

HIGH COURT OF AUSTRALIA

KIRBY 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 (S139/97) [1998] HCA 10

Date of Order: 24 December 1997

Reasons for Judgment Published: 10 February 1998

ORDER

That until 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.

Representation:

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

R E Cheetham for the first and second respondents (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 Seniet Abebe

Immigration - Removal of immigrant from Australia - Claim of refugee status - Assertion of persecution by repeated rape whilst in official custody - Allegation of well-founded fear if returned to country of former habitual residence - Argument that Refugee Review Tribunal failed to deal with allegation - Request for interlocutory injunction to restrain immediate removal from Australia - Arguability of ground - Unavailability of further review in Federal Court - Exclusion of judicial review by Federal Court - Protection of utility of application to High Court for constitutional writ directed to Tribunal - Balance of convenience - Interlocutory injunction issued.

Practice - High Court - Interlocutory injunction - Protection of utility of application under Constitution, s 75(v) - Threatened removal of prosecutor from Australia - Exclusion of judicial review in Federal Court by *Migration Act* 1958 (Cth), s 476 - Arguability of contentions - Need for further evidence - Balance of convenience - Temporary injunction granted.

Constitution, s 75(v).

Migration Act 1958 (Cth), s 476.

1 KIRBY J. Before me, on Christmas Eve 1997, is an application for constitutional and other relief directed to the Minister for Immigration and Ethnic Affairs (the Minister), the first respondent, and to a member constituting the Refugee Review Tribunal (the Tribunal), the second respondent. The application has been returned urgently because there was filed in the Court yesterday an affidavit by the solicitor for the prosecutor deposing to information and belief that, unless restrained by order of this Court, it was the intention of the Minister to remove the prosecutor from Australia later today pursuant to the *Migration Act* 1958 (the Act).

2 Upon the filing of that affidavit I directed that the proceedings be listed before me at 9.30 am this morning to permit argument to be heard concerning the need to preserve the utility of the proceedings filed in this Court on 22 December 1997. Appearing before me today is counsel for the prosecutor, Ms Seniet Abebe, and counsel for the Minister. The Tribunal submitted to the orders of the Court save as to costs and it has been excused.

The course of the proceedings

3 In support of the original proceedings, the solicitor for the prosecutor deposed that the prosecutor had travelled from South Africa to Australia, arriving at Sydney Kingsford Smith Airport on 7 March 1997. She was refused immigration clearance. Since her arrival she has been kept in detention. She is in detention today and has not appeared personally in these proceedings.

4 On 18 March 1997 the prosecutor applied for refugee status. This application was refused by the Minister's delegate on 21 March 1997. On 25 June 1997 the prosecutor applied for review of that decision by the Tribunal. On 3 September 1997 the Tribunal, having apparently conducted two hearings, determined that the prosecutor was not a person to whom Australia had obligations under the Convention relating to the Status of Refugees (1951). The Tribunal therefore decided that the prosecutor did not satisfy the criteria in section 36(2) of the Act for a grant of a protection visa. That section, in effect, requires consideration of Article 1A(2) of the Convention which defines a refugee as any person who:

[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

A copy of the Tribunal's reasons has been placed before me in support of the application today.

- 5 On 30 September 1997 the applicant filed in the Federal Court of Australia an application for judicial review of the Tribunal's decision. The application was handwritten. It was subsequently amended and elaborated on 11 December 1997, by which time the prosecutor had obtained legal representation. The application for judicial review was heard on 11 December 1997 by Justice Davies. On the same day his Honour gave reasons for declining to disturb the order of the Tribunal. He dismissed, with costs, the application for review. In doing so his Honour made it plain that he was declining to hear those parts of the amended application for review which raised grounds which have been placed outside the jurisdiction of the Federal Court of Australia by sections 476(2) and 476(3) of the Act.

