1-1-2000

Minister for Immigration and Multicultural Affairs v Fathia Mohammed Yusuf

Susan Kneebone

Case Commentary:
Minister for Immigration and Multicultural Affairs v Fathia Mohammed Yusuf

By Susan Kneebone
Senior Lecturer in Law, Monash University

Headings in this case note:

---

1. Background

{1} Fathia Mohammed Yusuf (Yusuf) is an applicant for a protection visa under s 36(2) of the *Migration Act* 1958 (Cth) (the Act) which incorporates Australia's protection obligations to asylum seekers under the Convention Relating to the Status of Refugees (1951). Her claim for protection, based upon race and membership of a particular social group, was rejected by the primary decision-maker and on review by the Refugee Review Tribunal (RRT). However, she was successful on judicial review in an application to Finn J at first instance and then to the Full Court of the Federal Court (Heerey, Merkel and Goldberg JJ). The Minister for Immigration and Multicultural Affairs (the Minister for Immigration) appeals against the latter decision.

{2} Yusuf is a national of Somalia who alleges that she fears persecution as a member of the Abaskul clan, to which the Hawiye clan is hostile. She claims that as a result of an attack by the Hawiye clan on her sister's house, her sister and three of her children were killed. Her sister's husband and one child survived the attack because they were absent. Subsequently Yusuf married her sister's husband under traditional law and gave birth to his children.

{3} In support of her application, Yusuf referred to three incidents involving attacks by the Hawiye clan upon her house and family. On the first occasion when her house was attacked, her husband ran away and she has no knowledge of his present whereabouts, or even if he is alive. Yusuf also referred to two other specific events when she was attacked and injured by members of the Hawiye clan whilst shopping.

{4} In the first judicial review application, Finn J found that the failure of the RRT to refer to the first of the three incidents amounted to a failure to satisfy the requirements of s 430 of the

Act, to give reasons for the decision. He held that the alleged attack was a central or material fact which the RRT was required to address. He referred to *Thevendram v Minister for Immigration* [1999] FCA 182 as authority for the proposition that a failure to satisfy ss 430(c) and (d) of the Act was a procedural error under s 476(1)(a) of the Act. He rejected other arguments for judicial review and set aside the decision. He remitted the case to the RRT saying that although in a sense there was a technical error, public confidence had to be maintained. Further, "an unsuccessful party is entitled to an explanation as to why their case was not accepted".

{5} An appeal by the Minister to the Full Court of the Federal Court was dismissed. The Minister had appealed on two grounds. First, that Finn J erred in holding that the first incident was a material question of fact. Secondly, that Finn J erred in holding that a failure to comply with s 430 was a procedure.

{6} Central to this case is the nature and extent of the obligation on the RRT to give reasons under s 430 of the Act, and the effect of failure to comply with the obligation. The Full Court in *Yusuf* referred to a line of authority of Federal Court decisions that a failure to comply with s 430 is a failure to observe procedures and a reviewable error under s 476(1)(a) of the Act. The Full Court also accepted that it is the role of the reviewing court to determine objectively whether there is an error in relation to a material question of fact. It further held that on the facts of this case it was an acceptable exercise of discretion under s 481 of the Act to set aside the decision.

{7} The reasons of the Full Court in *Yusuf* conflict with another line of Federal Court decisions, represented by *Xu v Minister for Immigration* [1999] FCA 1741 (17 December, 1999). The grounds for appeal in this application are based on the premise that the authority of *Xu* should be followed. Specifically the Minister argues that:

- Section 430 does not prescribe procedures;
- In the light of s 473(3)(e) of the Act (which removes failure to have regard to relevant considerations as a ground of review) an alleged omission to deal with a particular matter or fact is not a ground of review under s 476(1)(a);
- The appropriate remedy was not to set aside the decision but to order the giving of a further and better statement of reasons;
- A fact is material only if it is a statutory requirement;
- Section 430 does not impose a duty on the RRT to state reasons for rejecting, or attaching no weight to, evidence or other material inconsistent with the findings made.

