FEDERAL CIRCUIT COURT OF AUSTRALIA

SZTES v MINISTER FOR IMMIGRATION & ANOR *[2014] FCCA 1765*

Catchwords:
MIGRATION – Persecution – review of Refugee Review Tribunal ("Tribunal") decision – visa – protection visa – refusal.

ADMINISTRATIVE LAW – Allegation that the Tribunal's decision affected by jurisdictional error by reason that the Tribunal took irrelevant considerations into account, failed to consider all the integers of the applicant's claims and misapplied s.36(2B)(c) of the *Migration Act 1958*.

Legislation:
Migration Act 1958, ss.36, 474, 477
Federal Circuit Court Rules 2001, r.13.10

Cases Cited:
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
SZSRY v Minister for Immigration & Border Protection [2013] FCCA 1284

Applicant:	SZTES
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1925 of 2013
Judgment of:	Judge Cameron
Hearing date:	30 July 2014
Date of Last Submission:	30 July 2014
Delivered at:	Sydney
Delivered on:	12 August 2014

REPRESENTATION

Counsel for the Applicant:	Mr P. Bodisco with Mr T. Little
Solicitors for the Applicant:	Stanford
Counsel for the First Respondent:	Mr T. Reilly
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) The application for an extension of time within which to bring these proceedings be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 1925 of 2013

SZTES
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of Afghanistan who arrived at Christmas Island by boat on 18 July 2012. On 15 January 2013 he lodged an application for a protection visa with what is now the Department of Immigration and Border Protection ("Department"), alleging that he feared persecution in Afghanistan. On 11 March 2013 the applicant's application was refused by a delegate of the first respondent ("Minister"). The applicant then applied to the second respondent ("Tribunal") for a review of that departmental decision and was unsuccessful in that review.

2. On 19 August 2013 the applicant applied to this Court for judicial review of the Tribunal's decision. That application was filed outside the limitation period prescribed by s.477 of the *Migration Act 1958* ("Act") and the applicant has applied for an extension of that limitation period.

3. For the reasons which follow, the application for an extension of the time within which to bring these proceedings will be dismissed.

Background facts

4. In its decision the Tribunal summarised the facts alleged in support of the applicant's claim for a protection visa. As summarised by the Tribunal, the applicant relevantly made the following claims in a statement attached to his protection visa application:

    a) his parents had rented a house in a complex in Kabul which was owned by a Pashtun man. In April 2012, upon returning from work, he was told by his neighbours not to go to his home as Afghan authorities had raided his housing complex and found bombs for use in suicide attacks. His neighbours did not know where his family was so he fled to the house of his father's friend who then helped him to flee Afghanistan;

    b) he would be detained and mistreated by the Afghan authorities because they believed that either he or his family were involved in plotting suicide attacks or he would be harmed by his Pashtun landlord and his affiliates as he (the landlord) believed that either he or his family reported the location of the bombs to the Afghan authorities; and

    c) he did not know if his Pashtun landlord had connections to the Taliban but the fact that he had been planning suicide attacks suggested that he had some connection to Afghan insurgent groups.

5. The applicant appeared before the Tribunal on 13 May 2013 to give evidence and present arguments. The applicant's evidence at the hearing was not set out separately in the Tribunal's decision record but, where relevant, incorporated into its reasoning.

The Tribunal's decision and reasons

6. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the

United Nations Convention relating to the Status of Refugees 1951, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention") or pursuant to s.36(2)(aa) of the Act. The Tribunal's decision was based on the following findings and reasons:

a) while the Tribunal accepted that the applicant was a Hazara Shi'a who had spent most of his life in Kabul, Afghanistan, it did not accept that he was a member of the group "unaccompanied Afghan minors" as it found that he was eighteen years old at the time of its hearing and would not be unaccompanied were he to return to Afghanistan because it did not accept that his parents had disappeared or fled from Afghanistan;

