

FEDERAL COURT OF AUSTRALIA

NARD v Minister for Immigration and Multicultural and Indigenous Affairs

[2004] FCAFC 27

MIGRATION - protection visa - Refugee Review Tribunal ("RRT") - appeal from decision of judge of Court exercising jurisdiction of the Court to review RRT decision - RRT's conclusions on credibility open to it on the evidence - RRT took into account relevant considerations - RRT made findings on material questions of fact - no lack of bona fides made out - reviewing court cannot conduct a merits review - alleged errors non-jurisdictional - appeal dismissed.

Migration Act 1958 (Cth)

Federal Court Rules O 52 r 38A(1)(d)

Re Minister for Immigration and Multicultural Affairs: ex parte Durairajasingham (2000)
168 ALR 407 cited

Kopalapollai v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 547 cited

W148/00A v Minister for Immigration and Multicultural Affairs (2001) 185 ALR 703 cited

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 cited

SCAS v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC
397 cited

**NARD v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS
N1558 OF 2003**

**BEAUMONT, LINDGREN AND TAMBERLIN JJ
12 FEBRUARY 2004
SYDNEY**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

N1558 OF 2003

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

**BETWEEN: NARD
 APPELLANT**

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

JUDGES: BEAUMONT, LINDGREN AND TAMBERLIN JJ

DATE OF ORDER: 12 FEBRUARY 2004

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

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

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

N1558 OF 2003

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

**BETWEEN: NARD
 APPELLANT**

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

JUDGES: BEAUMONT, LINDGREN and TAMBERLIN JJ

DATE: 12 FEBRUARY 2004

PLACE: SYDNEY

REASONS FOR JUDGMENT

THE COURT:

1 The appellant is a citizen of Pakistan who travelled to Australia via Brunei, entering on a tourist visa on 26 April 1997. On 14 May 1997, the appellant applied to the Department of Immigration and Multicultural and Indigenous Affairs (“the Department”) for a protection visa under the *Migration Act 1958* (Cth) (“the Act”). A delegate of the Minister refused this application on 5 June 1997. The appellant applied for a review of that decision by the Refugee Review Tribunal (“the RRT”), which held, on 8 September 1997, that the appellant’s application was out of time, and that it did not, therefore, have jurisdiction to undertake the review. The appellant then applied to the High Court challenging the decision of the Minister’s delegate. The matter was then remitted to the Federal Magistrate’s Court. On 9 February 1998, the Department consented to the matter being remitted to it for reconsideration. On 30 November 2001, a delegate of the Minister (“the delegate”) refused to grant a protection visa, and on 17 December 2001, the appellant applied for a review of that decision to the RRT. The RRT, on 22 April 2003, affirmed the decision not to grant a protection visa, whereupon an application for review was made to this Court.

2 The primary judge dismissed the application for review, finding that none of the five grounds of review that the appellant had outlined in his application demonstrated any error on the part of the RRT. The appellant, who was unrepresented before his Honour, did not expand upon the grounds of review at the hearing. He sought to tender three documents, two of which had been before the RRT, and rejected by the RRT as forgeries. His Honour noted that these documents went to the merits of the case, rather than the legality of the RRT's decision, and said that the authenticity of the documents was a question that fell to be determined by the RRT. In the absence of any argument regarding jurisdictional error by the RRT, his Honour dismissed the appeal.

3 The Notice of Appeal filed by the appellant on 20 October 2003, contains four grounds of review that essentially repeat four of the five claims that were before the primary judge. These are as follows. Firstly, that the RRT ignored various affidavits and other documents going to the appellant's credibility. Secondly, that the RRT had no evidential basis to conclude that the appellant had in the past, or would in the future, receive adequate state protection from persecution for a Convention reason if he returned to Pakistan. Thirdly, that the RRT failed to make findings on three material questions of fact, namely, whether he had been sentenced to three years' imprisonment in Pakistan; whether his Shia neighbours had persecuted him, burning his fields and harassing him; and whether his cousin was being unlawfully detained by the Punjab police. Fourthly, that the RRT had a closed mind when it came to the appellant's case, and was biased in its approach. Finally, the Notice of Appeal claims, as a ground of review, that the primary judge failed to provide written reasons for his decision.

RRT DECISION

4 The appellant claimed to fear persecution for reason of his religion and political opinion in Pakistan. He claimed to have been a member of the Sipah-e-Sahaba Pakistan ("SPP"), an organisation made up of a majority of Sikh Muslims, and to fear persecution from Shia Muslims, and political organisations associated with Shia Muslims, in Pakistan. He claimed that he participated in an SPP demonstration that became violent on 18 December 1996, which culminated in his arrest and a grant of pre-arrest bail, which was subsequently set aside by a trial court that sentenced him, in absentia, to three years' imprisonment, and issued a warrant for his arrest, which remains outstanding. Documentation was provided in

support of these claims. These documents were not accepted as genuine by the RRT for reasons given by it, including inconsistencies with accepted facts and discrepancies and omissions in the documentary material. The appellant also claimed that he feared persecution from neighbouring Shia landowners.

