FEDERAL COURT OF AUSTRALIA

NARE of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 135

ADMINISTRATIVE LAW - appeal - application to amend notice of appeal - breach of s 425 of the *Migration Act 1958* (Cth) raised as new ground of appeal - leave refused because appellant invited to appear and did appear but appellant chose to limit claims and evidence - whether the Court had power to remedy the situation on principles of justice - whether there was procedural unfairness in the hearing before the Refugee Review Tribunal

MIGRATION - visas - refusal to grant protection visa - whether there was jurisdictional error on behalf of the Refugee Review Tribunal - whether proceedings before Tribunal were vitiated by Tribunal's unawareness that applicant could not disclose true source of her fear to return to country of origin because of her fear of serious harm and duress - ground of appeal not raised before pr imary judge

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) s 425

NARE OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N325 OF 2003

WILCOX, KIEFEL AND BENNETT JJ
SYDNEY
13 MAY 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N325 OF 2003**

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

BETWEEN:	**NARE OF 2002** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**WILCOX, KIEFEL AND BENNETT JJ**
DATE OF ORDER:	**13 MAY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. The appellant 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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JUDGES:	**WILCOX, KIEFEL AND BENNETT JJ**
DATE:	**13 MAY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

WILCOX J:

1 I agree with Kiefel J. The order of the Court will be as indicated by her Honour, namely, the appeal is dismissed with costs.

I certify that the preceding one (1) numbered paragraph is a true œpy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 28 May 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
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DATE:	**13 MAY 2004**
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REASONS FOR JUDGMENT

KIEFEL J:

2 The appellant was born in Yessentuki in the Soviet Union. She is Ossetian/Armenian Jewish and her religion is Orthodox. She worked in Lithuania from 1982, and received Lithuanian citizenship in 1993. She moved to Moscow with her son, the appellant told the Refugee Review Tribunal ('the Tribunal'), because they were vilified and physically assaulted in Lithuania on account of being Russian.

3 The appellant formed a relationship with a man in Moscow, who was a Georgian Jew and he had a son. The family group all suffered some harassment but the appellant did not pursue the initial claims made by her of persecution by reason of race and religion. They were, in any event, unsupported by evidence.

4 The appellant's case presented to the Tribunal of persecution related to the murder of her partner, and her subsequent adoption of his son. The appellant's case was that the murder of her partner in June 1996 was because of his political and social activities. She received threats relating to her attempts to adopt her partner's son.

5 The Tribunal did not accept that the appellant's partner was killed because of anti-war or anti-government sentiments or activities. The evidence pointed strongly to an absence of political motives. His death involved criminal elements and was dealt with by the police and the courts as a criminal case.

6 The evidence concerning harassment during the adoption process the Tribunal found to be vague and unspecific. It did not accept the veracity of her claims, given that the family group remained in Moscow following the adoption, so that her adopted son could conclude the school year, and because they then stayed another two months before departing for Australia.

7 The Tribunal also rejected her claim that the State was compliant in delaying the adoption process. It found that generally she had received support from the police, prosecutors and other officers, District Guardianship Boards, and others. In general she had received support from the State apparatus. Even if she had received threats as a result of undertaking the adoption process, they were linked to it, and ceased once it was complete. Claims made of harassment following this period were found to be vague and inconclusive.

8 The appellant put forward statements and documents from her lawyers in Russia. The Tribunal did not accept them as reliable and considered that they were designed to assist her case. The Tribunal did not speak to the lawyer in Russia, although the appellant asked the Tribunal to do so by telephone. The Tribunal did accept that the appellant had experienced racial harassment in Lithuania in the early 1990s and had been raped in 1991. These incidents occurred during a period when nationalism and anti-soviet sentiment were high. It considered the situation to be different and nine percent of the population was ethnic Russian.

9 There was no evidence that the Lithuanian authorities would not protect the appellant from any threats posed by individuals from Russia. Before Moore J, the appellant argued that the Tribunal's approach had been 'subjective towards the current situation in Lithuania'. Some important country information was deliberately overlooked by the Tribunal and it had not acted in good faith, she alleged. At the hearing the appellant sought to go into the facts relating to her case and his Honour allowed her to file further submissions. On two occasions subsequent to the hearing, the appellant wrote to the Court seeking to provide further material, submissions and documents. His Honour considered the material. For the most

part, the documents had not been before the Tribunal and his Honour rejected them. His Honour considered that no error had been established to warrant relief by the Court under s 39B of the *Judiciary Act 1903* (Cth). In particular, his Honour said, (at [28]):