b) the Tribunal found that the applicant was not truthful as to the reasons which led him to flee Afghanistan and that his testimony was internally inconsistent, implausible and amounted to a fabrication which in turn undermined his credibility. While it accepted that the applicant's family had rented from a Pashtun landlord, it did not accept that the applicant had faced the difficulties he claimed to have faced, such as the existence of explosives in his home, that he had fled to a family friend's house and then from Afghanistan because of the discovery of those explosives, or that his family had also fled because of those explosives. In this connection, the Tribunal:

    i) noted that the applicant's evidence at the hearing, that he had only spoken to one neighbour who had told him that explosives had been found and that he should escape, contradicted the claims made in the statement attached to his protection visa application. In addition, he indicated at the hearing that he had not spoken to the neighbour about the whereabouts of his family nor had he asked about his family and denied that he had said in the statement attached to his application form that he had. The Tribunal considered those discrepancies to be significant on the basis that it would have expected the applicant to be consistent in his evidence because the whereabouts of his family would have been at the forefront of his mind in the circumstances;

ii) referred to the applicant's inconsistent evidence as to the whereabouts of his family. In this regard, it referred to the applicant's evidence at the departmental interview that he had been told by a family friend that his family was in Pakistan and to his evidence at the hearing that he did not know where his family was. When this inconsistency was put to him at the Tribunal hearing, the applicant stated that his family friend had told him not to worry and that his family were out of Afghanistan but he did not know where they were;

iii) referred to the applicant's inconsistent evidence at its hearing concerning whether he had inquired as to the whereabouts of his family and what steps he had taken to find them. The Tribunal found it implausible that the applicant would have only spoken to his case manager once about finding his family, given the circumstances surrounding his departure and that he had not seen his family for over a year. It considered that his lack of initiative brought into question his claim to not know where his family were and undermined his credibility generally. In this connection, the Tribunal noted the applicant's post-hearing submission of 28 May 2013 enclosing a form to the Red Cross Tracing Agency dated 23 May 2013. It considered that the timing and the inadequate information provided on the form were inconsistent with a person who was genuinely seeking his family; and

iv) noted the applicant's claims at the hearing that it was not until late at night on the day he fled his home that he had told his family friend what had happened, that his family friend had told him that it was not safe to enquire about the whereabouts of his family, that it was not safe for the applicant to stay with the friend and that he had to flee the country. However, the Tribunal found it difficult to accept the applicant's claims that his family friend would have paid $15,000 to organise his (a minor's) travel from Afghanistan the day after the alleged discovery of the explosives with no information as to what had happened to his parents and

whether he was actually at risk, and that the friend could have organised the trip in such a short period of time;

c) the Tribunal did not accept the applicant's claims that he had not understood the Hazaragi interpreter who had assisted him at his interview with the delegate and that the interpreter had not understood him and only interpreted half of what he had said. In this regard, the Tribunal accepted that there had been some discussion at the interview that the interpreter was not accredited but referred to the applicant's agreement at the start of that interview that he could understand the interpreter, to his representative's statement at the interview that the applicant had indicated to her that he could understand the interpreter and had been able to communicate effectively and to his lack of objection to the interpretation throughout the interview;

d) in making its adverse credibility findings, the Tribunal considered the submission of the applicant's representative at the end of its hearing that the applicant's mental state was "not flash" but, having listened to the delegate's interview and having read the applicant's statutory declaration, it was not satisfied that the applicant's mental state impacted his ability to give evidence to the Department or to it;

e) it did not accept that the applicant would face harm as a member of the particular social group "children and young people of Afghanistan" were he to return to Afghanistan. In particular, it did not accept the applicant's claim at the hearing that he would be forced to work day and night and become a dancing boy, implying that he would be sexually exploited despite his age;

f) the Tribunal was not satisfied that there was any real chance in the reasonably foreseeable future that the applicant would be killed, physically harmed or persecuted in Afghanistan by the Taliban or any other group or person by reason of his race, religion, imputed political opinion or for any other reason. In this connection:

    i) whilst the Tribunal accepted that Kabul was not entirely insulated from violence and accepted that there had been

