FEDERAL COURT OF AUSTRALIA

VWBU v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 39

MIGRATION – appeal – whether Refugee Review Tribunal failed to consider claim made by the appellant – whether independent finding of adequate state protection – whether leave to raise a new ground of appeal should be granted

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424 - cited

Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 197 ALR 389 – applied

VWBU v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
VID 591 of 2005

MERKEL J
3 FEBRUARY 2006
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 591 OF 2005**

BETWEEN:	**VWBU** **APPELLANT**
AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	THE REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**MERKEL J**
DATE OF ORDER:	**3 FEBRUARY 2006**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by McInnis FM be set aside and in lieu thereof the Court orders:
   (a) A writ of Certiorari issue quashing the decision of the second respondent of 30 October 2003;
   (b) A writ of Prohibition issue directed to the first respondent prohibiting her from acting upon or giving effect to or proceeding upon the decision of the second respondent of 30 October 2003;
   (c) A writ of Mandamus issue requiring the second respondent to determine the appellant's application for a protection visa according to law.

3. The first respondent pay the costs of counsel appearing pro bono for the appellant.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 591 OF 2005**

BETWEEN: **VWBU**
APPELLANT

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

THE REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT

JUDGE: **MERKEL J**
DATE: **3 FEBRUARY 2006**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The appellant, a citizen of Turkey, applied for a protection visa claiming that she is a refugee as defined by Art 1A(2) of the *Convention Relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* ('the Convention') because she has a well-founded fear of persecution for a Convention reason if she were to return to Turkey. Her application was refused by a delegate of the first respondent and the refusal was affirmed by the Refugee Review Tribunal ('the RRT'). The appellant then applied unsuccessfully to the Federal Magistrates Court ('the FMC') to review the decision of the RRT. She has now appealed to the Court against the dismissal by the FMC of her application for review.

2 The appellant claimed that her husband is a member of the Special Forces in the Turkish Army and has undertaken operations against members of the Partiya Karkerên Kurdistan ('the PKK'). She claimed that her name and her husband's name are on a PKK 'blacklist' as a result of his Special Forces operations, that they received threatening telephone calls and that someone shot at their house. She claimed that she was afraid that she would be killed if she returned to Turkey and that the Turkish authorities were only able to provide protection

for her for a limited time.

3 A difficulty with the present case is that the RRT's reasons for decision were expressed briefly and generally, making it necessary to ascertain the reasoning of the RRT from a fair reading of the decision as a whole. The RRT appeared to accept the appellant's evidence and, significantly, was satisfied that she had a subjective fear of persecution. However, the RRT found that the appellant's fear of persecution was not well-founded. The RRT appeared to make this finding on the basis of country information from a UK Home Office Country Information report and an article in *The Economist*. The passages from these sources which are set out in the RRT's reasons concerned the level of violence between the PKK and the Turkish government. As a result of this information, the RRT concluded:

> *'While it is clear that the situation is far from fully resolved, it is also clear that the violent confrontation between the PKK and the government has largely finished.* ***There is no information before the Tribunal that indicates PKK members are killing or otherwise attacking members of the armed forces, particularly when they are off duty, let alone members of their families.***
>
> *In considering the Applicant's claims in the context of the available information, the Tribunal concludes that there is not a real chance that the Applicant faces persecution at the hands of the PKK or its followers should she return to Turkey. If she feels anxious that she is under threat, it also concludes that the Turkish authorities are both willing and able to provide protection*.' (emphasis added)

4 In this Court, the appellant's counsel, who appeared pro bono, relied only on one ground, which was not a ground of appeal raised before the FMC. The ground was that:

> *'The primary judge should have held that the Refugee Review Tribunal (the 'Tribunal') failed to conduct its review in accordance with the duties imposed on it under the* Migration Act *and therefore constructively failed to exercise its jurisdiction or ignored relevant material.*
>
> ***Particulars***
> *The Tribunal failed to address and deal with the claim articulated by the appellant that she had a well founded fear of persecution based on her membership of a particular social group namely that she is the wife of a person on a PKK blacklist and/or is herself on a PKK blacklist.'*

5 I am satisfied that leave should be granted to raise the ground. It is based on the reasons for decision of the RRT and on the material before the FMC, does not involve the adducing of any further evidence and does not cause injustice or unfairness to the respondents. Furthermore, in view of the conclusions at which I have arrived, it is clearly in the interests of

justice that the leave sought be granted: cf *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 438 [34]-[35] per Allsop J (with whom Drummond and Mansfield JJ agreed).

