FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZBZN v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 27

MIGRATION – Review of decision of RRT – where the applicant produced letters in support of his claims to fear persecution for the Convention reason of political opinion – where the Tribunal originally had doubts as to the genuineness of these letters – where the Tribunal subsequently made its own investigations and found that the letters were actually genuine but nonetheless did not contain honest expressions of opinion – whether the failure of the Tribunal to put that conclusion to the applicant amounted to a breach of procedural fairness.

Migration Act 1958 (Cth), s.422B

WAGU v Minister for Immigration [2003] FCA 912
QAAR v Refugee Review Tribunal [2005] FCA 1818
Applicant VEAL of 2002 v Minister for Immigration [2005] HCA 72

Applicant:	SZBZN
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2553 of 2003
Judgment of:	Raphael FM
Hearing date:	12 January 2006
Date of Last Submission:	12 January 2006
Delivered at:	Sydney
Delivered on:	18 January 2006

REPRESENTATION

Counsel for the Applicant:	Mr Godwin
Solicitors for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondent:	Ms Henderson
Solicitors for the Respondent:	Blake Dawson Waldron

THE COURT DECLARES:

That the decision of the Refugee Review Tribunal made on 29 September 2003 and handed down on 23 October 2003 is void and of no effect.

THE COURT ORDERS:

(1) The application to the Tribunal for review of the decision of the delegate made on 30 April 2002 be referred back to the Tribunal differently constituted to be heard and determined according to law.

(2) The respondent pay the applicant's costs assessed in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2553 of 2003

SZBZN
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a citizen of Bangladesh who arrived in Australia on 30 November 2001. He made an application for a protection (class XA) visa from the Department of Immigration and Multicultural and Indigenous Affairs on 14 January 2002. This application was refused and on 24 May 2002 he applied for review of that decision from the Refugee Review Tribunal. The applicant claimed to have come from a family long associated with Bangladeshi struggle for independence and with the political party known as the Awami League. The applicant had moved through the student movement of the Awami League and had been active against the BNP in the 1996 election campaign, supporting a candidate in that election who had stood against the BNP leader. The Awami League candidate is said to have lost the election but the result was overturned a few months later. The Awami League took power after 1996 and remained in power until October 2001. In January 2001 the applicant had left Bangladesh working as a

seaman. When his boat docked in Fremantle in November 2001 he appears to have jumped ship and applied for protection.

2. The applicant claimed that he was a leading activist in the Awami League and that prior to 1996 he had been the subject of false charges which were not pursued thereafter:

> *"The applicant said that he had not only had to leave Bangladesh because of false charges but also because the Chittagong area was dominated by the BNP, Jama'at e Islami and Jama'at's student wing, Chatra Shibir. He said that he was a particular target of Jama'at because his father had fought in the independence war on the side of the independence forces. He said, in answer to a question, that he could not find safety even if he moved to another area of Bangladesh."* [CB 133]

3. The applicant produced in support of his claims to fear persecution for the Convention reason of political opinion three letters. The first found at [CB 67] is from the General Sectary of the Bangladesh Awami League, Mr Abdul Jalil, the second found at [CB 68] is from the Chittagong District Awami League. The third letter was written by Sheikh Hasina, a former Prime Minister and now the leader of the opposition in the Bangladesh parliament and the leader of the Awami League. All three letters suggest that the applicant's life and security is at risk. Sheikh Hasina said:

> "As a political opponent he has been targeted as subject of oppression by four party alliance government. His (sic) is also implicated in concocted criminal cases. His life and security is a risk in Bangladesh during four party alliance government reign."

Mr Jallil says:

> "Because of his political activities he has become a target of the present government. He is not safe to be in Bangladesh. If he comes back to Bangladesh he may be incriminated in false cases and the subject of torture because of his political belief."

4. When the applicant appeared before the Tribunal and gave evidence there was some considerable discussion about the genuineness of these letters. It is clear from a perusal of the transcript which is annexed to the affidavit of Nigel James Dobbie sworn on 1 February 2005 that the Tribunal was sceptical as to the genuineness of the documents particularly that coming from Sheikh Hasina. The Tribunal pointed to a number of spelling and grammatical errors that it did not believe the

Sheikh would have made and indicated to the applicant and his advisor that it proposed to have investigations made about the document. The applicant and his advisor assured the Tribunal that the document was genuine and had been obtained because of the applicant's importance within the Awami League. There is an interesting exchange between the Tribunal and the applicant commencing at Question 96:

