# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZFVK v MINISTER FOR IMMIGRATION & ANOR* *[2007] FMCA 349*

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – where applicant claimed to be a citizen of Afghanistan – where Tribunal not satisfied that the applicant was from Afghanistan – where Tribunal failed to consider a relevant matter.

*Migration Act 1958* (Cth), ss.36, 50, 416, 474

*Craig v South Australia* (1994) 184 CLR 163 referred to.
*W389/01A v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 432 referred to.
*Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1985-1986) 162 CLR 24 referred to.
*Minister for Immigration & Multicultural & Indigenous Affairs v Lay Lat* [2006] FCAFC 61 followed.
*SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 followed.

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| Applicant: | SZFVK |
| First Respondent: | MINISTER FOR IMMIGRATION & CITIZENSHIP |
| Second Respondent: | REFUGEE REVIEW TRIBUNAL |
| File Number: | SYG 568 of 2005 |
| Judgment of: | Scarlett FM |
| Hearing date: | 17 November 2006 |
| Date of Last Submission: | 17 November 2006 |
| Delivered at: | Sydney |
| Delivered on: | 23 March 2007 |

## REPRESENTATION

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| Counsel for the Applicant: | Mr Jackson |
| Counsel for the Respondent: | Mrs Sirtes |
| Solicitors for the Respondent: | Clayton Utz |

## ORDERS

(1) The title of the First Respondent is changed to Minister for Immigration and Citizenship.

(2) That there be an order in the nature of certiorari quashing the decision of the Second Respondent signed on 21 January 2005 and handed down on 10 February 2005 affirming the decision of a delegate of the First Respondent not to grant a protection visa to the Applicant.

(3) That there be an order in the nature of mandamus requiring the Second Respondent to determine the Applicant's application for a protection visa according to law.

**FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY**

**SYG 568 of 2005**

**SZFVK**
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

**REFUGEE REVIEW TRIBUNAL**
Second Respondent

# REASONS FOR JUDGMENT

## Application

1. This is an application for review of a decision of the Refugee Review Tribunal that was signed on 21 January and handed down on 10 February 2005. The Tribunal affirmed a decision of the delegate of the Minister not to grant the Applicant a protection visa.

2. The Applicant commenced proceedings for judicial review by filing an application on 7 March 2005. He filed an amended application on 21 April 2005, seeking an order in the nature of certiorari setting aside the Tribunal decision and an order of prohibition to restrain the Respondent Minister from giving any further effect to the decision.

## Background

3. The Applicant is a citizen of Afghanistan who arrived in Australia on 30 December 2000. He applied for a Protection (Class XA) visa and was granted a subclass 785 (Temporary Protection) visa on 30 April 2001. On 26 June 2001 the Applicant applied for a further protection (Class XA) visa. The visa was refused by a delegate of the Minister on 11 May 2004. The Applicant then sought a review of that decision from the Refugee Review Tribunal.

## Application for review by the Refugee Review Tribunal

4. On 27 May 2004 the Applicant made his application to the Tribunal. The Tribunal invited the Applicant to attend a hearing on 16 September 2004. The Applicant attended the hearing and gave oral evidence with the assistance of an interpreter in the Dari language.

5. The Applicant stated that he is a Muslim and his ethnic group is Hazara. He said that he left Afghanistan because of atrocities committed by the Taliban. He stated that he fears harm from the Taliban because he is Hazara and a Shia.

6. The Tribunal received a submission from the Applicant's migration adviser to which was attached a statutory declaration by the Applicant. The Applicant's adviser later submitted, on the day before the hearing, a Psycho-Educational report, based on an assessment carried out on 25 August 2004.

