FEDERAL CIRCUIT COURT OF AUSTRALIA

MINISTER FOR IMMIGRATION v SZRUH & ANOR *[2013] FCCA 1164*

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

ADMINISTRATIVE LAW – Allegation that the Tribunal's decision affected by jurisdictional error by reason that it misapplied sub-s.36(3) of the *Migration Act 1958*.

WORDS & PHRASES – "to reside temporarily".

Legislation:
Migration Act 1958, ss.36

Cases Cited:
WAGH v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 131 FCR 269
Minister for Immigration & Citizenship v SZRTC [2013] FCCA 1
SZRDX v Minister for Immigration & Citizenship [2012] FMCA 838
SZMWQ v Minister for Immigration & Citizenship (2012) 187 FCR 109

Applicant:	MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS & CITIZENSHIP
First Respondent:	SZRUH
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2023 of 2012
Judgment of:	Judge Cameron
Hearing date:	9 August 2013
Date of Last Submission:	9 August 2013
Delivered at:	Sydney

Delivered on:	23 August 2013

REPRESENTATION

Counsel for the Applicant:	Mr J. Smith
Solicitors for the Applicant:	DLA Piper Australia
Counsel for the First Respondent:	Mr J. Gormly
Solicitors for the Second Respondent:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue bringing the second respondent's decision of 14 August 2012 into this Court to be quashed.

(2) A writ of mandamus issue directing the second respondent to re-determine according to law the first respondent's application to it dated 4 January 2012.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 2023 of 2012

MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS & CITIZENSHIP
Applicant

And

SZRUH
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The first respondent is a citizen of Burundi who arrived in Australia on 6 June 2011 as the holder of an AusAid student visa. On 29 July 2011 he lodged an application for a protection visa with the Department of Immigration and Citizenship. On 14 December 2011 that application was refused by a delegate of the applicant ("Minister"). The first respondent then applied to the second respondent ("Tribunal") for a review of the delegate's decision.

2. On 14 August 2012 the Tribunal found that the first respondent was a person to whom Australia owes 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") and remitted the matter to the Minister's department for

reconsideration with a direction that the first respondent satisfied s.36(2)(a) of the *Migration Act 1958* ("Act"). The Minister has applied to this Court for judicial review of the Tribunal's decision.

3. For the reasons which follow, the Tribunal's decision will be set aside and the matter remitted to it to be determined according to law.

Relevant legislation

4. The Act relevantly provides:

> ***36 Protection visas***
>
> …
>
> *(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or*
>
> *(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) 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*
>
> …
>
> *Protection obligations*
>
> *(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*
>
> *(4) However, subsection (3) does not apply in relation to a country in respect of which:*

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Background facts

5. The facts alleged in support of the first respondent's claim for a protection visa were set out in some detail at pages 4-11 of the Tribunal's decision. However, as the matter presented for determination in these proceedings is a narrow one, it is sufficient simply to record that the first respondent claimed to fear persecution in Burundi because of his political opinion.

The Tribunal's decision and reasons

6. After discussing the claims made by the first respondent and the evidence before it, the Tribunal found that he satisfied the criterion for the grant of a protection visa found in s.36(2)(a) of the Act. The Tribunal was satisfied that the first respondent had a well-founded fear of persecution for a Convention reason in Burundi.

7. The Tribunal noted that the evidence before it indicated that citizens of Burundi could enter other countries in the East African Community ("EAC") (Kenya, Uganda, Tanzania and Rwanda) and receive a pass to stay for six months and, further, that individuals with contracts of employment could apply for work permits to stay longer. The Tribunal found that as there was no evidence before it that the first respondent had a contract of employment in Kenya, Uganda, Tanzania or Rwanda, he only had a right to enter and then reside in any of those countries for six months. Referring to *WAGH v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 269, the Tribunal did not accept that the first respondent's right to enter and reside in an EAC country for six months was a "right to enter and reside" as intended by s.36(3) of the Act. The Tribunal noted that the persecution of political opponents in Burundi was ongoing and, on the basis of country information, was not satisfied that that persecution would cease in the foreseeable future or within six months such that the first respondent could return to Burundi. The Tribunal therefore concluded that the temporary right to enter another EAC country for up to six months was not sufficient to amount to a right to enter and reside.

