FEDERAL COURT OF AUSTRALIA

Applicant S256 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 170

MIGRATION – refugees – protection visa – application for extension of time in which to apply for leave to appeal – Refugee Review Tribunal made credibility finding – no jurisdictional error – in any event Tribunal found that it was reasonable for the applicant to relocate – proposed appeal lacking any merit – application dismissed.

APPLICANT S256 OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N25 of 2004

CARR, TAMBERLIN & LANDER JJ
2 JULY 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N25 OF 2004**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPLICANT S256 OF 2002** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**CARR, TAMBERLIN & LANDER JJ**
DATE OF ORDER:	**2 JULY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application is dismissed with costs.

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

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JUDGES:	**CARR, TAMBERLIN & LANDER JJ**
DATE:	**2 JULY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

CARR J:

INTRODUCTION

1 This is an application for an extension of time in which to apply for leave to appeal from a decision of a judge of this Court, made on 12 December 2003, to dismiss the applicant's application for constitutional writs in relation to a decision of the Refugee Review Tribunal ("the Tribunal"), on 26 February 2001. The Tribunal affirmed a decision of a delegate of the respondent to refuse to grant the appellant a Protection visa. The applicant also seeks leave to appeal (the decision being interlocutory) if time is extended.

FACTUAL AND PROCEDURAL BACKGROUND

2 The applicant is a citizen of Colombia. She arrived in Australia on 20 April 1998 with her two children and her mother-in-law, on a Visitor's visa. On 4 June 1998 the applicant lodged an application for a Protection visa with the Department of Immigration & Multicultural & Indigenous Affairs. Her husband made a separate application for the same class of visa. On 29 June 1998 a delegate of the respondent refused to grant the applicant or her husband Protection visas. On 20 July 1998 the applicant applied to the Tribunal for a review of that decision. Her husband also sought review by the Tribunal. On 13 May 1999 the Tribunal affirmed the decisions not to grant the applicant or her husband Protection visas. On 10 June 1999 the applicant and her husband applied to the Federal Court for judicial

review of the decisions of the Tribunal of 13 May 1999. On 20 October 1999 Wilcox J made orders that the Tribunal's decisions be set aside and both applications be remitted to the Tribunal for redetermination: see *C & Anor v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 366. That order led to the decision of the Tribunal of 26 February 2001 to which these proceedings relate.

3 In her application to the Tribunal, the applicant said this:

> *'I fear returning to Colombia, death threats were made to the whole family and my sister was killed.'*

4 In its decision of 26 February 2001, the Tribunal referred to that matter. It noted:

> *'In the application for review dated July 1998 the Applicant wife wrote that death threats were made to the whole family and that her sister had been killed.'*

5 Later, in its reasons the Tribunal said:

> *'The Applicant wife could not explain why there was no mention of threats or of the death of her sister in her protection visa application which was completed with the assistance of a registered migration agent and solicitor, and an interpreter from that office, and was completed after her husband's application had been rejected by the Department. She said that they had told the solicitor everything.'*

6 The Tribunal addressed the claim of the applicant that the immediate source of her fear (more generally based on her husband's fear of retribution as a police informer) was the murder of her sister shortly before the applicant arrived in Australia (and on the basis that her sister was murdered in the mistaken belief she was the applicant). The Tribunal reasoned as follows:

> *'Even though she had assistance from a registered migration agent and Spanish interpreter, the Applicant wife made no mention of the murder of her sister or more relevantly, that it was a case of mistaken identity, or that the family had been threatened, in the protection visa application. She told this Tribunal that she told the solicitor everything and she could not explain why these matters had not been included. The Tribunal is not satisfied that the Applicant wife's claims are true or that if they are true that her experiences occurred for the reasons claimed. This is because the Tribunal is satisfied that had her sister been killed in mistake for the Applicant wife for the reasons claimed and the family been threatened for the reasons claimed, that it is reasonable to expect that these very serious and recent matters would have*

been at least mentioned in the protection visa application especially as she applied after her husband's application had been rejected by the Department and she was assisted by a registered migration agent and an interpreter.'

THE PROCEEDINGS AT FIRST INSTANCE

7 The grounds of the application filed in this Court were that the Tribunal erred in law, having misinterpreted the law or erred in the application of the law to the facts as found. The learned primary judge noted that the point raised in the application was a narrow one.

8 The point raised by the applicant in the proceedings at first instance concerned the approach taken by the Tribunal in the passage quoted at paragraph [6] above. That is, the Tribunal had not believed the applicant's claim that her sister had been murdered, because no reference had been made to the murder (and the circumstances in which it occurred) in the application for the protection visa lodged on 4 June 1998.

9 The starting point of the submission made by counsel for the applicant was that the respondent's Department had denied her procedural fairness by sending a letter (the letter of 8 June 1998) which would have led the applicant to believe that she had at least 28 days in which to forward further information. Her intention to do so was, so it was put, manifest by the stamped notation in the application itself. The delegate should not have made a decision until that further information was provided.

10 The applicant contended that the Tribunal should have drawn her attention to what was described as this unfair procedure, and also should have made it clear to her that the Tribunal intended to make an adverse credit finding on the basis of her failure to refer to the sister's death in her original application. In addition, so the applicant contended, the Tribunal failed to take into account or give sufficient weight to the fact that the applicant had adverted to the sister's death in the application of 15 July 1998 made to the Tribunal as first constituted. The applicant also submitted that the Tribunal failed to make a finding whether she had told the solicitor everything. There was no evidence to impeach the applicant's credit, because the failure had been that of the solicitor. These matters were said to reveal jurisdictional error on the part of the Tribunal.

