FEDERAL COURT OF AUSTRALIA

WAJS v Minister for Immigration and Multicultural and Indigenous Affairs

[2004] FCAFC 139

MIGRATION – Application for protection visa – Appeal against decision of Federal Magistrate dismissing application for review of decision of Refugee Review Tribunal – Tribunal disbelieved evidence of appellant as to his mistreatment by police – Application of 'no evidence' ground in relation to non-acceptance of evidence – Whether Tribunal's view was perverse and irrational – Appeal dismissed.

WAJS v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

W 218 of 2003

WILCOX, MARSHALL and JACOBSON JJ
21 MAY 2004
PERTH

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **W 218 of 2003**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**WAJS** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**WILCOX, MARSHALL and JACOBSON JJ**
DATE OF ORDER:	**20 MAY 2004**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs of the appeal.

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

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DATE:	**21 MAY 2004**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

THE COURT:

1 Yesterday we heard and dismissed an appeal from an order of Driver FM in the Federal Magistrates Court dismissing an application for judicial review of a decision made by the Refugee Review Tribunal ('the Tribunal'). These are our reasons for doing so.

2 The Tribunal had affirmed a decision of the delegate of the present respondent, the Minister for Immigration and Multicultural and Indigenous Affairs, refusing to grant a protection visa to the appellant. The appellant is a citizen of Sri Lanka, of Tamil ethnicity.

3 The notice of appeal to this Court identified five grounds of appeal. One of them was abandoned at the hearing. The surviving grounds are as follows:

> *'2. The learned Federal Magistrate erred in failing to find that the Refugee Review Tribunal ("**the Tribunal**") committed jurisdictional error.*
>
> *3. The learned Federal Magistrate erred in finding that the Tribunal approached the consideration of the Appellant's evidence in a rational and logical material* [sic]*, and that its conclusions on the Applicant's credibility were "reasonably open" on the material before it.*
>
> …

> 5. *The learned Federal Magistrate erred in failing to find that there was no evidence to support the Tribunal's rejection of the Appellant's evidence.*
>
> 6. *The learned Federal Magistrate erred in failing to find that the reasoning of the Tribunal in relation to the Appellant's credibility was irrational, perverse or illogical.'* (original highlighting)

4 All these grounds were advanced to the magistrate by the appellant's same counsel, Mr S D Ower. Subject to two points, to which we will later refer, the arguments Mr Ower put to us are virtually identical to those made to the magistrate in relation to the same issues. This circumstance makes it possible for us to deal with the case more succinctly than might have otherwise been possible. We agree with the conclusion reached by Driver FM and the reasons he stated.

5 The essence of the appellant's argument is that the Tribunal was not entitled to reject key elements of the evidence given to it by the appellant. The appellant recounted to the Tribunal a series of events that he claimed occurred in 2000 and 2001. The appellant said he was working as a professional fisherman with his cousin when their boat was intercepted by four LTTE men who demanded that the appellant assist them by obtaining and delivering supplies such as batteries, petrol and oil. The appellant claimed to have been reluctant to do this but yielded ultimately to threats. He said that, over a six month period, he regularly delivered the required supplies. His assistance came to an end when he was arrested by police in May 2001. He was detained by the police for more than three months.

6 The appellant gave to the Tribunal an account of his treatment by the police over the period of his detention. He said that this treatment included torture and repeated severe beatings. The appellant said he was released only after his father paid a large sum of money to the police; his release was subject to a condition that he reside with his aunt in a particular town remote from the fishing village.

7 The appellant told the Tribunal of various incidents, involving himself, that occurred before 2000. The Tribunal member said she accepted much of what he said about those incidents but she did not consider that, even when considered cumulatively, those incidents 'constituted serious harm of a kind which could be regarded as persecution within the meaning of the *Refugee Convention*'. No complaint has been made about that conclusion.

