HIGH COURT OF AUSTRALIA

KIRBY J

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — RESPONDENT

EX PARTE P T — APPLICANT

Re Minister for Immigration and Multicultural Affairs; Ex parte P T
[2001] HCA 20
7 March 2001
P2/2001

ORDER

Application dismissed with costs.

Representation:

M T Ritter for the respondent (instructed by Australian Government Solicitor)

H N H Christie for the applicant (instructed by Henry Christie)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte P T

Migration – Application for protection as refugee – Failure of Minister's delegate to afford interview to applicant – Whether failure amounts to breach of rules of natural justice – Whether delegate lacked jurisdiction and whether constitutional writ should issue.

Migration – Refugee application – Asserted fear of extortion by criminals – Asserted fear of lack of protection by authorities for reasons of race – Whether fear of extortion outside grounds of protection – Whether relevant fear proved.

Administrative law – Natural justice – Content of – Relevance of legislative framework for decision – Decision on refugee claim by delegate of Minister – No statutory obligation to interview applicant – Whether failure to interview amounts to breach of common law rules of natural justice.

Practice – Proceedings for constitutional writ of prohibition – Refugee claim under *Migration Act* 1958 (Cth) – Use of pseudonym in High Court – Need for reasonably arguable case for issue of order nisi for constitutional writ – Review of decision of Minister's delegate – Avoidance of pernickety scrutiny of reasons.

Practice – Costs – *Migration Act* proceedings – Application for refugee protection – Application fails – Review by Refugee Review Tribunal unavailable by reason of delay by applicant – Application of ordinary rule as to costs.

Words and phrases – "fear".

Constitution, s 75(v).
Migration Act 1958 (Cth), ss 36, 54, 417, 496.
Migration Regulations 1994, cl 866.221.

1 KIRBY J. Yet another case is before this Court, in part because of restrictions imposed by the Parliament on access by applicants for refugee status to the Federal Court of Australia[1].

The course of the proceedings

2 Mrs P T ("the applicant") seeks the making of an order nisi for the constitutional writ of prohibition and an associated writ of certiorari to render prohibition effective. Because of an expressed concern of retaliation against her were this application refused, a request was made that she be identified only by initials. The Australian public has no interest in knowing her identity. I therefore agreed to that request. The applicant will be so described. There may be a problem with respect to the applicant's request for the writ of certiorari in that the delegate has not been named as a party to the proceedings[2]. However, I pass that technical problem by for the application has larger problems to which I must now refer.

3 The applicant claims relief against the Minister for Immigration and Multicultural Affairs ("the Minister"). She does so on the basis that the Minister, acting under the *Migration Act* 1958 (Cth) ("the Act"), by his delegate, failed to accord the applicant natural justice in the making of a decision on 11 July 2000 and otherwise in making a decision which involved jurisdictional error of law. On that day the delegate decided that the applicant should be denied refugee status. She refused the applicant a protection visa.

4 Normally, following rejection of such relief by a delegate, a disappointed applicant could seek review before the Refugee Review Tribunal ("the Tribunal"). The Tribunal could then hear the application on its merits and substitute its own decision for that of the primary decision-maker[3]. By s 425 of the Act, the Tribunal is obliged to conduct a hearing at which the applicant has an opportunity to be heard. It must do so unless the Tribunal has decided to make a determination in favour of the applicant.

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1 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407-408 [7]-[15]; 168 ALR 407 at 409-411; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 77 [124]; 176 ALR 219 at 253.

2 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* unreported, High Court of Australia, 17 January 2000, transcript of proceedings at 5, line 155 per McHugh J.

3 The Act, s 415.

5 By a series of misadventures, explained in the evidence, the applicant failed, within the time limited, to lodge her application for review by the Tribunal. She attempted to lodge a late application; but this was rejected. She then asked the Minister, in his discretion, to provide her with a visa[4] or to permit her to make a further application for a protection visa. The latter course is permitted by s 48B of the Act. However, these requests were refused by the Minister.

6 Because the applicant's complaint is one concerning procedural fairness and jurisdictional error, and because, in respect of the complaint of procedural fairness at least, this would be excluded from the jurisdiction of the Federal Court exercising its powers of judicial review in cases of this kind, the application has been made to this Court. This Court is the only place in which judicial relief of the kind sought by the applicant can now be obtained. She invoked that relief pursuant to s 75(v) of the Constitution.

