HIGH COURT OF AUSTRALIA

Simsek

Vs.

Macphee

Stephen J.(1)

10 March 1982

STEPHEN J.

1. The applicant is a Turkish national who arrived in Australia from Turkey on ensure that he is not deported from Australia before the determination of an action which he has instituted in this Court and also to secure his release from custody. He claims that he is entitled to status as a refugee under the 1951 Geneva Convention relating to the Status of Refugees and the associated Protocol of 1967, to each of which Australia is now party. (at p637)

2. The applicant, although only twenty when he arrived in Australia, had had a troubled history in his own country which is relevant only because it is said to have been due to his political affiliations and activities and is relied on as giving rise to his status as a refugee. His experiences in Turkey included a serious assault on him by political opponents, another occasion when he was stabbed, his receipt of death threats and the bombing of the house where he lived in Ankara. He had at times carried a gun and had undertaken what he described as armed protective patrols of his village at night. In December 1978 he had been sentenced to twelve months' imprisonment on a charge of using a firearm. Some little time after his release from imprisonment he was charged and convicted by a military court of wounding with intent to kill. Both of these charges were apparently associated with his political activities. He was released on bail pending appeal and fled Turkey believing, he says, that he would not get a fair hearing of his appeal because of his political beliefs. (at p638)

3. The applicant arrived in Australia in January 1981 as a holder of a Turkish passport and was granted a three months' temporary entry permit. He at that time made no claim to refugee status. He overstayed the term of his permit and in May 1981 went through a form of marriage with an Australian woman in the hope that this would enable him to remain in Australia; he did not, however, cohabit with his wife at any stage. The day after his marriage he applied for residence status in Australia and was subsequently interviewed by officers of the Department of Immigration and Ethnic Affairs who learned that he had paid his wife $1,000 to marry him and who concluded correctly that the marriage was one of convenience only. On 1 September 1981 he was arrested as a supposed prohibited immigrant and was detained until, on 17 September, he was released on bail despite objections by the Commonwealth. (at p638)

4. Meanwhile on 15 September, two days earlier, the Minister for Immigration and Ethnic Affairs had ordered the applicant's deportation; however this did not become known to Departmental officers in Melbourne until 18 September, the day after the applicant had been granted bail. The applicant, in terms of an undertaking which he had given to report daily, reported to the Department

in Melbourne on 18 September, the day after his release on bail, and was again arrested, this time as a person in respect of whom a deportation order was in force. He has been held in custody ever since. (at p638)

5. It was after his first arrest that, on 7 September, he for the first time applied to the Department seeking refugee status. This led to a lengthy interview with officers of the Department; his application for refugee status is at present being considered by an interdepartmental committee, the Committee for Determination of Refugee Status, a committee which is neither constituted nor regulated by statute but which makes recommendations to the Minister concerning the implementation of the Convention and Protocol. Although that Committee has received written representations made on the applicant's behalf, his legal advisers have been denied the opportunity of representing him in person before the Committee, which apparently does not operate by means of formal hearings but considers each case on the written materials before it. (at p639)

6. On 15 February 1982 the applicant instituted proceedings in this Court against the Minister and the Commonwealth. By his statement of claim he alleges that the Commonwealth is bound to conform to the provisions of the Convention and Protocol and those of the 1977 International Covenant on Economic and Cultural Rights, ratified by Australia in 1980. He claims that he was a refugee on his arrival from Turkey; that he is held in custody while the Committee considers his application for refugee status; that he has been refused the opportunity to make, or have made on his behalf, representations before the Committee or the Minister and that he will be deported if the Committee does not accord him refugee status. Various breaches of the Contention, Protocol and Covenant are alleged, those relating to the Contention and Protocol being alleged on the footing that he is entitled to refugee status; there are also allegations of breaches of the Administrative Decisions (Judicial Review) Act 1977 and of failure to observe the principles of natural justice. (at p639)

7. The present interlocutory relief, so far as it is directed against the applicant's threatened deportation, is sought upon three alternative bases. First, it is said that the Convention and Protocol oblige the Commonwealth to accord the applicant certain rights and that this is an obligation enforceable by suit in this Court; the Commonwealth is denying the applicant these rights, which includes a right not to be expelled from Australia except on grounds of national security or public order and then only in accordance with due process of law and after opportunity to be represented before competent authority. The applicant complains of the denial of representation before the Committee or the Minister and fears that as a result he will not be accorded the refugee status to which he is entitled and will instead be deported to Turkey before he has the opportunity of litigating his claim before the Court; hence his application for interlocutory injunctive relief. (at p639)

