FEDERAL CIRCUIT COURT OF AUSTRALIA

SZTRI v MINISTER FOR IMMIGRATION & ANOR *[2014] FCCA 1803*

Catchwords:
MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming particular social group persecution in Pakistan – applicant's psychologist sending a further document to the Tribunal between the time it despatched its decision to the applicant and to the Secretary of the Minister's Department – whether the Tribunal was required to recall its decision and take the additional material into account considered.

Legislation:
Migration Act 1958 (Cth), ss.5, 36, 420A, 424A, 425, 430A, 441A, 441F

Cases cited:
Minister for Immigration v SZQOY (2012) 206 FCR 25
Minister for Immigration v SZRKT (2013) 212 FCR 99
Minister for Immigration v SZRNY (2013) 214 FCR 374
Semunigus v Minister for Immigration (2000) 96 FCR 533
SZRMQ v Minister for Immigration [2013] FCAFC 142
SZSFK v Minister for Immigration & Anor [2013] FCCA 7
SZSHK v Minister for Immigration [2013] FCAFC 125

Applicant:	SZTRI
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3142 of 2013
Judgment of:	Judge Driver
Hearing date:	11 August 2014
Delivered at:	Sydney
Delivered on:	19 September 2014

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondents: Mr J D Smith

Solicitors for the Respondents: DLA Piper

ORDERS

(1) The application filed on 17 December 2013 is dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 3142 of 2013

SZTRI
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal (Tribunal). The decision was made on 27 November 2013[1]. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa.

2. The applicant is from Pakistan and claimed to fear persecution in that country by reason of his membership of particular social groups. The following statement of background facts concerning the applicant's claims and the Tribunal decision on them is derived from the Minister's outline of submissions filed on 4 August 2014.

3. The applicant, a citizen of Pakistan, arrived in Australia on 29 May 2008 and lodged an application for a protection visa on 15 June 2012. He claimed that he feared gangsters who he had refused to help fix a horse race and that the authorities would not protect him from the

[1] But, as will appear, the Tribunal's statement of reasons was despatched to the applicant and the Secretary of the Minister's Department later.

gangsters. He also claimed that he would be persecuted by the Taliban because horse racing was against Sharia law and also because they were connected to the gangsters[2].

4. On 10 September 2012 a delegate of the Minister decided to refuse to grant the applicant a visa[3] and the applicant applied to the Tribunal for review of that decision. The applicant was invited to, and attended, two hearings conducted by the Tribunal: the first on 12 March 2013[4] and the second on 4 October 2013[5]. Before the second hearing, the applicant's agent, Mr Vassiliou, sent the Tribunal a medical report dated 25 September 2013[6]. The author of that report, Dr Abdulkareem, stated in it that he found the applicant to be suffering from major depressive disorder and generalised anxiety disorder. He opined that the applicant's psychological state was in part related to issues associated with his residency status in Australia.

5. After the second hearing, the Tribunal received a report from a registered psychologist, Sashil Moreno[7]. The report stated that the applicant's symptoms were consistent with Post Traumatic Stress Disorder (PTSD) and recommended that the applicant continue with psychological treatment and stay in touch with his GP. It further recorded the opinion that there was a high probability that the impact of returning home would be detrimental to the applicant's mental health and physical safety.

6. The Tribunal made a decision and prepared a statement of reasons which it signed and dated 27 November 2013. It is necessary to consider in some detail what it did with that statement of reasons. For the purpose of this statement of background facts, it is sufficient to note that the reasons were sent to the Secretary of the Department, and also to both the applicant and his representative under cover of letters dated 28 November 2013 and that, on the same day, as noted above, a document was sent by email by the psychologist apparently on behalf of the applicant to the "Registry, Perth"[8]. The document was stamped

[2] Court Book (CB) 47
[3] CB 131
[4] CB 187
[5] CB 224
[6] CB 219
[7] CB 227
[8] CB 286

as received on 28 November 2013 by the Administrative Appeals Tribunal (AAT), Perth, and by the MRT-RRT Melbourne on 3 December 2013.