> *'But the applicant's challenge to the Tribunal's decision is, save for one matter I discuss in the following paragraph, a challenge to specific findings of fact made by the Tribunal or a specific complaint about the fact-finding process. However the findings of fact made by the Tribunal were made in circumstances where it is apparent from the Tribunal's reasons that it has sought,* bona fide, *to evaluate in a detailed and comprehensive way the material before it, make judgments about the veracity of the applicant's evidence and other evidence given and assess the import of a range of documents the applicant relied on in support of her claims. No jurisdictional error is apparent in the way the Tribunal went about its task.'*

10 His Honour went on to refer to the complaints by the appellant that the Tribunal had not taken oral evidence from her lawyer in Russia. His Honour did not consider the Tribunal was obliged to do so and its reasons for not doing so were reasonable. There was nothing in another complaint made by the appellant about how the Tribunal had dealt with a contention of hers. No error is apparent to me in his Honour's reasoning.

11 In the grounds of appeal it is alleged that his Honour failed to hold that there was a lack of procedural fairness in the conduct of the hearing in the Tribunal because it took account of independent country information which was adverse to her claim without giving her an opportunity to comment on it. It is also alleged that his Honour failed to consider that if the appellant's partner was killed for non-political reasons, the threats she received could have been for political or other reasons. Further, the Tribunal was unaware of the critical fact that the appellant could not disclose her true source of her fear to return to her country of origin because of her fear of serious harm including harm in Australia. In her counsel's written submissions, the appellant abandoned all but the last ground. None of these grounds were raised before his Honour and are raised for the first time now. The last contention was not raised before the Tribunal and it was not raised when an application for an extension of time within which to appeal was made. It was sought on the appeal to raise a further ground following on from the lastmentioned ground, but leave was refused in that regard.

12 The appellant's contention is that the proceedings before the Tribunal are vitiated by her fear or duress. An analogy was sought to be drawn from contract law and equity. Reference was made to concepts of illegitimate pressure and to persons being overborne in

such a way as to prevent them from exercising an independent judgment. The analogies are not apt. At the hearing of the appeal, the appellant sought to file further material to explain the basis of her fear and why she had not earlier raised it. The basis for it appears to be a political connexion with her partner's murder, from which she says she has a fear of the Georgian Government or of particular persons in it.

13 This is quite different from her claim of persecution made to the Tribunal. There is some doubt whether the material exposes the prospect of persecution of the appellant for a Convention reason. I put that matter to one side for the moment. It was not suggested by the appellant in her material that she was so overborne that she could not present her case before the Tribunal. Additionally, she had had a migration agent acting for her at the outset and apparently chose not to tell him of the matters she now raises. The appellant says that she made a decision not to refer to the material and to her fears because she thought she could succeed in the Tribunal without relying upon it.

14 This is a very unusual approach by an applicant for a protection visa. Moreover, it goes nowhere to explain why she did not raise the matter before his Honour when it must have been obvious that the Tribunal had held that there was no political connexion with the murder. Instead, she conducted her case before his Honour on the basis that the Tribunal had viewed country and other information incorrectly. Courts must necessarily be sceptical of claims made so late and which are not capable of being properly tested. Another inference that can be drawn is that the appellant's case has evolved and that the matter now raised is raised because the appellant perceives that she has little prospect of success on the appeal.

15 In any event the short answer is that no jurisdictional error can be pointed to on the part of the Tribunal. It can only proceed on the basis of claims put forward. Perhaps conscious of this problem, counsel for the appellant sought leave to amend the appeal to raise a breach of s 425 of the *Migration Act 1958* (Cth). That leave was refused. The section requires that an invitation be given to an applicant to appear and give evidence and it has been held that that invitation must be meaningful. No breach is shown. The appellant was invited and did appear. The fact that she may have chosen, if this is truly the case, to limit her claims and her evidence, does not make out a breach.

16 Counsel for the appellant also submitted that the Court had power to remedy the

situation on principles of justice. The submission, amongst other things, assumes that the Court must accept her story, which, as I have said, the respondent has not had an opportunity to test. In any event, the jurisdiction this Court is exercising involves legal review under the *Migration Act.* The only possible ground to which facts like this might be relevant is procedural fairness. Even then it would only be where the Tribunal in some way prevented an applicant putting his or her case forward that the ground would be made out. Here, on the appellant's own evidence, her case was limited by a choice that she made.

17 In my view, the appeal should be dismissed with costs.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 28 May 2004

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IN THE FEDERAL COURT OF AUSTRALIA

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JUDGES:	**WILCOX, KIEFEL AND BENNETT JJ**
DATE:	**13 MAY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BENNETT J:

18 I agree.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.

Associate:

Dated:

Counsel for the Appellant:	Mr I Archibald
Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Clayton Utz

Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	13 May 2004
Date of Judgment:	13 May 2004