8 The Tribunal member regarded the appellant's claims about the events of 2000 and 2001 as being critical to his claim for a protection visa. That conclusion is also unchallenged. However, the difficulty, from the appellant's point of view, is that the Tribunal member was not satisfied of the truth of the appellant's account of his mistreatment by the police. She said in her reasons for decision:

> *'I consider it implausible that the applicant was detained and tortured in three separate locations and each time accused of having supplied batteries, oil and petrol to the LTTE and that he continually denied having done so. I am unable to accept that the applicant was taken blindfolded to Colombo and detained there for three months in connection with the allegation when interrogatory capacity and detention facilities exist at police and military facilities throughout the country which could deal with allegations involving the local supply of small batteries and gallon cans of fuel. In the context of all of the evidence, I consider it most unlikely that the obvious injury to the applicant's eye and the perception that he received this as a LTTE combatant led to his transfer to Colombo and his extended detention there. In reaching this conclusion, I have had regard to the applicant's evidence about his release: he said that he had been charged but was unaware of the progress of the case and whether it involved court. He was also unaware of whether the payment made by his father was a bribe, a bond or a fine. I consider that the applicant would have known more about this had he been detained and released in the circumstances he has claimed. It follows from these conclusions that I do not believe that he provided goods to the LTTE (this was the alleged reason for being taken into custody in May 2001), or that the CID* [the Criminal Investigation Department] *came looking for the applicant in connection with any allegation that he supplied goods to the LTTE or in connection with his detention for this reason, or that they have interrogated his aunt and searched her house for these reasons.'*

9 Counsel for the appellant submitted to the magistrate that the Tribunal displayed jurisdictional error in rejecting that part of the appellant's evidence outlined in this passage. According to para 6 of the magistrate's reasons, counsel put his submission on two bases:

> *'a) first, it is said to breach the RRT's obligation to afford procedural fairness, by failing to base its findings relating to the claimed events upon probative material, being material that tended logically to show the non-existence of facts relevant to the issue to be determined; and/or*
>
> *b) secondly, it is said that the RRT constructively failed to exercise the jurisdiction vested in it and the duty placed upon it by ss.65 and 414(1) of the* Migration Act 1958 *(Cth) ("the Migration Act"), by being "not satisfied" in circumstances where the probative material underpinning its findings was inadequate.'*

10 As is apparent from our recital of the grounds of appeal to this Court, counsel for the appellant no longer presses an argument about denial of procedural fairness. However, he does press the argument that the Tribunal was not entitled to disbelieve the appellant. Although counsel put the matter in various ways, essentially his case was that there was no evidence to support the magistrate's conclusion. Counsel said the conclusion was founded on mere speculation.

11 Counsel referred to the principle that an administrative decision maker makes a jurisdictional error if he or she bases a decision upon a finding of fact which lacks any supporting evidence.

12 There is no doubt about the existence of that principle. However, it is difficult to apply it to a rejection of evidence. After reviewing the relevant case law up to that date, in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 70 ALR 147 at 150, Wilcox J said that all of the cases of which he was aware, in which 'no evidence' was treated as a separate ground of invalidity, 'were cases in which the power to make the relevant decision depended upon the prior establishment of a particular fact, it being held in those cases that there was no evidence of that fact'. We are unaware of any later case that departs from that pattern.

13 In his reasons for judgment, Driver FM said at para 18:

> *'The evidence before the presiding member which led to the adverse findings on credibility was the applicant's own account. The presiding member found the applicant's account to be implausible and illogical. The presiding member did not require other evidence to support her rejection of the applicant's evidence. She had to satisfy herself, or not, on the basis of the material put before her. It is up to an applicant to satisfy the decision maker that he or she faced persecution. If an applicant presents evidence and it is rationally rejected by the decision maker, the applicant can hardly complain that there was no evidence supporting the rejection. There plainly was evidence, being the evidence presented by the applicant himself. Provided that the presiding member approached the consideration of the applicant's evidence in a rational and logical manner, which, in my view, she did, the applicant cannot found a judicial review application on a no evidence ground, or on the third limb of the rules of procedural fairness, if it exists in Australia.'*

We agree with those observations.

