

HIGH COURT OF AUSTRALIA

GUMMOW J

An application for Writs of Certiorari, Prohibition,
Mandamus and Habeas Corpus and injunctions against
THE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS

FIRST RESPONDENT

AND

LUKE HARDY (constituting the Refugee
Review Tribunal)

SECOND RESPONDENT

Ex Parte SENIET ABEBE

PROSECUTOR

Ex Parte Abebe (S139-1997) [1998] HCA 16

Date of Order: 28 January 1998

Reasons for Judgment Delivered: 28 January 1998

ORDER

- 1. The Court accepts the undertaking given to the Court by counsel for the first respondent that until the determination of the matter, or earlier further order, the first respondent, his servants and agents, will not remove the prosecutor from Australia without first having given 72 hours notice in writing to the prosecutor or her solicitors.*
- 2. Direct that the application for prerogative relief under s 75(v) of the Constitution be, pursuant to O 55 r 2, made by notice of motion to a Full Court.*
- 3. Any further affidavits for the prosecutor be filed and served on or before 27 February 1998. Any further affidavits for the first respondent be filed and served on or before 27 March and any affidavits in reply be filed and served by the prosecutor on or before 17 April.*
- 4. Liberty to apply on seven days written notice.*

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5. *Certify for counsel.*

6. *Costs of the proceeding on 24 December 1997 and of today be costs in the cause.*

Representation:

J M Gersten for the prosecutor (instructed by Alex Lee)

G T Johnson for the first respondent (instructed by the Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ex Parte Abebe

High Court – Practice – Judicial review – Rejection of claim of refugee status – Conduct of proceeding – Refusal to grant order nisi – Referral of application to Full Court under O 55 r 2.

High Court Rules, O 55 r 2.

1 GUMMOW J. On 18 March 1997, the prosecutor made an application for a protection visa as provided in s 36 of the *Migration Act* 1958 (Cth) ("the Act") and subclass 866 in Sched 2 of the Migration Regulations. The application was made on the footing that the prosecutor was a non-citizen in Australia to whom this country has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). The application was refused on 21 June 1997. The prosecutor then applied for a review of the decision by the Refugee Review Tribunal ("the Tribunal"). That body, in written reasons given on 3 September 1997, held it was satisfied that the application for review was valid and that it had jurisdiction to review the decision. However, having considered the evidence, the Tribunal determined that the prosecutor is not a person to whom Australia has protection obligations under the Convention. It followed that she did not satisfy the criterion set out in s 36 of the Act for the grant of a protection visa. Accordingly, the Tribunal affirmed the decision not to grant a protection visa.

2 The decision of the Tribunal was given after, and took account of, the decisions of this Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*¹, *Applicant A v Minister for Immigration and Ethnic Affairs*² and *Minister for Immigration and Ethnic Affairs v Guo*³.

3 The prosecutor then applied to the Federal Court under s 476 of the Act for review of the decision of the Tribunal. The grounds upon which the Federal Court may proceed in such matters are limited to those specified in s 476, and s 486 renders the jurisdiction of the Federal Court exclusive of the jurisdiction of all other courts other than the jurisdiction of this Court under s 75 of the Constitution. Section 476(2) specifically excludes from the grounds available in the Federal Court the grounds:

"(a) that a breach of the rules of natural justice occurred in connection with the making of the decision; [and]

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power".

Further, s 476(3)(d) and (e) removes from the purview of the Federal Court the taking into account of " an irrelevant consideration ... in the exercise of a power"

1 (1996) 185 CLR 259.

2 (1997) 71 ALJR 381; 142 ALR 331.

3 (1997) 71 ALJR 743; 144 ALR 567.

and the failure in the exercise of a power "to take a relevant consideration into account".

- 4 The Federal Court application came before Davies J who dismissed the application⁴. Counsel for the prosecutor conceded that there has been, and will be, no appeal instituted to the Full Court of the Federal Court against his Honour's decision. Davies J held that he was not satisfied that there was an error in the decision of the Tribunal and, in particular, was not satisfied that there was any error which the Federal Court would have jurisdiction to correct. Davies J said:

"It is important to keep in mind that, in fulfilling the function conferred upon it by s 476 of the Act, the Court must look to the matters specified in the grounds of review. It is not the function of the Court itself to review the merits of the case or to decide the facts of the case. The facts are for the administrative decision-maker, the [Tribunal]. The function of the Court is to see whether there was something having the nature of an error of law in the decision of the Tribunal including an error in the approach of the Tribunal to the questions before it. The present case falls very much into the category of a fact case, for the Tribunal did not accept the substance of the claims made by the [prosecutor].

Dealing with refugee claims can be a difficult matter. It is very often a complex task for an administrative decision-maker to arrive at a view of the facts of the case. The decision-maker, in order to grant refugee status, must be satisfied as to a number of facts: who the applicant is, his or her country of nationality, why it was that the applicant left that country, whether the applicant did so for a fear of persecution and whether that fear of persecution was well-founded, as to the last of which the '*real-chance*' test will apply."

