FEDERAL COURT OF AUSTRALIA

VQAB v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 104

MIGRATION – application for protection visa refused by delegate of Minister – application for merits review by Refugee Review Tribunal dismissed – application for judicial review – primary judge concluded that in not making particular finding, Tribunal had not failed to take into account relevant consideration – primary judge concluded that in relying upon "older" country information, Tribunal had not taken into account irrelevant consideration – appeal to Full Court – whether primary judge erred in law

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) s 477
Migration Legislation Amendment (Judicial Review) Act 2001 (Cth)

Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396 at [79] applied
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10 at [13] referred to
Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 referred to
Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630 at [46]-[47] referred to
VTAG v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 447 referred to
Tran v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 509 referred to
Applicant M31 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 533 referred to

VQAB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V197 of 2004

BEAUMONT, WEINBERG & CRENNAN JJ
4 MAY 2004
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V197 OF 2004**

ON APPEAL FROM A SINGLE JUDGE OF THE COURT

BETWEEN:	**VQAB** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**BEAUMONT, WEINBERG & CRENNAN JJ**
DATE OF ORDER:	**4 MAY 2004**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
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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DATE:	**4 MAY 2004**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE COURT

1 The appellant, who is a citizen of Iran, arrived in Australia on 1 November 1999. On 6 January 2000, he lodged an application for a protection visa with the then Department of Immigration and Multicultural Affairs. On 22 March 2000, a delegate of the respondent Minister refused to grant a protection visa and, on 24 March 2000, the appellant applied for review of that decision. On 21 June 2000, the Refugee Review Tribunal ("the Tribunal") affirmed the decision not to grant the appellant a protection visa.

2 For reasons that are not immediately apparent, there was then a delay of about three years before the appellant sought judicial review of the Tribunal's decision, under s 39B of the *Judiciary Act* 1903 (Cth). The application for review was filed in this Court on 6 June 2003. It was heard on 4 February 2004, and judgment was delivered on 13 February 2004: *VQAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 89. The appellant now appeals from that judgment.

THE APPELLANT'S CLAIMS

3 The appellant claimed to have a well-founded fear of persecution by reason of his race, or religion, or actual or imputed political opinion. He told the Tribunal that he had been born in Iranian Kurdistan in 1972, and that he was both Kurdish and a Sunni Muslim. He claimed that he had suffered discrimination and harassment in the past because of his Kurdish ethnicity, and his adherence to Sunni, rather than Shiite, Islam.

4 In 1995, the appellant graduated from university in Teheran. He had been politically active whilst a student, and claimed to have been harassed because of his beliefs. He had been spoken to by the security forces because of his activities. He had been threatened, and told not to organise any more meetings. Importantly, he claimed to have been placed on a blacklist, which denied him access to government employment, or a passport.

5 The appellant then told the Tribunal that he had worked for his father for three years as a salesman, and then for a mobile phone company. He claimed that in June 1999, other activists with whom he had maintained contact, told him of a demonstration that was planned for that month. He said that he travelled to Teheran, a distance of about 700 kilometres from where he was then living, in order to take part. The demonstration was held in response to the government's decision to close a newspaper that had been critical of the regime.

6 The demonstration took place at the university, and lasted four days. The appellant claimed that security police had cordoned off the campus, and that there had been a violent confrontation when the group of activists with whom he was aligned sought to go there. He claimed that a number of students had been trapped, and that his group had sought to free them. He claimed that he had been arrested, and locked in a room for about four hours. He claimed that during that time he had been abused, spat upon, and kicked. He told the Tribunal that his company identity card had been seen, and that the police therefore knew of his presence at the demonstration.

7 The appellant claimed that eventually he, and the others detained, had been freed by a large crowd of demonstrators. He said that he later participated in the demonstration, carrying placards critical of the President, and chanting anti-government slogans. He claimed that he subsequently discovered that he and his colleagues had been followed by security police, or by spies acting on their behalf.

8 In substance, the appellant claimed that the security forces must have known that he was involved in the demonstration because of his identity card, the fact that he had been followed, and the fact that the demonstration had been video taped.

9 The appellant then told the Tribunal that after the demonstration he went into hiding in order to avoid arrest. He claimed that he subsequently obtained an Iraqi passport with which he was able to leave Iran. He maintained that he was able to avoid detection because he mingled with a group of Iraqis who were leaving Iran at the same time. He said that Iraqi passport holders were not generally subjected to security checks.

