

HIGH COURT OF AUSTRALIA

HAYNE J

In the matter of an application for a Writ of Prohibition
against the MINISTER FOR IMMIGRATION
AND MULTICULTURAL AFFAIRS

FIRST RESPONDENT

AND

BRENDAN KISSANE in his capacity
as a member of the REFUGEE REVIEW
TRIBUNAL

SECOND RESPONDENT

Ex Parte SE

PROSECUTOR/APPLICANT

*Re Minister for Immigration and Multicultural
Affairs & Anor; Ex Parte SE (M99-1998) [1998] HCA 72*
Date of Order: 16 November 1998
Date of Publication of Reasons: 25 November 1998

ORDER

- 1. Application for order nisi refused with costs.*
- 2. Interlocutory injunction restraining the applicant's removal discharged.*
- 3. Certify for counsel.*

Representation:

D S Mortimer for the applicant (instructed by Refugee and Immigration Legal Centre)

C Gunst QC for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

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

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs & Anor; Ex Parte SE

Immigration – Refugee – Protection visa – Refugee Review Tribunal affirmed decision to deny protection visa – Whether decision of Refugee Review Tribunal unreasonable – Whether failure to take relevant considerations into account – Whether Refugee Review Tribunal followed statutory procedure – Whether proposed removal unlawful.

Administrative Law – Application for prerogative relief – Application for interlocutory injunction restraining removal.

Migration Act 1958 (Cth) – ss 48B, 198(6), 417, 420(2)(b).

1 HAYNE J. The applicant seeks orders nisi for prohibition and certiorari and an interlocutory injunction restraining the first respondent from removing him from Australia until the hearing and determination of the proceedings.

2 The applicant arrived in Australia on 2 October 1997 on a British Airways flight. He did not produce proper documents and he was refused immigration clearance. On the next day, 3 October 1997, a delegate of the Secretary of the Department of Immigration and Multicultural Affairs gave notice to British Airways pursuant to s 217(1) of the *Migration Act* 1958 (Cth) ("the Act") requiring British Airways to transport the applicant from Australia.

3 On 8 October 1997, the applicant applied for a protection visa as a refugee. In later documents the applicant provided to the Department he said that "[i]f I am to return to Somalia, given that I am from the Chikal tribe¹, I will be probably killed by the rival more powerful tribes who now control Somalia". After an interview with officers of the Department, the application for a protection visa was refused. On 30 March 1998, the applicant applied to the Refugee Review Tribunal for review of the decision. He sought, and obtained, an oral hearing of his claim. Written submissions were provided by solicitors on his behalf but he was not represented at the oral hearing. On 21 May 1998, the Tribunal affirmed the decision not to grant a protection visa.

4 On 29 October 1998, the applicant was taken to Melbourne airport to board an aircraft bound for Perth where it was intended he should board an international flight bound for Johannesburg. The applicant refused to board the aircraft in Melbourne and he was eventually returned to the Immigration Detention Centre. On 30 October, the applicant was given a further notice of intention to remove him from Australia. Application was then made to this Court for an injunction temporarily restraining his removal and an order was made to that effect. That order has been extended from time to time.

5 The applicant contended that an order nisi should be granted which would give four grounds:

"1. The proposed removal by the Minister, his servant and agents of the prosecutor from Australia pursuant to s 198 of the *Migration Act* is unlawful in that:

(a) It involves the detention in custody of a non-citizen by a private contractor, where the detention is for the purpose of removing the non-citizen from Australia and delivering him or her to his or her

1 The name of the tribe is more often spelled "Shikal" in the papers.

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country of nationality, and such detention is not authorised by the *Migration Act* 1958, nor by any other law of the Commonwealth.

(b) The delivery of a non-citizen to a country which is in a state of civil war and lawlessness, and where there is a substantial likelihood that the person may be killed, detained arbitrarily, tortured or may disappear, is an unreasonable exercise of the power to remove a non-citizen from Australia.

