HIGH COURT OF AUSTRALIA

KIRBY J

IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS, CERTIORARI AND PROHIBITION AGAINST THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

EX PARTE APPLICANT S190 OF 2002 APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S190 of 2002
[2002] HCA 39
19 August 2002
S190/2002

ORDER

1. Application refused with costs.

2. Certify for the attendance of counsel.

Representation:

S E J Prince for the applicant/prosecutor (instructed by the applicant/prosecutor)

S B Lloyd for the respondent (instructed by Clayton Utz)

CATCHWORDS

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S190 of 2002

Immigration – Refugees and protection visas – Constitutional writs of prohibition and mandamus sought against officers of the Commonwealth – Decision of officer of a federal department not to refer to the Minister a request to make a further application in Australia for a protection visa after an earlier such application has failed – Whether such non-reference was arguably manifestly unreasonable – Ministerial guidelines – Minister has no duty under Act to consider whether to exercise the power – Inferences available from the evidence – Appearance of applicant's name on electronic report of Federal Court decision – Subsequent enactment of legislative prohibition on identification of applicants for refugee status.

Practice – High Court – Application for orders nisi for constitutional writs – Application to add further party – Sufficiency of evidence to establish reasonably arguable case for relief – Evidence of departmental form – Absence of reasons – No duty to state reasons – Distinction between hearing on merits and constitutional review – Limits of constitutional relief.

Constitution, s 75(v).
Migration Act 1958 (Cth), ss 48A, 48B, 91X, 417.

1 KIRBY J. I have before me a claim for an order nisi for constitutional writs.

The applicant's claim for a protection visa

2 The applicant is a national of Mongolia of the minority Chinese ethnicity. He was born in that country in 1959. He arrived in Australia in October 1996 as a dependant of his then wife, who had a student visa. In October 1997 the applicant and his wife were divorced. In due course she returned to Mongolia with their two sons. The applicant stayed on. In March 2001, in Australia, the applicant applied for the first time for a protection visa under the *Migration Act* 1958 (Cth) ("the Act"). He claimed to have a well-founded fear of returning to Mongolia on the basis, in short, of his minority ethnicity and because of his knowledge of secrets and of corruption derived during his connection with the army and officials in Mongolia, for the most part during Soviet times.

3 On 11 May 2001 a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"), the first respondent, refused to grant the applicant a protection visa. This decision was reviewed by the Refugee Review Tribunal ("the Tribunal"). On 12 July 2001, the Tribunal affirmed the delegate's decision. I have read the Tribunal's decision which was placed before me without objection. It concludes that the applicant was lacking credibility, his evidence was said to be "weak", "suspicious" in material respects, "vague" in others and generally unconvincing.

4 As well, the Tribunal accepted certain country evidence about Mongolia. This described the discrimination that the minority ethnic Chinese suffer in that country. However, as described, this occurs on a personal and social basis, not on a public or formal basis. The government of Mongolia was reported by the Tribunal, and accepted, as respecting the constitutional rights of its nationals to return without restriction. As such reports go, Mongolia does not emerge from the Tribunal's reasons as a seriously oppressive country.

The decisions of the Federal Court

5 The applicant then applied to the Federal Court of Australia for judicial review. In September 2001 a single judge of that Court dismissed his application. The applicant then appealed to the Full Court of the Federal Court of Australia. His only ground before that Court was that the single judge had "made the wrong decision". On 18 February 2002, the Full Court (Spender, Gyles and Conti JJ) dismissed this appeal. A matter raised in the Full Court was that the applicant was concerned that his name had been published on the Internet

in the electronic report of the decision of the single judge. On this point, Spender J, speaking for the Full Court, said[1]:

> "The second matter which the appellant raised before this court concerns the continued publication of his name on the internet in the judicial decisions recorded on the SCALEplus database. Section 91X of the *Migration Act 1958* (Cth) did not come into effect until after the judgment of [the single judge] given [in] September 2001 and the prohibition contained in s 91X(2) is a prohibition binding on the Court. The section does not, after the commencement of s 91X, prohibit the publication by another party of judgments delivered before the coming into operation of that section. It is understandably a matter of continuing concern to the present appellant that the matters referred to in that judgment can still be sheeted home to the appellant by virtue of the continued publication of his name in the report available on the internet."

6 Notwithstanding these remarks, the Full Court dismissed the applicant's application. I was informed today that the report of the single judge's decision, reproducing the name of the applicant, still appears on the Internet. So far as I am aware, no application has been made to the Federal Court to delete the references to the applicant's name in the record of his Honour's decision. At least I was not told of any application to that effect.