Proceedings in this Court

8. In his amended application the Minister alleged:

> *1. In remitting the application with the direction that the first respondent ('visa applicant') satisfies section 36(2)(a) of the* Migration Act 1958 *(Cth) ('the Act'), the second respondent erred in concluding that section 36(3) of the Act did not apply to the visa applicant.*

Particulars

a. Having found that the first respondent had a right to enter and reside for up to 6 months in any EAC country, the Tribunal held (at [73]) that that did not constitute a 'right to enter and reside' within the meaning of section 36(3).

b. The second respondent erred in relying on WAGH v Minister for Immigration and Multicultural Indigenous Affairs *[2003] FCAFC 194 in that the visa applicant could not be regarded as not holding the 'right to enter and reside' in an EAC country.*

9. A second allegation was not pressed.

Consideration

10. Relevantly, the Tribunal said at paras.72 and 73 of its reasons for decision:

> *… Justice Hill observed in WAGH v MIMIA that while a transit visa, for example, would be a right to enter, it would clearly not be a right to enter and reside. ((2003) 131 FCR 269 at [64]). Whether a tourist visa is a visa which authorises both entry and (temporary) residence was, in his Honour's opinion, a more difficult question. The applicants in that case held US visas 'for the purpose of business and tourism'. Referring to the usual dictionary sense of 'reside', ('To dwell permanently or for a considerable time; have one's abode for a time': The Macquarie Dictionary (revised 3rd ed).) his Honour stated that it would be an unusual, but not impossible, use of the word to refer to a tourist: while a tourist may stay for a time in a country, that country would not be his or her place of abode, even temporarily (WAGH v MIMIA (2003) 131 FCR 269 per Hill J at [65]). In the same case, Lee J took a narrower approach. Justice Lee held that the right to enter and reside in s.36(3) is a right which a person may exercise pursuant to a prior acceptance or acknowledgment by the relevant country, to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a contracting state under the Convention. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required. (WAGH v MIMIA (2003) 131 FCR 269 at [34].*

> *The Tribunal finds the applicant has a right to enter other EAC countries and stay for up to 6 months. The Tribunal does not accept however that the right to enter and reside up to 6 months is a 'right to enter and reside' as intended by s.36(3) given the applicant would have to leave whichever EAC country he sought protection in after 6 months. The Tribunal notes the persecution of political opponents in Burundi is ongoing. On the basis of reports such as the Human Rights Watch report of May 2012 the Tribunal is not satisfied that persecution of political opponents in Burundi will cease within the foreseeable future or within 6 months such that the applicant could return to Burundi. The Tribunal finds in the circumstances of this case that such a temporary right to enter another EAC country for up to 6 months is not sufficient to amount to a right to enter and reside.*

11. The Minister submitted that this construction of s.36(3) was erroneous with the result that the Tribunal failed properly to apply the criteria found in s.36, causing its decision to be affected by jurisdictional error.

12. For his part, the first respondent argued that the Tribunal's construction of s.36(3) was correct in that it recognised that the provision was concerned with an applicant's need for protection, rather than with the quality of protection which might be accessed.

13. An effectively identical issue was considered by Judge Driver in *Minister for Immigration & Citizenship v SZRTC* [2013] FCCA 1. His Honour found in that case that the Tribunal had erred in finding that a right to enter and stay for up to six months was not a right to enter and reside for the purposes of s.36(3). His Honour held that the words "temporarily" and "residence" were to be construed by reference to the qualifying provisions in ss.36(4), (5) and (5A) and, implicitly accepting that s.36(3) contained a temporal element, concluded that a decision-maker must determine how long an applicant would need to stay in the third country "in order to access the protection envisaged by those sub-sections".