2. The Second Respondent erred in construing the definition of 'persecution' for the purposes of the Refugees Convention as not including communal violence within the framework of a civil war.

3. The findings of the Second Respondent that the experiences of the applicant and his family were not capable of constituting persecution for reasons of the applicant's membership of the Shikal clan and therefore his fear of persecution was not for a Convention reason, and was not well founded was so unreasonable that on the evidence before the tribunal no reasonable decision maker could have reached it.

4. The RRT erred in law in that it did not follow the procedures set out in s 420(2) of the Act and did not act according to substantial justice and the merits of the case."

6 It is convenient to deal first with the contentions that were made about the arrangements for removal.

7 The applicant submitted that there was sufficient material in the evidence adduced in the hearing before me to warrant granting an order nisi that would permit consideration of "[t]he lawfulness of the removal of the [applicant] from Australia, where there is extra-territorial custodial restraint exercised over him (whether by an agent of the Minister and unlawfully because it is excessive or unreasonable; or whether by a person not the agent of the Minister and therefore unlawfully)". It was submitted that the evidence revealed a case for inquiry whether the removal of the applicant from Australia would involve delivery of him into the custody of a company called P & I Associates Pty Ltd (or some other private contractor)² or his detention in custody otherwise than by an officer of the Commonwealth authorised under the Act to detain him.

8 The evidence to support the contention that the applicant would be detained by or in the custody of any person once he had boarded an aircraft bound out of Australia and that aircraft had been sealed for take-off, was, at best, exiguous. The

2 It is not entirely clear what is the proper name of the contractor concerned. Nothing turns on this. I will refer to it simply as "P & I Associates".

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applicant deposed that when he went to the airport on 29 October 1998 an officer of the Department introduced him to a man who would "escort" him to Johannesburg. When he refused to board the aircraft the man who had been introduced to him as the escort said that he would carry him on board the aircraft and that he would handcuff him. This threat of the application of forcible restraint was submitted to be the more significant when regard was had to an internal memorandum produced in evidence before me (and taken from the files of British Airways) that recorded that "P & I Associates in JNB" [presumably Johannesburg] had been "advised of the situation" and that their response was to suggest sedation of the applicant. The memorandum records that the Department rejected this proposal (and, it seems, did so with some asperity).

- 9 So far as the evidence before me goes, P & I Associates or an associated organisation was asked by the Department (and agreed) to obtain travel documents for the applicant that would enable him to re-enter Somalia. There is, however, material which suggests that the role of P & I Associates in relation to the applicant's travel may not be limited in that way. Thus, British Airways has written to the Department that P & I Associates "will take responsibility" for the applicant on his arrival in Johannesburg and that "a South African national has been enlisted to escort [the applicant] up to Nairobi on South African Airways and from Nairobi, a Tanzanian national will be taking over". The document also says that the applicant would be accommodated in the transit hotel at Johannesburg after his arrival at that airport. A brochure tendered in evidence suggests that P & I Associates is a company that

"specialises in offering a complete management service in the repatriation of inadmissibles, deportees, stowaways, unlawful non-citizens ("inadmissibles") to the individual's country of origin."

It goes on to say:

"We render a comprehensive identification and documentation service, we assist and conduct all consular and diplomatic liaisons to ensure an accurate, efficient and expedient identification and documentation process.

We take care of, and manage, all travel arrangements, escort and security services to remove the inadmissible from its current location to the Republic of South Africa, (if appropriate) to be held in transit detention whilst the identification and documentation process is completed, and thereafter, to the individual's country of origin."

- 10 It was from material such as this that the applicant contended I should infer that there was a case for investigation whether the applicant's removal from Australia would involve his being restrained or held in custody by P & I Associates (or some other private contractor), either in or outside Australia, or would involve

his restraint or detention in custody otherwise than by an officer of the Commonwealth authorised under the Act.

