

AUSTRALIA / JUDGMENT

Demetita, E.R. v Faubel, A.E. [1987] FCA 645

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JUDGMENT No. 49 [Bm

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

(NOT FOR DISTRIBUTION)

No. VG I50 of 1987

GENERAL DIVISION

BETWEEN:

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

EMMANUEL RUSIANA DEMETITA Applicant and ANTHONY EARNEST FAUBEL (who is sued in his capacity as Delegate of the Minister of State for Immigration and Ethnic Affairs)

Respondent

No. VG 151 of 1987

GENERAL DIVISION

BETWEEN:

EMMANUEL RUSIANA DEMETITA Applicant

and MICHAEL JEROME YOUNG (who is sued in his capacity as the Minister of State for the Commonwealth of Australia for Immigration and Ethnic Affairs)

Respondent

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MINUTES OF ORDER

COURT: Woodward J.

DATE: 12 June 1987

PLACE: Melbourne

THE COURT ORDERS THAT:

The applications, in VG 150 of 1987 and VG 151 of 1987,

be dismissed with costs.

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NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY No. VG 150 of 1987

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GENERAL DIVISION

BETWEEN:

EMMANUEL RUSIANA DEMETITA Applicant

and

ANTHONY EARNEST FAUBEL

(who is sued in his capacity as Delegate of the Minister of State for Immigration and Ethnic Affairs)

Respondent

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY No. VG 151 of 1987

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GENERAL DIVISION

BETWEEN:

EMMANUEL RUSIANA DEMETITA Applicant and MICHAEL JEROME YOUNG (who is sued in his capacity as the Minister of State for the Commonwealth of Australia for Immigration and Ethnic Affairs)

Respondent

COURT: Woodward J.

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EX-TEMPORE REASONS FOR JUDGMENT

In this matter I have before me two applications. The first, in matter VG 150 of 1987, seeks an interlocutory injunction staying the deportation of the applicant, who has applied for judicial review of various decisions taken under the Migration Act 1958, the end result of which would be his deportation. I am also asked, in matter No VG 151 of 1987, to rule that the reasons which have been supplied to the applicant pursuant to the Administrative Decisions (Judicial

Review) Act 1977 are insufficient.

These cases involving possibility of deportation are never easy. They involve considerations which have very serious implications for the applicants. On the other hand it must be borne in mind that the role of the court is not to consider the merits of the application, which are entirely a matter for the Minister for Immigration and Ethnic Affairs and his delegates. The role of the court is simply, when called upon, to determine whether the Minister and his delegates have acted in accordance with law in reaching the

conclusions which they have.

In this case there is obviously a fairly lengthy history, covering a range of matters, some pointing in favour of the applicant and some pointing against him. Out of the lengthy statement which sets out the circumstances and the reasoning of a departmental officer, subsequently adopted by the decision-maker, and covering in total some 21 pages of

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fairly detailed typescript, one point has been highlighted on behalf of the applicant, in the hope of showing that the applicant has been denied natural justice. That is the only issue which has been put before me in the interlocutory

application.

The point that is involved is based upon a single sub-paragraph, one of 16 sub-paragraphs which list the various circumstances which might point against the grant of permanent residence, and thus a stay of deportation, for the

applicant.

The particular point that has been highlighted

reads thus: "" ... he [the applicant] has not presented information to justify his claims that he had insufficient time to apply for migration in the Philippines and that at the time he sought his visit visa his life was in danger - the advice of 25 May 1987 from Manila is also

relevant in so far as it indicates his claims are not substantial ..."

It is to be noted that the reference to the applicant's life being in danger is a reference to the situation at the time he sought his visitor's visa, and it is given as an explanation why he did not apply for migration. That circumstance, that it relates only to his reasons for applying for a visit visa and not for migration, tends to reduce the significance of the point. Nevertheless the point is made, and it seems that the material that was relied upon

by the departmental officer in making that statement consists

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ef two or three items that were before him. One of those is a record of interview with the applicant which was held, it

seems, on 20 May this year.

One paragraph of the six or seven pages which

record the interview reads thus:

"... in relation to his claim that there was a danger to his life on deportation to the Philippines he related how he came from a small island called 'Negros' whose chief crop was sugarcane run by a small number of landlords. Apparently guerrilla activity has increased in the region against these landlords thus prompting the military to assist. Demetita stated that as a reserve in the military he could be conscripted. He could give no positive explanation as to how his life might be in danger. After several prompts from his solicitor he claims to have heard reports of friends, neighbours being killed in crossfire, from 'news items'..."