7. The document is headed "Recent Developments", refers to a claim by the applicant that thugs were asking his family where he was and, as a result, his sister was hospitalised for shock. That much says no more than the report dated 20 November 2013[9]. The email also included a letter from the Department of Psychiatry and Behavioural Sciences of the Allama Iqbal Medical College & Jinnah Hospital Lahore dated 7 October 2013 saying that [a named female person] had been admitted to that facility from 16 September 2013 to 26 September 2013. A document headed "out door ticket" (but looking like a prescription) was also included in the email.

8. The Tribunal did not refer to these documents in its decision and the Minister does not dispute that it did not consider them.

Tribunal's decision

9. The Tribunal accepted that there was corruption in the horse racing industry in Pakistan but was not satisfied that the gangsters wanted to kill the applicant or that he would continue to be of interest to the gang for any reason. It rejected the claim that the Taliban would act on the gangster's behalf because there was no evidence that horse racing was against Sharia law and had been conducted legally for many years in Pakistan.

10. The Tribunal also found that there was no real chance that the applicant would be denied treatment for his mental health issues for any Convention reason, that any harm he might suffer as a result of generalised violence in Pakistan would not be discriminatory and that he would not face any harm as a result of having lived and worked in Australia.

11. On the basis of those findings, the Tribunal concluded that the applicant did not satisfy the criterion in s.36(2)(a) of the *Migration Act 1958* (Migration Act).

[9] CB 231

12. In respect of the complementary protection criterion, the Tribunal found that there was no real risk of harm to the applicant from the thugs or the Taliban or as a result of his having lived in the West. Further, while it accepted that the applicant suffered from PTSD and the public health system in Pakistan may not be the same as in Australia, any suffering caused to the applicant as a result would not be the consequence of an intentional act or omission and so did not amount to significant harm. Finally, although it accepted that there was sectarian and generalised violence in Pakistan, the Tribunal found that the applicant would not be personally targeted or face a real risk of such harm there.

13. For those reasons, the Tribunal concluded that the applicant did not satisfy the criterion in s.36(2)(aa) and so affirmed the decision under review.

The judicial review application

14. These proceedings began with a show cause application filed on 17 December 2013. The applicant continues to rely upon that application. The application contains many paragraphs, only some of which could be said to constitute grounds of review. I gave directions in the matter on 6 February 2014. I listed the application for a show cause hearing, pursuant to rule 44.12 of the *Federal Circuit Court Rules 2001* (Cth) at 2.15pm on 11 August 2014. However, counsel for the Minister foreshadowed in his outline of submissions that there was a separate issue meriting a final hearing which the Minister contended should be dealt with at that time. I discussed that issue with the applicant at the outset of the hearing on 11 August and he consented to the matter proceeding on a final basis.

15. In addition to the court book filed on 7 February 2014, I received as evidence (subject to relevance) the applicant's affidavit filed with his application. I also received as evidence the affidavit of Deirdre Ellen Scott King made on 4 June 2014, to which are annexed a substantial bundle of documents.

16. The Minister, through his counsel, made both oral and written submissions. The principal issue dealt with by counsel was too complex for the applicant to address at the trial of the matter and I gave

him time after the hearing to make submissions in writing. He has not done so.

Consideration

17. There is no substance to the grounds of review in the application. In that regard, I agree with the Minister's submissions.

The grounds in the application

> *(1) The Tribunal made a procedural mistake that the Tribunal collected information from the applicant and rejected the information without proper assessment and proof. The Tribunal simply rejected the applicant's claim by saying that it is not satisfied but did not give any proper reason. The Tribunal's rejection is not acceptable by law.*

18. This ground appears to have been formulated without regard to the facts of the case. The ground is, in essence, that the Tribunal did not give the claims proper consideration and rejected them without reasons. That is clearly not so. The applicant's central claim was rejected for the simple reason that the gangsters, who had the means to do so when the applicant was in Pakistan many years ago, did not kill, or try to kill him. That, together with the significant passage of time since the relevant events, was a logical basis for the conclusion that they are not now interested in him. Otherwise, as the above summary reveals, the Tribunal did give each claim separate consideration and the reasons for its conclusions.

