FEDERAL COURT OF AUSTRALIA

NAUV v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 124

MIGRATION – appeal from a single Judge – where application for a protection visa refused – where appellant did not know of the delegate's decision because he escaped detention and remained at large for eighteen months – where jurisdictional error by delegate found to exist – whether trial Judge erred in exercise of discretion.

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

Re Refugee Review Tribunal; Ex parte Aala [2000] 204 CLR 82 referred to
House v The King (1936) 55 CLR 499 referred to
Boral Gas (NSW) Pty Ltd v Magill (1993) 32 NSWLR 501 cited

NAUV V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 2298 OF 2003

BEAUMONT, CONTI & CRENNAN JJ
14 MAY 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 2298 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NAUV** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**BEAUMONT, CONTI & CRENNAN JJ**
DATE OF ORDER:	**14 MAY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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

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JUDGES:	**BEAUMONT, CONTI & CRENNAN JJ**
DATE:	**14 MAY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 This is an appeal from a judgment of a single Judge of this Court ([2003] FCA 1319).

2 Pursuant to the provisions of s 39B of the *Judiciary Act 1903* (Cth), on 29 October 2003, by way of amended application, the appellant applied to this Court for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal') under the *Migration Act 1958* (Cth) ('the Act').

3 The appellant claimed that the Tribunal fell into jurisdictional error by denying the appellant procedural fairness by refusing to hear his application. In the alternative, the appellant also sought review of the decision of the Minister's delegate, also claiming jurisdictional error and denial of procedural fairness there by first, failing to provide the appellant with adequate interpretation facilities to allow the appellant to fairly and properly present his application; secondly, by failing to provide the appellant with an opportunity to remedy errors of interpretation that occurred in the preparation of the statement prepared for the appellant on 14 May 2001 and relied upon by the Tribunal; thirdly, by failing to provide

the appellant with an opportunity to respond to matters which it determined adversely to his interests; fourthly, by failing to consider a claim made by the appellant that he had a well-founded fear of persecution due to the fear of corrupt police in Algeria and the consequent failure by those police to afford the protection of the state to him from the Group Islamic Army ('the GIA'); fifthly, by not taking adequate steps to notify the appellant of his decision; and finally, by failing to provide the appellant with a copy of the decision at the earliest available opportunity.

4 The primary Judge found jurisdictional error on the part of the delegate, but refused relief on discretionary grounds. This is an appeal from the dismissal of the proceedings. The Minister has not challenged his Honour's finding of jurisdictional error, but adopts his Honour's reasons in refusing relief on discretionary grounds.

THE BACKGROUND

5 The appellant, an Algerian citizen, claims that whilst in Algeria he was captured and tortured by an organisation known as the GIA, but that he escaped from its clutches in 1994. He remained in Algeria until 1996, when he 'fled' to Libya via Tunisia. He arrived in Australia on about 4 May 2001 (without lawful authority), and was transferred to Villawood Detention Centre ('Villawood'). He was informed that MacPherson & Kelley, Lawyers, had been 'allocated to [his] case', apparently in response to his request for assistance.

6 On 14 May 2001, a member of that firm of lawyers met with the appellant, with an Arabic interpreter from Lebanon. On this occasion, the appellant signed a statement, in English, explaining (*inter alia*) what he feared might happen if he returned to Algeria.

7 However, in an affidavit sworn in this proceeding, the appellant said that he 'could hardly understand [the interpreter] at all and she had even more trouble understanding [him] because Algerian and Arabic are quite different'. The appellant said that if he had understood his statement, he 'would have refused to sign it'.

8 On 14 May 2001, the appellant signed an application for a Protection (Class XA) visa, attaching his statement.

9 The Minister's delegate interviewed the appellant on 1 July 2001 with an Arabic interpreter.

10 In his affidavit, the appellant said that at the interview, he 'was given another Arabic interpreter from Lebanon whom I could not understand'.