> *"Q96. Okay. I'll leave that aside. The information I have abut the situation in Bangladesh doesn't suggest that people need to leave the country and escape the country just because they work for the Awami League. Okay. The Awami League is very active in politics at every level. Why is it that you are not safe in Bangladesh? That's what puzzles me. Everyone else, Sheikh Hasina is there, Inginir Musharef is there fighting away. Why do you have to leave?*
>
> *A(Int) Inginir Musharef Husseein they are in leading position but I, we are working in the field level in a actual sitatuin so anything happened we are suffering. If police want the arrest, they arrest me, they cannot go and arrest Inginir Musharef Hussein because they are very powerful. If some fighting took place also, we have to go and manage that one and other thing we are working in the field so that's why the fear come on my life, it's not their life.*
>
> *Q97. I have problems with that explanation for several reasons. You've just been telling me proudly that you are in a, you have a very strong base in the party and that uif you weren't so prominent as you are described, prominent here, you wouldn't have had a letter from the leader of the opposition. So you can't then in the next breath put yourself down and say that you are just a field worker.*
>
> *A (Int) I'm not like Sheikh Hasina.*
>
> *Q98. No, you don't have to be the leader of the opposition, there is only one leader of the opposition but you've just said that you are in a strong position, Sheikh Hasina's letter says that you are a prominent member of the Awami League. So you are not just a field member, right?*
>
> *A (Int) Yeah, no means I did mention that much low. It's low, it's below Sheik Hasina, below Musharef Hussein but not htat much low.*

Q99. Okay. The other problem I have with your explanation is that you say that people like you are vulnerable to arrest and so on, nut not people like Inginir Musharef. Okay. Or on the hand Inginir Musharef's son was arrested for possessing arms, right? So he's not above it either. Inginir Musharef has had charges pressed against him, whether they're false or not remains to be seen. So they are also vulnerable, they're still there. Why do you have to leave?

A(Int) There is a lot of difference between these two position, the Inginir Musharef Hussein and myself. (indistinct) very big leader there and (indistinct) not arrest them but anything (indistinct) police can arrest us and if we have to do fighting we have to do this thing. If any, we have to take any bullet, we have to take the bullet but these people not come there, the actual same.

5. The tribunal appears to have made its own investigations concerning the genuineness of the Sheikh Hasina letter and had been satisfied that it was genuine:

> *"I have given consideration to the documents submitted by the applicant in support of his claims of facing persecution. DFAT has verified that the letter written by the Awami Leader Sheikh Hasina is genuine and that Sheikh Hasina has knowledge of the applicant. I therefore accept as being genuinely written by Sheikh Hasina and am prepared to accept that the other letters submitted by the applicant are also genuine."* [CB 145]

6. In its findings and reasons the Tribunal comes to a researched, logical and well argued set of reasons for concluding that members of the Awami League in the position of the applicant are not "persecuted" within Bangladesh and do not come within the definition of a person to whom Australia owes protection obligations under the Convention and the Migration Act. That is a finding of fact based upon evidence available to the Tribunal which cannot be impugned in this court. The difficulty which the applicant has with the Tribunal's decision is the way in which the Tribunal has dealt with the letters. After the reference to documents that I have quoted above the Tribunal states:

> *"Nevertheless I do not accept that the applicant is in need of protection in Australia because I do not consider that activists of the Awami League face persecution in Bangladesh. There is*

> *nothing in the applicant's evidence **barring** the letters written on his behalf that causes me to consider that there are reasons why he in particular might have a well-founded fear of persecution." (emphasis added)* [CB 145]

7. The Tribunal in this sentence appears to be saying that the letters do make a case of persecution with which it is required to deal. The Tribunal does deal with the case but it does not do so on the basis that it disagrees with the views expressed by the writers, a state of mind the Tribunal could easily reach on the basis of the arguments it had already put for why Awami League activists were not subject to persecution. Instead the Tribunal says:

> *"In all, I am not satisfied that the claims of persecution in those letters of support from Awami League luminaries are credible. I consider that the applicant has, through using political influence or by other means, obtained letters to suit his ends and I am not satisfied that he left Bangladesh to escape political persecution or that is motivated by a fear of persecution in his attempt to stay in Australia."* [CB 146]

This is the first time in the grounds and reasons that the question of credibility or honesty is raised by the Tribunal. Certainly the Tribunal raised the veracity of the documents at the hearing but at that stage the Tribunal believed they were forgeries. The case now being put by the Tribunal is that the letters were indeed written by the persons who signed them but they were not honest expressions of those persons opinion. When a similar suggestion was made by the Tribunal in *WAGU v Minister for Immigration* [2003] FCA 912 French J in dealing with an appeal from the Federal Magistrates Court:

> "In the present case there is no doubt that the Tribunal made findings generally adverse to the credibility of the appellant. It decided that the appellant's claim of involvement with the Freedom Movement of Iran were fabricated. That finding having been made would perhaps have supported a finding that the email from the Secretary-General should be given no weight. But the Tribunal expressly disclaimed any reflection upon the character of the author of the email and observed that:
>
> *"No doubt the applicant is well-enough connected there to have such statements arranged."*
>
> This was a proposition, which as the learned magistrate observed, was not supported by any evidence before the Tribunal. It was a proposition that the Tribunal never put to the appellant and does not naturally flow from adverse finding as to his credibility.