> *(2)-(4) In respect of each of those points of claim made by the applicant the Tribunal was not satisfied that the applicant's claims were established. In respect of each of those claims the Tribunal has set out the evidence that it relied upon in reaching its conclusions that it was not satisfied on each particular claim. Each of those conclusions was reasonably open to the Tribunal on the evidence before the Tribunal and no grounds of review arise. The conclusion of the Tribunal being "reasonably open" does not mean that conclusions were not open; it simply means that there were no legal errors in particular Tribunal coming to its stated conclusion.*

19. These grounds are grouped together as they are answered by the same submission by the Minister. They appear to be copied from either a

judgment or submissions that support the decision of a Tribunal rather than expose any error in it. Thus, even if they were directed towards the current decision they would not assist the applicant.

> *(5) The Tribunal made a procedural mistake that the Tribunal did not understand its obligations under the Act how to review an application for protection.*

20. A failure to understand how to review a decision is not necessarily a procedural error. In any event, there is no procedural error here: the Tribunal conducted a hearing in accordance with s.425 of the Migration Act and there was no evidence that may have attracted any obligation under s.424A(1). Ground 11 takes issue with the interpretation at the hearing, but I deal with that below.

21. If, on the other hand, the ground is intended to point to some misunderstanding or misapplication of the test to be applied, there was no such error. The Tribunal specifically set out its conclusions by reference to the relevant criteria. In particular, when considering s.36(2)(aa), it adapted its findings made in respect of s.36(2)(a)[10].

> *(6) … "the Tribunal has considered the psychologist's report when considering the applicant's overall evidence but has concerns with applicant's (sic) credibility". But the Tribunal has not given any proper reasons and only mentions that the applicant was only able to remember some dates and forgetting other dates. But at point 16 of the decision the Tribunal says that it "… accepts the psychologist's reports in regards to the analysis of the applicant's mental state that has PTSD, is stressed, unable to concentrate for long periods and suffers memory loss."*

22. The complaint about the Tribunal's reasons for its concerns about the applicant's credibility is unsustainable. The Tribunal refers to the applicant's inability to remember dates as only an example of the fact that he was unforthcoming at the hearing and that it was difficult to get responses from him[11]. It concluded that, on most occasions, "in relation to his other claims, the responses were vague, general and repetitive." These were valid bases for concerns about credit.

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[10] see *SZSHK v Minister for Immigration* [2013] FCAFC 125 and cf. *SZSFK v Minister for Immigration & Anor* [2013] FCCA 7
[11] CB 244 [18]

> *(7) The Tribunal simply rejected the applicant's claim by saying that it is not satisfied but did not give any proper reason. The Tribunal's rejection is not acceptable by law.*

23. I reject this ground for the same reason as Ground 1.

24. Grounds 8-10 simply repeat findings made by the Tribunal without any relevant comment. As such, they do not raise any arguable basis for the relief sought.

> *(11) I am also not satisfied with the interpretation at the interview with the RRT for which I would request to grant me an opportunity to provide the script of the interview CDs.*

25. In respect of the quality of interpretation, fundamentally, the question is one of evaluation as to whether the applicant has had a real and fair opportunity to put what she or he wanted to put, to understand what was being said to her or him, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done[12]. Without a transcript (or a sound recording) of the hearing, it is impossible to engage in that evaluation. The applicant was directed to file and serve any evidence including a transcript by 1 May 2014. He has not done so and without a transcript, the ground cannot succeed.

> *(12)-(15) ... it is clearly evident that "persecution" need not be torture or incarceration.*

26. These grounds do not need to be set out in full because they largely do no more than state propositions of law. The Tribunal did not limit its understanding of the scope of "persecution" to torture or incarceration. Its consideration of the gangster claim focussed on death simply because that is what the applicant claimed would happen. However, its findings did not stop at death: it found that the applicant would be of no further interest to the thugs[13]. Otherwise, the Tribunal clearly considered other possible aspects of persecution such as a denial of medical treatment and involvement in generalised sectarian violence.

[12] *SZRMQ v Minister for Immigration* [2013] FCAFC 142
[13] CB 248 [47]

The additional issue – did the Tribunal err by failing to take into account documents sent on 28 November 2013?

