HIGH COURT OF AUSTRALIA

McHUGH J
Ex Tempore

RE PHILLIP RUDDOCK, IN HIS CAPACITY AS THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS	FIRST RESPONDENT
KIM WILSON, IN HER CAPACITY AS A MEMBER OF THE IMMIGRATION REVIEW TRIBUNAL	SECOND RESPONDENT
SUE TONGUE, IN HER CAPACITY AS THE PRINCIPAL MEMBER OF THE MIGRATION REVIEW TRIBUNAL	THIRD RESPONDENT
EX PARTE ALICIA REYES	APPLICANT

Re Ruddock & Ors; Ex parte Reyes
[2000] HCA 66
27 September 2000
S240/2000

ORDER

Applications dismissed.

Ex Tempore Judgment

Representation:

D J Watson for the first respondent (instructed by the Australian Government Solicitor)

No appearance for the second and third respondents

B M Zipser for the applicant (instructed by the applicant)

CATCHWORDS

Re Ruddock & Ors; Ex parte Reyes

Constitutional law – Constitutional relief – Jurisdictional error – Whether the Immigration Review Tribunal made a jurisdictional error.

Practice and procedure – Constitutional relief – Whether writ of prohibition properly sought against the Minister.

Practice and procedure – Constitutional relief – Whether writ of mandamus properly sought against the principal member of the Migration Review Tribunal.

Practice and procedure – Constitutional relief – Whether person constituting tribunal should be respondent to application for constitutional relief.

1 McHUGH J (Ex Tempore). This is an application made, without filing any documents, for an injunction against the Minister for Immigration and Multicultural Affairs to restrain him from deporting the applicant, Alicia Reyes, and her family tomorrow. The application for an injunction is made in the context of an application, which has been filed in the Court today, for orders nisi to be issued directed to three persons. The first is Mr Phillip Ruddock in his capacity as the Minister for Immigration and Multicultural Affairs, the second is Ms Kim Wilson in her capacity as a member of the Immigration Review Tribunal, and the third is Ms Sue Tongue in her capacity as the principal member of the Migration Review Tribunal.

2 The draft order nisi calls on the three respondents to show cause why a writ of prohibition should not be issued out of this Court directed to the Minister prohibiting him or his agents or delegates from acting upon or giving effect to or enforcing a decision of the second respondent made on or about 23 February 1998. In that decision, the second respondent held that neither the applicant nor her husband were entitled to the grant of a class 816 special permanent entry permit.

3 The respondents are also asked to show cause why a writ of certiorari should not be issued out of this Court directed to the second respondent removing into this Court and quashing the decision. Finally, the respondents are asked to show cause why a writ of mandamus should not be issued out of this Court directing the third respondent to appoint a member of the Migration Review Tribunal to rehear and determine the applicant's application for a class 816 special permanent entry permit in accordance with law.

4 In support of the application for orders nisi the applicant, Alicia Reyes, has filed an affidavit dated today, 27 September 2000. In her affidavit, she recites that she arrived in Australia with her husband from the Philippines in 1988 and that from 1988 until 1991 they were in hiding in Australia. She states that, in May or June 1994, she applied to the Department of Immigration and Multicultural Affairs for a class 816 special permanent entry permit or a class 818 highly qualified on-shore permanent entry permit.

5 In January 1996, the application was refused by a delegate of the Minister. In May 1996, the decision of the delegate was affirmed by the Migration Internal Review Office. In June 1996, the applicant applied to the Immigration Review Tribunal for review of the decision, but on 23 February 1998 the Tribunal affirmed the decision of the delegate not to grant her or her husband a class 816 or class 818 entry permit.

6 The reasons of the Tribunal show that the applicant failed to meet the criteria for a class 816 or a class 818 entry permit. Apparently there was no evidence which could arguably support the application for a class 818 permit, and the application turned on whether or not the applicant could make out a case for a class 816 entry permit. To do so, it was necessary for her to establish seven

criteria, five of which had to be met at the time of the application and two of which had to be determined as at the date of the decision.

7 In its reasons, the Tribunal drew attention to the fact that neither the applicant nor a related person had the relevant academic qualifications, nor had they completed academic work or had qualifications sufficient to meet the Australian standard for the criteria in cl 816.721(2)(a). The Tribunal expressly said that this part of the matter was uncontested. The Tribunal went on to say that the issue became whether or not the occupation of the applicant's husband was sufficient to come within the criteria in cl 816.721(2)(b). In that respect the applicant's claim to meet the criteria was a derivative one based on her husband's qualification.

8 To deal with that qualification the Tribunal had to be satisfied that the husband:

> "held an overseas trade qualification, or had work experience, that is assessed as meeting Australian education or training standards for that trade."