5 The RRT reasons are summarised in its Conclusion as follows:

“CONCLUSION

In sum, the Tribunal accepts that the applicant was a member of SSP and that on 18 October 1996 he participated in a mass demonstration organised by the SSP. The Tribunal accepts that a FIR was registered against the applicant for participating in the demonstration. The Tribunal accepts that on 4 November 1996 the applicant was granted pre-arrest bail by an Additional Session Judge in Lahore. The Tribunal does not accept that the applicant was convicted at any point by any court or judicial authority in Pakistan. The Tribunal does not accept that he was genuinely sought after by the authorities after the issue of his pre-arrest bail, that he was sentenced to three years detention by the Deputy Commissioner of Lahore and that a warrant of arrest was issued against him in April 1997. The Tribunal finds that the essential and significant reason behind the registration of the FIR against the applicant was his participation in a violent demonstration and not his membership of the SSP or any other Convention reason. The Tribunal finds that there is only a remote chance that the applicant will come to the attention of the authorities if he returns to Pakistan now or in the foreseeable future. Even if the applicant is arrested upon his return, the Tribunal is satisfied that he would be given a fair trial in respect of any charges which may have been brought against for the reason of his participation in the October 1996 demonstration. The Tribunal is satisfied that the Government of Pakistan will provide the applicant with adequate state protection to remove a real chance of him being persecuted in Pakistan by Shia Muslims. The applicant’s fear of persecution is not well-founded. He is not a refugee.”

DECISION OF THE PRIMARY JUDGE

6 The primary judge summarised the grounds of appeal raised by the appellant, and considered that they went entirely to the merits of the case before the RRT, and were therefore not appropriate bases for judicial review by the Court. After noting that two of the three documents that the appellant sought to tender had been before the RRT, and that all three documents sought to establish findings of fact, and did not demonstrate that the RRT had erred in reaching its conclusions, which were based largely upon findings of adverse credibility against the appellant, his Honour dismissed the appeal.

THE APPEAL HEARING

7 The appellant did not appear when the appeal was called on for hearing. The solicitor for the respondent gave evidence that he had been informed of the time, date and place of the appeal hearing. The Court has therefore decided to proceed with the hearing pursuant to O 52 r 38A(1)(d) of the *Federal Court Rules*.

REASONING ON APPEAL

8 We respectfully agree with his Honour's assessment of the grounds of appeal raised by the appellant, which have been substantially repeated in the Notice of Appeal before this Court.

9 The outcome of the appellant's case before the RRT turned upon the finding that the appellant had fabricated much of his evidence, including most of the documentation that he had presented in support of his claims. This is a finding of fact, and as such, it is a matter for the RRT: see *Re Minister for Immigration and Multicultural Affairs: ex parte Durairajasingham* (2000) 168 ALR 407 per McHugh J at 67. The findings that the RRT made with respect to the appellant's credibility were open to it, on the basis of the inconsistencies that it noted in the appellant's evidence and the independent country information. Accordingly, no error is demonstrated in the conclusions that the RRT based upon these findings: see *Kopalapollai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-559; *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703 at [64]-[69] per Tamberlin and RD Nicholson JJ.

10 The appellant claims that the RRT erred in its finding that he would be able to avail himself of adequate state protection in Pakistan from persecution by the Shias. Before the primary judge, the appellant claimed that there was "no evidence" for this conclusion. However, the RRT was entitled, particularly where it has made findings adverse to the appellant's credibility, to rely upon independent country information in drawing its conclusions of fact. Its finding in relation to the appellant's ability to avail himself of state protection draws on specific country information from governments, non-government organisations, and international news sources, indicating that the Pakistani government has been strengthening its law enforcement apparatus in response to sectarian violence. It cannot be said that there was "no evidence" to support this conclusion. If this Court were to

substitute the RRT's preference for one line of evidence over another it would be conducting a merits review. This Court cannot review the merits of the RRT's decision: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

11 The appellant also claims that the RRT "failed to make findings" on material questions of fact in relation to his conviction and sentence, persecution by his Shia neighbours, and the detention of his cousin by the Punjab police. The RRT reasons disclose that the RRT made clear findings on all these claims. They are outlined in the RRT's reasons, which note incongruities in the appellant's evidence on these matters and inconsistencies between his evidence and the independent country information.

12 In relation to the appellant's claim that his cousin is currently detained on the basis of a false case registered by the Punjab police, the RRT noted that the appellant had not presented any evidence in support of this claim, and that it was not pursued at the hearing. It found that, along with others that had been detained following the SPP demonstration, the detention of the appellant's cousin was due to participation in a violent demonstration and not for a Convention reason. These are all findings of fact made by the RRT, albeit findings that would be unsatisfactory to the appellant, because they do not support his case. Accordingly, in our view, this ground of appeal must fail.

13 The appellant claims that the RRT had a closed mind because it made up its mind before the hearing, and was biased in its rejection of certain evidence that supported the appellant's case, and its "excessive reliance" on advice from the German Federal Office for the Recognition of Foreign Refugees. An allegation of bias against the RRT is serious, and should only be made where there are proper grounds: see *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 397 at [19]. We have already noted that the RRT is entitled to prefer evidence from independent country information rather than the appellant, and to do so for the reasons that it outlines. The weight it gives to such evidence is a matter of fact and degree for it to evaluate and not for this Court. The appellant's documentary evidence was reviewed thoroughly, and rejected for inconsistencies with other evidence provided by the appellant as well as country information. In our view, there is no basis for the conclusion that the RRT approached these issues with a closed mind, and we reject this ground of appeal.

14 Finally, the appellant claims that the primary judge failed to provide written reasons
for his decisions. However, we note that certified copies of his Honour's *ex tempore*
15 judgment, delivered on 29 September 2003, were available from 21 October 2003. This
ground has no substance.

15 In our view, no reviewable error by the RRT or the primary judge has been shown in
this case.

16 Accordingly, the appeal should be dismissed with costs.

I certify that the preceding sixteen
(16) numbered paragraphs are a true
copy of the Reasons for Judgment
herein of the Honourable Justices
Beaumont, Lindgren and Tamberlin.

Associate:

Dated: 18 February 2004

No appearance for the Appellant.

Counsel for the Respondent: T Reilly

Solicitor for the Respondent: Sparke Helmore

Date of Hearing: 12 February 2004

Date of Judgment: 12 February 2004