The applicant's request for reconsideration

7 On 1 March 2002, following the judgment of the Full Court of the Federal Court, the applicant wrote to the Minister asking him to exercise his discretion to grant him a visa under s 417 of the Act, to allow him to remain in Australia on humanitarian grounds. The applicant also asked for consideration of his refugee status. This letter was construed, in the latter respect, to be an application by the applicant to lodge a second protection visa application within Australia pursuant to s 48B of the Act.

8 In the letter to the Minister the applicant expressed specific concern about the publication of his name on the Internet. He said:

> "[A]fter the rejection of my case in the Federal Court of Australia, All [sic] the details of my case, together with my real name have been published on the Internet. This has placed me in significant danger, of imprisonment and possible persecution and also almost certain execution, by the authorities, should I return to Mongolia."

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1 *NAAF v Minister for Immigration and Multicultural Affairs* unreported, Federal Court of Australia, 18 February 2002 at [10] per Spender, Gyles and Conti JJ.

9 Normally, such a second application for a protection visa is forbidden to a non-citizen whilst still in Australia[2]. The applicant has remained in Australia at all material times. Before me he tendered an affidavit in which he stated:

> "After some days, but before my Full Federal Court hearing, I received a call from overseas informing me that my given name and family name and case details had appeared on the Internet.
>
> At the hearing before the Full Bench of the Federal Court I told the Judge about the publication of my name and case details on the Internet. He asked the Minister's barrister about this but she said she had no idea. After this the Judge said: 'This is a different case'.
>
> I applied to the Minister under 48b [sic] and 417 but he refused me on 17 May 2002.
>
> I wish to challenge the Minister's decisions not to grant me a fresh application on the grounds that events have occurred in Australia (publication of my case details on the Internet) which jeopardise my safety should I be forced to return to Mongolia."

Refusal to forward the request to the Minister

10 By a letter of 14 May 2002 the Minister notified the applicant that he had decided not to consider exercising his power to grant a visa to the applicant on humanitarian grounds under s 417 of the Act. By a letter of 15 May 2002 an officer of the Minister's department notified the applicant that his request under s 48B of the Act would not be forwarded to the Minister. The applicant's requests were therefore rejected.

11 It is in these circumstances that I now have before me the applicant's application that I issue an order nisi for constitutional relief. Originally this application was directed to the Minister alone. It sought prohibition to forbid the Minister from acting on the earlier decision. It is not necessary for me to decide what would have been the case if the Minister had not personally considered the applicant's application under s 417 of the Act. The Minister's letter, which is before me, is signed by the Minister personally. This sufficiently shows that the Minister did so.

12 Instead, as it was developed, the applicant sought to add to the process a second respondent, Mr Henry Lemaniak. He is an officer of the Department of Immigration and Multicultural and Indigenous Affairs ("the Department"). For the purposes of s 75(v) of the Constitution it is not contested that Mr Lemaniak is

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2 See the Act, s 48A(1).

an "officer of the Commonwealth". Counsel for the Minister announced his appearance for Mr Lemaniak. He did so in order to resist the applicant's application to add Mr Lemaniak as a respondent. I postponed a final decision on that application pending clarification of the issues propounded by the applicant and, specifically, elucidation of whether the applicant could demonstrate a reasonably arguable case for relief against Mr Lemaniak in his capacity as an officer of the Commonwealth.

13 The basis for the application in the amended order nisi was, in effect, that the process of consideration of the applicant's application within the Department, and thus by the Minister, had miscarried. The applicant asserted that Mr Lemaniak, by failing lawfully to exercise his powers under the Act, had, in effect, mis-streamed his application. Instead of referring it to the Minister for the personal exercise of the Minister's discretion to permit a second application for a protection visa to be made onshore (as s 48B of the Act permits), Mr Lemaniak had, in effect, deprived the Minister, and thereby the applicant, of that facility. Accordingly, the applicant sought an order nisi for the constitutional writ of mandamus, addressed to Mr Lemaniak, commanding him to consider the applicant's application in accordance with law. He also sought an order nisi for a writ of prohibition, or possibly an injunction, addressed to the Minister, in effect, to prevent the carrying into force of the consequences of the earlier refusal to permit the applicant to reapply to the Minister.

The relevant provisions of the Act

14 It is now necessary to set out certain provisions of the Act. Relevantly, s 48A provides:

> "(1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:
>
> (a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or
>
> (b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);
>
> may not make a further application for a protection visa while in the migration zone.
>
> …
>
> (2) In this section:
>
> ***application for a protection visa*** includes:

> (aa) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; and
>
> …
>
> (b) an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol …"

And s 48B provides:

> (1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.
>
> (2) The power under subsection (1) may only be exercised by the Minister personally.
>
> …
>
> (6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances."

The "migration zone" referred to in s 48A(1) includes the Australian mainland where the applicant has been at all material times.

The Ministerial guidelines

15 The Minister has issued guidelines to assist in the implementation of these provisions and presumably to ensure that they are applied consistently within the Department. No contest was raised as to the power of the Minister to issue such guidelines. Nor was it suggested that the guidelines, as issued, were contrary to the provisions of the Act. I shall assume that such concessions were properly made[3].