10 Eventually, the appellant made his way to Australia. He arrived in this country without any travel documents.

11 The Tribunal accepted that the appellant was an Iranian Kurd, as he claimed, and that he was a Sunni Muslim. It considered, and rejected, his claim to have been subjected to discrimination and harassment by reason of his ethnicity and religion. It referred to comments by the Office of Asylum Affairs, United States State Department, in "Iran – Profile of Asylum Claims and Country Conditions 1994" in support of its conclusion that ethnic Kurds were not persecuted in Iran. It also noted that the appellant had been able to complete his university studies and find gainful employment. It found that his claims were at odds with the country information referred to above.

12 The Tribunal stated that:

> *"Whatever discrimination the Applicant suffered because he is Kurdish and a Sunni Muslim seems to have caused him harm rather less significant than persecution in the past.*
>
> *I am not satisfied, on the evidence available that there is a real chance that the Applicant would suffer persecution because he is Kurdish and a Sunni, should he return to Iran."*

13 The Tribunal then turned to the claim that the appellant had been discriminated against by reason of his political opinion. It accepted that he had been a student activist while enrolled at university. It noted, however, that he had graduated in 1995, and that he had been able to find employment even if his name had been put on a blacklist that precluded him from gaining government work. It made no mention of his claim that persons who were put on the

blacklist could not obtain Iranian passports.

14 The Tribunal concluded that any harm suffered by the appellant while he was a student activist did not amount to persecution within the meaning of that term in the Refugee Convention.

15 With regard to the appellant's claims relating to the demonstration in 1999, the Tribunal referred to a United States Department of State Country Report on Human Rights Practices for Iran, released on 25 February 2000. That report described the Iranian government's record as poor, and referred to systematic abuses including killings, torture and other degrading treatment as well as arbitrary arrest and detention. It found that the judiciary was not independent, and did not ensure that citizens received due process. It described in detail a demonstration that took place on 8 July 1999 at Teheran University confirming that there had been mass arrests. Four student leaders had been sentenced to death for their role in demonstrations.

16 The Tribunal accepted that the demonstration described in this report had taken place, just as the appellant claimed. It was satisfied that he had attended and participated in that demonstration. It noted his claim to have been arrested, identified, and then released by fellow demonstrators. It described this as plausible, though an unlikely scenario.

17 With regard to the appellant's claims concerning the false Iraqi passport, the Tribunal had regard to certain information provided by the Department of Foreign Affairs and Trade ("DFAT") dated 7 February 2000. DFAT reported that it was unaware of Iraqi passports, whether genuine or forged, being able to be purchased in Iran. It doubted that usual security checks did not apply to Iraqis departing Iran as a group, or otherwise. The Tribunal also referred to a DFAT report, dated 18 March 1999, that cast doubts upon whether Iranians could leave Iran using forged Iraqi passports.

18 The Tribunal noted that DFAT did not entirely rule out the possibility that an Iranian citizen could leave Iran on an Iraqi passport by joining a group of Iraqis. To that extent, it could not be said that the appellant's claims were completely implausible. However, the scenario that he presented was "clearly most improbable, and quite at odds with the independent information".

19 The Tribunal accepted that anyone who had been involved in the 1999 demonstration was potentially at serious risk. However, the appellant's claim that he had been identified as having been present at the demonstration was entirely dependent upon acceptance of his claim that he was in hiding from that point on, and his claims as to his departure from Iran. The Tribunal concluded:

> *"Having heard the Applicant's evidence and though I have attempted to give him the benefit of the doubt I am not satisfied that he left Iran on an Iraqi passport, or that he avoided the usual airport checks.*
>
> *If his claims as to his departure are not true, then, given the security checks at Teheran airport, then there is a strong presumption that he was not identified as being present at the demonstration.*
>
> *I am not satisfied that the Applicant's claim as to his departure from Iran and his having been in hiding are true. I am not satisfied that there is a real chance that the Applicant will be identified as having been present at the demonstration in Teheran in mid-1999. I am not satisfied that there is a real chance that the Applicant will be harmed as a result of having attended a demonstration in Teheran in mid-1999.*
>
> *I am not satisfied, on the evidence available, that there is a real chance that the Applicant will suffer persecution, should he return to Iran."*

20 The Tribunal therefore affirmed the decision not to grant a protection visa.

THE PRIMARY JUDGE'S REASONING

21 The primary judge identified three grounds upon which review of the Tribunal's decision was sought.

22 The first was that it had failed to deal with, and ignored, the appellant's claim that he had been denied a passport by the Iranian authorities on account of his political activities. This claim was said to be integral to the claim that he had to obtain a false passport, and leave Iran under the guise of being an Iraqi. It had been submitted that if this first-mentioned claim had been dealt with, and found to be true, it bore upon the issue whether he needed to, and had obtained, a passport by other means. That, in turn, went directly to whether his fear of persecution was well-founded.

