, at the time of the decision, a person to whom Australia has protection obligations under the Refugees Convention.'*

10 The judgment in *NBGM v MIMIA* is the subject of an appeal to the Full Court. As I consider that this application can be determined without resolving whether the Tribunal accurately

identified its task, no useful purpose would be served by my considering further whether Emmett J accurately identified the task of a decision-maker when considering an application for a protection visa made by a person who holds a temporary protection visa. Nor, having regard to the view which I have taken of the Tribunal's reasons for decision, have I considered it necessary to defer publishing these reasons for judgment to allow the parties to make submissions with respect to the recently published decision of the High Court in *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6.

11 Under the heading *'FINDINGS AND REASONS'* the Tribunal's reasons state that the applicant advanced two claims that were not relied on when he was granted a temporary protection visa. The first of these claims is identified as a claim arising out of the loss of his family and the second as a claim of problems related to his status as a returning refugee. The claim arising out of his father's association with the Wahdat party is not here identified as a claim not earlier relied upon.

12 After considering the claims in relation to which the applicant had initially been found to be a person to whom Australia had protection obligations and the two additional claims that it identified, the Tribunal concluded as follows:

> *'The lack of details and substance of the information before the Tribunal in supporting the application, the ICI which is contrary to that presented by the applicant and the non-responsiveness of some of the answers of the applicant to the Tribunal's queries, has lead it to the conclusion that the application is, therefore, without foundation.*
>
> *It follows that the Tribunal finds on the totality of the evidence before it that the applicant has no genuine subjective fear of persecution. It follows there is no basis for the applicant's claims that he has a well-founded fear of persecution if he returns to Afghanistan now or in the foreseeable future.*
>
> *Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore, the applicant does not satisfy the criterion set out in s 36(2) of the Act for a protection visa.'*

CONSIDERATION

13 I am satisfied by reference both to the Tribunal's reasons for decision and the transcript of the

hearing before the Tribunal that the applicant advanced a claim that he would face persecution in Afghanistan because of his now deceased father's affiliation with the Wahdat party. The applicant contended that while the Tribunal recited the claim in its reasons for decision it did not address it. The respondent contended that when the Tribunal's reasons are read as a whole it becomes clear that the Tribunal did address the claim. The respondent argued that the Tribunal did not accept that the militia are interested in politics, but only in money, and by inference rejected the suggestion that they would have any interest in the applicant by reason of his father's political affiliation. The passage from the Tribunal's reasons for decision on which the respondent places particular reliance is the first paragraph of the extract set out in [8] above.

14 If the Tribunal did consider, and then reject, the applicant's claim to fear persecution at the hands of Hazara militia because of his father's affiliation with the Wahdat party its reasons for rejecting the claim must be found in the paragraphs from the reasons for decision quoted in [8] above. No other section of the Tribunal's reasons for decision refer to the claim. Three difficulties seem to me to face the argument that the Tribunal rejected the claim because it did not accept that the Hazara militia are interested in politics. The first is that the Tribunal's reasons later record that the applicant advanced only two claims that were not relied on when he was granted a temporary protection visa. If the claim concerning his father's affiliation with the Wahdat party is taken into account, the applicant advanced three claims not relied on at that time. The second difficulty is that the Tribunal seems in the extract set out in [8] above to have equated Hazara militia with Hazara political groups. This seems to me to be the conclusion to be drawn from the Tribunal's reference first to '*the Hazara militia'* and then, apparently in the same context, to '*Hazara political groups currently in the area* [being] *dominated by things commercial and criminal …'*. While the reference may simply be an editorial slip, I cannot be confident that it is. The third is that there is no inconsistency between a group being interested in the drug trade, extortion and the illegal imposition of taxes on the one hand and that group targeting perceived political enemies on the other.

15 Having regard to the above difficulties, and to the obligation of the Tribunal to record its material findings of fact, I conclude that the Tribunal overlooked addressing the claim advanced by the applicant that he would be targeted by Hazara militia because of his father's affiliation with the Wahdat party. For this reason I conclude that the Tribunal constructively failed to exercise its jurisdiction. Its decision is thus not a decision under the *Migration Act*

1958 (Cth) within the meaning of s 474 of the Act.

16 I propose to order the issue of a writ of certiorari quashing the decision of the Tribunal made on 16 March 2004 and the issue of a writ of mandamus directing the second respondent to determine the applicant's application to it according to law. I presently see no reason for the issue of any other writ. The first respondent will be ordered to pay the costs of the applicant.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 11 March 2004

Counsel for the Applicant:	L Karp
Solicitor for the Applicant:	Legal Aid Commission of New South Wales
Counsel for the Respondent:	J Smith
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	9 February 2005
Date of Judgment:	11 March 2005