11 The Minister did not cross-examine the appellant upon his affidavits, nor was any evidence in response filed.

12 On 22 July 2001, the appellant escaped from Villawood. He remained at large until he returned to Villawood on 6 February 2003.

13 The appellant's claim, that he had a well-founded fear of persecution if he returned to Algeria, had two substantial foundations. First, his past association with the GIA. Secondly, he feared imprisonment by the Algerian authorities by reason of his evasion of military service in 1994 because he feared retribution from the GIA if he joined the army.

THE DELEGATE'S DECISION

14 On 24 July 2001, the Minister's delegate refused the application for a protection visa. He considered the claims of the appellant against the background of the situation in Algeria, apparently those made in the 14 May 2001 statement. From this perspective, the delegate came to these conclusions:

- There was once a risk of forced conscription by the GIA in the way the appellant describes.

- The Algerian government has been active in trying to prevent attacks such as those feared by the appellant and has to a considerable extent been successful.

- The likelihood of the appellant being targeted by the GIA in the future is remote.

- In the unlikely event that the appellant were targeted by the GIA in the future, he would have the protection of the government.

- The appellant has the option of relocating to a major city in Algeria, where he is far less likely to come to the attention of the more violent factions of the GIA.

- Any risk from either the GIA or the Algerian authorities to the appellant, or to his family, because of the claim of his past association with the GIA, would be virtually non-existent now, given the time elapsed since he left Algeria.

15 Having analysed the appellant's evidence, the delegate said:

> *'…Despite the* [appellant's] *claims at interview that there had been a "misunderstanding" with the interpreting, I was satisfied that the* [appellant's] *account of these events was not accurate or truthful. This has implications for my readiness to accept at face value his evidence about other matters.'*

16 The delegate then found that had the GIA been serious in their wish to harm the appellant or his family, they would have done so after his claimed escape in 1994 and prior to his departure for Libya in 1996; and that if the appellant was genuinely in fear of terrorist action against him personally, he would have left Algeria at the time of the claimed threats in 1994, and not two years later.

17 It thus appears that the delegate did not accept the appellant's account of his forced conscription and claimed escape from the GIA; nor did the delegate accept that the appellant was genuinely in fear of persecution by reason of his claimed association with the GIA.

18 With respect to the appellant's claim based on avoidance of military conscription, the delegate found that it was highly unlikely that the appellant would be imprisoned for a period of three years for avoiding military service as claimed; it was far more likely that if he were required to undertake any form of military service, that he might be required to serve his eighteen months of normal service. The delegate did not consider this to be an unreasonable requirement, nor was it a ground for a persecution claim. Given the appellant's age (34 years), it was likely that the appellant would receive an amnesty from the President of Algeria for his avoidance of military service.

THE APPELLANT'S APPLICATION TO THE TRIBUNAL FOR REVIEW

19 On 24 July 2001, Macpherson & Kelley lodged an application for review of the delegate's decision with the Tribunal. On 15 August 2001, Macpherson & Kelley informed the Tribunal that the appeal was lodged in error and should be withdrawn. They advised the Tribunal that (unbeknown to them) when the appeal was lodged, the appellant had escaped from Villawood and had not responded to their written request to authorise the filing of an appeal. Consequently, they stated, they were not authorised by him to file the appeal on 24 July 2001, and their action had not been ratified subsequently by the appellant.

20 On 27 August 2001, the Tribunal decided that, in the absence of a valid application, it did not have jurisdiction to review the decision refusing to grant to the appellant a protection visa because 'an application may only be made by the person who is the subject of the primary decision …'.

21 Both parties have accepted that the Tribunal's decision was correct.

THE JUDICIAL REVIEW APPLICATION

22 As has been mentioned, on 29 October 2003, the appellant lodged an amended application under s 39B of the *Judiciary Act* seeking relief in relation to, *inter alia*, the delegate's decision. It was, and is, common ground that, even though merits review of the delegate's decision was available in the Tribunal, the Tribunal's decision to affirm the delegate's decision does not create a statutory bar to the granting of relief in relation to the delegate's decision, if the appellant is otherwise entitled to it. However, the primary Judge dismissed this application.