11 His Honour found that the applicant had not demonstrated jurisdictional error on the part of the Tribunal.

12 In summary his Honour's reasoning was as follows:

1. The Tribunal's description, in its reasons, about what occurred at the hearing was not put in issue. The Tribunal had raised with the applicant her failure to refer to her sister's death in the original application.
2. The Tribunal was clearly aware that a little over a month after the initial application was completed, the applicant had raised the death of her sister in the application to the Tribunal as first constituted. It referred to that fact in its reasons.
3. The Tribunal gave the applicant the opportunity at the hearing to explain why the murder of her sister was not referred to in the original application. She had the opportunity to explain, for example, that she had told the solicitor about her sister's murder before the form was completed (if that was what had happened).
4. It might be accepted that the questioning by the Tribunal could have taken a different course, and also that other inferences could have been drawn about the failure to refer to the sister's death in the original application (particularly having regard to the apparent collateral purpose of making the application on 4 June 1998 to obtain a Medicare card). But the Tribunal was charged with the duty of finding relevant facts.

13 His Honour made an order extending the time for making the application, but dismissed the application.

THE APPEAL

14 It is convenient, in my view, to consider whether there is any merit in the proposed appeal. There is really only one proposed ground. It was what might be termed a "no evidence" ground. That is, the applicant contended that the Tribunal had found that the applicant had not told her solicitor about the murder of her sister and that there was no evidence upon which the Tribunal could make such a finding. The term "everything" in that part of the applicant's evidence where she said that she had told her solicitor everything was, so it was put, all-encompassing. It was not open to the Tribunal, so the applicant contended, either by reference to the words used by the applicant or in the broader context of the form of the application and the circumstances of its preparation, to make the adverse credibility finding.

15 In my view, there is no substance in this ground. The evidence before the Tribunal

was that the applicant had the assistance of a Spanish interpreter and a registered migration agent. Despite those circumstances, there was no mention in the Protection visa application of the murder of the applicant's sister.

16 In my opinion, it was open to the Tribunal to infer from the presence of a Spanish interpreter in conjunction with a registered migration agent that the applicant wife had not mentioned the murder of her sister.

17 It was also open to the Tribunal, in my view, on the basis of that conclusion, i.e. that the applicant had not told the Spanish interpreter and through that interpreter the migration agent about her sister's murder, that her sister had not in fact been murdered.

18 Furthermore, as the respondent submitted, the Tribunal had a separate independent basis for refusing the application, namely, reasonableness of relocation. The Tribunal's reasoning on this point was as follows:

> *'In any case if the Applicants still fear harm in their home area of Cali the Tribunal is satisfied that it is reasonable to expect them to relocate elsewhere within Colombia, away from the Cali area. The Tribunal does not accept the adviser's submission that the Applicants tried to relocate after the Applicant husband left Colombia but were forced back to Cali. This is because the Tribunal is not satisfied that staying in the Applicant mother's small home village close to Cali, or with 2 of the Applicant wife's sisters in the Cali area, rather than say away from immediate family or at least with family in other parts of the country, and with the Applicant children continuing to go to school in Cali, are serious attempts to relocate within Colombia. The Tribunal notes that the Applicant husband has visited other countries, he and his wife have skills, qualifications and varied work experience and they, with the Applicant mother and children, have managed to settle and work in Australia without English language skills and where they had no relatives or close friends. The Applicants claimed that the Police and paramilitaries are everywhere and that no city in Colombia is safe but the evidence does not indicate that the authorities are searching for or have any interest in the Applicant or that they would be at risk of harm elsewhere. The Tribunal is satisfied that if the Applicants fear harm in their home area of Cali from those connected to the Cali cartel, corrupt politicians, police or officials, that it is reasonable for them to relocate elsewhere in Colombia where there are a number of very large and populous cities. The Tribunal is not satisfied that the Applicants have a well-founded fear of persecution within the meaning of the Convention if they return to Colombia now.'*

THE APPLICANT'S HUSBAND

19 Counsel for the applicant asserted that the applicant's husband was included as an applicant. It is not necessary to go into the detail of that submission, but I think it is incorrect. The husband's application for a protection visa was separate and proceeded separately. It is true that the Tribunal's reasons covered both applications, but there were two decisions which were affirmed. The proceedings at first instance quite clearly only involved the applicant wife.

CONCLUSION

20 As the proposed appeal has no merit, I would refuse the application for an extension of time and dismiss the motion for leave to appeal. The applicant should pay the respondent's costs of both applications.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Carr.

Associate:

Dated: 2 July 2004

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JUDGES:	**CARR, TAMBERLIN AND LANDER JJ**
DATE:	**2 JULY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

TAMBERLIN J:

21 I agree with the reasons and orders proposed by the Honourable Justice Carr in this matter.

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

Associate:

Dated: 2 July 2004

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DATE:	**2 JULY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

LANDER J:

22 I also agree with the reasons and orders proposed by the Honourable Justice Carr in this matter.

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

Associate:

Dated: 2 July 2004

Counsel for the Applicant:	Mr I Archibald
Solicitor for the Applicant:	Ms Michaela Byers
Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	19 May 2004
Date of Judgment:	2 July 2004