It does seem in that paragraph as though the question of the danger at the time he left the Philippines, which I understand was in 1985, has given way to the danger at the present time if he were to be deported. The paragraph begins by reference to his claim that there was a danger of deportation to the Philippines. The reference to activity having increased, presumably in the period since he has been away, and to the possibility of his being conscripted on return, both suggest that the emphasis at this point is on what would happen on return. The references to having heard

of friends and neighbours being killed in cross-fire appear

to be to the same effect.

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I should mention also the cable that has been referred to, in the relevant paragraphs in the reasons, as the advice of 25 May 1987 from Manila. That cable was in response to one from the department to its officers in Manila

seeking information, and the request includes this passage:

"... grounds include claims that he lived on island of Negros and at time sought visit visa his life was in danger and he had not enough _ time to apply for migration. Claims New People's Army has HQ on Negros and is very active ..."

Now that request directs attention both to the time at which the original visa was sought and to the present time. The answer reads:

"Claims regarding circumstances of his entry to Australia are not substantial. While there is NA [this obviously stands for New People's Army] activity in Negros Oriental, it is at a low level (tending to be a spill over from Negros Occidental, the adjoining province). It is in fact one of the quietest areas of the Philippines. If there were any substance to A/N's claims, [obviously a reference to the applicant] he would have been able to relocate within Philippines without need to 'escape' to Australia."

I do not think there is any doubt that that reply relates to the question that was asked about the situation at the time the applicant left for Australia. It makes a positive statement that even if there had been any problems at the time he would have been able to relocate within the Philippines and it also carries the situation forward and describes the present situation as one in which the

particular ,area is one of the quietest in the Philippines.

It expresses the opinion that the claims about his entry to Australia are not substantial; and I think it can reasonably be inferred that there has been no dramatic change in the situation in Negros between the time when the applicant left for Australia and the present time. Indeed, I think that that may well be the underlying circumstance which has led to any degree of confusion that has arisen ~ there is no reason to think that there was any great difficulty in 1985 nor that there is any significant difficulty today, and those two factors have sometimes been run together in the way in

which these matters have been expressed.

But to say, as is put on behalf of the applicant, that he was not given a proper opportunity to justify his claims that there was danger at the time that he left the Philippines because any emphasis in the interview was on the

present situation is, in my opinion, simply not made out.

I think it is quite understandable that' the applicant and the departmental officers would both tend to run those two situations together. It seems to me that there is really more importance in the current situation if the applicant were to be deported and it may well have been that that was where he and his solicitor tended to place their emphasis. The question as to whether his failure to apply for a migrant's (as distinct from a visitor's) visa, was justified by his fears in 1985 is a comparatively minor part of the history, which could reasonably be thought to have

been subsumed by all that has happened since. I would find

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it hard to believe, first of all, that there is likely to be any further information which the applicant could adduce concerning the situation in 1985 as distinct from the present situation, or that it could reasonably be thought that it would have affected the end result if such information were forthcoming.

It seems to me that what has been done here is to pick out one very small and not very important part of the total reasoning and to rely upon an arguable running—together or confusion of the situation at two different times - which

may well have been, in fact, similar at both those times.

It is pointed out for the department that the applicant has had an opportunity to advance anything more that he wanted to advance under this heading at the time when he applied for residence status in 1986 and, had he wanted to emphasise the pressures under which he left the Philippines and the reasons for not having applied for migration at that time and, in particular, to rely upon the situation in the

Philippines in 1985, then he could have done so.

As is further argued for the Minister, there is no obligation on the department to press the applicant for further material about a matter such as this and particularly one which relates to past history. As far as the current situation of danger is concerned, it seems that the applicant had every opportunity at the interview to put before the

departmental officers anything that he was able to.

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Bearing all these considerations in mind, it seems to me that if there has been any defect in the processes which the department has followed, it has been a very minor one indeed, that it relates to a comparatively insignificant,

historical factor and it is just not sufficient to raise a

serious question to be tried.

For those reasons the application for stay of

deportation is dismissed.

With regard to the application for further detailed reasons, I have to bear in mind that the person making the decision, whether it be the Minister or his delegate, is not obliged to set out in each case his own detailed consideration of the facts or his reasoning. It is sufficient if he adopts facts which have been put before him by another departmental officer and the reasoning of any recommendation which may be placed before him.

