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21 SOCIAL SECURITY Reporter

Including Student Assistance Decisions

Opinion

Prerogative writs

Re Refugee Review Tribunal & Anor Ex Parte Mansour Aala, High Court, 16 November 2000, S185/1999.

Aala is a decision of the High Court, following an appeal from a decision of the Refugee Review Tribunal. As such, it may seem not to be directly relevant. However, it is of interest and relevance to all involved in the area of administrative review.

Aala was an Iranian citizen who arrived in Australia in 1991. He had low level involvement with the Savak, the Shah's secret police, and then with a counter-revolutionary organisation, the Mujahideen. He alleged that following the arrest and execution of a friend in Iran he too had become of interest to the regime, and hence was in danger of his life.

Aala made an application for a protection visa which was rejected by the Department, and this was affirmed by the Refugee Review Tribunal. Aala then applied to the Federal Court for review of this decision. The Court rejected his application. Aala then appealed to the Full Federal Court. The Court upheld the Aala's appeal, by, in effect, conducting a review of the facts and holding that the first Tribunal had misdirected itself as to the legal test to be applied in assessing Aala's assertions. As a result, the matter was remitted to a differently constituted Refugee Review Tribunal.

In the course of the application to the Federal Court, Aala provided handwritten documents numbering, altogether, more than 50 pages, setting out his reasons for fearing persecution at the hands of the Iranian government should he be returned. Some of this material, not in the form of affidavits, contained new statements, not previously provided to the Tribunal, which if believed, may have influenced the Tribunal in its decision.

At the beginning of the second hearing the Tribunal said:

'Now, I've got both of your — I've got Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal file plus all of the Federal Court papers. So I've read everything that's in all of those files. There's quite a lot there but I've read it all and I'm going to have a number of questions for you and you'll have a lot of things that you'll want to tell me.'

Later the Tribunal added this:

'Okay, I mean I — as I've said I've read everything that's in your file, I've got all your other statements and I've got the tapes from your other hearing and your departmental interview so I — you know, if there's anything in there that you've missed today then you know I've got it?'

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(zj) a payment of an approved scholarship awarded on or after 1 September 1990;

Section 8(1) of the Act states:

In this Act, unless the contrary intention appears:

approved scholarship' means a scholarship in relation to which a determination under section 24A is in force;

Section 24A(1) of the Act states:

The Minister may determine in writing that a scholarship, or a class of scholarships:

(a) awarded outside Australia; and

(b) not intended to be used wholly or partly to assist recipients to meet living expenses;

is an approved scholarship, or a class of approved scholarships, as the case may be, for the purposes of this Act.

As the scholarship was not awarded outside Australia it could not be an approved scholarship for the purposes of the Act.

Under s.8(1) of the Act:

'earned, derived or received' has the meaning given by subsection (2);

'income', in relation to a person, means:

(a) an income amount earned, derived or received by the person for the person's own use or benefit; or

(b) a periodical payment by way of gift or allowance; or

(c) a periodical benefit by way of gift or allowance;

but does not include an amount that is excluded under subsection (4), (5), (7A) or (8).

'income amount' means:

(a) valuable consideration; or

(b) personal earnings; or

(c) moneys; or

(d) profits;

(whether of a capital nature or not);

Section 8(2) of the Act defines 'income' as:

(a) an income amount earned, derived or received by any means; and

(b) an income amount earned, derived or received from any source (whether within or outside Australia).

The scholarship was for $6000 payable in two equal installments and as such it was paid periodically. The scholarship therefore, in the opinion of the Tribunal, falls within the genre of 'a periodical payment by way of gift or allowance' (Reasons, para. 24). The Tribunal further found that there were no regulations abut the use of the money for educational purposes in the granting of the scholarship, whatever might be the expectation of both the university and Thompson. Therefore it is not exempt from being considered as income for the purposes of the Act.

Thompson further argued that the original decision maker appeared to have relied on s.1073 of the Act, which is not relevant to DSP. The Tribunal stated that as this section was not referred to in the decision letter of the authorised review officer, it was not necessary to consider this.

Formal decision

The Tribunal set aside the decision under review and substituted therefore:

- that the applicant derived $3000 income from the said scholarship on 2 March 2000; and
- that the applicant derived a further $3000 income from the said scholarship on 17 July 2000; and
- the matter be remitted to the respondent to recalculate the applicant's entitlement to DSP for the period under review accordingly.

[A.B.]

[Editors note: It is not clear what the financial consequences to Thompson are of this substituted decision].

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To which the prosecutor responded:

'I think it is that missed that there are plenty of information to take place but I'm afraid I don't know which one it is necessary I'd say, that's why I'm asking if there is any question you have, you can ask me I would like to answer anxiously.'

The Tribunal then said:

'Well, I think I've asked you everything that I need to know.'

The second Tribunal also rejected Aala's application, and in doing so made findings adverse to his credibility, specifically that certain claims had never been raised prior to the second Tribunal hearing. The claims had in fact been raised in the documents given to the Federal Court, which the second Member stated she had read. It was accepted that this was an honest mistake by the Tribunal Member, who thought she had been given all the documents lodged with the Federal Court, although the handwritten documents had not been provided to her.

Aala again lodged an application to the Federal Court. The Federal Court rejected the application, and Aala appealed to the Full Federal Court. The Full Federal Court in accordance with the decision in *Eshetu* accepted that the Federal Court had no jurisdiction "to set aside the decision of the Tribunal on the ground that it denied to the Appellant natural justice" noting that the submission was not without some substance'.

Aala then sought relief in the High Court by way of prerogative writ. By a majority, the High Court granted a writ of prohibition prohibiting the Department from acting on the decision of the Refugee Review Tribunal.

In the past 20 years great steps forward have been made in administrative review to relieve applicants from the difficulties of seeking to remedy defects in administrative action by way of prerogative writs. Now the High Court has had to return to their use as a way of granting some applicants natural justice. While the use of privative clauses as a means of ousting the jurisdiction of the Federal Court has only been particularly apparent in the area of migration applications, it may be one more indication of the movement away from allowing and encouraging review of government decision making.

As Mr Justice Michael Kirby said:

This is another case in which, in the absence of effective access to the Federal Court of Australia [134], an application has been made in the original jurisdiction of this Court for relief. In substance, the application seeks the remedies provided by the Constitution ...

I cannot forbear to mention that the debate reflected in the different opinions in this Court on this question illustrates once again the great inconvenience occasioned by the exclusion from the jurisdiction of the Federal Court of consideration of the legal requirements of natural justice [155]. In this matter, this Court has been involved, not in the elucidation of some important question of constitutional, statutory or other legal significance. The applicable principles are clear. This Court has been engaged in nothing more than the elucidation of the facts and the application to them of settled rules of law. In the event that the Parliament was of the opinion that consideration of arguments of procedural fairness (and administrative unreasonableness) was consuming too much time and cost in migration matters, both in the Tribunal and before the Federal Court, there must surely have been a better way of reducing those burdens than by heaping them upon this Court.

[A.B.]