some attacks in Kabul, it referred to country information which pointed to a "situation of safety" for Hazaras in the city. It considered that no truthful evidence had been submitted by the applicant that he or his family had in any way been targeted in such attacks during his time living in Kabul;

ii) it accepted that there had been some violence against Shi'a Muslims in Afghanistan but found that Shi'as were generally free to perform their traditional religious practices in Kabul without incident; and

iii) the Tribunal noted the applicant's claims at its hearing that all policemen were robbers and thieves, that Hazaras were degraded and that the Taliban could do what they please if they caught a Hazara. It also noted his claim that if he was caught by the government his only option would be to do what the police wanted. However, the Tribunal considered that the country information indicated that Kabul was a relatively secure place, that there were large numbers of trained army personnel and that Shi'a Hazaras were relatively safe from persecution.

g) referring to country information, the Tribunal was not satisfied that the applicant would face a real chance of persecution by the Taliban or by anyone else for being a failed asylum seeker returning to Afghanistan from a western country, by reason of being perceived as a spy or by reason of an imputed political opinion;

h) it did not accept that the applicant would be uniquely vulnerable because of his youth, his lack of personal and social connections in Afghanistan or at risk as a perceived opponent as it considered that he did have social connections through his family and it did not accept that a bomb had been found at his home;

i) while the Tribunal accepted that, despite certain improvements, Hazaras continued to face some discrimination in the areas of accommodation and employment, the Tribunal did not accept that this had been the situation for the applicant and his family or

would be the case in the future. It found that the applicant would be able to work and did not accept that he would be denied an education. It also thought the chance remote that the applicant would, for any Convention reason, be denied access or accommodation or that as a Shi'a Hazara in Kabul he would suffer significant economic hardship threatening his capacity to subsist. It further found that poor though the standard of health care services were in Afghanistan, that did not itself amount to persecution and, in any event, the applicant would not be denied access to basic services such as to amount to persecution; and

j) the Tribunal referred to the applicant's claim in his statement that he had been subjected to verbal abuse because of his Hazara ethnicity and that when he worked in a car repair shop he had been denied opportunities for career advancement. While the Tribunal was willing to accept that the applicant may have suffered some harassment and insults from people of other ethnicities, it was not satisfied, on the applicant's evidence, that he had suffered treatment such as to constitute serious harm or persecution. It also accepted that the applicant might face some harassment or insults in the future but was not satisfied that this treatment would amount to serious harm.

Application for extension of time

7. Section 477 of the Act provides the time limit which applies to proceedings for judicial review of Tribunal decisions in respect of which this Court has jurisdiction. It relevantly provides:

> ***477 Time limits on applications to the Federal Circuit Court***
>
> *(1) An application to the Federal Circuit Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.*
>
> *(2) The Federal Circuit Court may, by order, extend that 35 day period as the Federal Circuit Court considers appropriate if:*

(a) an application for that order has been made in writing to the Federal Circuit Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the Federal Circuit Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

***date of the migration decision** means:*

…

(b) in the case of a written migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the written statement under subsection 368(1) or 430(1); …

8. The Tribunal's decision was dated 27 June 2013 which means that the applicant had until 1 August 2013 to commence these proceedings. As the application was not filed until 19 August 2013, it was brought out of time.

Application in writing citing reasons

9. The consequence of the application having been filed late is that the Court must consider the two questions posed by s.477(2). The first of these is whether a written application has been made to the Court for an extension of time to bring the proceedings which specifies why the applicant considers it is necessary in the interests of the administration of justice that an order extending time to bring the proceedings be made. In this case the applicant made an application in writing for an extension of time by including such a request in his application commencing these proceedings. Further, his initiating application specified why he said it was in the interests of the administration of justice for time to be extended. The initial criteria for the granting of an extension of time have therefore been satisfied.