THE DECISION OF THE PRIMARY JUDGE

23 It will be convenient to summarise the steps in the Judge's reasoning to his conclusion.

(a) Was there, *prima facie*, a denial of natural justice before the delegate?

24 His Honour held (at [30]) that it was implicit in the statutory scheme (in particular s 56(1) of the Act) that, if an interview is to be held, it will be one at which the appellant and the delegate will be able to understand each other, if necessary with the assistance of an

interpreter; and that it would be unreasonable to expect that it was for the appellant to arrange for the provision of an interpreter. However, the Judge inferred (at [33]) from the delegate's reasons that the delegate 'did not perceive that there was a translation problem at the interview'. Nonetheless, his Honour found (at [35]) that it was 'likely that an Algerian of the [appellant's] age would be more comfortable in French rather than Arabic'.

25 The primary Judge said (at [37] – [38]):

> *'The interpreters with which the* [appellant] *was provided came from Lebanon. The expert evidence is that the differences between the varieties of darija* [i.e. 'dialectical' Arabic] *frequently leads to difficulties, confusions and misunderstandings between citizens of different Arab countries. While this is not so great a problem between people from the Arab Middle East, or between North Africans, the difficulty is multiplied many times when it is a question of speakers from North Africa and the Middle East talking darija to each other.*
>
> *…I accept that the* [appellant] *would be more comfortable in French, than in Arabic, but he does have some ability to communicate in Arabic, and in particular Algerian Arabic. …'*

26 Notwithstanding, the Judge proceeded upon the basis that it was at least possible that the delegate's assessment of the appellant's credibility was affected by problems in translation (at [41]).

(b) Did the denial of natural justice make a difference or cause 'practical injustice'?

27 After noting the appellant's sworn evidence, which was not the subject of cross-examination, that he had been tortured by the GIA, his Honour proceeded (at [45]) to 'accept that the [appellant] suffered from the language-based inability to convey to the delegate that he was tortured by the GIA for failing to take part in the GIA's terrorist activities'.

28 The Judge then held that he could not conclude (at [47]) that the delegate would have necessarily reached the same conclusion as the delegate did, had he commenced from the premise that the appellant's relationship with the GIA was as the appellant claimed, assuming, of course, that the delegate accepted the claim. His Honour stated 'He may or may not have reached the same conclusion'.

29 Accordingly, his Honour rejected (at [48]) the Minister's submission that the denial of natural justice, constituted by the inadequacy of the translation services, could not have affected the outcome.

(c) How should the exercise of the discretion to grant, or refuse, prerogative relief be exercised in the present circumstances?

30 The Judge noted (at [49]) the general principle that –

> *'Save in exceptional circumstances, prerogative relief will be withheld on discretionary grounds where other suitable remedies are available and have not been used:* Boral Gas (NSW) Pty Ltd v Magill *(1993) 32 NSWLR 501 at 508-512;* NAJT v Minister for Immigration & Multicultural & Indigenous Affairs *[2003] FCA 487 at [28].'*

31 His Honour went on to observe (at [51]) that delay, waiver, acquiescence or other conduct of the prosecutor may be relevant to the exercise of the Court's discretion, citing *Re Refugee Review Tribunal; Ex parte Aala* [2000] 204 CLR 82 at [50], [53]; and that prohibition may be refused where provision is made for an internal 'appeal', where, at the first stage, procedural fairness was denied, but an appeal was taken and there was a 'full and fair' hearing on that appeal.

32 His Honour observed (at [52]) that the Act provides for a full review of the delegate's decision on the merits before the Tribunal. Before the Tribunal, the appellant's lack of proficiency in the English language would have led to the appointment of an interpreter. Any errors or misunderstandings arising from language difficulties which may have impacted on the preparation of the 14 May 2001 statement, or in the interview with the delegate, could have been identified, and to the extent necessary, explored.