Exclusion of the Federal Court's jurisdiction

- 6 The subsections just mentioned delete, as grounds for judicial review in the Federal Court, decisions of the Refugee Review Tribunal based on certain of the traditional grounds of prerogative review, including that a breach of the rules of natural justice has occurred in connection with the making of the decision, that the decision involves an exercise of power that was so unreasonable that no reasonable person could have exercised the power in such a way and that the Tribunal has taken an irrelevant consideration into account in the exercise of the power or failed to take a relevant consideration into account in the exercise of the power.
- 7 The application to this Court invokes the Court's constitutional jurisdiction to provide review of the action of officers of the Commonwealth, including the Tribunal. At this stage, as was made plain at the commencement of the hearing, all that the prosecutor could hope to obtain is an injunction to restrain the Minister from removing her from Australia until this Court, in the orderly dispatch of its business, could consider the case with as much expedition as the other demands upon the Court would permit. It was not contested, nor in the face of the Constitution could it be, that this Court's jurisdiction to provide relief and to defend its power to hear and consider an application for relief remained, notwithstanding the amendments of the Act which have circumscribed the jurisdiction of the Federal Court.
- 8 There is obviously a certain inconvenience in excluding from the Federal Court's jurisdiction of judicial review the grounds which I have mentioned. At least this is so if the practical result is to divert such questions to this Court. However, that is what the Parliament has done and this application is a consequence. The application did not challenge the matters which were determined by Justice Davies. It sought to raise in this Court those matters which, by the Act, Justice Davies could not deal with.

The complaint of the prosecutor

9 In support of the application, counsel for the prosecutor addressed attention to a relatively narrow ground. He said that a consideration of the reasons of the Tribunal demonstrated an arguable case, that the Tribunal had failed to take into account a matter upon which the prosecutor had given consistent testimony, namely, that she had been arrested whilst in Ethiopia and whilst in official detention had been repeatedly raped. The findings of the Tribunal are critical of the prosecutor's truthfulness. The Tribunal found that she was an unreliable witness in this matter. It rejected her claim for refugee status on the ground of political opinion. It was not satisfied that she faced a real chance of Convention-related persecution in Ethiopia if she were removed from Australia. It therefore found that she was not a refugee.

10 However, the only reference in the Tribunal's findings to what is claimed to have been the prosecutor's consistent assertion that she had been raped whilst in official custody in Ethiopia is the following passage:

The Tribunal considers it possible that the Applicant might have suffered some form of abuse in the past: her difficulty with the truth might be argued to be consistent with a disturbed past; however, it is not able to accept on the Applicant's evidence to the effect that she and her husband were the sole victims of a 1994 police swoop on their small suburban branch of the AAPO in isolation of anyone else in the branch, such as its leader and office holders, and in isolation of the kind of events that attracted such action during that year.

The complaint advanced for the prosecutor is that this passage demonstrated either a complete failure on the part of the Tribunal to address the oppression of the prosecutor by repeated rape whilst in custody or the arrival at a conclusion which was manifestly unreasonable in the *Wednesbury* sense by failing to address that aspect of the prosecutor's evidence at all or in a satisfactory way.

11 The Minister declined to give any undertaking that the prosecutor would not be removed from Australia if this Court did not make an order restraining such removal. I have been informed that arrangements have been made for the prosecutor to be flown out of Australia on a flight at 9.40pm this evening unless an order is now made. The question is whether either until this Court can hear the substantive application filed by the prosecutor, or until some shorter time, I should now provide the order restraining the Minister which the prosecutor seeks.

12 In answer to the contention that the omission of the Tribunal to deal expressly with the consistent assertions of rape made before the Tribunal by the prosecutor amounted to error, it was put on behalf of the Minister that such omission did not represent a failure to take into account a relevant consideration. It is well

established that the Tribunal's reasons should not be read in a pernicky way¹. It is not necessary for a Tribunal to deal with every factual issue which is contested. The general conclusions on the credibility of the applicant and the context of the reasons were said to be sufficient to demonstrate that the Tribunal adequately took into account the assertion of rape or at least not to demonstrate that there was either a failure to take into account a plainly relevant consideration or the arrival at a conclusion which was unreasonable in such a way as would attract judicial intervention.