Interests of the administration of justice

10. The second question posed by s.477(2) is whether it is in the interests of the administration of justice to extend the time for the filing of the application commencing these proceedings. The Court is not confined in the issues which it may consider relevant to its determination of that question. In this case, relevant considerations are whether the applicant has provided a satisfactory explanation for his delay in commencing the proceedings and whether the proceedings as a whole have a reasonable prospect of success, noting that a matter which does not have such prospects is liable to be dismissed pursuant to r.13.10(a) of the *Federal Circuit Court Rules 2001*.

11. The applicant filed an affidavit which set out certain practical difficulties he encountered in the filing of his initiating process. I am satisfied that the applicant's explanation for the delay in commencing these proceedings is a satisfactory one. I also note that the Minister did not oppose an extension of time.

Reasonable prospects of success

12. In his second [sic] further amended application the applicant alleged:

> *1. The RRT took into account an irrelevant consideration under section 36(2)(aa) of the* Migration Act *and/or applied the incorrect test under section 36(2)(aa) of the said* Migration Act.
>
> *Particulars*
>
> *In finding that the applicant will not suffer significant harm "as a member of the group 'children and young people in Afghanistan'" or "'children and young people'" at paragraphs [80] and [81] of the decision, the Tribunal imported an irrelevant consideration (or relied upon an erroneous construction of the test under section 36(2)(aa) of the* Migration Act*), importing the motivation for the infliction of persecution and/or membership of a particular social group into the test under section 36(2)(aa) of the said* Migration Act.
>
> *2. The RRT applied the incorrect test.*

Particulars

At paragraph [83] of the decision, the RRT has misconstrued section 36(2B)(c) of the Migration Act *by finding that a real risk of harm faced by the community generally in Kabul would not also be a risk faced by the Applicant personally as a part of the community.*

13. In proceedings for judicial review of a Tribunal decision the Court's task is to determine whether the relevant Tribunal decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 of the Act; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Consequently, before the Court will conclude that it is in the interests of the administration of justice to extend the time within which to bring these proceedings, the applicant must demonstrate that he has reasonable prospects of proving that the Tribunal's decision on his visa application was affected by jurisdictional error.

14. I have concluded that he has not done so.

Legislation

15. At the time of the Tribunal's decision, s.36 of the Act relevantly provided:

> ***36 Protection visas***
>
> *(1) There is a class of visas to be known as protection visas.*
>
> *(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *...*
>
> *(aa) a non-citizen in Australia ... in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or*
>
> *...*
>
> *(2A) A non-citizen will suffer **significant harm** if:*

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

...

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ground 1

16. In paras.80, 81 and 82 of its reasons, the Tribunal said:

> *Having regard to my findings of fact above, as I do not accept the applicant is a member of the group "unaccompanied Afghan minors" I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act for this reason.*
>
> *Having regard to the findings above, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act as a member of the group "children and young people in Afghanistan" or "children and young people".*
>
> *The Tribunal appreciates that there is evidence of a number of insurgent attacks in Kabul, including the Ashura attack in 2011. For the reasons already outlined, the Tribunal finds that the Ashura attack or the sectarian skirmishes in universities in*

November 2012 do not establish that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm. The Tribunal does not accept that, if the applicant returns to Kabul, there is a real risk that he will suffer significant harm because he is a Hazara or because he is a Shia Muslim. On the basis of the evidence before it, the Tribunal finds that there is no real risk of the applicant facing discrimination amounting to significant harm in Kabul.

17. As elaborated by the applicant in his submissions, the first ground of the further amended application contained the following elements:

    a) the Tribunal erred by considering his claim to complementary protection by reference to two identified particular social groups when the only question posed by s.36(2)(aa) and s.36(2A) is whether a person will suffer significant harm if repatriated. The applicant submitted that the motivation for such any harm was an irrelevant consideration;

    b) the Tribunal erred by considering his claim to complementary protection by reference to his religion and ethnicity; and

    c) the Tribunal failed to consider all the integers of his claim. The applicant referred in this regard to the prospect of harm befalling him because of the security situation in Afghanistan.

Irrelevant considerations

18. Although the complementary protection tests did not require the Tribunal to refer to the applicant's "particular social group" claims, his religion or his ethnicity the fact that the Tribunal referred to them in that context, and not just in the context of the applicant's Convention-based claims, is not indicative of error.