33 In refusing, in his Honour's discretion, to grant prerogative relief, the Judge said (at [53] – [54]):

> *'The right of review by the* [Tribunal] *for which the Act provides is a far more convenient and satisfactory remedy than that which the* [appellant] *now seeks to invoke. It is beside the point that the* [appellant] *is now out of time to seek that remedy, as this is due to his own conduct in absconding. Some two years have elapsed between the* [appellant's] *escape, and the institution of these proceedings on 7 August 2003; a delay which must necessarily impede the proper investigation of language difficulties which the* [appellant] *has sworn that he experienced in May and June 2001.* ***The claim to a remedy is based***

> ***upon contestable facts, albeit that no evidence was adduced in opposition to the* [appellant's]** *claim. Questions of degree are involved*.
>
> *There is no satisfactory explanation for the* [appellant] *not pursuing the course of merits review before the* [Tribunal]. ***Had he sought judicial intervention before pursuing that remedy, it would have been refused on discretionary grounds****. By escaping from detention, and remaining at large for as long as he did, the* [appellant] *has effectively waived any complaint he might otherwise have had in relation to the procedures adopted by the delegate. By his conduct the* [appellant] *decided to put himself outside the law. Having done so, and for so long, he cannot now claim the law's protection. …'* (Emphasis added.)

THE GROUNDS OF THIS APPEAL

34 By his grounds of appeal, the appellant submits that relief on discretionary grounds should not be refused in circumstances where jurisdictional error by the delegate was found to exist, and where that decision remains extant.

35 The appellant further contends, by his counsel, that his Honour misapplied the principles described in *Boral Gas*; instead, he says, the Court's relevant discretion should have been exercised in the appellant's favour where:

- The appellant had not in fact been made aware of the decision within a period in which he could lodge an application to the Tribunal, although deemed notification had been given.

- A time limit precludes the appellant from now seeking review in the Tribunal and there is no mechanism in the legislation for extending time in which to make an application.

- Accordingly, no suitable remedy was available to the appellant at the time he made the application for relief to the Court.

- There had not been any actual review of the delegate's decision which gave to the applicant an opportunity to make the denial of natural justice irrelevant.

- The denial of natural justice at the first stage remains and means that the only effective decision (i.e. that of the delegate) is affected by jurisdictional error. The appellant has not had a 'full and fair hearing' at any stage.

36 Moreover, the appellant further contends that his Honour's discretion miscarried by virtue of the following:

- The approach adopted by his Honour does not give sufficient weight to the primacy inherent in s 39B of the *Judiciary Act*, and in the constitutional writs, of ensuring that decisions made under the exercise of the Commonwealth's authority are free of jurisdictional error and properly authorised by the legislation.

- In considering the matters of 'delay, waiver, and acquiescence', his Honour took into account the delay in applying to the Court from the date of the decision rather than from the time that the appellant applied to the Court within 180 days of surrendering himself to the Department and returning to detention.

- His Honour erred by taking into account (at [53]) the following irrelevant matter –

> *'Some two years have elapsed between the* [appellant's] *escape, and the institution of these proceedings on 7 August 2003; a delay which must necessarily impede the proper investigation of language difficulties which the* [appellant] *has sworn that he experienced in May and June 2001. The claim to a remedy is based upon contestable facts albeit that no evidence was adduced in opposition to the* [appellant's] *claim' –*

in circumstances where: (i) the hearing of the application for judicial review was heard in full before his Honour; and (ii) no issue of prejudice due to delay was raised by the Minister.

- His Honour did not have regard to a relevant matter, or gave it insufficient weight; that is, the very grave consequences for the appellant in exercising his discretion to refuse relief to the appellant where the appellant's claim is that, should he be returned to Algeria, his life and freedom will be in jeopardy.

- His Honour did not have regard to a relevant matter (or gave it insufficient weight); that is, the importance of the appellant's receiving the protection of the Australian

Government, should he in fact be a refugee within the meaning of the Convention, a matter which has never been considered by the Minister in accordance with the Act, given the circumstance that the decision of the delegate was affected by jurisdictional error.

