FEDERAL COURT OF AUSTRALIA

WAKH v Minister for Immigration & Multicultural Affairs [2003] FCAFC 159

MIGRATION – appeal – whether decision of Refugee Review Tribunal based on a particular fact which did not exist – 'fresh' evidence on appeal insufficient to support the ground

Migration Act 1958 (Cth) s 476
Migration Legislation Amendment (Judicial Review) Act 2001 (Cth)
Federal Court Rules O 80

Minister for Immigration and Multicultural Affairs v Rajamanikkam (2002) 190 ALR 402, cited

WAKH v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
W 374 OF 2001

LEE, CARR & FINKELSTEIN JJ
30 JULY 2003
PERTH

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **W374 OF 2001**

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

BETWEEN: **WAKH**
APPELLANT

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

JUDGES: **LEE, CARR & FINKELSTEIN JJ**

DATE OF ORDER: **30 JULY 2003**

WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondents costs

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

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

JUDGES:	**LEE, CARR & FINKELSTEIN JJ**
DATE:	**30 JULY 2003**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a judgment of a Judge of this Court (Emmett J), which dismissed an application by the appellant under s 476 of the *Migration Act 1958* (Cth) ("the Act"), as it then stood, for review of a decision of the Refugee Review Tribunal ("the Tribunal").

2 Both the decision of the Tribunal and the judgment of his Honour preceded the date of commencement of amendments to the Act introduced by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) on 2 October 2001. It was accepted by the respondent ("the Minister") that this appeal is governed by the terms of the Act as it stood before the amendments took effect.

3 The appellant is a citizen of Bangladesh who arrived in Australia on 11 July 2000. At that time the appellant did not hold a visa issued under the Act and as a consequence he was placed in detention pursuant to s 189 of the Act. The appellant has been held in detention ever since.

4 On 26 October 2000 the appellant applied for the grant of a "protection visa" for which s 36 of the Act makes provision. Section 65 of the Act states that if a Minister is satisfied that, *inter alia*, the criteria for a visa prescribed by the Act are satisfied the Minister is to grant the visa, but if the Minister is not so satisfied the grant of the visa is to be refused. At the relevant time s 36 provided for a class of visa known as protection visa and stated that a criterion for a protection visa was that the applicant be a non-citizen in Australia to whom Australia has "protection obligations" under the "Refugees Convention as amended by the Refugees Protocol". The international instruments to which s 36 refers, and to which Australia is a Contracting State, are defined in s 5 of the Act and are together referred to hereafter as the Convention.

5 The term protection obligations is not defined in the Convention or in the Act. It appears to be accepted that at least the expression means the duties Australia has undertaken with respect to a person who is a "refugee" as defined in the Convention, being a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country", and in respect of whom the Convention requires Australia, as a Contracting State, to accept responsibilities of a protective nature.

6 In support of his application for a protection visa, the appellant supplied the following account:

> *'1. I am a single Muslim man from Bangladesh who lived with my family in my home village about 200 kilometres south east of Dacca. My father has about 8 acres of land on which he grows rice and ponds for fish culture. My father also owns some shops in the market and gets about $600 (AUS) as rent from these shops. We lived in the village (small town) near to the shops which my father owns.*
>
> *2. My childhood was relatively uneventful and I started to have problems when I became involved in politics in 1988. I joined the student wing of the Jatya Party.*
>
> *3. In 1997, I became President of the Ramganj Branch of the student wing of the Party.*
>
> *4. In 1997, the Bangladesh government initiated a peace process to settle the insurgency problem amongst the Chittagong hill tribes. We started a movement opposing that process.*

5. In October 1997, all the opposition parties united against the peace process. At the local level we also gave our support to this opposition movement. Following that movement a united student movement was launched and a convening committee was formed and I became the Convenor of that committee.

6. At one stage we intensified our movement to prevent the government making any peace agreements. On the 25th November, a meeting was scheduled between the leaders of the insurgents and the government of Bangladesh. We called a strike on that day and then we had a large procession which clashed with the government's procession.

7. We had a confrontation with them and that clash lasted for 3 hours. The government party was helped by the police. At one stage I received bullet injuries on my knees.

8. Two cases were constructed against me for being in the possession of arms and this case was initiated by local activists of the government party – Bangladesh Awarni League – because some of their supporters were injured. The second case was brought by the police because of their members was killed in the clashes.

9. I was unable to move for about 3 months following my injuries. I used to hide in different places around the town because the police were trying to arrest me and the government party representatives were trying to harm me.

10. The movement against the peace process continued and the leadership was continued by the joint Convention in my region. The government signed a peace agreement and at the same time my town was made a Municipal – a different type of local government organization. Following this municipal elections were held on 17 June 1998 and it was the government strategy to deflect attention from our movement to the election. None of the opposition parties took part in the election and the night before the election some of the government party members were killed making bombs. The blame was passed onto me for these further actions and I had another charge against me, this time for sabotage.

11 I was still involved in leading the opposition movement from my hiding position. Differences arose between me and my party concerning the movement over the mayoral elections in Chittagong. I sent party members to take part in movements against these elections and two of our activists were killed during the election period. My party blamed me for this saying I had not sent these activists with proper preparation.

12. Eventually in December 1999, I resigned from the position as Convenor and my party became suspicious of me that I may be in

collusion with the opposition party. I was declared a traitor for leaving my party and there was an order that if I could be presented before my party there would be a reward for that person.

13. A Public Safety Act (January 2000) was instituted by the government and some of our members including myself were listed as wanted as being threats to public safety. I left my own locality in February 2000 and I started living in Dhaka. I used to move with caution so that I avoided being arrested in Dhaka. I contacted a cousin of mine who owns a travel agency and after telling him about my problems of staying in Bangladesh he agreed to arrange an agent for me to get me out of my country to a place where I could apply for political asylum to save my life.

