HIGH COURT OF AUSTRALIA

KIRBY J

RE REFUGEE REVIEW TRIBUNAL & ANOR RESPONDENTS

EX PARTE HB PROSECUTOR

Re Refugee Review Tribunal; Ex parte HB
[2001] HCA 34
Date of Order: 7 May 2001
Date of Publication of Reasons: 8 June 2001
S63/2001

ORDER

Application dismissed with costs.

Representation:

The prosecutor appeared in person

No appearance for the first respondent

M J Leeming for the second respondent (instructed by Sparke Helmore)

CATCHWORDS

Re Refugee Review Tribunal; Ex parte HB

Immigration - Application for protection visa - Claim to refugee status - Claim rejected by Refugee Review Tribunal - Application to High Court for constitutional writs - Whether order nisi should issue - Unrepresented applicant held in immigration detention - Applicable principles - Mention by Tribunal of humanitarian considerations - Whether jurisdictional error demonstrated - No reasonably arguable case.

High Court Practice - Constitutional writs under s 75(v) of the Constitution - Application for order nisi - Applicable principles - Whether grounds reasonably arguable - Absence of demonstrated jurisdictional error.

Administrative law - Breach of rules of natural justice - Allegation of apprehended or ostensible bias - Whether amounts to jurisdictional error - Whether propounded grounds for order nisi for constitutional writs reasonably arguable.

Legal aid - Unrepresented litigant in immigration detention - Application for order nisi for constitutional writs - Role of a federal court in respect of application.

Constitution, s 75(v).
Migration Act 1958 (Cth), ss 417, 476(2)(a).
High Court Rules O 55 r 17.

1 KIRBY J. This is an application for relief pursuant to s 75(v) of the Constitution. It is brought by Mr B. I have described him in this way at his request. There is no interest in the Australian community in knowing his name. It may be desirable that his name should not be disclosed to authorities in his own country. I shall call him "the applicant".

2 In his application, the applicant names the Refugee Review Tribunal ("the Tribunal") as the first respondent and the Minister for Immigration and Multicultural Affairs ("the Minister") as the second respondent. Nothing turns, in these proceedings, on whether the first respondent is correctly named by its institutional title rather than by reference to the particular officer of the Commonwealth concerned[1]. The Minister has appeared to resist the relief sought. The Tribunal has submitted to the orders of this Court. The Minister is represented by counsel. The applicant is unrepresented and has communicated to the Court through an interpreter of the French language.

The history of the proceedings

3 The draft order nisi filed by the applicant seeks the issue of the constitutional writs of mandamus directed to the Tribunal and prohibition directed to the Minister. Effectively, it seeks to restrain the carrying into effect of a decision of the Tribunal concerning the applicant given on 14 October 1999. That decision affirmed the decision of the Minister's delegate refusing the applicant a protection visa. Such visa was claimed on the basis that the applicant is a refugee under the Convention relating to the Status of Refugees 1951 as read with the Protocol of 1967 and as incorporated in Australian law[2].

4 The applicant arrived in Australia without proper documents on 18 November 1998. He applied for a protection visa on 2 December 1998. His application was refused by the Minister's delegate. The refusal was affirmed by the Tribunal on 11 February 1999. However, the applicant successfully applied to the Federal Court of Australia for review of that decision. On 8 July 1999 Tamberlin J set aside the Tribunal's decision. He remitted the matter for re-determination by the Tribunal, differently constituted. Such reconsideration occurred on 14 October 1999. On that date the second Tribunal affirmed the decision not to grant the applicant a protection visa.

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1 cf *Re Ruddock; Ex parte Reyes* (2000) 75 ALJR 465 at 468 [25]; 177 ALR 484 at 489 referring to *Brown v Rezitis* (1970) 127 CLR 157 at 169.

2 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at [1], [58], [110] and [169].

5 Once again, the applicant applied to the Federal Court for judicial review. This time his application was heard by Madgwick J. On 16 November 2000 his Honour refused the application. The applicant then appealed to a Full Court of the Federal Court. That Court, constituted by Wilcox, Weinberg and Conti JJ, on 5 February 2001, dismissed the appeal.