11 I would be prepared to find, to the limited level of satisfaction necessary for determining an application such as the present, that British Airways is unwilling to transport the applicant from Australia unless another person, who would be primarily charged with ensuring that there is no disturbance in flight, travels with the applicant. So far as the evidence goes, British Airways has retained P & I Associates to provide such a person. I would also be prepared to find that British Airways had made some arrangement with P & I Associates under which that company would provide a similar escort for the applicant on his flights from Johannesburg to Nairobi and from Nairobi to Mogadishu. In addition, I would be prepared to find that the arrangements made between British Airways and P & I Associates extend to the provision by P & I Associates of some kind of escort and supervision of the applicant during his time in Johannesburg.

12 There is, however, no basis revealed in the evidence before me for suggesting that any of the arrangements for escort or supervision have been made at the behest of the first respondent or his Department. Indeed, it was the submission for the first respondent that the removal of the applicant would be effected by his being placed aboard an aircraft bound from Australia to Johannesburg with papers sufficient to gain him entry to Somalia, and that whatever steps were taken by British Airways (as the person bound to transport him from Australia) for ensuring that there was no disturbance on the flight, or that he travelled onwards to Somalia, were matters entirely for the carrier, not for the Minister or the Department³. Such evidence as there is (including the evidence of the departmental officers concerned) supports this submission. None of the material before me gives cause to doubt that what is intended is as the submission described it. If the airline, or those engaged by the airline, were to seek to exercise some restraint over the applicant, beyond the confinements that are the consequences of being in an aircraft in flight and of being in the transit area of an international airport with no papers permitting entry to the country concerned, there is nothing in the material to suggest that this additional restraint would be imposed by or on behalf of the first respondent or at his direction. It would be entirely a matter for the airline and those whom it has engaged and would be done with no authority - actual or pretended - given by the first respondent. There is, in my view, no factual basis established for the grant of an order nisi for prohibition or the grant of injunction restraining removal on the basis that the first respondent proposes removal of the applicant from Australia by a means which includes extra-territorial custodial restraint or his detention in custody by a private contractor.

3 The material suggests that Qantas Airways will provide at least some part of the carriage but, again, nothing turns on this fact and I do not notice it further.

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- 13 There being no sufficient factual basis for the contention which it was sought to advance, it is unnecessary to consider the several questions about the ambit of the statutory power to remove an unlawful non-citizen that were debated in argument. The first respondent submitted that s 198(6) of the Act obliges officers of the Department to remove the applicant. That sub-section provides:

"An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

- (a) the non-citizen is a detainee; and
- (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
- (c) one of the following applies:
 - (i) the grant of the visa has been refused and the application has been finally determined;
 - (ii) the visa cannot be granted; and
- (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone."

It is not necessary to consider whether removal of an unlawful prohibited non-citizen is complete when the aircraft or vessel carrying that person travels beyond Australia or whether removal extends to the port at which that aircraft or vessel first calls outside Australia or some other, more distant place. The applicant accepted that the power to remove necessarily carried with it a power to exercise, in some circumstances, a degree of force to effect the removal. (Reference was made in this connection to several deportation cases⁴.) It was submitted that the present case required consideration of what degree of force might be applied to effect the removal of an unlawful non-citizen, and whether that force could be applied only until the person concerned had left Australia or could be applied to this applicant in the course of his journey: for example while he was in Johannesburg. It is not necessary to consider whether the obligation to remove an unlawful non-citizen carries with it a power to exercise any (and, if so, what) force or physical restraint over that person until arrival at the first port of call or ultimate destination. It is not necessary to consider those matters because there is no

4 *Robtelmes v Brenan* (1906) 4 CLR 395; *Ferrando v Pearce* (1918) 25 CLR 241; *Znaty v Minister for Immigration* (1972) 126 CLR 1.

evidence to suggest that the Minister or the Department or any officer of it threatens or intends to assert such a power over the applicant.