27. Both the court book[14] and the affidavit of Ms King[15] reproduce three documents sent by email by the applicant's psychologist on 28 November 2013 at 5.28pm to the registry of the AAT in Perth. Those documents had some bearing upon what the psychologist referred to as "recent developments" concerning claims made by the applicant that thugs were harassing members of his family. Ms King deposes that the Tribunal has no registry in Perth and Tribunal members in Perth use the support services of Tribunal registry staff located in Melbourne as well as the support services of the AAT in Perth. The Tribunal has a Memorandum of Understanding (MOU) with the AAT in Perth. Under the MOU, the AAT in Perth provides limited support services to the Tribunal. Those support services are provided by AAT staff located in Perth. There is no Tribunal support staff member located at the AAT in Perth. There is no Tribunal registrar or any Tribunal officer working at the Perth AAT registry. The email sent by the applicant's psychologist to the AAT in Perth was received by it and apparently forwarded by mail to the Tribunal registry in Melbourne. The documents were received by the Tribunal registry in Melbourne on 3 December 2013.

28. Ms King deposes that although the Tribunal's Statement of Reasons was finalised by the presiding member on 27 November 2013, the decision record was not despatched to the applicant until the following day. Ms King deposes that on the same day, the Secretary of the Minister's Department was advised electronically of the Tribunal decision (in the sense of the outcome of the review) but that a copy of the Tribunal's decision record was not sent to the Secretary until the Department's file was returned to the Minister's Department (with the decision record placed on it) on 4 December 2013.

29. The Minister contends that the additional documents were not received by the Tribunal until after the Tribunal decision had been finalised and sent to the applicant but concedes that the documents were received before a copy of the Tribunal's decision record was placed on the Department's file and sent to the Department. I find, based upon the

[14] at CB 286-288
[15] at pages 68-70

evidence of Ms King, that the documents were not in fact received by the Tribunal prior to 3 December 2013. Neither could they be said to be constructively before the Tribunal by that date as further explained below.

30. Sections 441F and 420A of the Migration Act provide as follows:

> *Section 441F*
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> *(1) If, in relation to the review of an RRT-reviewable decision, a person is required or permitted to give a document or thing to the Tribunal, the person must do so:*
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> *(a) by giving the document or thing to the Registrar or an officer of the Tribunal; or*
>
> *(b) by a method set out in directions under section 420A; or*
>
> *(c) if the regulations set out a method for doing so--by that method.*
>
> *(2) Directions under section 420A may make provision for a person to give a copy of a document, rather than the document itself, to the Tribunal.*
>
> *Section 420A*
>
> *(1) The Principal Member may, in writing, give directions, not inconsistent with this Act or the regulations as to:*
>
> *(a) the operations of the Tribunal; and*
>
> *(b) the conduct of reviews by the Tribunal.*
>
> *(2) In particular, the directions may relate to the application of efficient processing practices to the conduct of reviews by the Tribunal.*
>
> *(3) The Tribunal should, as far as practicable, comply with the directions. However, non-compliance by the Tribunal with any direction does not mean that the Tribunal's decision on a review is an invalid decision.*
>
> *(4) If the Tribunal deals with a review of a decision in a way that complies with the directions, the Tribunal is not required to take any other action in dealing with the review.*

31. Pursuant to s.420A of the Migration Act, the Principal Member has issued a direction specifying the manner in which documents may be sent to the Tribunal. In relation to Perth, the only specified manner of delivery is delivery by hand to the AAT registry.

32. In the circumstances, the Minister submits that the Tribunal was under no obligation to consider the additional documents because they were not received by the Tribunal until after the Tribunal decision was beyond recall (in the sense that the decision was finalised and published to the applicant). The Secretary was also informed of the outcome of the review, although the review itself was not finalised until the Department's file was returned to it with a copy of the Tribunal's decision record placed upon it[16]. I accept that submission.

33. The Tribunal only has the power given to it by statute. Once that power has been exercised, it cannot be re-exercised, and therefore the Tribunal has no duty to re-exercise it. Thus, the first question here is whether the Tribunal had exercised its power by the time it received the documents sent by email on 28 November 2013.