7 As I have had occasion to say in previous cases, it would be no misfortune if this Court could be spared matters of this kind. However, the restrictions in the Act, and the rigidity in the administration of the Act in respect of minor time defaults, mean that the burden falls on me. It is one that I have to shoulder because of the cardinal importance of the relief afforded by the constitutional writs and because, at least in respect of the complaint of the breach of the rules of natural justice, this Court cannot remit the matter elsewhere.

8 The principle governing the issue of an order nisi is not in doubt. If the applicant can show a reasonably arguable case, she is entitled to the relief that she seeks[5]. The question is, therefore, whether her case falls within that class.

The facts

9 In support of the applicant's case three affidavits were read. These were, first, an affidavit of the applicant herself; secondly, an affidavit of the applicant's solicitor, Mr Henry Christie (who appeared before the Court on her behalf), and, thirdly, an affidavit by Ms Vanessa Moss, also a solicitor who works with Legal Aid in Perth. For the Minister an affidavit by Mr P J Corbould was read. Reference will be made to that affidavit later. From these affidavits the following facts emerge.

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4 See the Act, s 417.

5 *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1149-1150 [2]-[5]; 173 ALR 145 at 146-147.

10 The applicant is a national of Sri Lanka. She is of Tamil ethnicity. She arrived in Australia on 7 May 1999 to visit her daughter who lives in this country. She travelled to Australia on a visitor's visa. The visitor's visa was valid for a year. Two days short of the expiry of that year, namely on 5 May 2000, the applicant made an application for a protection visa. She claimed that Australia owed her obligations under the Act and pursuant to the Refugees Convention which is relevantly incorporated into Australian law by force of the Act[6]. She claimed that she was a refugee.

11 The applicant complained of experiences which she said she had undergone in Sri Lanka as a member of the Tamil community during and after racial riots which broke out there in 1983. She claimed to have been a victim of those riots. She said that they had forced her to flee from the capital, Colombo, where she lived to take refuge in Jaffna, an area to the north of the island where there is an ethnic Tamil majority.

12 Subsequently, the applicant returned to Colombo for her daughter's wedding. She became stranded there after fresh fighting broke out. Thereafter, she claimed to have spent time travelling between Sri Lanka, India, the Maldive Islands and Australia. She said that this was necessary "to avoid the thugs tracing me and intimidating my life".

13 She alleged that she had been intimidated in Colombo by Sinhalese thugs who demanded money from her because her family had property in Colombo of great value. This property has apparently now been transferred to her children, one of whom, as I have said, lives in Australia.

14 In her application, the applicant claimed that the security situation in Sri Lanka was bad and deteriorating, that arbitrary arrests were taking place and that the authorities were not able to protect innocent civilians of Tamil ethnicity, like herself. She expressed fear for her life because of the criminal element in Colombo and as a result of the security problem more generally. She also expressed concern that the authorities in Sri Lanka either could not, or would not, defend her from such criminal elements who were subjecting her to extortion. It was upon this basis that she claimed an entitlement to be treated as a refugee.

The delegate's decision

15 Upon the making of her application, on a form which was provided to her, the applicant was granted a bridging visa. She was informed of her rights. Her

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6 The Act, s 36(2) referring to the Refugees Convention: the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, (1954) *Australia Treaty Series* No 5 (entered into force 22 April 1954) ("the Refugees Convention").

application was ultimately decided, as the Act permits, by the Minister's delegate, Ms K Corkill, on 11 July 2000. The power of delegation from the Minister to the delegate is afforded by s 496(1) of the Act.

16 The delegate's decision recounts the details of the application. It notes certain "country information" about Sri Lanka. This information reported large-scale arbitrary arrests of Tamils in the year between December 1997 and November 1998, just prior to the applicant's departure for Australia. However, the decision continues that human rights groups report that the number of arrests under the emergency regulations and the Prevention of Terrorism Act in Colombo had "decreased over the last few months". Nevertheless, the decision acknowledges that the "tamils [sic] are targeted at checkpoints because the present insurgency is tamil-based".

17 The delegate concluded:

> "Having considered the detailed statement of the applicant, in the light of available country information, I accept her claims at face value. …
>
> Whilst the applicant is Tamil, she would have a low profile and no known connections to the LTTE [Liberation Tigers of Tamil Eelam] or anyone of interest to the Sri Lankan authorities.
>
> …
>
> I note that the applicant has been free to travel in and out of Sri Lanka in 1995, in 1998 (twice) and in 1999 (in January and again when departing Sri Lanka for Australia). The applicant has not claimed any difficulty with the authorities on any of these occasions."