Removal to Somalia unreasonable

14 It was submitted that on its true construction s 198(6) of the Act not only does not oblige an officer to remove the applicant to a destination that is unsafe for the person removed, the provision does not permit it. Thus, it was submitted that it is arguable that there is no power to remove the applicant to Somalia because his destination in that country, Mogadishu, is unsafe and he is at risk of death, arbitrary detention or other serious harm in that place.

15 Section 198(6), so far as presently relevant, provides that "[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen" if certain conditions are met. It may be noted that the sub-section addresses the time of removal by specifying that time as being "as soon as reasonably practicable" but otherwise it imposes what (on its face) is an absolute obligation on an officer to remove an unlawful non-citizen. (Remove is defined as meaning "remove from Australia"⁵.)

16 Counsel for the first respondent contended that the evidence revealed that although Mogadishu was once the scene of bitter civil war fighting, that has now been resolved and Mogadishu is a safe destination for the applicant. There was, however, other evidence which suggested that this was not so and it is arguable that Mogadishu is an unsafe destination for the applicant in the sense that he may be at risk in the way he described. This aspect of the applicant's case must, however, be approached on the assumption that he is not entitled to a protection visa. It must also be approached on the basis that the Act makes explicit provision for the Minister (in his or her unfettered discretion) to permit persons such as the applicant to remain in Australia despite their not being entitled to protection as refugees⁶. Indeed the applicant has unsuccessfully sought the exercise of such powers. It must also be approached on the basis that there is nothing in the evidence to suggest that the applicant could travel and be admitted to some country other than Somalia.

17 I do not accept that it is arguable that the apparently general obligation cast on officers to remove unlawful non-citizens is limited in the particular way for which the applicant contended.

5 s 5.

6 See ss 48B, 417. Each section provides that the Minister does not have a duty to consider whether to exercise the power.

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18 The applicant submitted that s 198(6) should be read as limited to obliging removal only when to do so is reasonable. It was submitted that to remove to a place where the applicant's human rights may be violated was not reasonable and that the Act should be construed as not permitting or requiring action that would violate Australia's obligations under various international instruments concerning human rights⁷.

19 To read the provisions of s 198(6) of the Act as limited in the way for which the applicant contends would, in effect, require the first respondent to exercise his power to permit the applicant to remain in Australia despite his having been refused refugee status. The power under ss 48B and 417 to permit persons such as the applicant to remain in this country are powers that are expressed as discretionary powers which the Minister is not under a duty to consider using⁸. That being so, the construction of s 198(6) for which the applicant contends is not arguable.

20 I am therefore not prepared to grant an order nisi on either part of the first of the stated grounds.

The decision of the Refugee Review Tribunal

21 Although the applicant put the matter in a number of slightly different ways, the essence of the attack made on the decision of the Refugee Review Tribunal was that it had not asked itself the right question when it considered the applicant's case. It is as well to set out part of the Tribunal's decision. Under the heading "Findings and Reasons" the Tribunal said that it accepted "that the Applicant is Somali, a member of the Shikal clan and was formerly a goldsmith". It went on to say:

"The Tribunal accepts that the Applicant's father and brother were killed in 1991 at the start of the war. The Tribunal also accepts that the Applicant's sister committed suicide. However the Applicant clearly states that his clan has remained outside the conflict that has plagued Somalia since 1991. He describes his clan as the victims of war. He makes no claim that his clan has been targeted or the subject of any persistent harassment. He states his delay leaving Somalia was because he did not have the money at hand to leave and desired to assemble his family before he departed. None of this suggests that the Applicant was targeted or in any way feared that he may be targeted because of his clan. He has no doubt had to move from place to place to avoid the fighting but this has been in the context of fleeing war."

7 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

8 ss 48B(6), 417(7).

After referring to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* and the decision of this Court in *Applicant A v Minister for Immigration and Ethnic Affairs*⁹, the Tribunal went on:

"It is apparent that fleeing war or other civil disturbances does not bring an Applicant within the Convention. In this case the Tribunal is satisfied that the Applicant has at times had to flee the civil war or disturbance. The Tribunal is also satisfied that neither the Applicant nor his family were the specific targets of any instances of harassment serious enough to amount to persecution on account of the Applicant's membership of his clan, which the Tribunal considers to be a particular social group, or on account of his ethnic origin or for any other Convention reason.