In giving its reasons the Tribunal said:

> "In this matter, absent clear qualifications which would have been capable of assessment by the relevant authority, the Tribunal has considered the material provided and has come to the view that the occupation of the Applicant's husband is not a trade. The occupations claimed become that of furniture assembler and junior upholsterer with Anes Studio [sic] work as a warehouse store person and warehouse manager. I have considered the information provided and the work that is carried out. In my view, the work does not meet the relevant criteria to be considered as a trade. I do not regard either occupation as a handicraft although clearly both occupations require some skill. I am not satisfied on the basis of the material provided that the skill involved is sufficient to nominate the occupations as a trade with all that involves.
>
> On the basis of this consideration the Applicant fails to meet one of the key criteria in relation to the application."

The Tribunal affirmed the decision not to grant a class 816 or class 818 entry permit.

9 In support of her claim for an order nisi, the applicant said that the decision of the Tribunal was wrong for three reasons. First, it had recited that she had failed the STEP test twice. The applicant asserts that that is not correct and that she sat that test once and passed it. But whether that be so or not, that

matter was referred to only as a matter of historical fact in the reasons of the Tribunal. It had nothing whatever to do with the decision it came to.

10 Secondly, the applicant claimed that the Tribunal had held that her academic attainments did not meet cl 816.721(2)(a) in Sched 2 of the Migration (1993) Regulations. I have already pointed out that the Tribunal's reasons recite that that was not contested and that the issue in the case became whether or not the applicant's husband could satisfy the alternative limb under cl 816.721(2)(b) of having an overseas trade qualification or work experience that met the relevant Australian standards for that trade.

11 Thirdly, the applicant claimed that the Tribunal erred in holding that her husband's occupation as "a furniture assembler and junior upholsterer" and also his work as a warehouse manager were not sufficient to satisfy the test of "trade" in cl 816.721(2)(b) in Sched 2 of the Regulations. The applicant asserts that his "occupation satisfied the test of 'trade' in cl 816.721(2)".

12 On the face of the affidavit filed in support of the order nisi, it seems to me very clear that the applicant had no case for the issue of orders nisi for prerogative writs in this Court. At the highest, only factual errors were alleged. Because I was concerned to give the applicant every opportunity to put further material before me which might show an arguable case of error sufficient to attract s 75(v) of the Constitution, I intimated that I would adjourn the proceedings until tomorrow morning to enable the applicant to put further evidence before me to make out a case. However, Mr Zipser, who appears for the applicant, candidly conceded that there was no material that he could put on by that time which would advance his case. Nor did he indicate that he knew of other evidence that would support his case.

13 Faced with his statement that he could not put on any additional material by tomorrow morning, it seemed to me, in all the circumstances, that I should continue with the hearing of the application in view of the fact that arrangements had been made to deport the applicant tomorrow. As a result, the application for the injunction continued, and Mr Zipser valiantly attempted to persuade me that there was some material upon which I would be justified in granting an order nisi with the result that I should injunct the Minister from deporting the applicant until the order nisi had been determined.

14 In my view, notwithstanding his valiant attempts to make out a case, there is nothing before the Court that would enable it to issue an order nisi directed to any of the respondents. Nor is there anything before me which would justify the Court injuncting the Minister.

15 The reasons for decision of the Tribunal show that the case before it turned on a simple question of fact - whether the material put forward concerning the husband's work as a furniture assembler and junior upholsterer constituted a

trade for the purpose of the relevant criteria. There is nothing to suggest that there was any error of law. Indeed, error of law in itself would not be sufficient to obtain an order nisi. To succeed in an application for an order nisi, the applicant would have to make out a case of jurisdictional error. If there was any error – and I cannot see any error – it would seem only to be an error within jurisdiction and not an error which would constitute jurisdictional error.

16 In oral argument, Mr Zipser referred to another matter which he claimed would justify the grant of orders nisi. In its reasons, the Tribunal said:

> "The Tribunal had the benefit of a submission from Belen Oag in relation to this matter and that submission argued that the qualifications that Mr Reyes has, and experience, are such that he would meet entry standards for the occupation of forklift operator and that a similar situation would apply in relation to the occupation of store person.
>
> In cases such as this the Tribunal has to make an assessment about whether or not the occupation that the person in question, in this case the Applicant's husband, has is a trade."

Mr Zipser contends that the Tribunal's reasons do not deal with the question of forklift operator and, if I understood him correctly, with the occupation of store person. As to the latter, however, it is clear that the Tribunal's reasons, which I have set out earlier, show that, in so far as the occupation of store person was concerned, the Tribunal considered but rejected it as a trade. However, it is true, as Mr Zipser points out, that there is no further mention of the submission that the husband would meet entry standards for the occupation of forklift operator.

17 I think the short answer to that is that it would only meet the entry standards if being a forklift driver constituted a trade for the purpose of the criteria. The Tribunal, in examining the applicant's case, took the view that there was no relevant trade, a decision which would seem to be absolutely correct in respect of a forklift operator, a position which requires a good deal of skill but is not ordinarily thought of as a trade.