6 On 3 April 2001 the applicant applied to this Court for the order nisi for the constitutional writs mentioned. This process was accompanied by a very brief affidavit mentioning the above history but not otherwise disclosing the grounds on which the relief was claimed. However, filed in the Court were the decision of the second Tribunal, the decision of Madgwick J and the decision of the Full Court. It appears to have been assumed by the applicant that this Court would accept the version of events recounted in these decisions as setting out the facts relevant to the grant of the relief sought. Subsequently, in his evidence, the applicant asked me to take the decisions into account as stating generally the background facts.

7 Initially when the matter was listed, the applicant sought an adjournment of the hearing. However, on reflection, he asked that the hearing proceed. I was satisfied that he understood that this would require him to present the entirety of his evidence and argument today. He proceeded to do so.

The propounded grounds for relief

8 The stated grounds of relief mentioned in the draft order nisi are: (1) that the decision of the second Tribunal was affected by apprehended bias; (2) that the decision of the second Tribunal was affected by insufficient reasons; and (3) that the decision of the second Tribunal was made in circumstances which amounted to a breach of the rules of natural justice.

9 The relief sought appears to be outside the jurisdiction of the Federal Court of Australia, making it impossible for me now to remit the matter to that Court[3]. Certainly, the first and the third grounds are outside the Federal Court's jurisdiction[4]. As it has been elaborated, the second ground appears to represent an aspect of the complaint of apprehended bias. At least, that is as much as I could make of it. As such, it would be inappropriate to remit it to the Federal Court, even if that course were available, which I doubt.

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3 *Migration Act* 1958 (Cth) ("the Act"), s 476(2)(a).

4 *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 at [2] and [112].

The applicable principles

10 I take the following principles to govern my consideration of this application:

1. The applicant is entitled to have the order nisi issue if he makes out a reasonably arguable case on the grounds propounded or on any other grounds that emerge during the hearing of the application[5].

2. Upon current exposition of the law concerning the subject of constitutional writs, the case must demonstrate not merely that the officer of the Commonwealth concerned has acted erroneously or made errors of law or fact, but that he or she did so in a way that constituted "jurisdictional error"[6].

3. The applicant bears the onus of establishing an arguable case entitling him to relief[7]. Allegations of the possibility of bias and of a breach of the rules of natural justice must be firmly established. A mere sense of disquiet is not sufficient to secure relief[8].

4. The demonstration of a breach of the rules of natural justice or of apprehended or ostensible bias on the part of the officer of the Commonwealth concerned, if made out, could amount to jurisdictional error[9].

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5 *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 74 ALJR 1404 at 1406 [9]; 175 ALR 209 at 212.

6 *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* [2001] HCA 20 at [24]; cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 551-552 [105]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at [211]-[213].

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

8 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553.

9 *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* [2001] HCA 20 at [24]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at [213], applying *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 61 [41]; 176 ALR 219 at 231.

5. Whatever might be the limitations on the jurisdiction and powers of the Federal Court, the Act does not purport to, and could not, exclude the jurisdiction of this Court under the Constitution, s 75(v), to provide the constitutional writs there mentioned in a proper case to which those writs apply[10].

6. If the entitlement to relief is otherwise established, this Court retains a power to refuse such relief on discretionary grounds[11].

Procedural difficulties

11 The application faced a number of procedural difficulties. I have already mentioned the lack of a foundation in affidavit evidence for the relief sought. As well, the draft order nisi did not, in terms, seek a writ of certiorari, as is normal, to quash the decision of the Tribunal to make effective the issue of the constitutional writs claimed. Furthermore, the application is well out of time. If an application for certiorari were sought, for example, it would have to be made within six months of the decision impugned[12]. The present application is well outside that period. No apparent reason has been shown to excuse the delay or to warrant an extension of time, save for the inferences available as to the difficulties arising from the applicant's detention.

12 The judges of the Federal Court noted that the applicant came from a civil law country where, conventionally in administrative matters, the judge or magistrate adopts an active inquisitorial role in elucidating facts and clarifying issues. Because the applicant is unrepresented before me, I have endeavoured to do that today to the extent that I considered proper. Obviously, there are limits to the extent to which a judge, like me, exercising the judicial power of the Commonwealth under the Constitution and in this Court, can adapt the normal procedures of a federal court to meet the predicament of the applicant.