{8} Since the granting of special leave to appeal in this case, a five member bench of the Full Court of the Federal Court has considered the conflict between its decisions in *Yusuf* and *Xu*. In *Minister for Immigration v Singh* [2000] FCA 845 (30 June 2000) four of the five members of the Court held that s 430 prescribes procedures which can be reviewed under s 476(1)(a). The whole court agreed that an objective test determined the materiality of a fact or evidence to satisfy the s 430 obligation. However, it said that s 430 did not require a court to give reasons for rejecting inconsistent evidence, or for the weight attached to particular facts. On the facts of *Singh* it was decided that a failure to comply with s 430 had not been made out. The Full Court rejected the *Xu* line of authority and accepted the *Yusuf* reasoning on the point that a failure to comply with s 430 is a procedural error within s 476(1)(a). Thus this appeal must determine whether the reasoning in the *Singh* decision, which has been applied in numerous previous and subsequent decisions, is correct.

2. Comments

(i) The context of the RRT's obligation to give reasons

{9} Before considering the nature and extent of the obligation to give reasons under s 430 of the Act, it is important to recall the context of that obligation. The role of the RRT under s 415 of the Act is to conduct an independent merits review of a decision of the primary decision-maker to reject an application for a protection visa under s 36(2). Section 415(3) of the Act states that a decision of the RRT which varies the primary decision (not to grant a visa) is taken to "be a decision of the Minister". Under s 65 of the Act, the Minister is required to be "satisfied" that criteria for any category of visa have been satisfied before granting a visa. (This includes the health, etc. requirements set out in sub-class 866.22 of Sch 2.) In *Minister for Immigration v Eshetu* (1999) 162 ALR 577 at 604 and 607, Gummow J stressed the "central importance" of the Minister's state of satisfaction under s 65 as an "anterior question as to jurisdictional fact" or precondition to the grant of a visa under s 36.

{10} Section 36 incorporates Australia's international protection obligations to asylum seekers under the Refugees Convention. The elements of the refugee definition were stated in *Chan Yee Kin v Minister for Immigration* (1989) 169 CLR 379 to involve a "real chance" test requiring proof of both a subjective and an objective "well-founded fear of persecution". In *Minister for Immigration v Guo* (1997) 191 CLR 559, the High Court said that in determining whether there is a real chance of persecution in the future, the degree of probability that similar events have or have not occurred in the past for a particular reason is relevant. That is, the application of the "real chance" test by the RRT requires estimation of the likelihood of persecution. It requires evaluation and weighting of the evidence. It requires the RRT to be as "satisfied" as the Minister under s 65 of the Act that the elements of the refugee definition are made out. In *Xu* the Full Court of the Federal Court stressed the "inquisitorial nature of the proceedings, and the fact that … the Tribunal be 'satisfied' of relevant facts …" (para 54).

{11} In a number of Federal Court decisions it has been stressed that the statement of reasons given by the RRT under s 430 must reveal that it has conducted its merits review function so as to reach this standard of satisfaction. See eg *Thevendram v Minister for Immigration* [1999] FCA 182; *Parmamanthan v Minister for Immigration* (1999) 160 ALR 24; *Logenthiran v Minister for Immigration* 1999 56 ALD 639; *Caseem v Minister for Immigration* [2000] FCA 976; *Wang v Minister for Immigration* [2000] FCA 963; *Muthukuda v Minister for Immigration* [1999] FCA 1499.

(ii) The nature of the obligation to give reasons under s 430 — a procedural error?

