HIGH COURT OF AUSTRALIA

McHUGH J

RE THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ORS — RESPONDENTS

EX PARTE ABDUL RAHMAN MOHAMMED CASSIM — APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural Affairs;
Ex parte Cassim
[2000] HCA 50
Date of Order: 7 September 2000
Date of Publication of Reasons: 26 September 2000
C8/2000

ORDER

Application dismissed.

Representation:

P J Hanks QC for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second and third respondents

J McD Evans with T A Warwick for the applicant/prosecutor (instructed by City First)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim

Immigration law and administrative law – Refugee – Refugee Review Tribunal decision refusing to grant protection visa – Application in original jurisdiction of High Court for constitutional writs and injunction – Whether denial of natural justice by reason of statutory provision restricting representation and cross-examination at the hearing – Whether denial of natural justice by failing to investigate the applicant's claims and documents adduced – Whether denial of natural justice by taking into account an irrelevant consideration in refusing to investigate the applicant's claims and documents adduced – Whether denial of natural justice by making findings of facts so unreasonable that no reasonable Tribunal could have come to them – Whether denial of natural justice by failing to warn that a document referred to in a decision relied upon by the applicant would be relied upon – Whether denial of natural justice by failing to provide a fair and just mechanism for review and by failing to act according to the substantial justice of the case.

The Constitution, s 75(v).
Migration Act 1958 (Cth), ss 415(1), 420, 424(1), 427(1)(d), 427(6).

1 McHUGH J. In this matter, brought in the original jurisdiction of the Court under s 75(v) of the Constitution, the applicant sought the issue of orders nisi for writs of prohibition, certiorari and mandamus, and the issue of an injunction directed to officers of the Commonwealth. After hearing argument on 7 September 2000, I dismissed the application. By reason of my commitments that day, I was not then able to give my reasons for dismissing the application. I now do so.

The relief sought

2 The applicant, Abdul Rahman Mohammed Cassim, is a citizen of Sri Lanka. He applied for a protection visa on 22 July 1997 when the temporary visa that he was holding could no longer be extended. He claimed that he was entitled to a protection visa because he was a refugee, asserting that he was a person who had a well-founded fear of persecution by reason of imputed membership of two particular social groups. The first group was Muslim traitors who help the "murderous" Liberation Tigers of Tamil Eelam ("the Tamil Tigers") for financial gain. The applicant claimed that the Sri Lankan authorities believed him to be a member of this group. The second group was Muslim traitors who help the Sri Lankan authorities with valuable information about the Tamil Tigers. The applicant claimed that the Tamil Tigers believed that he belonged to this group. If he had a well-founded fear of persecution by reason of his imputed membership of either group, he qualified as a refugee and was entitled to a protection visa. But a delegate of the Minister for Immigration and Multicultural Affairs rejected the applicant's claim for a protection visa. The second respondent, the Refugee Review Tribunal ("the Tribunal"), affirmed the delegate's decision.

3 In this Court, the applicant contended that the decision of the Tribunal should be set aside because the Tribunal:

(1) had breached both the hearing and the bias rules of natural justice;

(2) had taken into account an irrelevant consideration;

(3) had failed to provide a fair and just mechanism for review of the delegate's decision;

(4) had failed to act according to the substantial justice of the case;

(5) had no evidence to support its findings; and

(6) had acted unreasonably.

4 Claiming that the decision of the Tribunal was void and should be quashed, the applicant sought:

(1) an order of certiorari quashing the Tribunal's decision;

(2) an order prohibiting the Minister from detaining the applicant in custody pursuant to s 189 of the *Migration Act* 1958 (Cth) ("the Act") and from removing him from Australia pursuant to s 198 of the Act;

(3) a writ of mandamus directing the third respondent, the Acting Principal Member of the Tribunal, to appoint a member of the Tribunal to re-hear and re-determine the application for a protection visa according to law; and

(4) an injunction against the Acting Principal Member ordering him to appoint a member of the Tribunal to re-hear the application for a protection visa, not being the member who first heard the application.