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3 cf *Bedlington v Chong* (1998) 87 FCR 75 at 80-81.

16 The guidelines were tendered before me. They permit certain applications to be placed before the Minister personally. Others they permit, in effect, to be diverted by an officer of the Department, thereby sparing the Minister of any need personally to consider such applications. In such a field of administrative decision making, with a large number of applications, the course that has been adopted is perhaps understandable and arguably contemplated by s 48B(6) of the Act. In any case, it is provided for in the guidelines. Relevantly, the guidelines state (with emphasis added):

> "The purpose of these Guidelines is to provide directions for case managers when considering whether to forward to the Minister cases where he/she may wish to consider using the non-compellable and non-delegable power to allow a further application for a protection visa to be made.
>
> …
>
> 10. The Guidelines identify two categories of what constitutes additional information:
>
> - claims of Refugee *Sur Place*; or
> - other new claims provided by the applicant (which may or may not have been known to the applicant during consideration of the previous protection visa application)
>
> **CLAIMS OF REFUGEE SUR PLACE**
>
> ***(i) Changed Conditions in the Country of Origin***
>
> 11. Clients may claim that changes in the country of origin have occurred since consideration of the previous application which enhance the applicant's chances of making a successful claim under the Refugees Convention …
>
> ***(ii) Circumstances arising in Australia***
>
> 13. Where the applicant provides evidence that they have:
>
> - expressed views;
> - been involved in activities; and/or
> - been the subject of publicity;
>
> *which may jeopardise their safety in the country of origin for a Convention reason, since 'final determination' of the previous application for a protection visa, this needs to be considered in light of*:

- *whether such activities are likely to have come to the attention of the authorities in the claimant's country of origin*; and

- how they are likely to be viewed by those authorities.

…

20. **CASE MANAGERS SHOULD NOT ENGAGE IN A COMPLETE ASSESSMENT AND DECISION AT THIS STAGE, AS AN APPLICATION HAS NOT BEEN VALIDLY MADE.** However, they should ensure that their consideration is *consistent with Australia's international obligations to prevent refoulement*."

The Departmental consideration of the request

17 The only evidence the applicant proffered to indicate how the relevant officer had made the decision affecting him was a printed file note dealing with his case. By this, it appears the applicant's application to the Minister was considered by an officer in the Ministerial Interventions Unit of the Department. Relevantly, this document, which was admitted as exhibit A1, reads:

"The Manager
Ministerial Interventions Unit

I have found that:

❑ The purported further application/request is considered to meet the guidelines and a submission to the Minister will be prepared as soon as possible.

OR

☑ The purported further application/request is considered **NOT** to meet the guidelines.

OR

❑ The purported further application/request is not subject to the s 48A bar as the previous Protection Visa application was not a valid application in the context of the judgment in *MIMA vs Applicant A*.

Henry Lemaniak 22.3.02

(Case Manager) (Signature) (Date)"

18 From this exhibit I am prepared to infer that Mr Lemaniak is the officer who considered the applicant's application and made the decision there recorded.

The applicant submitted that this provided a sufficient evidentiary foundation for the grant of an order nisi. He argued that it should issue in order to permit a Full Court of this Court to consider his application. Reference was made in the papers to the applicant's fear if he were returned to Mongolia and his contention that, through the Internet, he was now known there to be a person who had claimed refugee status in Australia by reliance on grounds referring to secrecy, national security, high level corruption and the like.

Analysis of the sufficiency of evidence

19 In repeated decisions of this Court it has been made clear that the constitutional writs, and associated relief, are not available to allow a merits review of ministerial or administrative decisions or decisions of federal courts[4]. Relevantly to this case, this includes the decisions of the delegate of the Minister, of the Tribunal, of the primary judge in the Federal Court and of the Full Court of that Court. Nor are such writs available to allow a merits review of a decision of an officer of the Ministerial Interventions Unit of the Department, such as Mr Lemaniak. A constitutional writ under s 75(v) of the Constitution is only available for what are described as jurisdictional errors – errors going to the authority and power of the decisionmaker to do what was done[5]. Although I have myself favoured a broader view, I am obliged at the level of this application to conform to the approach of the Full Court before whom any order nisi granted by me would be returned.

20 The applicant did not claim any breach of the rules of natural justice (a fertile source of jurisdictional error). He confined his application essentially to the ground that there was no sufficient evidence that Mr Lemaniak had properly addressed his attention to the matter to be decided by him. Alternatively, he contended that Mr Lemaniak's decision, in the circumstances, was manifestly unreasonable in the sense explained in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[6] and the cases in this Court that have applied that principle. I will assume that the *Wednesbury* principle applies to the availability

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4 eg *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291.