- 5 The prosecutor arrived in Australia on 7 March 1997 on a South African Airlines flight which originated in Johannesburg. She was detained under s 189 of the Act and remains in detention under s 196. It appears that the prosecutor had left her country of origin and nationality, Ethiopia, and had found her way to South Africa via Kenya. Davies J found that at relevant times the prosecutor gave three stories, differing substantially. The first was given in connection with a claim that she had made in South Africa for refugee status, the second was given when she arrived in Australia, and the third was her case put to the Tribunal.

- 6 His Honour identified the substance of the case as put to the Federal Court as one based upon the allegation that the prosecutor had been detained in Ethiopia and held in prison for two months by soldiers and that she had repeatedly been raped and abused during that period. The submission made to his Honour was that

4 Unreported, Federal Court of Australia, 11 December 1997.

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the Tribunal had erred in reaching a conclusion adverse to the prosecutor because there was no finding that these events did not occur. However, Davies J said:

"It seems to me, however, that the Tribunal did not accept that evidence and that the Tribunal made that clear. The Tribunal certainly considered it possible that the applicant might have suffered some form of abuse in the past and that her difficulty with the truth may be consistent with a disturbed past. However, the Tribunal did not accept that such abuse had occurred as a result of her arrest by government soldiers, that she had been arrested because she had been a member of AAPO or that the mistreatment of which she complained was attributable either to her membership of AAPO or to her ethnicity."

The term "AAPO" identifies the All Amhara People's Organisation, a body resistant to the present regime in Ethiopia. The prosecutor had claimed that members of the Amhara ethnic group such as herself were systematically persecuted by the regime.

7 Five days after Davies J delivered his decision, that is to say on 16 December 1997, an officer of the Department of Immigration and Multicultural Affairs ("the Department") wrote to the prosecutor at the Villawood Detention Centre stating:

"I refer to your immigration status in Australia. As you are aware, your application to the Federal Court was dismissed. You now have no outstanding matters for consideration before the Department and your status in Australia is that of an unlawful non-citizen.

This Department is now making arrangements for your removal from Australia and this letter is your notice to that effect."

8 On 22 December 1997, that is to say some days after the date of this letter, the prosecutor invoked the jurisdiction of this Court under s 75 of the Constitution seeking orders in effect to provide for judicial review of the decision of the Tribunal. I have referred to the effect of s 476(2) and (3) in curtailing the grounds which had been available in the Federal Court. The prosecutor sought to rely on grounds of review available only in this Court. Hence the fragmentation of the litigation.

9 Following discussions between the solicitor for the prosecutor and an officer of the Department, it became apparent that arrangements were being made to remove the prosecutor on 24 December 1997. However, on that day, the matter came before a Justice of this Court. The second respondent, the Tribunal, submitted to any order which the Court might make, save as to costs, and was excused. The Court heard the legal representatives of the prosecutor and the Minister and then made the following order:

"[U]ntil Wednesday, 28 January 1998 at 4pm, or until further or other order of the Court or of a Justice of the Court the First Respondent, his servants and agents, be restrained from removing the Prosecutor from Australia."

10 In view of the undertaking on behalf of the first respondent which has been proffered, and which the Court accepts, what now remains is the question of the further conduct of the principal application for relief. I would not grant an order nisi in the first instance. There is, I think, a real prospect that, as with the grounds which were available in the Federal Court, the case in this Court, in substance and reality, may well turn upon the administrative fact-finding by the Tribunal with a like outcome to that reached in the Federal Court. On the other hand, there has been no detailed consideration of the grounds urged in the written submissions in support of the substantive application for relief.

11 The history to date of this litigation, which I have outlined, indicates the procedural difficulties for all concerned that arise from the legislative fragmentation of what is, in truth, the one controversy between the parties. Further, s 485(3) of the Act states:

"If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the *Judiciary Act 1903*, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part."

In the present case, that provision operates to exclude the exercise of the remitter power for which the Parliament otherwise has made provision in s 44 of the *Judiciary Act*. That power of remitter is of considerable importance in facilitating the exercise by this Court of its primary and unique functions. These are, first, in the original jurisdiction, the disposition of certain matters arising under, or involving, the interpretation of the Constitution and, secondly, its function, subject to the grant of special leave, as a final court of general appeal for the whole nation. The result achieved by the Act as it now stands is to encourage the twin evils of cost and delay and, it would appear, to impede the efficient administration of the migration laws.

12 The state of the list with respect to the exercise by the Court of its primary and unique functions is such that there must be some delay, once the present matter is ready, in the availability of a date for a final hearing in the sittings of the Full Court which have been scheduled for this year.

13 The orders of the Court are:

1. The Court accepts the undertaking given to the Court by counsel for the first respondent that until the determination of the matter, or earlier further order, the first respondent, his servants and agents, will not remove the prosecutor

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from Australia without first having given 72 hours notice in writing to the prosecutor or her solicitors.

2. Direct that the application for prerogative relief under s 75(v) of the Constitution be, pursuant to O 55 r 2, made by notice of motion to a Full Court.
3. Any further affidavits for the prosecutor be filed and served on or before 27 February 1998. Any further affidavits for the first respondent be filed and served on or before 27 March and any affidavits in reply be filed and served by the prosecutor on or before 17 April.
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6. Costs of the proceeding on 24 December 1997 and of today be costs in the cause.