Factual and procedural background

5 The applicant arrived in Australia on 19 August 1995 on a student visa which he had applied for before he left Sri Lanka. He filed his visa application in the Australian Embassy in Colombo. He supported it with documentary evidence. That evidence included three apparently authentic letters from a company. They showed that the company had offered him employment in Colombo in April 1991, that it had informed him in 1993 that he had been promoted to a senior executive position, and that it had advised the Australian High Commission in 1995 that the applicant had been granted leave without pay to study in Australia. The applicant told the Tribunal that most of the information in support of his student visa application was false. The Tribunal did not believe him. At all events, it thought that the information was more accurate and reliable than the documentary and oral information with which the applicant supported his claim for a protection visa.

6 Contrary to the material supporting the student visa, the applicant told the Tribunal that between 1990 and about November 1994 he had worked in a resort in the Eastern province of Sri Lanka, an area where the Tamil Tigers were active and police activities against them were extensive. He described his work duties in a way that suggested that he was employed as a reception clerk. The applicant claimed that police security forces often came to the resort and asked him and other workers about the people staying there. He said that in early 1994 the authorities questioned him about links with the Tamil Tigers. He said that a worker at the resort was taken away for questioning, released, then taken away again and killed. Another worker, who had been taken away after the applicant had left the resort, had disappeared. The brother of this worker gave evidence to the Tribunal confirming the applicant's evidence about this worker's detention and disappearance. But the Tribunal did not accept the witness's evidence.

7 The applicant told the Tribunal that in late 1994 he left the Eastern province and stayed in Kandy, Matale and Colombo. While in Colombo, he worked with his father for a while but he then received a number of letters from police officers in Batticaloa, in the Eastern province, asking him to report to them. He produced to the Tribunal "three documents in Singhalese said to be notices from the police" ("the police letters"). The Tribunal was not prepared to accept these documents as authentic for five reasons. First, a document fraud examiner thought that there were question marks about their authenticity. Second, in Sri Lanka the use of fraudulent documents was a common practice. Third, the terms of the documents were inherently implausible. Fourth, the letters were dated several months after the applicant said he had left the resort. The Tribunal did not accept that the police would wait that long to try and contact the applicant if, as he said, they came regularly to the resort and hence would have known he had long left. Fifth, there had been considerable delay in submitting the documents to the Tribunal.

8 The applicant said that, after receiving the police letters, he decided to leave for Australia. He claimed that, after he had left Sri Lanka, his family had been harassed by people coming to look for him. Sometimes, they were in plainclothes; at other times they were in police uniform. The Tribunal did not accept that the applicant's family had been harassed. The Tribunal considered that letters written by the applicant's brother and father-in-law stating that they had been harassed had been written for the express purpose of supporting the applicant's claim.

The grounds of the application

9 To make out a case for the grant of orders nisi for writs of prohibition, mandamus and certiorari, the applicant had to show an arguable case of jurisdictional error by the Tribunal in affirming the Minister's decision. In my opinion, he failed to do so even though I was prepared to assume two matters in his favour. First, that unless specifically excluded, *all* the common law rules of natural justice continue to apply in a hearing by the Tribunal, despite the apparently comprehensive code of procedure laid down in Pt 7 of the Act. Second, that a breach of the common law rules of natural justice is always a jurisdictional error.

10 Because the applicant's claims of jurisdictional error failed, his claim for an injunction also failed because its issue was dependent on the applicant obtaining relief by way of prohibition, mandamus or certiorari.

The grounds relied on to support the application

Ground 1

11 The applicant claimed that the Tribunal denied him natural justice because s 427(6) of the Act prevented him from being properly and adequately advised and represented at the hearing. That sub-section declares that a person appearing before the Tribunal is not entitled to be represented or to examine or cross-examine witnesses. The common law rules of natural justice cannot prevail against this legislative declaration.

Ground 2

12 The applicant contended that the Tribunal had denied him natural justice by failing to investigate his claims that he had worked in the resort in the Eastern province and that the police letters were authentic. He asserted that the Tribunal's failure to exercise its powers under ss 415(1), 424(1) and 427(1)(d) of the Act was a denial of natural justice. These provisions of the Act give the Tribunal wide discretionary powers to investigate the claims of an applicant.

13 Decisions and *dicta* in the Federal Court of Australia indicate that a failure by the Tribunal to make inquiries about the claims or the evidence of an applicant may sometimes be a breach of the rules of natural justice or render the decision unreasonable[1]. Even if that proposition is valid, those cases and *dicta* recognise that the Tribunal has no general duty to make inquiries about an applicant's claim. They declare that ordinarily the Tribunal should only make inquiries if the material is "readily available".