18 After noting the reports that persons returning to Sri Lanka following a failed refugee application were "generally speaking … safe", the delegate remarked that the applicant had delayed virtually a year in making her application. The delegate went on:

> "This behaviour is generally inconsistent with that of people with a genuine fear of persecution on return to their country of origin.
>
> I also note that the applicant's passport was issued in 1994 and was extended by the Sri Lankan authorities as recently as 22nd October 1999.
>
> The applicant also states that she receives or is entitled to receive a 'widow pension'. …
>
> In view of all of the above, I am unable to conclude that the applicant is of adverse interest to the authorities."

19 Finally, the delegate suggested that the applicant's concern about the criminal element in Colombo amounted to a fear of extortion rather than a fear for a Convention reason, as contemplated by s 36(2) of the Act. She rejected the applicant's claim, not being satisfied that the applicant met the criteria for a protection visa.

The supplementary evidence

20 The applicant annexed to her affidavit a detailed statement. It contained materials which she had not previously provided to the Minister and hence to the delegate. In this statement the applicant explained her default in filing an application to the Tribunal and her failure to provide at an earlier time all of the information contained in the statement. She explained the latter on the basis that she had hoped "it would not be necessary to state the details of what had happened to me much of which I had found deeply shaming and distressing to recall and repeat to others".

21 The statement included assertions about an attempted rape of the applicant at an unspecified time after 1983. It contained a statement that her daughter and son-in-law would take care of her and that she would not be a burden on Australia if permitted to stay in this country as a refugee. The applicant's statement concluded with a complaint that she had "not been granted the opportunity to date to personally explain my plight to the Australian authorities".

22 Under the Act, the delegate is not obliged to conduct an oral hearing or to permit a person, in the position of the applicant, to make an oral statement before the delegate. However, in her affidavit, Ms Moss points out that the provision of a personal interview is ordinarily afforded before such decisions are made by delegates of the Minister. On the basis of extensive experience in working with refugees and in connection with their litigation, Ms Moss states:

> "Since the commencement of my work in the area of refugee law in March 1992 to the present day it has been my experience that the delegate of the Minister for Immigration making the primary decision on the application for refugee status invites the refugee applicant to attend an interview. I know of the case of only one family (in which three adult members of it had their own claims to refugee status) for whom the Department of Immigration rejected their applications for protection visas without inviting the applicants to attend an interview. In this case the applications for the family members were not supported by any claims setting out the basis as to why they claimed to be refugees."

23 No mention is made in the affidavit of Mr Corbould about the practice of delegates in this regard. This fact makes it easier for me to accept as accurate the statement of Ms Moss[7]. I will therefore proceed on the basis that the evidence establishes that it is the normal practice of delegates to invite persons in the position of the applicant to an interview to make an oral statement. The applicant did not receive such an invitation.

Approach: general propositions

24 For the purpose of this application, I accept the following general propositions:

1. A breach of the requirements of the rules of natural justice, if proved, would ordinarily enliven the jurisdiction and power of this Court to issue a constitutional writ to the officer of the Commonwealth responsible.

2. Assuming that jurisdictional error must always be established in order to secure the constitutional writ of prohibition, breach of the requirements of natural justice, if made good, would establish such jurisdictional error[8].

3. A failure by an officer of the Commonwealth to take into account a consideration relevant to the exercise of jurisdiction may amount to jurisdictional error entitling an applicant, in an appropriate case, to a constitutional writ on that ground[9].

4. The detailed provisions of the Act (called a "Code"), setting out the manner in which the delegate is to perform his or her tasks, do not exclude the requirements of natural justice either to the extent that these are implied as preconditions to the valid exercise of powers conferred by the Parliament or as required by the common law rules of natural justice, grafted onto the statute[10].

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7 *Jones v Dunkel* (1959) 101 CLR 298 at 308.

8 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 54 [5], 61 [41], 81 [142], 86 [170], 93 [216]; 176 ALR 219 at 221, 231, 258, 265, 275.

9 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 537 [59].