{12} Although in Australia there is no common law duty to give reasons (*Public Service Board v Osmond* (1986) 159 CLR 656; cf *Baker v Canada* (1999) 174 DLR (4th) 192), it is accepted that where there is a statutory obligation to give reasons, it has both a "grievance" and a forensic purpose (*North Coast Environmental Council v Minister of Resources* (1994) 36 ALD 30 per Sackville J). The object of a set of reasons is to explain the logical basis of the reasoning for the decision (*Kandiah v Minister for Immigration* [1998] FCA 1145 per Finn J); *Addo v Minister for Immigration* [1999] FCA 940).

{13} Section 430 imposes a statutory obligation to give reasons. It co-exists with other statutory obligations which were introduced as part of the New Administrative Law package (eg s 13 of the ADJR Act, ss 28, 37 and 43 of the AAT Act). Like those provisions it requires

the decision-maker to set out the findings on material questions of fact, referring to the evidence or other materials on which those findings were based, and the giving of reasons. The terms of s 430 reverse the order of those requirements in part, but it is submitted that nothing turns upon that. Section 430 states:

> "(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:
>
> (a) sets out the decision of the Tribunal on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based."

Subsection (3) imposes a duty on the Tribunal in such cases to "(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based."

{14} Unlike s 430, some of the other provisions include an obligation to give further and better particulars (eg s 13(7) ADJR Act, ss 28(5) and 38 AAT Act). Section 430 is more akin to s 43(2B) of the AAT Act in that it does not contain an obligation to give better reasons. In the case of the AAT from which appeal may lie to the Federal Court on a question of law, it is established that the legal consequences of a failure to give adequate reasons under s 43(2B) (for which there is no provision for further and better particulars) may amount to an error of law (*Dornan v Riordan* (1990) 24 FCR 564). This may lead to a decision of the AAT being set aside by the Federal Court under its discretionary powers (s 44(4) and (5) of the AAT Act), or an order requiring the giving of adequate reasons (*Comcare Australia v Lees* (1997) 151 ALR 647; *Repatriation Commission v O'Brien* (1985) 155 CLR 422, 446).

{15} The issue that arises in relation to s 430 is: does a failure to comply with the requirement to give adequate reasons amount to a failure to comply with procedures for the purpose of s 476(1)(a)? This provision appears in Part 8 of the Act which restricts the grounds of review in the Federal Court.

{16} Section 476(1)(a) is in the same terms as s 5(1)(b) of the ADJR Act in that it provides a ground of review where "procedures that were required … to be observed in connection with the making of the decision were not observed". One difference is that s 476(1)(a) refers to the procedures required in the *Migration Act* and regulations, whereas the ADJR Act provision refers to procedures "required by law to be observed".

{17} Although an obligation to give reasons does not come within the usual categories of procedures (which are traditionally discussed in terms of whether they are mandatory or directory requirements — but cf *Project Blue Sky v Australian Broadcasting Authority* (1998) ALR 687), it is established that for the purpose of the ADJR Act the term "procedures" has a broader meaning. Section 5(1)(b) of the ADJR Act applies to "designated [statutory] procedures" (*Minister for Health and Family Services v Jadwan Pty Ltd* (1998) 159 ALR 375 at 391). Further, it is recognised that the words "in connection with" indicate a wider scope of application than the "making" of the decision. In *Our Town FM Pty Ltd v Australian*

Broadcasting Tribunal (No 1) (1987) 77 ALR 577 at 592, Wilcox J said that this extended to any procedure required whether as part of, before or after the actual making of the decision. In *Our Town FM Pty Ltd* it was decided that a statutory requirement to report, which included the giving of reasons, was a procedure. That concept was not limited to conditions precedent. **Arguably if the preparation of a statement of reasons is required by statute, it is a procedure inextricably connected to the making of a decision.** The statement of reasons records the process of decision-making which preceded the preparation of a statement of reasons.