7. The Tribunal asked the Applicant a number of questions about his background and about his religion. One of the issues that concerned the Tribunal was whether the Applicant was actually from Afghanistan, as he claimed:

> *The Tribunal put to the Applicant that the Tribunal needs to be satisfied that the Applicant was from Afghanistan and that this did not necessarily mean that the Applicant had lived in Afghanistan all his life, but that Hazaras living in Pakistan may still be entitled to protection in Australia. The Tribunal stated that the Applicant knew little about Afghanistan and knew nothing about the route he took to leave Afghanistan and this raised concerns for the Tribunal. The Applicant stated that he was assisted by a*

> *smuggler. He stated that the smuggler came to his village and that the smuggler organized everything for him and that he did not know any of the details or the route he took in leaving Afghanistan. The Applicant stated that he was from Afghanistan and not from Pakistan.*[1]

8. The Tribunal went on to ask the Applicant further questions about his history and his fears of persecution.

9. A copy of the Tribunal's decision record appears on pages 273 to 295 of the Court Book. The Tribunal's findings and reasons are on pages 292 to 295.

10. The Tribunal came to the conclusion that the Applicant was not credible in respect of key aspects of his claim for protection. Because the Tribunal was not satisfied in respects of those aspects of his claims, the Tribunal concluded that the Applicant did not have a well founded fear of persecution under Article 1A(2) of the Refugees Convention.

11. The Tribunal stated:

> *The Tribunal accepts that the Applicant is of Hazara ethnicity however the Tribunal does not accept that the Applicant fled Afghanistan in the year 2000 out of fear of the Taliban. As raised with the Applicant at the hearing the Tribunal was struck by the Applicant's extreme vagueness in the hearing about his life in Afghanistan and about the route and manner by which he fled Afghanistan.*[2]

12. The Tribunal did not accept the psychologist's assessment of the Applicant's mental capacity and formed the view that when he was asked questions about his circumstances in Afghanistan and his departure from there the Applicant was not experiencing difficulties of comprehension but rather did not have the relevant knowledge.[3] The Tribunal was unconvinced about the Applicant's explanation about his ability to provide relevant detail and found it implausible that a person, even of limited formal education, could travel for four days in a car without being able to provide some detail as to the towns or villages that he passed through.

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[1] Court Book at page 288
[2] Court Book at 292-293
[3] Court Book at 293

13. The Tribunal was not satisfied on the basis of the evidence before it that the Applicant was from Afghanistan and, because the Tribunal was not so satisfied, did not accept that the Applicant had or ever had a well founded fear of persecution within the meaning of the Convention in respect to Afghanistan. The Applicant had not made any claims in respect of any other country, so the Tribunal was not satisfied that he satisfied the Convention definition of a refugee.

14. The Tribunal affirmed the delegate's decision not to grant a protection visa to the Applicant.

## Application for judicial review

15. The Applicant commenced proceedings for judicial review of the Tribunal's decision. In his Further amended application the Applicant sets out three grounds for relief, however, Ground one was not pressed:

### Ground one

16. (Not pressed)

### Ground two

17. The Tribunal failed to take into account a relevant consideration, namely the existence of a credible and critical document of great weight obtained by the Respondent herself in support of the Applicant's claim that he was from Afghanistan, and thus failed to exercise its jurisdiction.

> ***Particular***
>
> *The Tribunal had before it the language report commissioned by the Respondent, and extracted in the First Tribunal's decision (at Court Book ("CB") p.89) which powerfully supported the Applicant's assertion that he was from Afghanistan, and the Tribunal makes no mention of it, yet states that it is "not satisfied that the Applicant is a resident of or a national of Afghanistan" (at CB 294).*

### Ground three

18. The Tribunal failed to accord the Applicant procedural fairness in failing to warn the Applicant that it intended to revisit and revise an earlier finding that the Applicant was an Hazari Afghan without having regard to earlier material obtained by an earlier Tribunal supporting the Applicant's claim to be an Hazari Afghan (being the document referred to in ground two).