8. The matter is also put another way: it is said that the Commonwealth, having entered into the Convention and Protocol, has received his application for refugee status, has informed him of the definition of a refugee in the Convention and Protocol and has told him that his application is being placed before the Committee for consideration and recommendation to the Minister. This has led the applicant to have a legitimate expectation that he will not be denied that status nor be deported unless he is first accorded such a hearing by the Minister or the Committee as accords with the requirements of natural justice, including in all the circumstances representation before the Minister or the Committee. (at p640)

9. A third contention is also advanced: to deport the applicant will, it is said, be tantamount to the destruction of the subject matter of his action and the injunction sought should accordingly issue so

as to preserve that subject matter. The advantage said to accrue to the applicant from an acceptance of this contention, as compared with his other submissions, is that it will entitle him to the grant of an injunction whether or not a prima facie case be made out, it being enough that the applicant's statement of claim reveals contentions not so lacking in substance as to call for its striking out. (at p640)

10. Consideration of the second injunction, which seeks the applicant's release from custody, may conveniently be deferred until I have dealt with these three submissions made in support of the first injunction. I turn first to the third of these submissions, that concerned with preservation of subject matter. (at p640)

11. Order 49, r. 3 of the Rules of this Court is concerned, inter alia, with the preservation of property the subject of proceedings but, as counsel for the applicant concedes, its wording makes it inapplicable to the present case. It is, rather, upon the analogous inherent jurisdiction of the Court that reliance is placed. In Johnson v. Tobacco Leaf Marketing Board (1967) VR 427 Gowans J. held that where preservation of subject matter is in question no investigation of merits, nor any requirement that a prima facie case be shown, is called for. But that was a case concerned with the Victorian rule equivalent to O. 49, r. 3. I am not concerned to examine the correctness of what was said in Johnson's Case, which is founded upon earlier Victorian authority; but to seek to apply it to the exercise of the inherent jurisdiction of the Court, which is what the applicant must rely upon, is, I think, misconceived, as is the submission that this inherent jurisdiction has any application to the present case. (at p640)

12. There is no doubt that our courts have wide inherent powers to ensure that justice is not denied to those who litigate before them: Dixon C.J. observed in argument in Tait v. The Queen [1962] HCA 57; (1962) 108 CLR 620, at p 623 that he had never had any doubt "that the incidental power of the Court can preserve any subject matter, human or not, pending a decision". My unreported decision in Australian Building Construction Employees' and Builders' Labourers' Federation v. Victoria and Winneke 17 November 1981. and the further cases there cited as well as the case of Beck v. Value Capital Ltd. (1975) WLR 1; (1974) 3 All ER 437 all provide recent instances of other facets of the inherent power of courts to ensure that justice may be done between parties, as does the making of what have come to be called "Anton Piller" orders - see Anton Piller K.G. v. Manufacturing Processes Ltd. [1975] EWCA Civ 12; (1976) Ch 55 . However such inherent power is not to be exercised as of course - see especially per Ormrod L.J. in Anton Piller (1976) Ch, at p 62 . That jurisdiction provides no general substitute where application for injunctive relief would be the normal course nor should it be used to circumvent the safeguard which the requirement that a prima facie case be made out provides in ensuring that the potent weapon of interlocutory injunctive relief is not misused. (at p641)

13. If the power of deportation which Parliament has given to the Minister is to be interfered with in a case such as the present, where the applicant neither denies that he was a prohibited immigrant nor contests the validity of the mading of the deportation order itself, the applicant must in my view first make out a prima facie case for injunctive relief in accordance with the principles referred to in Beecham Group Ltd. v. Bristol Laboratories Pty. Ltd. [1968] HCA 1; (1968) 118 CLR 618 . I accordingly turn to examine the other two submissions made in support of this application for interlocutory injunctive relief. (at p641)