23 His Honour dealt with this ground by noting that the Tribunal had recorded the appellant's claim that because of his political activities his name had been put on a blacklist,

thereby denying him access to a government job or passport. The Tribunal accepted that having had his name placed on a blacklist would have precluded him from government employment. It made no finding regarding whether he had been precluded from obtaining a passport. That was not surprising, having regard to the Tribunal's reasoning process. It saw the crucial issue as being whether the appellant had been identified as having attended the 1999 demonstration. The Tribunal plainly concluded that he had not been so identified. If he was not identified, he would have had no problem in leaving Iran by reason of having been at the demonstration.

24 The primary judge observed that having regard to the Tribunal's findings that the appellant had not left Iran on an Iraqi passport, and had not avoided the usual security checks, findings that it was entitled to make, the Tribunal could only have concluded that he had not been identified as having been present at the demonstration. Having regard to the Tribunal's reasoning, the claim about the denial of a passport was irrelevant. On the appellant's story, he could not use an Iranian passport. If he had one, it would disclose his identity, and he would be at risk. That was why, on his account, he had had to obtain a false Iraqi passport. Because he could not use an official Iranian passport at the airport, it was irrelevant if he had one, or had been refused one.

25 The primary judge had another basis for rejecting this first ground. He concluded that the failure to make a finding regarding the passport claim could not amount to a jurisdictional error. That was because there was no claim that being refused a passport amounted to persecution. The claim that he had been refused a passport was merely a piece of evidence to bolster the claim of persecution by reason of the appellant's political opinion. His Honour referred to a passage in the judgment of Allsop J in *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 at [79] in which a distinction was drawn between an element or integer of a claim, and a mere piece of evidence.

26 The second ground dealt with by the primary judge complained that the Tribunal took into account irrelevant material by relying upon outdated country information to reject the appellant's fears of persecution as a Kurd. This was said to constitute jurisdictional error. In substance, the complaint was that the Tribunal should not have accepted the 1994 report when it had been superseded by later material. His Honour rejected that contention. He concluded that the later material had not superseded the 1994 information. The two reports

dealt with different matters, the earlier report being concerned with the distribution of Kurds throughout Iranian society, and the later material being directed to a specific part of Iran, namely Iranian Kurdistan. In addition, there were numerous cases that held that a Tribunal does not commit jurisdictional error when it prefers one body of country information over another. See for example *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [13].

27 The third ground that was raised, although it appeared not to have been seriously pursued, was a complaint that the Tribunal had applied the wrong test, and/or applied a wrong standard of proof in making its ultimate determination. His Honour concluded that there was nothing in this complaint. In using expressions such as "not completely implausible", "clearly most improbable" and "an unlikely scenario", the Tribunal was not adopting any standard of proof. It was merely assigning a degree of probability to particular factual claims about past events with a view to determining whether these provided a reliable guide to the future.

28 Finally, the primary judge referred to the delay that had occurred between the Tribunal's decision in June 2000 and the filing of the application for review nearly three years later. His Honour drew attention to s 477 of the *Migration Act* 1958 (Cth) which was introduced by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth). That Act commenced in October 2001. Section 477 requires proceedings in this Court to be instituted within twenty-eight days of notification of the decision. However, the section applies only to "privative clause decisions".

29 Having concluded that the Tribunal's decision was not affected by jurisdictional (or any other) error, his Honour held that the decision was relevantly "a privative clause decision". Accordingly, the application failed for want of jurisdiction.

THE APPEAL TO THIS COURT

30 The appellant was represented by pro bono counsel before the primary judge. He was represented before this Court by a solicitor from the Refugee Advocacy Service of South Australia Inc for the limited purpose of seeking an adjournment of the appeal. That application was refused. The appellant was then unrepresented on the appeal. His notice of appeal reflects that fact. There are two grounds specified. They are:

"at least 2 misinterpretation over my case (RRT)"

and

"using old and different information"

31 The first ground is singularly uninformative. The primary judge dealt with the complaint that the Tribunal had not addressed the passport claim correctly, and to the extent that this ground seeks to agitate that point, it is without merit. In addition to *Paul*, and the cases cited therein, regard should be had to *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244, *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [46]-[47], *VTAG v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 447, *Tran v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 509, and *Applicant M31 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 533.

32 The second ground is equally without merit. It was dealt with correctly by his Honour. We can discern no error in the Tribunal's reasons, still less any error that might be described as jurisdictional. It follows that the appeal must be dismissed. The appellant must pay the respondent's costs.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Beaumont, Weinberg and Crennan.

Associate:

Dated: 4 May 2004

	The appellant appeared in person
Counsel for the Respondent:	Dr S Donaghue
Solicitors for the Respondent:	Blake Dawson Waldron
Date of Hearing:	4 May 2004
Date of Judgment:	4 May 2004