14 Consistently with those decisions and *dicta*, the Tribunal had no duty to make inquiries to see whether in Sri Lanka or elsewhere there was evidence which would support the applicant's claim for a protection visa. The powers conferred by ss 415(1), 424(1) and 427(1)(d) of the Act are discretionary, not mandatory. Although the applicant asked the Tribunal to contact two persons in Sri Lanka, there was no evidence – apart from the applicant's assertions – that they were independent and reliable. Nor was there evidence that reliable, independent corroborating evidence was "readily available". Moreover, other evidence (including the documents in the application for a student visa) gave the Tribunal good reason for thinking that the applicant's case for refugee status was concocted and that the police letters were forged. Nothing in the evidence indicated that in Sri Lanka or elsewhere there was "readily available" reliable

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1 *Yao-Jing v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553.

evidence which would support his claims that he had worked in the Eastern province and that the police letters were genuine.

Ground 3

15 The applicant claimed that he was denied natural justice because the Tribunal denied him the opportunity to make out an essential part of his case, as the Tribunal:

(a) assumed without evidence that his evidence lacked bona fides;

(b) declined to exercise its powers of inquiry to satisfy itself as to whether the evidence was credible or not; and

(c) made adverse findings of credit about the applicant and the witness "as a consequence of denial of procedural fairness".

This claim was baseless.

16 (a) & (c) Ample evidence to support the Tribunal's findings was contained in:

- the information in the application for a student visa and the documents in support of it;
- the suspicious nature of the police letters;
- the lack of any known or likely reason for either the Tamil Tigers or the police or security forces to hold adverse views concerning the applicant; and
- the improbability that the applicant would move from Colombo to the Eastern province and take a comparatively menial position in a dangerous area, given his education, business qualifications and family connections.

The applicant was given every opportunity to present his case. On a number of occasions during the hearing, the Tribunal made it clear to the applicant and, after the hearing, in correspondence to his solicitor, that it doubted the reliability of the police letters and the applicant's evidence of working in the Eastern province. It gave him a number of opportunities, oral and written, to deal with the Tribunal's concerns.

17 (b) For the reasons given under Ground 2, the Tribunal did not breach the rules of natural justice by declining to make inquiries concerning the credibility of the applicant's evidence.

Ground 4

18 The applicant claimed that the Tribunal denied him natural justice because, having the capacity to verify "essential facts", it failed to verify them and made adverse assumptions about the applicant's case that were not otherwise supported by evidence. He also claimed that the findings of the Tribunal (each and all of them) were so unreasonable that no reasonable Tribunal could have come to them.

19 The making of an unjust or unreasonable finding of fact does not constitute a breach of the rules of natural justice. The merits of the matter are for the decision maker[2]. But that said, the findings of the Tribunal were plainly open to it for the reasons given under Ground 3.

Ground 5

20 The applicant claimed that the Tribunal had denied him natural justice because the totality of the erroneous findings referred to in Ground 4 and the failure to verify the applicant's credibility about "substantive matters" gave rise to a reasonable apprehension of bias on the part of the Tribunal. The applicant also argued that the failure to put to him what was contained in "Cable CL 847" led to a denial of natural justice.

21 In its reasons, the Tribunal said that Cable CL 847 from the Department of Foreign Affairs and Trade was inconsistent with part of the applicant's evidence. The applicant claimed that he should have been given an opportunity to comment on the contents of this cable. This was a surprising claim given that the cable had been brought to the attention of the Tribunal by the applicant's solicitor. After the applicant had given evidence, the solicitor had sent to the Tribunal an extract from an earlier decision of the Tribunal. That extract referred to this cable. In this Court, the applicant contended that the Tribunal could not use the cable without giving him an opportunity to comment on it.

22 There is no substance in this assertion. The rules of natural justice do not require the Tribunal to reveal to an applicant that it intends to act on information that is in the public domain or on information of which the applicant is or should be aware. The extract forwarded by the applicant's solicitor referred to the cable. That being so, the Tribunal was under no obligation to ask the applicant to comment on the cable. It was for the applicant to put before the Tribunal whatever evidence or argument he relied on to support his case, and for the Tribunal to rule on that evidence and argument[3]. It is preposterous to suggest

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2 cf *Kioa v West* (1985) 159 CLR 550 at 622.