10 See *Abebe v The Commonwealth* (1999) 197 CLR 510 at 534 [50]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407-408 [7]-[15]; 168 ALR 407 at 409-411; *Re Review Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 79 [134]; 176 ALR 219 at 256.

5. Nevertheless, the "precise or practical content [of natural justice] is controlled by any relevant statutory provisions and, within the relevant legislative framework"[11].

6. The decision to be made by the delegate is a serious one, important for an applicant and also for the Australian community. It is a decision that in some cases can literally affect the life and safety of an applicant. It is a decision to be made having regard to the protective purposes of the Act and the international law the Act was designed to implement in Australia in respect of the Convention requirements concerning refugees[12].

7. The provision of the constitutional writs is discretionary. This Court has a large discretion that will be exercised according to the circumstances of each case.

Natural justice was sufficiently accorded

25 In the facts of this case I am not convinced that a reasonably arguable case for prohibition has been made out. I will address, first, the complaint of a departure from the requirements of natural justice.

1. The Act expressly empowers the Minister, and thus the delegate, to refuse a protection visa without giving the applicant an opportunity to make oral or even written submissions[13]. No rule of natural justice could be expressed by this Court that would contradict or qualify that provision.

2. The applicant was not limited in any way in the materials which she could put forward in support of her claim. She knew, or was informed, that it was a very important decision requiring that all relevant materials should be provided. It was a decision to be made by the primary decision-maker and not simply a provisional decision subject to further review and appeal. The affidavit by Mr Corbould, which was read for the Minister, attached the application of the applicant for the relevant visa. To that application form is annexed another form containing basic information for applicants for refugee status. This form includes the following statements[14]:

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11 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 66 [60] per Gaudron and Gummow JJ; 176 ALR 219 at 238.

12 cf *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 74 ALJR 1556 at 1594-1595 [196]-[197]; 175 ALR 585 at 638-639.

13 The Act, s 54.

14 Original emphasis removed.

> "You should answer all these questions in your own words and tell [the Department] everything about why you think you are a refugee. You may answer these questions on the application form or submit a separate statement with your application.
>
> ...
>
> Please note that you will be requested to attend an interview only if the case officer decides it is necessary.
>
> …
>
> You may also provide any additional documents which are relevant to your application.
>
> …
>
> If you do not provide documents to support your application, a decision could be made without them.
>
> ...
>
> If you have new information related to your application, you should send it to [the Department] as soon as possible so that it can be considered with your application.
>
> A decision on your application will be made on the basis of all the information you provide and the legal requirements which apply at the time."

The application filed for the applicant, as expressed, bears the imprint of an articulate and intelligent hand. It does not appear to be that of an illiterate person or one lacking fluency in English or otherwise disadvantaged. Different considerations might well arise in respect of persons suffering such disadvantages. That is not the present case.

3. The scheme of the Act reinforces the provisions of s 54. A person dissatisfied with a decision of the delegate may apply for review before the Tribunal where there is a full opportunity to make an oral representation and verbal elaboration. The only reason that the applicant lost that opportunity was a mistake about, and delay in, filing her application to the Tribunal within time. Whilst interviews by the primary decision-maker are often desirable and probably useful in most cases, it would contradict the scheme of the Act to hold that they are universal or obligatory in a case such as the present.

4. Nor does the material disclosed in the delegate's decision suggest a failure on the delegate's part to put something important to the applicant which might otherwise have been unexpected or surprising and to which the applicant should have been given an opportunity to respond. For example, the "country information" on Sri Lanka is unremarkable and apparently balanced. It does not suggest a sudden alteration in the security situation or other developments that would reasonably have come as a surprise to the applicant and caught her off guard when first read in the decision.

5. To these factors may be added the other matters mentioned by the delegate in reaching her decision. The applicant lived in Australia, presumably with her daughter and son-in-law, until virtually a year after her arrival on a visitor's visa. Then, on the eve of the expiration of that year, she lodged an application for a protection visa. In my view, it was open to the delegate to conclude from this, from the applicant's earlier travels, from her renewal of her Sri Lankan passport while she was resident in Australia on a visitor's visa and the other materials provided, that the applicant had not established the grounds that would qualify her for refugee status.

26 The delegate might, indeed, have invited the applicant to an interview. On the evidence before me that is the usual practice. However, I cannot accept, in the circumstances proved, that the failure of the delegate to do so amounted to an arguable departure from what the rules of natural justice required in the applicant's case. I bear in mind the fact that the asserted failure would deprive the delegate of jurisdiction to reach the decision that she did or any decision.