19. The matters which the Tribunal must consider are as prescribed by the Act and as raised by an applicant in his or her claims. Paragraphs 80, 81 and 82 of the Tribunal's reasons, together with para.79, were no more that the Tribunal's discussion of the applicant's own claims, already considered in the context of Convention-related protection, in the complementary protection context. The Tribunal was not testing

the possible engagement of Australia's complementary protection obligations by reference to the reasons for any harm which might be caused to the applicant but was considering, based on the claims the applicant had made, whether he faced a real risk of significant harm if returned to Afghanistan. That was not an error.

Integers overlooked

20. Contrary to the applicant's submission, the risk of him suffering significant harm in Afghanistan by reason of the security situation in that country was not left unaddressed by the Tribunal. That issue was expressly dealt with by the Tribunal at paras.82 and 83 of its reasons when it said:

> *The Tribunal appreciates that there is evidence of a number of insurgent attacks in Kabul, including the Ashura attack in 2011. For the reasons already outlined, the Tribunal finds that the Ashura attack or the sectarian skirmishes in universities in November 2012 do not establish that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm. The Tribunal does not accept that, if the applicant returns to Kabul, there is a real risk that he will suffer significant harm because he is a Hazara or because he is a Shia Muslim. On the basis of the evidence before it, the Tribunal finds that there is no real risk of the applicant facing discrimination amounting to significant harm in Kabul.*
>
> *In relation to other insurgent attacks, the Tribunal finds that any harm faced by the applicant in Kabul is faced by the population generally and not by him personally. The Tribunal finds that there is taken not to be a real risk that the applicant will be arbitrarily deprived of his life or will suffer significant harm in Afghanistan as a result of general violence.*

Ground 2

21. The second ground of the application also referred to para.83 of the Tribunal's reasons, which plainly draws on the terms of s.36(2B)(c) of the Act, quoted above. The essence of this allegation was that s.36(2B)(c) of the Act would apply if the risk in question was faced by a population but not by an individual applicant and would not apply if

an individual applicant faced a particular risk, even if the relevant population generally also faced that risk.

22. I am not persuaded that the applicant's suggested construction of s.36(2B)(c) is correct.

23. Given that any population is made up of individuals, the reference in s.36(2B)(c) to "the population of [a] country generally" must include an individual applicant who has left that country to seek protection in Australia and who, if unsuccessful in that application, is likely to be returned to that first country. If the risk in question is one which is faced generally by the population of that country, it must also be faced by such an applicant as a member of that population group.

24. Consequently, the reference in s.36(2B)(c) to a person facing a risk "personally" must mean something other than him or her facing that risk merely as a member of the relevant population group. I conclude that it refers to an individual facing a risk which is particular to him or her: *SZSRY v Minister for Immigration & Border Protection* [2013] FCCA 1284 at [43], and which is not attributable to his or her membership of the population of the country to which he or she might be sent or shared by that population group in general.

25. The applicant also submitted in para.37 of his written submissions that the Tribunal had misconstrued s.36(2B)(c) because it found that he would be at risk personally if returned to Afghanistan. However, the Tribunal did not make such a finding, as the summary above at [6] discloses. In any event, the finding in question, set out in para.83 of the Tribunal's reasons, makes no reference to the matters the applicant identified in para.37 of his submissions and is based solely on a quite different consideration, namely its finding that whatever risk the applicant faced by reason of insurgent attacks, it was a risk faced by the Afghani population generally.

Conclusion

26. I am not persuaded that there is any basis to find that the Tribunal's decision is affected by jurisdictional error. Consequently, the substantive proceedings have no reasonable prospects of success.

27. In such circumstances, and notwithstanding that I have found that the applicant has supplied a satisfactory explanation for his delay in filing his initiating application, I conclude that it is not in the interests of the administration of justice to extend time to bring these proceedings.

28. Consequently, the applicant's application for an extension of time will be dismissed.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 12 August 2014