14. One man named, Nazmul Hoque told my cousin he had ways of getting me out. An agreement was reached with him that he would get me out to Indonesia.

15. I think that if I am sent back to Bangladesh the people of my own party plus the members of the government and the police will harm me. I do not think that I can expect protection from the authorities in my country and that members of the opposition parties are not treated according to the rule of law.'

7 His Honour set out as follows a summary of the material findings of the Tribunal in respect of the appellant's claims:

'The applicant held a relatively minor position in an opposition party in 1997 and, although he held the title of president of the Jatiya party student wing, his actual political profile was insignificant. The applicant participated in a demonstration over a three-day period in his own area, and on the third day after violence broke out, he was injured in a melee when guns were fired on both sides. The applicant continued in his role as president of the Jatiya party youth wing, with a group of twenty one members, until the end of 1999 when he resigned. From that time the applicant has had no political involvement, and intends to have nothing further to do with any political group or activity. While there are no warrants for the applicant's arrest, or any charges against him, if there were, the applicant's profile and disengagement from politics is such that he would be able to rely on the judicial system in Bangladesh to defend himself.

The Tribunal concluded, therefore, that the applicant had no well-founded fear of persecution for any political opinion or any opinion imputed to him. The Tribunal, therefore, was not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.'

8 His Honour found no reviewable error in the reasons of the Tribunal.

9 The appeal first came on for hearing on 14 February 2002. The appellant appeared in person. He did not speak English and was assisted by an interpreter. Through the interpreter the appellant told the Court that subsequent to the decision of the Tribunal and the judgment of his Honour he had been informed by his father that on 28 December 2001 he had been convicted in his absence in a court in Bangladesh and sentenced to imprisonment for life with two other people, as persons responsible for the death of a policeman that had occurred on 27 November 1997 in the clash between students and government forces referred to in the foregoing statement of the appellant.

10 The Court determined that the appeal should stand adjourned to allow inquiries to be made through official channels as to the existence of any record of the conviction of the appellant. On 7 May 2002 the appeal was further adjourned to allow the Minister to make further inquires. The Court then directed the Registrar to obtain representation for the appellant, *pro bono publico*, pursuant to O 80 of the Federal Court Rules.

11 To allow sufficient time for *pro bono* counsel to be appointed, receive instructions, and make further inquiries on behalf of the appellant, the matter continued to stand adjourned until the parties were ready to continue the hearing on 5 June 2003.

12 By that time affidavits had been filed on behalf of the Minister and on behalf of the appellant about attempts made in Bangladesh to ascertain whether there was a record of the conviction of the appellant. Those affidavits left the question of the conviction of the appellant unresolved.

13 Inquiries made on behalf of the Minister in Bangladesh ascertained that district courts which sat in the area in which the appellant lived had not conducted trials in December 2001, being a period of court vacation. Inquiries made on behalf of the appellant by the Refugee Appeals Project at the Law School of Western Australia, a group which assisted counsel to prepare the case on behalf of the appellant, suggested that the inquiries made on behalf of the Minister may not have identified, or exhausted, all possible places of record of the appellant's conviction. Counsel for the appellant, in a telephone conversation with the appellant's father conducted through an interpreter, confirmed that the appellant's father understood that the appellant had been convicted by a "Judge court" of an offence relating to the death of a police officer.

14 Counsel for the appellant submitted that the material now before the Court was sufficient to meet the requirements of ss 476(1)(g) and 476(4)(b) of the Act and establish ground for review of the Tribunal's decision, in that there was no evidence or other material to justify the decision made by the Tribunal by reason of the fact that the decision was based on a particular fact which did not exist (See: *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 190 ALR 402 per Gaudron, McHugh JJ at [53] – [54]; Kirby J at [111].)

15 Counsel submitted that the Tribunal's decision was based on a finding of fact that the appellant had not been charged with an offence, or was not a person "wanted by the police", in respect of involvement in the death of a police officer. Counsel further submitted that it "now appeared" that the appellant had been convicted of such an offence thereby negating the Tribunal's finding of fact. The finding that the appellant had not been charged, or was not "wanted by police", in respect of the death of a police officer was said to be critical to the Tribunal's finding that the appellant did not have a well-founded fear of persecution if returned to Bangladesh.

16 Without deciding whether the material placed before the Court may, or should, be received on evidence on the appeal, it is apparent that it would fall well short of establishing that a particular fact upon which the Tribunal based its decision did not exist. It may be that the appellant has been convicted of the offence described and at all material times was a person charged with, or "wanted by the police" in respect of, that offence. However, the material before the Court raises no more than speculation in that regard and does not prove that the fact found and relied upon by the Tribunal did not exist.

17 Whether the material alluded to by counsel for the appellant is sufficient to ground a request to the Minister pursuant to s 48A of the Act that the Minister exercise a discretion to permit the appellant to make another application for a "protection visa", or under s 417 of the Act that the Minister substitute for the decision of the Tribunal a decision more favourable to the appellant, is unnecessary for this Court to consider.

18 Counsel did not argue that the judgment of his Honour was susceptible to challenge on any ground other than the foregoing. It follows that the appeal must be dismissed with costs.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 30 July 2003

Counsel for the Appellant:	I Morison (*pro bono publico*)
Counsel for the Respondent:	A A Jenshel, (14 February, 7 May 2002,) L B Price (5 June 2003)
Solicitor for the Respondent:	Australian Government Solicitor
Dates of Hearing:	14 February, 7 May 2002, 5 June 2003
Date of Judgment:	30 July 2003