It may be that, in a particular case, the material put before him is in such an uncertain form that, for him to say that he adopts it, does not sufficiently indicate what findings he has made and what facts they were based upon. That seems to be the basis of Keely J's decision in a matter

of *Palko v The Minister for Immigration and Ethnic Affairs*,

delivered 6 March 1987. It is not possible, without the full details of the reasons in that case before me, to determine just what the inadequacies were in that matter, although it

appears from the reasons for judgment that there were a

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number of them. I must be concerned with the present case, and the criticisms that have been drawn to my attention by counsel for the applicant do not, in my view, amount to sufficient to justify the Court in making any order that the

task of stating the reasons should be done again.

I was concerned myself when I first saw in the delegate, Mr Faubel's, Statement of Reasons the sentence: "I adopted the findings of fact on the evidence before me as set out in Part B of that Submission". When one looks at the submission on which he acted and which he adopted, part B is headed "Evidence or Other Material on which the findings are based", and then are listed all the documents on the departmental file which were before the officer who made the recommendation and before Mr Faubel. I think the wording that he has chosen in that sentence is a little ambiguous but I am prepared to accept the submission of counsel for the respondent that what Mr Faubel intended to say was that he adopted the findings of fact which were set out by Mr Neilson in the submission which Mr Faubel attached to his reasons.

Those findings of fact are in part A of the submission.

Mr Faubel then intended to say that the evidence before him was that set out in part B of the submission. I am thus no longer concerned, as I was at first, that Mr Faubel may have failed to adopt the actual findings of fact in part A of the submission. I note in passing that that was not one of the arguments for the applicant, except insofar as

counsel relied upon it when I drew attention to it.

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Matters that he relied upon were several passages in the submission which indicated that there were two views open to the delegate when he came to consider the matter. I think the only matter relied upon in the first instance by counsel occurred in paragraph 34 of the submission, when the departmental officer said, in relation to the possible hardship to other Australian residents to whom the applicant is related,

"In the circumstances you may accept the view

that any apprehension he may have at returning

there, or hardship arising therefrom for

residents of Australia attracts less than compelling weight to his case to remain here."

Mr Faubel has said with regard to the part of the submissions which contain that sentence, which is headed 'Assessment', that he adopts the reasoning set out in the assessment; and in my view it is clear enough that, in the passage quoted, he is being invited to accept a particular view and that he does accept that particular view. I do not

believe that matter is attended by any doubt.

In his reply, counsel also relied on a statement in the assessment on page 17 of the document, in which a note appears saying:

"Note: whether or not a payment or gift was made has not been substantiated. It is not crucial to the case and you are invited to disregard the matter in your consideration of the case."

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It is suggested that once again it is not clear whether the delegate has disregarded the matter or not. But it seems clear enough to me that, in adopting the assessment as he says he has done, he has accepted the invitation to disregard the matter. In any event, counsel concedes that the point referred to is of little or no significance. He really only drew attention to it as an illustration of uncertain advice which he said was contained in this

document. '

Once again I think it is important to recall that these are departmental submissions; they are drawn up under pressure of work-loads and time. Bearing that in mind, I think they are, generally speaking, remarkably careful and detailed and, as this Court has said on previous occasions, they ought not to be analysed as if they were either an Act of the Parliament or a contractual document which has been drawn up at leisure with plenty of opportunities for review and evaluation. I rely on the general statements of the Full

Court in *Smith v The Minister for Immigration and Ethnic*

Affairs (1984) 53 ALR 551 at 554; and a decision of

Lockhart J in the case of Sundar v The Minister for

Immigration and Ethnic Affairs an unreported decision given

on 27 November 1986. For those reasons and adopting that approach, it seems to me that the vice which Keely J found in the reasons before him in Palko's case is not apparent in the case before me. This application, VG 151 of 1987, is also

dismissed.

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I will order that there be costs against the applicant in both cases. The taxing officer will of course

allow for the fact that they were heard together.

I certify that this and the eleven (11) preceding pages are a true and accurate copy of the Reasons for Judgment herein of The Hon Mr Justice Woodward

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Dated: 12 June 1987

Counsel for the Applicant: Mr T. Hurley

Solicitors for the Applicant: Nick Koenig & Associates

Counsel for the Respondent: Mr T. North

Solicitor for the Respondent: Australian Government Solicitor

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