{18} It was decided in *Muralidharan v Minister for Immigration* (1996) 62 FCR 402 applying *Our Town FM Pty Ltd* that the predecessor of s 430 prescribed a procedure. The provision in issue in that case was in the same terms as s 430 but at that time the legislation did not contain the restrictions on the grounds of review which were later enacted in Part 8 of the Act. In that case the applicant successfully sought review under s 5(1)(b) of the ADJR Act for failure to comply with the obligation to provide reasons. This decision was followed by the Full Court in *Yusuf* and *Singh* (and the long line of authority to which those cases belong (e.g. *Sellamuthu v Minister for Immigration* (2000) 58 ALD 30). However in *Xu* the authority of *Muralidharan* was rejected on the basis of the difference in the legislative context of s 430 of the *Migration Act*.

{19} In *Xu*, the Federal Court concluded that to allow review of reasons given under s 430 as "procedures" would be to introduce the restricted ground of relevant considerations through a "side wind". It also relied upon a literal grammatical reading of s 476(1)(a) to restrict the meaning of "procedures", concluding that it referred to decisions already made. These arguments were rejected by the majority in *Singh*. In that case the Federal Court referred to the Explanatory Memorandum to the Migration Reform Bill 1992 (Cth) which introduced Part 8 of the Act. This makes it clear that s 476(1)(a) refers to codified procedures (such as those in Part 7 of the Act) that would otherwise be covered by the rules of natural justice. As the giving of reasons is not a requirement of the rules of natural justice (*Osmond's* case), the majority in *Singh* concluded that this was an additional reason to describe the requirement to give reasons under s 430 as a procedure.

{20} The *Xu* reasoning on this point is analogous to that of the High Court in *Eshetu*. That case concerned the meaning of the "substantial justice" provision in s 420 of the Act. The High Court disapproved a long line of Federal Court decisions which established that a breach of the rules of natural justice (also an excluded ground of judicial review under Part 8) was a failure to act according to substantial justice and reviewable as a failure to observe procedures within the meaning of s 476(1)(a). The High Court in *Eshetu* said that it was necessary to construe s 476(1)(a) in the context of the legislation as a whole. It was decided that s 420 did not describe procedures within the meaning of s 476(1)(a). There was a clear legislative intention to exclude the natural justice ground.

{21} The analogy of this reasoning to s 430 can only be made out if the effect of reviewing reasons under s 476(1)(a) does introduce the excluded relevant considerations ground as a "side wind". In *Xu* the court thought that "materiality" was inextricably linked to relevant considerations.

(iii) The extent of the s 430 obligation — what is its content? Relevant considerations by a "side wind"?

{22} In *Xu* the court concluded that a fact was "material" only if it was a statutory requirement. It thus equated the question of "materiality" to relevant considerations (see *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39 per Mason J). It also treated s 430 to a very literal statutory interpretation saying that it was necessary to distinguish between s 430(1)(c) ("findings on material questions of fact"), and s 430(1)(d) ("the evidence or any other material on which the findings of fact were based"). It implied that this distinction may impose separate statutory requirements. It is submitted that the Full Court in *Xu* was wrong in both these views.

{23} The Full Court in *Xu* confused the concepts of relevant statutory considerations with the materiality in weighting facts and evidence. In *Singh* by contrast, the court said that:

> "A fact is material if the decision in the practical circumstances of the particular case turns upon whether that fact exists." (para 57)

It is submitted that this is the better approach. Decisions about refugee status do not turn upon statutory criteria. In reality they turn upon credibility. They involve judgment on events which have occurred in the past and events which may occur in the future. They involve judgment on issues of the political, religious, racial and human rights situation in a foreign country. They involve as stated above a weighting of evidence. The Minister and the RRT must be "satisfied" to a statutory standard, but the decision as such does not turn upon statutory criteria.

{24} Secondly, there is a dangerous suggestion in *Xu* to treat the provisions of s 430 as though they impose separate sub-requirements of the obligation to give reasons, and as procedures or relevant considerations per se. It is submitted that if the s 430 obligation is interpreted and applied correctly, it does not indirectly bring in the relevant considerations ground.