13 The applicant does not have counsel or a solicitor or any other advocate or representative. He has for a long time been detained in immigration detention. He is unable to earn funds to pay for a lawyer of his choice. He does not speak the English language. He claims to be a refugee. In such circumstances it would be an affront to justice for me to sit silent and allow him, unaided, to flounder in the mysteries of our court procedures and substantive law until he had adequately

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10 *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 at [113].

11 *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* [2001] HCA 20 at [24].

12 High Court Rules O 55 r 17.

demonstrated an incapacity to present relevant evidence and argument. The judicial power of the Commonwealth does not oblige those who exercise it to engage in a charade of justice. On the other hand, there are limits to what judges can do. I express a sense of disquiet about participating judicially in this Court in such an unequal struggle between an indigent unrepresented litigant, detained in custody, and the government of the Commonwealth, well represented and resourced.

14 I also express concern as to whether it is truly the intention of the Parliament that cases of this kind should occupy the time of the Justices of this Court, exercising the original jurisdiction of the Court in such a way. However, in default of a facility to remit the matter to another court or to have the application heard in some more satisfactory way elsewhere, I must shoulder the responsibility of determining it as best I can in the circumstances described.

The findings of the Tribunal

15 I have considered carefully the decision of the Tribunal and the reasons of the judges of the Federal Court which the applicant has placed before me. I have also considered his evidence and his submissions at the close of the evidence. I do not have the transcript of the evidence, or statements adduced, before the second Tribunal. Nor do I have, so far as it may be relevant, the decision of the delegate. However, the second Tribunal's decision covers 27 pages. On the face of things it appears, as I told the applicant, to be a thorough and detailed explanation of the Tribunal's reasons for its decision. It also appears to be fair, containing some conclusions favourable to the applicant and some unfavourable. It does not show on its face any defect of substance or procedure that I could perceive.

16 From the Tribunal's decision it emerges that the applicant is an Algerian national of Berber ethnicity. The essence of his application is that he has the well-grounded fear which is referred to in the Convention for the reason of his Berber ethnicity and for the reason of events that have occurred to him consequent upon that fact and the attitudes to him of religious fundamentalists and nationalists in Algeria and their supporters.

17 The applicant relied before the Tribunal upon a number of particular circumstances. These circumstances were reviewed in the Tribunal's decision. For example, the Tribunal accepted, on page 17 of its reasons:

> "that the applicant was involved in Timlitit [a Berber activist organisation] from 1988 and in the MCB [another such organisation] from 1983".

The Tribunal also accepted:

> "that he was a secretary of these organisations from the time he joined, and that in 1987, his arm and thumb were broken when the authorities were breaking up a Berber demonstration".

18 However, the Tribunal did not accept that, were the applicant to return to Algeria, he would suffer persecution by reason of his Berber ethnicity. On page 19 of its reasons, the Tribunal found:

> "After considering all the applicant's evidence as to his being detained in Algeria … the Tribunal does not accept that his claim of being detained many times, or at all, is credible."

And on page 24 of its reasons the Tribunal added, after reviewing national reports of the treatment of Berbers in Algeria:

> "After considering all the evidence, the Tribunal has found that in general, the Algerian government does not target Berber activists for persecution. However, the adviser submitted … that though Berber organisations are legal, this does not preclude that there is 'an unofficial policy of persecuting those Berbers such as [the applicant] who are actively promoting Berber separateness'. The Tribunal accepts that anything is possible, particularly in the context of Algeria, but nevertheless, it has to make a decision as to the real chance of persecution happening to the applicant for a Convention reason. On the evidence before it, the Tribunal finds that if the applicant returns to Algeria, there is not a real chance of persecution being done to the applicant in Algeria by the authorities in the reasonably foreseeable future, because of his Berber activities as he described them in his claims."