18 In my view, the contention that the Tribunal has committed a jurisdictional error by not dealing with an argument of the applicant's solicitor must be rejected.

19 Mr Zipser also sought to put an argument in respect of the question of educational qualifications. Even though there had been no contest at the Tribunal hearing, he submitted, or said he would want to submit, that the applicant's qualifications did meet the criteria and for that reason there was an error sufficient to warrant the grant of an order nisi.

20 There seem to me to be a number of answers to that. The first is that, it being common ground that she did not meet the educational qualifications, the Tribunal made no error of law or fact in coming to the conclusion that that particular criterion had not been made out. Secondly, even if it was open to argue this point in support of an order nisi, it would seem to be very much a question of fact and certainly not one which could be regarded as giving rise to a jurisdictional error.

21 For those reasons, it seems to me that there is no ground whatever for the issue of orders nisi as sought or for granting an injunction against the Minister.

22 Before leaving the case, I should mention a matter that I referred to at the outset of the hearing, namely, that the relief sought was misconceived. I pointed out that, having regard to the gravity of the issue so far as the applicant was concerned, I would not deal with the matter on that basis but would look at the substance of the matter. Nevertheless, because this is not the first time that I have seen a summons for an order nisi seeking relief such as that directed to the parties in this case, it is necessary that something should be said about the relief sought.

23 In the first place, there is no ground whatever in a case such as the present for the issue of a writ of prohibition against the Minister. As was conceded, as the law stands at the moment and on the facts of the case, the Minister was under a duty, in accordance with s 198 of the Act, to deport the applicant. No claim for prohibition could possibly be made on the basis of his personal fault or breach of the law or jurisdictional error.

24 However, if the decision of the Tribunal had been quashed and a further hearing ordered, it would be proper in an appropriate case to injunct the Minister from deporting the applicant while the matter was still before the appropriate Tribunal. But such an order against the Minister would be incidental to the principal relief which would be obtained, namely, the quashing of the Tribunal's decision and the ordering of a further determination of the applicant's claim before the appropriate Tribunal.

25 The second matter to which I refer is that the writ of certiorari is directed to the second respondent "in her capacity as a member of the Immigration Review Tribunal". However, it is not the proper practice, and never has been, to make persons constituting tribunals the respondent in applications for prerogative relief. The respondent should be the Tribunal itself, apart from those cases falling within O 55 r 8 of the High Court Rules. In that respect I would refer to

Brown v Rezitis[1] and to *Kerr v Commissioner of Police and Crown Employees Appeal Board*[2].

26 The third matter I mention is that relief by way of mandamus was sought against the third respondent in her capacity as the principal member of the Migration Review Tribunal. However, mandamus will not lie except for the breach of some public duty imposed upon a person. There is not the slightest suggestion, nor could there be, that the third respondent is in breach of any duty. Indeed, even if the order of the Tribunal was quashed, no relief could be sought against the principal member of the Migration Review Tribunal. Of course, it may be that at some subsequent time if the principal member failed to appoint a person to carry out the duties of that Tribunal, it would be proper to order mandamus against her. But it is certainly not lawful to issue mandamus against a person such as the principal member of the Migration Review Tribunal in respect of something that has not occurred and where no breach or potential breach of duty on that person's part has been shown.

27 If jurisdictional grounds had been made out in this particular case, a serious question would still arise as to whether or not writs of certiorari or mandamus should be directed to the Tribunal. In my view, in a case of this nature, if there are grounds, the proper relief that should be sought is a mandamus directed to the Tribunal to re-hear the matter according to law, and certiorari to quash the original decision. In an appropriate case, it may be necessary also to restrain the Minister from deporting the applicant pending the determination of the Tribunal of the re-hearing. But the principal relief would be mandamus and certiorari, not prohibition against the Minister, which is not a relevant remedy.

28 Mandamus and certiorari are both discretionary remedies. In the case of certiorari, there are time limits which have long since expired. In the case of mandamus, more than 2½ years have elapsed since the decision of the Tribunal. It appears from the applicant's affidavit that she did not apply to the Federal Court for review of the Tribunal's decision because of the advice of her solicitors. Instead, she joined in a class action in February 1998 which was dismissed in June 1999. She has made three applications for the exercise of power by the Minister under s 351 of the Act. In all the circumstances, I think I would have hesitated before issuing orders nisi for writs of mandamus and certiorari, given the history of the matter and the long delay that has taken place.

---

1 (1970) 127 CLR 157 at 169.

2 [1977] 2 NSWLR 721.

29 There being no grounds for the issue of orders nisi, it follows that the application must be dismissed. Similarly, the application for an injunction against the Minister must also be dismissed.