6 The appellant's claim before the RRT was that she fears persecution if she returns to Turkey because she is on a PKK blacklist because of her husband's activities in the Special Forces against PKK members ('the blacklist claim'). As the RRT accepted that the appellant had a subjective fear of persecution as she claimed, it was bound to determine whether that claim fell within the Convention. One aspect of that determination was whether the subjective fear of persecution held by the appellant by reason of the blacklist claim was well founded. Another aspect was whether the fear of persecution held by the appellant was for reasons of an actual or imputed political opinion or as a member of a particular social group being that she is a person on a PKK blacklist or she is the wife of a person on a PKK blacklist. On a fair reading of the decision of the RRT, the claim considered by it was a different claim, namely whether a fear of persecution held by a member of the armed forces or as a family member of a member of the armed forces was well founded. This is apparent from the way in which the RRT expressed its decision and from the country information upon which it relied.

7 This case is analogous to *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 389 ('*Dranichnikov*'). In that case, the applicant claimed to be a member of a social group consisting of entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals. However, the RRT considered whether the applicant was at risk of persecution by reason of his membership of a social group consisting of businessmen in Russia. The majority in the High Court (Gummow and Callinan JJ, with whom Hayne J agreed) found at 394-5 [27] that the RRT had fallen into jurisdictional error by determining:

> *'whether Mr Dranichnikov's membership of a social group, namely of "businessmen in Russia" was a reason for his persecution and relevantly nothing more.'*

The majority held that:

> *'The tribunal should have decided the matter which was put to it, whether Mr Dranichnikov was a member of a social group consisting of entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals.'*

Kirby J reached the same conclusion as Gummow, Callinan and Hayne JJ and observed at 407 [87]-[88]:

> *'Difficult as it may sometimes be to differentiate jurisdictional or non-jurisdictional error with exactitude, in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction. It will be treated as a constructive failure of the decision-maker to exercise the jurisdiction and powers given to it.*
>
> *Obviously, it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction. But where, as here, the mistake is essentially definitional and amounts to a basic misunderstanding of the case brought by an applicant, the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way.'*

8 The first respondent argued that there was no jurisdictional error by the RRT because the RRT determined the risk of harm to a more general social group, the armed forces, a subset of which was members of the armed forces on a PKK blacklist. However, I am satisfied that in this case, as in *Dranichnikov*, the RRT was required, but failed, to consider and make findings in respect of the claim made by the appellant and instead made findings in relation to a different claim which was not the claim put by the appellant. This constitutes a failure by the RRT to exercise its jurisdiction.

9 The first respondent contended in the alternative that the appellant must fail in any event because the RRT made an independent finding of adequate state protection. However, the RRT's finding of adequate state protection related to the claim with which it was dealing, namely the threat likely to be experienced by members of the Turkish armed forces and their families. As explained above, that was not the appellant's claim. The question of whether a person in the appellant's position was able to obtain adequate protection from the Turkish authorities was not addressed by the RRT. I am confirmed in that view by the fact that the RRT made no reference in its state protection finding to the claim of the appellant that the Turkish authorities stated they could only provide her with protection for three months but no longer. The failure to deal with that specific claim, which was plainly relevant to the issue of adequate state protection for the appellant or for persons in her position, supports my view that the RRT was dealing with a different claim. It follows that the appeal is to be allowed and the orders of McInnis FM are to be set aside. Orders should also be made quashing the

decision of the RRT and requiring it to determine the appellant's application according to law.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel.

Associate:

Dated: 9 February 2006

Counsel appearing pro bono for the Appellant:	R Niall and C Symons
Counsel for the First Respondent:	H Riley
Solicitor for the First Respondent:	Australian Government Solicitor
Date of Hearing:	3 February 2006
Date of Judgment:	3 February 2006