CONCLUSIONS ON THE APPEAL

37 We have difficulty accepting the appellant's contentions.

38 We cannot accept that there is an error in refusing relief on discretionary grounds in circumstances where a jurisdictional error by the delegate was found to exist, and where that decision remained extant. It is only when a jurisdictional error has been established that the question of the exercise of discretion can arise in the first place.

39 The appellant takes exception to his Honour's reference to the principles in *Boral Gas* in circumstances where the appellant had not in fact been made aware of the decision of the delegate within a period in which he could lodge an application to the Tribunal, a time limit which precluded him from seeking review and where no other suitable remedy was available. However, the only reason the appellant did not know of the delegate's decision was by virtue of his own action in escaping and remaining at large for eighteen months. In our view, this ground of appeal seeks to isolate one paragraph from the decision below and take it out of the context of his Honour's overall reasons for reaching the conclusion that relief should be refused on discretionary grounds. We agree with counsel for the respondent that his Honour was doing no more than stating general principles arising from other cases before proceeding to consider their application to the facts in this case.

40 The same point applies in relation to his Honour's citation of *Aala*. The Judge was again stating established principles, in this case from High Court authority, before proceeding to consider whether or not, and if so how, those principles might be applicable to the present case. The appellant's submission again overlooks the fact that his missed opportunity arose entirely from his own conduct.

41 The grounds in the notice of appeal seem to suggest that, whenever there is jurisdictional error, a judge has no alternative but to grant the relief sought once the preceding requirement of a jurisdictional error has been established. We cannot accept this.

42 The appellant appears to suggest that his Honour was confined to considering the period of delay constituted by the seven-month period between the time that the appellant returned to immigration detention and the time that he applied to the Court for relief, and was correspondingly required to ignore the eighteen month period that the appellant was at large. It is stated, without explanation, that this eighteen month period was in some way irrelevant to the exercise of the discretion. In absence of a compelling reason not to do so, the Judge was at least entitled to take into account all the facts and circumstances in the case before his Honour.

43 The notice of appeal similarly takes issue with the Judge's taking into account the two-year gap between the appellant's escape and the commencement of proceedings. Again, we cannot accept that this was irrelevant to the exercise of the Court's discretion. Prejudice due to delay was raised by the respondent, who submitted before his Honour that most of the complaints made by the appellant were about all the additional things he now says he would have put forward had he not 'become very upset and frustrated', which, the respondent asserted, was an allegation easily made and difficult to refute. Necessarily, those difficulties, and the difficulties in ascertaining the facts as to what had occurred more generally, became greater with the passage of time.

44 The Judge did consider the consequences for the appellant in exercising his discretion to refuse relief. Apart from the claimed consequences being apparent from the very nature of the case, his Honour gave full consideration to the details of the weight of the appellant's case before the delegate. The Judge gave, as we think he was entitled to do, weight to the circumstance that the appellant's claim was based on 'contestable facts'. His Honour plainly had regard to the whole of the circumstances of the case, as he was bound to do. He placed particular weight, correctly in our view, on the fact that the appellant, by his own unlawful conduct, had deprived himself of his right to apply to the Tribunal within time. We see no reason why that circumstance could be said to be irrelevant to the exercise of the Court's discretion in this context.

45 Applying the principles governing an appeal against the exercise of a discretion (see *House v The King* (1936) 55 CLR 499 (at 505), we are not satisfied that the Judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide him, mistook the facts or failed to take into account a material consideration.

46 The appeal should be dismissed, with costs.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Beaumont, Conti and Crennan.

Associate:

Dated: 14 May 2004

Counsel for the Applicant:	Mr S E J Prince
Solicitor for the Applicant:	Stephen Blanks & Associates
Counsel for the Respondent:	Mr R Bromwich
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	12 May 2004
Date of Judgment:	14 May 2004