{25} In *Eshetu's* case, Gummow J discussed the obligation to give reasons under s 430. He pointed out that where compliance with the requirements of s 430 is in issue "the subject matter for judicial review nevertheless remains the decision itself" (162 ALR 577 at 603). He thought that in that case the prosecutor had treated "as distinct subject matter for judicial review … the cogency of reasoning of the tribunal and the adequacy of its findings on material questions of fact." He continued:

> "Such an approach is misconceived. Section 430 obliges the tribunal to prepare a written statement dealing with certain matters. It thereby furthers the objectives of reasoned decision-making and the strengthening of public confidence in that process. But the section does not provide the foundation for a merits review of the fact-finding processes of the tribunal." (162 ALR 577 at 603)

{26} It is submitted that this is the correct approach to adopt for s 430. The reasons must be looked at globally to determine whether they are adequate, whether they do reveal the logical process of reasoning. The fact that there has been a failure to refer to a finding on a material question of fact, or to certain evidence must be assessed in the light of that object. In the context of other statutory obligations to give reasons, it is recognised that there is no succinct answer to what are adequate reasons, or that it is possible to lay down definitive rules as to

the effect of failure to refer to a material finding or fact. See Justice A Goldberg, "When Are Reasons for Decision Considered Adequate?" (2000) 24 *AIAL Forum* 1; H Katzen, "Inadequacy of Reasons as a Ground of Appeal" (1993) 1 *AJ Admin L* 33.

{27} This view is also supported by McHugh J in discussing the obligation under s 430(d) in *Re Minister for Immigration; Ex parte Durairajasingham* (2000) 168 ALR 407. In that case McHugh J said that it was not necessary to refer to inconsistent evidence but that there might be circumstances in which a decision-maker should refer to reasons for rejecting evidence where that is one of the reasons for the decision. (168 ALR 407 at 423) But he continued:

> "[I]t is not necessary for the tribunal to give a line-by-line refutation of the evidence either generally or in those respects where there is evidence contrary to the findings of material facts made by the tribunal." (168 ALR 407 at 423)

He pointed out that this would be contrary to the requirement under s 420 of the Act for the RRT to make decisions that are "fair, just, economical and quick". It is submitted this is the correct approach.

{28} This "global" approach to s 430 reasons has been followed in a large number of cases. For example in *Singh's* case itself, the court found on the facts of that case that it was implicit from the reasons as a whole that a fact that was not referred to was not regarded as material. In the joint judgment in that case it was suggested that the applicant would not have been better informed if that fact had been rejected explicitly. This approach fits with the process of judicial review — to determine whether on the basis of the reasons given that the decision was a reasonable or proper one (*Drake v Minister for Immigration* (1979) 2 ALD 2 per Smithers J). See also *Kandiah v Minister for Immigration* [1998] FCA 1145 per Finn J; *Addo v Minister for Immigration* [1999] FCA 940; *Thien v Minister* (2000) 56 ALD 719; *Yelda v Minister for Immigration* [1999] FCA 1841. Since *Singh's* case itself; *Tin v Minister for Immigration* [2000] FCA 1109; *Duong v Minister for Immigration* [2000] FCA1145; *Han v Minister for Immigration* [2000] FCA 1046; *Shaffer v Minister for Immigration* I [2000] FCA 1087; *Thurairajah v Minister for Immigration* [2000] FCA 1034; *Tjoanardi v Minister for Immigration* 2000] FCA 1012; *Sivasubramaniam v Minister for Immigration* [2000] FCA 1035; *Minister for Immigration v Soare* [2000] FCA 1095.

{29} The *Xu* decision has confused the "materiality" of facts and the weighting of evidence with the concept of relevant considerations. The analogy of the *Eshetu* reasoning — that the available grounds of review cannot be used to bring in the excluded grounds by a "side wind" - is not made out in this context.