34. In *Minister for Immigration v SZQOY*[17] the Full Federal Court accepted[18] as correct the following statement by Madgwick J in *Semunigus v Minister for Immigration*[19]:

> *In a case of the kinds dealt with by the RRT, a decision is no decision, in my opinion, until either it has been communicated to the applicant or irrevocable steps have been taken to have that done. I speak of communication to the applicant because, before the RRT, the applicant is the only party. There is no need to regard a decision as irrevocable before it must be considered to have passed into the public domain.*

35. That case involved a document sent to the Tribunal after it had prepared its statement of reasons but before that statement had been sent to either the applicant or the Secretary. Although the judgments of both Logan J and Barker J contain some statements that go further, the case decided only that, in order for the Tribunal to be *functus officio*, the Tribunal must take some overt step to preclude it from being able to

[16] see s.430A
[17] (2012) 206 FCR 25
[18] [29] per Buchanan J, [34] per Logan J, [50] per Barker J
[19] (2000) 96 FCR 533 at [103]

reconsider its decision. The Full Court's reasoning in that case was explained in detail by Buchanan J in *Minister for Immigration v SZRNY* (*SZRNY*)[20].

36. While the reasoning of the majority in *SZRNY* is unhelpful to the Minister, it is important to remember that *SZRNY* concerned a different question, namely, the meaning of s.5(9) of the Migration Act and, in particular, the phrase "subject to any form of review under Part 5 or 7" in that sub-section. The majority held that a decision came within the meaning of this phrase until the Tribunal had notified both the review applicant and the Secretary in accordance with the obligation under s.430A(1) and (2). An important factor in the judgment of the majority was that s.5(9) was broadly expressed[21]. Critically, the Minister submits that that case, then, did not decide when the Tribunal is *functus officio* and does not apply to the facts of this case. Further and in the alternative, the Minister submits that *SZRNY* was wrongly decided. Obviously, the alternative submission is a protective one. The question for me is whether this case can be distinguished from *SZRNY*.

37. The relevant facts in this case appear both from the court book and the affidavit of Ms King affirmed on 4 June 2014. Importantly, Ms King says that there is no registry or Registrar of the Tribunal in Perth[22]. The communication from the psychologist was not delivered by hand to the AAT registry in Perth in accordance with the Principal Member's direction. It was sent by email to the AAT in Perth and sent on to the Tribunal registry in Melbourne. That means that the email was received by the Tribunal on 3 December 2013.

38. Ms King's affidavit shows that Ms Cignarella, an officer of the Tribunal, prepared two notification letters on 28 November 2013 at 13.49, to be sent to the applicant with the reasons for decision. Both letters were dated 28 November 2013. The first was addressed to the applicant's agent, Mr George Vassiliou at 16 Theodore Street, Surrey Hills, Victoria 3127. The second was addressed to the applicant at an address in Kewdale, Western Australia. Those addresses were the residential and service addresses last provided to the Tribunal in connection with

[20] (2013) 214 FCR 374 at 378 to 381
[21] FCR at 390 [85]
[22] [5]

the review. The letters were both sent the following day by pre-paid post[23].

39. This means that the Tribunal complied with s.430A(1) on 29 November 2013. That is, it sent the applicant a copy of its statement of reasons by one of the methods prescribed in s.441A. I accept the Minister's submission that, in so doing, the Tribunal did an overt act that put the decision beyond its ability to reconsider and so was *functus officio*. Those facts in my opinion distinguish this case from both *SZRNY* and *SZQOY*, where s.430A(1) had not been complied with before the document in question had been received. Further, in my opinion the delayed return of the Department's file with the Tribunal's decision record placed on it did not preserve any power to recall the Tribunal's decision once it had otherwise passed into the public domain.

40. Finally, I accept the Minister's submission that in any event, there was no error in any failure to have regard to the new material. As noted above, the body of the email was contained in a report already considered by the Tribunal. The only new matter was the medical certificate and prescription. Unlike the document considered in *Minister for Immigration v SZRKT*[24], this document was not cogent evidence of any aspect of the applicant's claims that was central to the Tribunal's reasons. The document went only to the hospitalisation of the applicant's sister and said nothing of the reason for that hospitalisation. Further, the Tribunal's reasons did not turn on the applicant's evidence about recent visits by thugs.

41. For those reasons, there was no obligation on the Tribunal to consider the documents both because it was *functus officio* when it received them and because of the content of the documents.

Conclusion

42. The applicant has failed to establish that the Tribunal fell into jurisdictional error in the review. It follows that the decision is a privative clause decision and the application must be dismissed. I will so order.

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[23] Annexure E
[24] (2013) 212 FCR 99

43. I will hear the parties as to costs.

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 19 September 2014