## Submissions

19. Counsel for the Applicant, Mr Jackson, submitted that the critical issue upon which the decision turned in this case was the Tribunal's finding that the Applicant did not come from Afghanistan, and did not come from the area from where he said he had come. Mr Jackson referred the Court to the decision of the High Court in *Craig v South Australia* (1994) 184 CLR 163 at 179:

> *If such an administrative falls into error of law which causes it to identify a wrong issue, to ask a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.*

20. Mr Jackson also referred to the decision of R.D. Nicholson J in *W389/01A v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 432, where his Honour at [71] noted that the Macquarie Dictionary defined the word "ignore" as meaning "to refrain from noticing or recognising". Mr Jackson went on to submit that in this case the Minister's delegate who first considered the Applicant's claims had obtained a document that was critical in addressing the question of the Applicant's nationality, ethnicity and place where he had grown up. This document, a report from a Swedish agency specialising in translations and linguistic analyses, had formed a critical part of the basis upon which an earlier Tribunal had reached a decision that was favourable to the Applicant.

21. Counsel for the Applicant submitted that the analysis strongly supported the Applicant's claim, as can be seen from this quote:

> *Assessment: The speech on the tape is Dari and the person speaking obviously uses the dialect occurring in Afghanistan.*
>
> *Explanation: The person speaks Dari with a Hazaragi accent. The accent spoken on the recording is the one occurring in Afghanistan. It is obviously his mother tongue.*
>
> *The person's pronunciation and his accent are typical for the Hazaragi dialect. He tries to speak ordinary Dari language and does not use typical Hazaragi words.*
>
> *He uses many typical Dari words like* ***rishsafid*** *(white beard),* ***riza*** *(small),* ***rafiq*** *(friend),* ***taiare*** *(aeroplane – in Iran they say "hawa paima" and in Pakistan they say "jahaz"),* ***shash*** *(six, in Iran and Pakistan they say "shish").*
>
> *There is nothing on the recording which indicates that the person speaking has his language background in any other country than Afghanistan.*[4]

22. Mr Jackson submitted that this document "must surely" have formed part of the Departmental file that was before the Tribunal and was certainly before the Tribunal as extracted from the first Tribunal, because the Tribunal in the decision under review extracted a passage from that decision.[5] He submitted that this was evidence that was credible and of central significance to the critical issue upon which the case turned. However, the Tribunal did not advert to that document or acknowledge its existence.

23. Whilst it may be accepted that there is no obligation to refer to evidence that the Tribunal does not consider relevant to its decision, and it might ordinarily not be possible to infer that the Tribunal had not taken this information into account, this is information of such centrality and such credibility[6] that the Tribunal's failure to mention it, and deal with it leads to an inference, on the balance of probabilities, that the Tribunal simply did not consider it.

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[4] Court Book 89
[5] Court Book 281
[6] *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1985-1986) 162 CLR 24 at 60

24. For the Respondent Minister, Mrs Sirtes of counsel submitted that simply because a previous Tribunal determined a different application in favour of the Applicant does not mean that the decision under review is affected by jurisdictional error. She referred the court to s.416 of the Migration Act, which provides:

> *If a non-citizen who has made:*
>
> > *a) an application for review of an RRT-reviewable decision that has been determined by the Tribunal or the Administrative Appeals Tribunal; or*
> >
> > *b) applications for reviews of RRT-reviewable decisions that have been determined by the Tribunal or the Administrative Appeals Tribunal;*
>
> *makes a further application for review of an RRT-reviewable decision, the Tribunal, in considering the further application:*
>
> > *a) is not required to consider any information considered in the earlier application or an earlier application; and*
> >
> > *b) may have regard to, and take to be correct, any decision that the Tribunal made about or because of that information.*

25. Mrs Sirtes submitted that by operation of s.416 of the Act, the Tribunal was not required to consider the earlier application and had a discretion under s.416(d) as to whether it would accept the previous decision as correct.

26. In reply, Mr Jackson submitted that s.416 was intended to operate in cases where a protection visa application had been refused and then a further application was made. He referred the court to *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2000] FCA 1901, where the Full Court of the Federal Court said:

> *…Section 416 merely mirrors section 50 of the act. An application for review may not be reopened in a fashion which avoids the limitations of sections 48A and 48B of the Act upon further applications for protection visas.*