19 The Tribunal also did not accept statements made by the applicant concerning the interpretation to be placed upon a robbery which he suffered. The Tribunal, on page 20 of its reasons, found that:

> "three unknown men broke into the applicant's shop in March 1998, asked him for money, did not give a reason why they wanted the money, and threatened to kill the applicant if he did not have further money the next day".

On the same page of its reasons, the Tribunal concluded:

> "the Tribunal is not satisfied that the robbers selected him for extortion, even in part, for his race, political opinion, actual or imputed to him, or any other Convention reason".

20 For the foregoing reasons, the Tribunal expressed its ultimate conclusion on page 26 of its reasons:

> "if the applicant returns to Algeria, he will not face a real chance of persecution because of his Berber race and/or political opinion imputed to him by the authorities and/or the militants by reason of his Berber activism. The Tribunal finds that the applicant's fear of return to Algeria on the ground of his Berber activism is not a well-founded fear of persecution for a Convention reason."

Mention of humanitarian considerations

21 At the close of its reasons the Tribunal, on page 27, stated this:

> "Given the state of Algeria, the Tribunal notes that the applicant's case appears to raise humanitarian issues. However the Tribunal's role is limited to determining whether the applicant satisfies the criteria for the grant of a protection visa. A consideration of his circumstances on other grounds is a matter solely within the Minister's discretion."

22 The applicant stressed this last-mentioned statement. The statement does appear to indicate accurately the limits of the Tribunal's jurisdiction. By s 417 of the Act, the Minister is entitled to substitute a decision for the Tribunal on humanitarian grounds. However, this entitlement must be exercised by the Minister personally. It is not a power that belongs to the Tribunal. Accordingly, it is not a power that could be exercised by this Court reviewing the decision of the Tribunal with a view to considering the availability of constitutional relief.

23 I can understand why the applicant, having read the Tribunal's reference to humanitarian issues, regards that question as pertinent to his case. He apparently applied to the Minister for the exercise of the Minister's discretion. The Minister has not exercised the discretion in his favour and has given no reasons for his decision. The applicant mentioned other cases involving Berbers from Algeria where a protection visa was granted by the Tribunal. However, I know nothing of those cases or of the particular circumstances upon the basis of which those cases were determined. I can only deal with the present application on the material that has been put before me and in relation to the law applying to it.

Absence of demonstrated jurisdictional error

24 I am not sure that the applicant fully appreciated the distinctions which our law draws between an appeal on the merits from a decision such as that of the Tribunal and the limited jurisdiction which this Court enjoys to set such a decision aside for jurisdictional error. I endeavoured, during the hearing, to address his attention to the three grounds which were set out in his application. Those grounds were apparently drawn with the assistance of someone who understands the limited jurisdiction of this Court. The applicant did his best; as did I. However, obviously, he was at a severe disadvantage, not having an advocate or available legal advice. The subtleties of "jurisdictional error" have

sometimes escaped experienced judges. It is, therefore, not wholly surprising that the distinction might not have been fully understood by the applicant.

25 For all this, I consider that the applicant has said all that, unaided, he can say in complaint about the decision of the Tribunal. His essential complaint is that the Tribunal came to the wrong decision in his case on the facts placed before it. That is not a complaint that, without more, enlivens the jurisdiction of this Court to provide a constitutional writ. Specifically, it is a complaint that falls short of showing jurisdictional error on the part of the Tribunal. In the circumstances, I am not convinced, by what I have read and heard today, that any of the grounds relied on by the applicant has been made out as reasonably arguable. I see no evidence, in the matters placed before me, that supports any of the three complaints which the applicant makes.

Conclusion: application dismissed

26 In these circumstances, to extend the applicant's claim, and continuing loss of liberty, would be futile and unreasonable. Without skilled legal representation, the applicant has no real prospect that he could identify an arguable ground of jurisdictional error on the part of the Tribunal. Unaided by such representation, I can see none. The applicant has already been in Australia without a proper visa for two and a half years. The time has come to close this chapter in his life. He has exhausted the remedies available under the Australian legal system, save only for an appeal, by leave, to the Full Court of this Court. In my opinion, his application for an order nisi must be dismissed. In accordance with the normal rule it must be dismissed with costs.