> It essentially involves a finding that the appellant has been involved in some kind of conspiracy with a person or person in Iran to fabricate information about his connection with the Freedom Movement…
>
> …
>
> None of this was ever put to the appellant. Moreover, it provided a basis for rejection of the document which meant that it did not have to be taken into account in the assessment of credibility."

In the instant case the conclusion reached by the Tribunal about the letters was not put to the applicant. The conclusion is at least as serious as that referred to in *WAGU* and the applicant argues that by not giving him an opportunity to comment upon it he was not provided with procedural fairness to which he was entitled, his application having being made before the commencement of s.422B *Migration Act.* The response of the Minister is that firstly this case was decided clearly on the basis that the applicant is not liable to be persecuted upon his return for the reasons given. The excursion into a debate about the letters as no more than that and in no way affected the decision. Secondly the respondent argues that this is not a case where credibility was in issue unlike the cases which are cited by the applicant as his authorities and there was therefore no need to raise with the applicant what was in fact only a conclusion drawn by the Tribunal.

8. As Greenwood J says *QAAR v Refugee Review Tribunal* [2005] FCA 1818 at [77]:

> "It is perfectly clear that "*there is no universal proposition that before the Tribunal ever makes a finding adverse to an applicant , it is necessary for the Tribunal to put to the applicant the concerns which are inclining to the Tribunal towards such an adverse finding,. The procedure is inquisitorial not adversarial":* Gaudron and Gummow JJ with whom Gleeson CJ agreed, [76] *Re Refugee Review Tribunal, ex parte Aala* (2000) 204 CLR 82."

9. In *QAAR* (supra) his Honour was dealing with a document purporting to be an arrest warrant issued by a court within the jurisdiction of Uganda. At [83] his Honour says:

> "Whilst there is no "universal proposition" that the RRT can never make a finding adverse to an applicant without putting the contention about the matter to the applicant (especially in the case of material first put to the RRT by an applicant), the Tribunal nevertheless must examine the document, in terms, make a judgment about the gravity of the document should the Appellant be able (perhaps remotely) to

> demonstrate a basis upon which its authenticity might be established and then plot a point on the continuum in the discharge of its duty which determines whether the particular document in the circumstances of the particular case is one which would require as a matter of procedural fairness, the Appellant being afforded an opportunity to say something about it. This is such a case."

His Honour found that the Tribunal was infected by jurisdictional error because it did not give the applicant an opportunity to answer the proposition that the warrant was not genuine. The applicant in this case was given no opportunity to answer the proposition that whilst the letters he provided were genuine the sentiments expressed therein where not. It seems to me that there is no real difference in those situations.

10. I am not convinced the finding in relation to the documents was a mere excursion and irrelevant to the grounds for decision. As can be seen from the transcript extract set out in [4] above the Tribunal clearly thought that the letters might have some weight and if the concerns expressed were genuine then it would be obliged to respond to them. As I have said, it could have responded by making a finding that the concerns, whilst genuine, were not well founded. If it had done that the Tribunal would have completed the task which it was mandated to complete. It did not do this and instead came to a conclusion based upon no evidence whatsoever that the applicant and very senior members of the Bangladesh opposition had connived to dishonestly influence the Minister. That was the Tribunal's reason for dismissing the effect of the letters and once they had been dismissed it followed that the Tribunal's original argument concerning the lack of persecution must remain valid. Put in this way it can be seen that the findings were important for the purposes of the decision.

11. In *Applicant VEAL of 2002 v Minister for Immigration* [2005] HCA 72 the court considered what procedural fairness required at [14]:

> "…As these reasons will show, it is not useful to begin the inquiry about procedural fairness by looking to what the Tribunal said in its reasons. Rather, as procedural fairness is directed to the obligation to giver the appellant a fair hearing, it is necessary to begin by looking at what procedural fairness required the Tribunal to do in the course of conducting its review."

And at [16]:

> "…Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do *in the course of* deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached."

The court decided in *VEAL* that the accusations made against the applicant in a "dob-in" letter should have been put to the applicant for him to comment upon even though the Tribunal stated that it took no notice of the document. That was a requirement of procedural fairness. Surely, if a Tribunal is going to come to a conclusion of the seriousness of that to which it came in this case where there has been no hint or suggestion that such a conclusion was being considered, the Tribunal is bound, as it was in *WAGU*, to put the Tribunal's suspicions to the applicant so that he might have an opportunity to comment upon them.

12. I am satisfied that in this case the Tribunal fell into jurisdictional error in the manner in which it dealt with the letters and did not provide the applicant with procedural fairness. I would find that this means that the decision of the Tribunal is void and of no effect and I would order that the matter be referred back to the Tribunal, differently constituted, to be heard and determined according to law. I would also order that the respondent pay the applicant's costs which I assess in the sum of $5,000.

I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 18 January 2006