(iv) Effect of failure to comply with s 430 — what should be done?

{30} Several issues arise from this question. First, what is the effect of failure to comply with s 430? Should it be treated as a procedural error? Should it be left to the discretion of a court to remit a decision rather than to order better reasons? Why are these issues argued as procedural errors rather than as errors of law?

{31} If the view I have advanced is correct, that the giving of reasons goes to the "satisfaction" requirement under s 65, and the standard of "real chance" test as explained in *Guo*, it would seem that a manifestly inadequate statement of reasons could justify setting

aside a decision. As Gummow J in *Eshetu* emphasised, this issue is a fundamental one which goes to jurisdiction.

{32} The *Project Blue Sky* decision emphasised that the consequences of an invalid decision are to be determined by reference to the purpose of the legislation. It would be consistent with the AAT jurisprudence to acknowledge that s 481 (which is in much wider terms than ss 44(4) and (5) of the AAT Act) gives the Federal Court a discretion to order either the giving of better reasons or the setting aside of the decision where there are inadequate reasons. In terms s 481 is as wide as s 16 of the ADJR Act.

{33} It is clear that s 476(1)(a) - the procedural error ground - is used because it avoids having to establish any other error of law, such as in relation to the "real chance" test as such or the standard of the test. It is also clear that there is a strong argument based on the analogy of the ADJR Act that the s 430 statement is a statutory procedural requirement. But it is not being used to bring in an excluded ground of review. The general tenor of the *Eshetu* decision is that the Act must be interpreted strictly in the light of Part 8 of the Act. However the reasoning in that case can be distinguished on the basis that there is no attempt to bring in an excluded ground by a "side wind".

{34} It is relevant that in *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259 the High Court stressed that although reasons are not to be scrutinised overzealously for error of law, the decision maker must weight material in applying the real chance test. Generally, the Federal Court has been restrained in its approach to the use of the s 476(1)(a) ground and s 430 reasons. *Yusuf* is one of the lesser number of cases in which the ground has been made out.

3. Conclusion

{35} In relation to each of the grounds of appeal, it is submitted:

- There is a strong argument that s 430 does prescribe a procedure within the meaning of s 176(1)(a). However, it is the composite obligation to give adequate reasons as such which constitutes the procedure. The specific requirements in relation to facts and evidence do not constitute procedures. To treat these as separate constituent requirements could lead to overzealous review of reasons.
- Consistent with this and in the light of s 473(3)(e) of the Act (which removes failure to have regard to relevant considerations as a ground of review) an alleged omission to deal with a particular matter or fact is not a ground of review under s 476(1)(a).
- The question of the appropriate remedy should be left to the reviewing court in the exercise of its discretionary powers under s 481. In some circumstances it may be appropriate to set aside the decision but in others it may be sufficient to order the giving of a further and better statement of reasons
- It is not correct to conclude that a fact is material only if it is a statutory requirement. Contrast the ground of review for "no evidence" — see ss 476(1)(g) and s 476(4). Materiality and relevant considerations are separate concepts. It is the function of a reviewing court to determine whether a failure to have regard to a material fact is an error of law on an objective test.

- It is correct that s 430 does not impose specific duties on the RRT to state reasons for rejecting, or attaching no weight to, evidence or other material inconsistent with the findings made. The correct approach is as stated above.

{36} Applying these conclusions to the facts of *Yusuf* it is clear that whilst s 430 was regarded as a procedure, the issue was the materiality of evidence rather than a failure to consider a relevant consideration. In other words, the Court was concerned with the standard of satisfaction of the real chance test. The Federal Court in *Yusuf* did not suggest that the RRT had a duty to state reasons for rejecting, or attaching no weight to, evidence or other material inconsistent with the findings made. In all these circumstances it would be open to the High Court to conclude that the grounds of appeal are not made out and that the Federal Court in *Yusuf* exercised its discretionary powers under s 481 reasonably.