14. As to the first of these, counsel for the applicant very properly concedes that on the authorities in this Court, as they at present stand, he cannot succeed before a single judge of the Court in a

submission founded upon rights said to be conferred by the Convention and Protocol or, for that matter, by the Covenant. Accepted doctrine in this Court is that treaties have "no legal effect upon the rights and duties of the subjects of the Crown" - Chow Hung Ching v. The King [1948] HCA 37; (1948) 77 CLR 449, at p 478 ; aliens are in no different position - Bradley v. The Commonwealth (1973) 128 CLR 557, at p 582 . The applicant wishes, however, to argue before a full bench that when what is in question is not an obligation imposed upon an individual by a treaty but, rather, a right conferred upon the individual by a treaty, the Commonwealth being subjected to a corresponding obligation towards the individual, the position is otherwise. This, it is said, is a quite different proposition from that for which Chow Hung Ching and Bradley, properly understood, are authority. (at p641)

15. In my view those authorities are not confined to the case of treaties which seek to impose obligations upon individuals; they rest upon a broader proposition. The reason of the matter is to be found in the fact that in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law: Wade & Phillips, Constitutional Law, 8th ed. (1977), p. 277. Were it otherwise "the Crown would have the power of legislation": Mann, Studies in International Law (1973), p. 328. In Attorney-General (Canada) v. Attorney-General (Ontario) (1937) AC 326, at p 347 Lord Atkin, speaking for the Judicial Committee, said that:

"Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes".

To a similar effect is what was said by the several members of the Court of Appeal in Blackburn v. Attorney-General (1971) 1 WLR 1037; (1971) 2 A11 ER 1380 . (at p642)

16. This principle has quite recently been applied to the case of an individual seeking to enforce against the Crown a right said to be conferred only by a treaty and not by municipal law. In Laker Airways Ltd. v. Department of Trade (1977) 1 QB 643, at p 674 Mocatta J. described as "commonplace law" the proposition that "a treaty, unless given effect to by Act of Parliament, forms no part of the law of England" and on appeal Roskill L.J. expressed "unhesitating" agreement with the submission to which he refers, namely that "When the Crown in the exercise of those prerogative powers concludes a treaty, the subject gains no personal rights under that treaty enforceable in our courts, unless the treaty becomes part of the municipal law of this country" (1977) 1 QB, at pp 717-718 . His Lordship cited Rustomjee v. The Queen (1876) 1 QBD 487; 2 QBD 69 and Civilian War Claimants' Association Ltd. v. The King (1932) AC 14 , cases in which a subject unsuccessfully sought to enforce against the Crown obligations arising under a treaty. In de Smith's Judicial Review of Administrative Action 4th ed. (1980), p. 499, the matter is summarized in the following words:

"Again, neither a declaration nor any other judicial remedy is obtainable for the purpose of . . . securing performance of an international obligation undertaken by the Crown unless the obligation has been incorporated into municipal law by statute".

There is, quite apart from the above, a further difficulty for the applicnt in this submission. He must show that what he complains of is in some way in breach of the Convention and Protocol. The present state of affairs is that his claim to refugee status is being examined by the Committee on the

Determination of Refugee Status and it is the procedural aspects of that examination that are complained of. But the Convention and Protocol are silent on that score: as Schaffer points out in her article in Australian Year Book of International Law, vol. 7 (1981), p. 203, they establish no particular procedural process for the purpose of determining whether any individual is in fact entitled to refugee status; as is said, ibid, pp. 203-204, "It follows from this that each contracting state may establish whatever procedure it seems fit for the purpose of such determination". Grahl-Madsen in The Status of Refugees in International Law, vol. 1, p. 339, says that "each Contracting State is in every respect free to make its own eligibility determination". The procedures vary widely, as appears from Professor Johnson's recent study, "Refugees, Deportees and Illegal Migrants", Sydney Law Review, vol. 9 (1980), at pp. 47-53. (at p643)

17. This being so, the applicant, even were he entitled to a remedy in this Court for the non-observance of rights conferred upon him by the Convention and Protocol, can point to no such rights which he is at present being denied. The reference in the Convention to a right of representation applies only to those who have been recognized as possessing refugee status (Art. 32); what the Committee is concerned with at present is the anterior question of whether the applicant is indeed entitled to that status. (at p643)

18. For these reasons the applicant's first submission must fail. The second way the applicant's case is put does not purport to rely directly upon any breach of the Convention and Protocol but rather upon an alleged denial of natural justice, said to arise from the Committee's refusal to hear the applicant's representation and its resolve to do no more than receive from the applicant written submissions concerning his claimed status as a refugee. (at p643)