5 cf *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [31], 226-230 [78]-[89]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 131 [132], 133-135 [137]-[141].

6 [1948] 1 KB 223.

of the constitutional writs, although it was developed by the common law long after the Constitution was adopted[7].

21 Under current doctrine it is not incumbent on an Australian official at common law, deciding even a matter so serious as a decision affecting an application for refugee status, to provide the reasons for that decision[8]. The decision in *Public Service Board of New South Wales v Osmond*[9] reversed a contrary conclusion in which I had participated in the New South Wales Court of Appeal[10]. Again, at this level of decision making, I am obliged to conform to the approach of the Full Court of this Court until it is changed. No submission was made to me that the decision of this Court in *Osmond* was wrong[11]. No statutory obligation was suggested that imposed a duty on Mr Lemaniak to provide reasons for his decision in more detail than appear in the document that he ticked and signed.

22 Upon this footing I find it impossible to say that, on its face, the document (exhibit A1) sufficiently establishes such an unreasonable decision by Mr Lemaniak that it can be said that no reasonable decisionmaker in his position could have made such a decision. The document indicates that the decisionmaker had the Minister's guidelines in mind. Indeed, I would infer that he had the guidelines before him. These refer expressly to claims by refugee applicants *sur place*. They also refer to risks that may have arisen since an earlier decision that applicants within Australia have been the subject of publicity that might have come to the attention of authorities in their country of origin so as to jeopardise their safety if they were returned there.

23 There is therefore nothing on the face of the documents to lift this case into the class of *Wednesbury* or "manifest" unreasonableness. Nor can it be said that the documents disclose a reasonably arguable case of a failure on the part of the official to consider relevant matters in reaching the decision or of taking into

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7 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 649-650.

8 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666-667.

9 (1986) 159 CLR 656.

10 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447.

11 cf *Mukherjee v Union of India* [1990] Supp 1 SCR 44; *Baker v Minister of Citizenship and Immigration* [1999] 2 SCR 817; *Stefan v General Medical Council* [1999] 1 WLR 1293.

consideration irrelevant matters going to jurisdiction or power. I would infer that Mr Lemaniak had before him the applicant's letter to the Minister making his assertions and his request that initiated the involvement of the Ministerial Interventions Unit. This squarely referred to the concern about publicity through the Internet. It is for the applicant to provide an evidentiary foundation for the relief he seeks. In another case, with different facts, the inferences about manifest administrative unreasonableness might be different. But on the basis of the evidence and materials propounded in this matter, I am not convinced that the applicant has established a reasonably arguable case.

24 The applicant submitted that the insertion in the Act, since his hearings in the Federal Court, of s 91X forbidding courts, including this Court, from naming applicants for refugee status, indicated a high legislative purpose of the Australian Parliament of safeguarding the identities of refugee applicants in Australia whose names would otherwise be published on the Internet to the world at large in the course of publishing Australian court decisions. However, as the Full Court of the Federal Court pointed out, the section was prospective in its operation. It was always possible for a court to use expedients to disguise the names of applicants. I have done so myself before s 91X came into force[12]. The Full Court in the present case did so by naming the applicant by identifiers and not by name. The naming of, and references to, the applicant before the single judge were limited. No application was made before his Honour to disguise the applicant's identity. The findings made by his Honour are not critical of Mongolia. There was no breach of Australian law in what occurred.

Conclusion and refusal of adjournment

25 In the foregoing circumstances the application to join Mr Lemaniak as a second respondent must be refused. In my view, it would be futile to join him. I would not grant any relief against him. I therefore dismiss that application.

26 When the applicant saw the way the wind was blowing in this respect, an application was made, virtually at the close of addresses, for an adjournment of the hearing of this application to permit further efforts to be made to enlarge the evidence that might be available to the applicant to found relief. Such a late application does not succeed. This case was argued in full. It should be decided by the Court on the basis of the evidence adduced on the return of the application.

27 Necessarily this decision does not restrict any further application that the applicant may make to the Minister, nor any further consideration of the matter

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12 eg *Re Minister for Immigration and Multicultural Affairs; Ex parte P T* (2001) 75 ALJR 808 at 809 [2]; 178 ALR 497 at 498.

by the Department or the Minister personally if that course is decided. Even now, such a fresh application is available to the applicant, as counsel for the Minister properly acknowledged, although the Minister has no duty to consider whether to exercise his powers. In saying this, I do not, of course, reflect on any decision that might, or should, be made in the circumstances.

Orders

28 In the light of my conclusions, it is unnecessary for me to consider the effect, if any, of the privative provisions introduced by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) and cognate legislation, enacted since the case was decided by the Federal Court. I express appreciation for the assistance that I received from both counsel in the determination of the application. The application for an order nisi is refused with costs. I certify for the attendance of counsel.