14 During the course of oral argument, counsel was asked whether he asserted that the Tribunal's conclusion was based upon any positive factual finding which was unsupported by evidence. In response, he referred to the passage in the Tribunal member's reasons (para 8 above) in which she referred to the existence 'throughout the country' of interrogation and detention facilities. However, the Tribunal member's belief in the existence of such facilities is supported by one of the 'country reports' considered by her, being a report on Human Rights Practices in Sri Lanka published by the United States Department of State on 4 March 2002. That report refers to visits to over 2,000 police stations and over 500 detention centres during the year under review, 2001. Given the size of Sri Lanka, it seems not inaccurate to speak of 'police and military facilities throughout the country'.

15 Mr Ower argued that, even so, the Tribunal's conclusion was perverse and irrational. He suggested that the existence of numerous interrogation and detention centres was not a reason for doubting the appellant's claim that he was taken blindfolded to Colombo. A similar submission was made to Driver FM. In response, his Honour referred to a passage in the judgment of McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; 198 ALR 59 at [36]-[37], in which their Honours quoted something that had been said by Dixon CJ, Williams, Webb and Fullagar JJ in *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120. In the earlier case, their Honours stated that inadequacy of material is not in itself a ground for prohibition. However, they added:

> *'it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.'*

16 Driver FM commented:

> *'I see nothing irrational, perverse or illogical in the reasoning of the presiding member in this case. The presiding member was unable to accept that the applicant was taken to three separate locations by the Sri Lankan authorities and ultimately taken blindfolded to Colombo and detained there for three months in connection with a simple allegation that he had been supplying batteries and fuel to the LTTE. I do not necessarily agree with the reasoning of the presiding member. It is conceivable that the Sri Lankan authorities thought that they may have caught a bigger fish than might have*

> *been thought apparent from the nature of the accusations. The applicant's eye injury could have marked him out as a combatant. It is possible that a different presiding member might have reached different conclusions on the evidence. However, mere disagreement with the analysis undertaken by the presiding member does not establish perversity, illogicality or irrationality. The conclusions reached by the presiding member were reasonably open to her on the material before her.'*

17 We agree with these comments. Like Driver FM, we would not necessarily have agreed with the view of the Tribunal member, if it were for us to determine the facts of the case. However, it is not. Determination of the facts of the case was the responsibility of the Tribunal member. Whatever our personal views may have been, and we have not reached any conclusion about them, it cannot be said the Tribunal member's view was perverse or illogical. Whether rightly or wrongly, she regarded a critical portion of the appellant's evidence as inherently improbable and, for that reason, was unable to accept its accuracy. This was not a finding for which positive evidence was required; it was simply a matter of disbelief of evidence because of surrounding circumstances. We do not think the 'no evidence' ground has application to such a situation.

18 In his submissions to us, counsel dealt with credibility as if it was a separate matter from that just discussed. He correctly observed that the Tribunal member made no comment about the appellant's demeanour and suggested, therefore, that the Tribunal was not entitled to reject the appellant's evidence about the events of 2000 and 2001. However, that does not follow. A tribunal of fact is entitled to reject the evidence even of an impressive witness, if it rationally considers that evidence to be implausible; for example, where the evidence is inherently unlikely or at odds with established facts.

19 We understand that Mr Ower appears for the appellant in this matter on a pro bono basis. We are grateful to him for doing that. From the Court's point of view, it is always preferable for a person in the position of the appellant to be legally represented. However, like Driver FM, we are unable to discern jurisdictional error in the Tribunal's handling of this matter. The appeal should be dismissed with costs.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Wilcox, Marshall and Jacobson.

Associate:

Dated: 21 May 2004

Counsel for the Appellant:	Mr S D Ower (who appeared pro bono)
Solicitor for the Appellant:	Refugee Advocacy Service of South Australia Inc
Counsel for the Respondent:	Mr M Ritter
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	20 May 2004
Date of Judgment:	21 May 2004