19. However in my view this submission necessarily involves critical reliance upon the Convention and Protocol, a reliance which proves to be ill-founded. It must seek to rely upon them in two ways: first, for the existence of some right or some legitimate expectation which might found an entitlement to be accorded natural justice; secondly, for the particular content of natural justice for which the applicant contends, the right to representation at a hearing before the Committee. (at p643)

20. I have already stated my reasons for concluding that until he acquires the status of refugee the Convention and Protocol by their terms confer no relevant present right of any sort upon the applicant. Moreover any right which might be made out would, in any event, form no part of municipal law, enforceable in this Court. The reliance which the submission places upon the existence of a legitimate expectation will not suffice to overcome this absence of any right. That expectation can, put at its highest, involve no more than that his application should be treated by the Minister, acting through the Committee, in a manner consistent with the Convention and Protocol, yet nothing that the Committee has done is in any way inconsistent with the international instruments. It follows that the applicant cannot succeed in this submission: he has no justiciable right, the only possible legitimate expectation which might be said to have arisen was not that he would be granted refugee status but that the Committee would consider his application in conformity with its own established procedures and this it is now doing. (at p644)

21. It may be observed in passing that to seek to apply anything like the full content of the maxim audi alteram partem to cases before the Committee, which may have to consider a wide range of confidential information about conditions overseas and whose conclusions might, if made public, affect good relations with other countries, might well stultify its operations and would not serve the best interests of applicants whose cases come before it - see Professor Johnson's article at pp. 47-48.

The Addendum to the 1977 Report of the United Nations High Commission for Refugees, the United Nations agency having the function of supervising the Convention and Protocol, to which Professor Johnson's article refers at p. 53, recognizes in its recommendations concerning procedures for the determination of refugee status that these may be either judicial or administrative and makes no reference either to any hearing or to the representation of the applicant before whatever authority a particular nation may constitute for the purpose. It recommends that there should be provision for an appeal from an unfavourable application but this may be either to an appellate body or to the authority that made the original unfavourable decision - see U.N. document A/AC 96/549, p. 15. (at p644)

22. The operation of Art. 32 of the Convention, which alone contains that reference to representation upon which the applicant relies, is confined to the case where a person who has been recognized as a refugee by a Contracting State is threatened with expulsion from its territory. Its provisions do not bear at all upon the determination of refugee status. Moreover Art. 32 speaks only of refugees "lawfully" in the territory of Contracting States. The applicant made no application for refugee status during the initial three months, when his presence in Australia was lawful; it was only after his arrest as a prohibited immigrant that his application was made. It would appear from an article by Frank in International Lawyer, vol. 11, p. 291, "Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States", that the United Nations High Commissioner for Refugees treats Art. 32 as applicable only to persons whose presence in the territory of a Contracting State is lawful, those who overstay a period of temporary lawful presence in the territory being regarded as thereafter unlawfully present (p. 298). Courts in the United States have regarded Art. 32 in the same light: Frank, ibid., pp. 302-304. Thus even were he to be accorded refugee status he could not rely upon that Article as according him any rights. It is Art. 31 which provides for those cases where a refugee is unlawfully in the country of refuge and it bestows no right of representation. (at p645)

23. It follows that I reject the applicant's second submission. The applicant has failed to make out any prima facie case to injunctive relief and I would accordingly dismiss the first of these two applications, that related to an injunction against deportation. (at p645)

24. The case of the second injunction sought, that directed to the applicant being released from custody pending determination of his application to the Committee, is a fortiori. His present status as a prohibited immigrant against whom a deportation order has validly been made provides statutory authority justifying his being held in custody. Even were effect to be given municipally to the Convention, its terms would not assist the applicant, who has not yet been accorded the status of a refugee, who was not lawfully in Australia when he applied for that status and who in any event did not, as Art. 31 (1) requires, present himself to the authorities as a refugee "without delay" either on his arrival in Australia or at the expiration of his temporary permit. (at p645)

25. The applications for interlocutory injunctions will be refused. Reserve costs. Certify for counsel. (at p645)

ORDER

Applications for interlocutory injunctions refused.

Costs reserved.

Certify for counsel.

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