27. Section 50 of the Act is similar but not identical in its wording to s.416. Section 50 states:

> *If a non-citizen who has made:*
>
> > *a) an application for a protection visa, where the grant of the visa has been refused and the application has been finally determined; or*
> >
> > *b) applications for protection visas, where the grants of the visas have been refused and the applications have been finally determined;*
>
> *makes a further application for a protection visa, the Minister, in considering the further application:*
>
> > *a) is not required to reconsider any information considered in the earlier application or an earlier application; and*
> >
> > *b) may have regard to, and take to be correct, any decision that the Minister made about or because of that information.*

28. Counsel for the Applicant submitted that the clear legislative intention of both provisions is to allow the Tribunal to deal with a subsequent application (made in circumstances where ss.48A and 48B do not prevent a further application being made after an application has been refused) without having to consider afresh claims already made. In order to give effect to the clear legislative intention, sub-ss.(c) and (d) have to be read together and must operate together. In other words, the Minister may "take to be correct" an earlier finding without re-evaluating or reconsidering the factual sub-stratum upon which it was based.

29. Mr Jackson goes on to submit that the Tribunal (or the Minister) cannot simultaneously ignore the evidence upon which the earlier finding was based and make a contrary finding.

30. This submission has a logical appeal.

## Proposed Further Ground of Review

31. Counsel for the Applicant also sought leave to raise a further ground of review alleging a breach of natural justice. The substance of this ground is that, even if the Tribunal were entitled to review the factual finding of the earlier Tribunal in relation to the origin of the Applicant

without having regard to the earlier material, natural justice required the Tribunal to indicate to the Applicant that it intended to do so in reliance upon s.416, so that the Applicant might urge the Tribunal against taking such a course, in particular so that the applicant might refer the Tribunal to the Swedish linguistic expert analysis. The Applicant further submits that the requirement for the Tribunal to act in this way is not affected by s.422B of the Act, as it is not part of the natural justice hearing rule in relation to the matters that the provisions, including s.416, deal with.

32. I am not persuaded by this argument.

## Conclusions

33. In my view, the natural justice argument raised by the Applicant cannot be sustained. The Full Court of the Federal Court has made it clear that there is no scope for the application of common law justice, as s.422B covers the field (*Minister for Immigration & Multicultural & Indigenous Affairs v Lay Lat* [2006] FCAFC 61; *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62).

34. I am more of the view that counsel's submission about the legislative intention in respect of s.416 is one that has merit. As was submitted, the intention of the legislature was to allow the Tribunal to deal with a subsequent application, made in circumstances where ss.48A and 48B did not prevent a further application being made after an application has been refused without having to consider afresh claims already made.

35. Mrs Sirtes, for the Minister, submitted that s.416 gives the Tribunal a discretion that can be invoked if the Tribunal wished to adopt the earlier finding. Further, she submitted that the report was not before the Tribunal. This was a fresh hearing that the Applicant attended and at which he gave evidence. Further, the highest the Swedish report could go was that it established that the Applicant had a language background in Afghanistan, but that did not make him a national of Afghanistan. I do not agree with this submission.

36. In my view, the report was before the Tribunal, as the Tribunal had considered the evidence of the earlier Tribunal hearing. It is important

to consider the nature of the report. It is a strong piece of independent evidence that supports the Applicant's claim that he comes from Afghanistan. The contrary evidence relied upon by the Tribunal, as to the Applicant's vagueness and lack of knowledge about the towns and villages through which he passed, and the "ambiguous, defensive and evasive" nature of the Applicant's responses[7], is comparatively flimsy.

37. It is surprising that the Tribunal completely ignored the existence of this strong piece of evidence, which went right to the very issue upon which the Tribunal made its decision, that is, whether or not the Applicant was a national of Afghanistan. To my mind, the Tribunal's very failure to refer to the existence of such a strong and relevant piece of evidence leads to the conclusion that the Tribunal overlooked it.

38. I am satisfied, therefore, that the Tribunal failed to consider a relevant factor and thereby fell into jurisdictional error.

39. The application will be granted and I propose to make orders in the nature of certiorari and mandamus. It also appears to me to be a matter for costs.

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**I certify that the preceding thirty-nine (39) paragraphs are a true copy of the reasons for judgment of Scarlett FM**

Associate: Virginia Lee

Date: 19 March 2007

[7] Court Book at 293