27 There is no universal rule that administrators making a decision affecting a person are bound to hold a hearing and conduct a face-to-face interview. Most administrative decisions are made without such a facility. To impose it unnecessarily would inflict a rule of inflexibility[15] as well as one having significant economic costs. Especially having regard to the provisions of the Act, such a rule could not be imposed on delegates of the Minister deciding applications such as the present.

No other jurisdictional error is proved

28 Nor am I convinced that the delegate failed to take into account a relevant consideration, namely, the basis of the well-founded fear asserted by the applicant.

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15 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 388-389.

29 It was said that, in her conclusion, the delegate had taken into account the extortion to which the applicant was subjected but had not taken into account sufficiently, or at all, the consideration of the inability or unwillingness of the authorities in Sri Lanka to protect the applicant, as an ethnic Tamil citizen, from such extortion.

30 It is important that this Court should not scrutinise the delegate's reasons in a pernickety way, with an eye vigilant to the discovery of error[16]. In the delegate's decision the critical passage appears towards the end of her reasons. There the delegate said, in a passage to which I have already referred:

> "I note that the applicant has expressed a fear of 'criminal elements who will mistreat ordinary tamil citizen like me in Colombo'. The behaviour feared by the applicant in those circumstances amounts to extortion rather than persecution for a Convention based reason."

31 I would not approach my conclusion on this second ground on the footing that there is a general rule relating to extortion that takes such cases outside the Convention definition of "refugees". Instead, to my mind, the considerations to which the Minister pointed indicate sufficiently that the delegate did address the relevant considerations in reaching her conclusion.

32 She correctly identified the criteria under cl 866.221 of the Migration Regulations 1994, which in turn refer to the provisions of s 36(2) of the Act. She referred to the definition of "refugee" in the Refugees Convention. She accepted the claims of the applicant at face value. She noted that the applicant had expressed a fear of criminal elements who would mistreat her because she was a Tamil. She made a finding of fact that the applicant's claimed fear of persecution on return to Sri Lanka was not well founded, that being the matter which she had to decide.

33 The delegate was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention. As I read the delegate's reasons, apart from other considerations she was unconvinced that the applicant had manifested the element of fear which is part of the definition. Having regard to the somewhat dilatory way in which the applicant asserted that fear, at the very end of a one-year stay on a visitor's visa with her family, this was a conclusion that was open to the delegate in the circumstances.

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16 See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291.

Order: application dismissed

34 Accordingly, neither of the grounds that were relied on by the applicant has been made out as reasonably arguable. The application does not, therefore, raise a reasonable foundation for the issue of an order nisi. For these reasons, I dismiss the application.

Costs

35 Having dismissed the application of the applicant PT for an order nisi for a writ of prohibition and of certiorari, a question arises as to the disposition of the costs of the application. Upon that question there have been competing submissions.

36 In *Minister for Immigration and Multicultural Affairs v Eshetu* Gaudron J and I considered that, in the circumstances of that case, no order should be made as to the costs of the application under s 75(v) of the Constitution "it having been brought, in large measure, in consequence of the bifurcated review process mandated by s 476(2) of the Act"[17].

37 However, that was a case in which there was already an appeal before this Court. The consideration which led Gaudron J and me to our conclusion as to costs was that a separate process was necessitated because of the provisions of the legislation. In those circumstances it would have been unjust to burden the applicant with two costs orders in related proceedings. This present is not such a case. There is no concurrent appeal before the Court. I have before me only the application of the applicant. It is before me, in effect, because the applicant became out of time and could not therefore enliven the jurisdiction of the body to which, most naturally and appropriately, her case would have gone, namely the Tribunal.

38 After the applicant became out of time there was a further delay. The exact delay is not certain. However, it is of a piece with the general lack of diligence of the applicant in pursuing her rights which provided part of the background to the decision of the delegate.

39 The normal rule as to costs in this Court is that those who bring applications and fail must pay the costs. Whether those costs can, or will, be recovered is another question. It is not a question that concerns this Court.

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17 (1999) 197 CLR 611 at 641 [104]; see also *Abebe v The Commonwealth* (1999) 197 CLR 510 at 595 [244].

40 I see no reason to depart from the normal rule applicable to such cases. Accordingly, the application is dismissed with costs.