14. With respect, I do not agree with his Honour's analysis of the provisions in question. Sub-section 36(3) does not depend for its meaning on sub-ss.36(4), (5) or (5A). Sub-section 36(3) excludes certain persons from the protection obligations set out in sub-s.36(2) and sub-ss.36(4), (5) and (5A) provide exceptions to the operation of that exclusion. Until it is determined that sub-s.36(3) applies to a

particular applicant for a protection visa, it is unnecessary to consider any of the exceptions to its operation (see also *SZRDX v Minister for Immigration & Citizenship* [2012] FMCA 838 at [20]). Once the operation of the provisions is understood in that way, it can be seen that sub-s.36(3) stands to be construed according to its own terms and not by reference to sub-ss.36(4), (5) and (5A).

15. I accept the Minister's submission that there is no authority which presently binds this Court on the matter in issue in these proceedings. Specifically, the passage from Lee J's judgment in *WAGH* relied upon by the Tribunal did not enjoy the concurrence of the others members of the Full Court, Hill and Carr JJ. Further, the reasoning of Hill J and Carr J turned on issues not present in these proceedings; in Hill J's case the Tribunal's failure to consider an aspect of the test in s.36(3) and in Carr J's case the limited entry rights granted by the applicants' American visas.

16. Similarly, no binding ratio relevant to the matter in issue in these proceedings is to be found in *SZMWQ v Minister for Immigration & Citizenship* (2012) 187 FCR 109.

17. The difficulty in this matter lies in attempting to determine when temporary residence is so brief that it does not amount to residence. That difficulty is caused by "temporary" and "residence" being incompatible concepts. Something which is temporary lacks permanence but residence implies permanency. Relevantly, "reside" is defined by the *Oxford English Dictionary* (2nd edition) as:

> ***1. a.*** intr. *To settle; to take up one's abode or situation. …*
>
> ***2. a.*** *To dwell permanently or for a considerable time, to have a settled or usual abode, to live,* in *or* at *a particular place.*

18. The *Macquarie Dictionary* (5th edition) relevantly defines "reside" as:

> ***1.*** *to dwell permanently or for a considerable time; have one's abode for a time. …*
>
> ***2. reside in****, … (of things, qualities, etc.) to abide, lie, or be present habitually in; exist or be inherent in.*

19. To reside somewhere temporarily is something less than dwelling there permanently and so dictionary definitions of "reside" are of limited assistance in deciding the present issue and, in particular, cannot be employed to qualify or determine the minimum duration of residence for the purposes of sub-s.36(3). Consequently, and there being no limitation in s.36(3) on how temporary a residence may be, in my view temporary residence includes a stay of any length as long as it involves a pause in a person's travels. The dictionary definitions indicate that residence involves establishment of an abode. Given that sub-s.36(3) does not prescribe a minimum duration for temporary residence, I conclude that to satisfy the "abode" element of residence the person in question would have to be able to stay in the third country for a period which would ordinarily require him or her to obtain accommodation.

20. As noted earlier, it is only once it is determined that an applicant for a protection visa is entitled to reside in a country to which he or she has a right of entry that it becomes necessary to consider whether any of the circumstances referred to in sub-ss.36(4), (5) and (5A) apply and negative the exclusionary operation of sub-s.36(3). Consequently, as a result of concluding that the right of residence referred to in s.36(3) had to be co-extensive with the duration of an applicant's need for protection, thus qualifying the meaning of "to reside" in sub-s.36(3) by applying concepts connected with sub-ss.36(4), (5) and (5A), the Tribunal erred. Instead of proceeding in that manner, the Tribunal should have first determined whether the first respondent had a right to reside in a third country and then whether that right was rendered irrelevant to its considerations because circumstances existed which caused one or more of the exceptions in sub-ss.36(4), (5) or (5A) to apply.

21. Because the Tribunal misunderstood the test it had to apply, it constructively failed to exercise its jurisdiction.

Conclusion

22. As jurisdictional error on the part of the Tribunal has been demonstrated, its decision will be set aside and the matter remitted to it to be determined according to law.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 23 August 2013