Given that the Applicant has not been the target of harassment in the past, and given that there is no country information available to the Tribunal which indicates that members of the Applicant's clan face problems, other than those that have occurred in the context of the general breakdown of law and order, the Tribunal is satisfied that if the Applicant returns there is no real chance that in the reasonably foreseeable future he will face persecution for a Convention reason. As a result the Tribunal finds that the Applicant does not have a well-founded fear of persecution for a Convention reason."

22 It was submitted that this reveals that the Tribunal did not consider whether the applicant had a well-founded fear of persecution on account of his membership of the Shikal clan but instead considered only whether the various events that had occurred to members of his family had occurred as the result of civil war or disturbance. That is, it was submitted that the Tribunal had fallen into the kind of error identified by the Full Court of the Federal Court in *Abdalla v Minister for Immigration and Multicultural Affairs*¹⁰. I do not accept that this argument is open.

23 Properly understood, the reasons reveal that the Tribunal did consider what would happen to this applicant if he returned to Somalia and did consider whether the fears he said that he held were well-founded fears of persecution on account of his membership of the Shikal clan. That view is reinforced by consideration of the transcript of the oral hearing before the Tribunal. In the course of that hearing the applicant was asked what he thought would happen to him if he went back to Somalia and he replied that he would be killed. The Tribunal asked him "Who by? Who is after you in Somalia?" and this elicited the answer "Yes, the people who already took my possessions and my shops, they are still there. If they saw me hanging around, they would see that I am first seeking for revenge, or I am seeking my rights to get my shops back and my ... so I have to get away from their family

9 (1997) 190 CLR 225.

10 Unreported, 20 August 1998.

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and away from them and that's ...". Making, as one must, generous allowance for the fact that the transcript of the oral hearing is obviously imperfect and that the oral hearing was conducted through an interpreter, the answer which the applicant gave to the direct question asked of him does not reveal fear of persecution on account of his membership of a clan. As counsel for the applicant pointed out, the various documents that had been submitted on behalf of the applicant all sought to make such a case. It would, then, be surprising if the Tribunal did not consider it. Both the reasons given and the course of the hearing reveal that the Tribunal did so. There is, in my view, no basis for concluding either that the Tribunal did not address the question raised by the applicant or that it reached a decision which was not reasonably open to it. The Tribunal dealt with the question in its reasons for determination and there was material before it upon which it could reach the conclusion that it did. In my opinion this case is very different from that considered by the Full Court of the Federal Court in *Abdalla*. It is, therefore, unnecessary to examine whether it is arguable that the decision of the House of Lords in *Adan v Secretary of State for the Home Department*¹¹ is wrong.

24 I am not persuaded that either the second or third proposed ground is arguable.

Failure to comply with procedures

25 Section 420(2)(b) obliges the Tribunal in reviewing a decision to "act according to substantial justice and the merits of the case". It was submitted that the Tribunal did not sufficiently investigate the case that the applicant sought to make and that it did not sufficiently inquire as to whether he had a well-founded fear of persecution because he is a member of the Shikal clan. It is enough to say that the Tribunal asked the applicant to explain why he feared return to Somalia. It is not arguable that the Tribunal erred in fulfilling its obligations under s 420(2)(b) of the Act. It is therefore unnecessary to canvass issues of the kind that are dealt with in *Eshetu v Minister for Immigration and Multicultural Affairs*¹².

26 The application for order nisi is refused. The interlocutory injunction restraining the applicant's removal is discharged.

11 [1998] 2 WLR 702; [1998] 2 All ER 453.

12 (1997) 71 FCR 300; an appeal to this Court and related applications for prerogative relief have been heard but not determined.