Rape as a basis for refugee status

- 13 There is of course force in these arguments. On the other hand, the use of rape as an instrument of oppression, particularly directed at women and by persons in authority in oppressive regimes, is arguably a matter of importance. As such, it is arguably a matter of objection that it did not find its way into the reasons of the Tribunal. But to judge whether, in the context, that omission was an acceptable omission, it would be necessary to have more material before the Court than has been placed before me today.
- 14 It would be necessary, for example, to understand whether it is true, as is claimed for the prosecutor, that, whatever the other matters upon which her credit was shaken, she had consistently contended that she was raped whilst in official custody in Ethiopia; whether that contention adds strength to the ground for refugee status which she advanced; and whether, therefore, in the context of the matters which were litigated before the Tribunal, the omission of the Tribunal to make express reference to that issue is a significant omission or a matter of no real importance.
- 15 In recent times there has been a livelier attention to the way in which rape, principally of women, can sometimes be used as an instrument of State policy to oppress women, to intimidate them and to deny them their fundamental human rights². It is always possible that courts and tribunals may not be alert to the significance of this consideration. Whether the Tribunal in this case made such an

1 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-291.

2 See Hathaway, *The Law of Refugee Status* (1991) at 112-113; Goodwin-Gill, *The Refugee in International Law* (1996) at 233, 255; Charlesworth and Chinkin, "Violence against women: A global issue" in Stubbs (ed) *Women, Male Violence and the Law* (1994) at 13, 27; Charlesworth, "Women in International Law" (1994) 19 *Australian Feminist Studies* 155; Nordstrom "Rape: Politics and Theory in War and Peace" (1996) 23 *Australian Feminist Studies* 147; Oosterseld and Copelon, "First Rape Charges Brought at the Rwandan Tribunal" (1997) 4 *Human Rights Tribune*, No 4 at 16.

error cannot be determined on the material before me. However, there is sufficient in that material to justify at least a short intervention by this Court which will allow that question to be examined and made the subject of further evidence and argument. Very properly, for the Minister it was agreed that, if it were shown that rape was used as an instrument of State policy to persecute a person for reasons of their race, nationality, membership of a particular social group or political opinion (relevantly), that could give rise to the well-founded fear which would ground a claim to refugee status and provide a basis that would impose upon Australia duties under the Convention and therefore under Australian law.

Conclusion: adjournment and injunction

- 16 I am therefore of the view that the prosecutor should have the opportunity of placing the necessary additional material before the Court. The result will be that an order will be made. It is accepted that the prosecutor will remain in detention until the matter comes back to the Court in late January 1998, as I would propose. The additional period of a month is not substantial, given that the prosecutor has already been in detention for almost nine months. No submissions were put as to the balance of convenience. It was conceded, correctly in my view, that there was no undertaking which should properly be extracted from the prosecutor for the adjournment which I propose. I will not, therefore, seek any such undertaking.
- 17 The adjournment will mean that the prosecutor will not be removed from Australia today. But it will also mean that her application to this Court will come again before a single Justice in late January 1998 when a determination can be made, with all relevant material, as to whether the case is one which should go forth to a hearing on the merits or, as the Minister contends, is one which should be dismissed as manifestly meritless.
- 18 It is no light thing to make an order restraining the Minister from proceeding to remove the prosecutor from Australia. The prosecutor has exhausted almost all of the many avenues of review of the decision which was made rejecting her claim for refugee status. But it is equally no light thing to deny a person, who has invoked the jurisdiction of this Court under the Constitution of this country, the opportunity of having the protection of the law of this country. That protection includes the protection of the constitutional writs to ensure the manifest lawfulness of the conduct of officers of the Commonwealth.

Order

- 19 The order which the Court makes is that until Wednesday, 28 January 1998 at 4 pm, or until further or other order of the Court or of a Justice of the Court the Minister, his servants and agents, be restrained from removing the prosecutor Seniet Abebe, from Australia.