3 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187].

that the applicant was denied a fair hearing because the Tribunal acted on information in a cable which was referred to in an extract of a judgment forwarded to the Tribunal by his solicitor.

23 What I have said about Grounds 2 and 4 is sufficient to deal with the remainder of the claim under Ground 5.

24 It follows that there was no evidence to support the claim of a reasonable apprehension of bias. On the contrary, the Tribunal gave the applicant every opportunity to put forward further material which would remove doubts that the Tribunal had concerning various aspects of the applicant's case. By doing so, it demonstrated that it carried out its duties and functions properly.

Ground 6

25 The applicant claimed that the Tribunal erred in law by taking into account an irrelevant consideration in refusing to make inquiries with the manager of the resort regarding the applicant and in refusing to make inquiries with the Sri Lankan police regarding the authenticity of the police letters. The consideration was that contact with these people might put the applicant at risk. This ground of complaint could only be relevant if the Tribunal had a duty to make the inquiries – which it did not. If it made an error, it was an irrelevant error. Moreover, even if the particular reason relied on by the Tribunal was erroneous, it was not a jurisdictional error. Indeed, if erroneous, it was not even an error of law, but an error of fact.

Ground 7

26 The applicant claimed that the second respondent breached the statutory duty imposed by s 420 of the Act by failing to provide a fair and just mechanism of review and by failing to act according to the substantial justice of the case. The matters alleged to demonstrate that the hearing was not fair and just were:

(a) the use of documents not available to the applicant;

(b) conducting the hearing by video-link and not in person;

(c) lack of representation at the hearing.

27 Section 420 does not create rights of review in addition to those set out in s 476 of the Act[4]. This claim had to fail.

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4 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

28 I have already rejected the applicant's argument concerning lack of representation at the hearing. In addition, the reference to "documents" not available was apparently a reference to the use of Cable CL 847. I have already rejected the applicant's argument concerning this cable.

29 Even if s 420 created rights, it is impossible to see how the Tribunal made any error of law in the manner that it conducted the proceedings. The hearing by the Tribunal was conducted by video-link with the Tribunal member in Melbourne and the applicant in Brisbane. At the time, the Act laid down no specific procedure for hearing an applicant[5]. But the Tribunal's general authority to hear the application entitled it to adopt any manner of procedure that it thought fit provided it was not inconsistent with the Act[6].

Ground 8

30 The applicant contended that, by reason of the matters in Grounds 1 to 7, the Tribunal erred in law in making findings of fact without evidence on which it could base those findings.

31 There were several answers to this contention. First, none of Grounds 1 to 7 was made out. Second, as I have already indicated there was ample evidence to support the Tribunal's findings. Third, even if the Tribunal had erred in its findings of fact, that would have been an error within jurisdiction and not a jurisdictional error.

Ground 9

32 The applicant contended that, by reason of the matters alleged in Grounds 1 to 7, the Tribunal erred in law in making findings of fact on the basis of irrelevant considerations.

33 What I have already said in relation to Grounds 1 to 7 disposed of this ground.

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5 Section 429A of the Act now specifically authorises the Tribunal to hear an applicant by the medium of "closed-circuit television" or any "other means of communication".

6 *Browne v Commissioner for Railways* (1935) 36 SR (NSW) 21 at 28-29.

Ground 10

34 The applicant contended that, by reason of the matters alleged in Grounds 1 to 7, the Tribunal failed to give adequate weight to the applicant's claim and the independent evidence.

35 What I have already said in relation to Grounds 1 to 7 disposed of this ground.

Ground 11

36 The applicant contended that, by reason of the matters alleged in Grounds 1 to 10, the decision of the Tribunal was so unreasonable that no Tribunal acting within jurisdiction and according to law could have come to that decision.

37 Given my findings concerning Grounds 1 to 10, this ground also failed.

Conclusion

38 For these reasons, I was of opinion that the Tribunal had made no error that arguably attracted this Court's jurisdiction under s 75(v) of the Constitution and that the application had to be dismissed.