# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*MZYEG v MINISTER FOR IMMIGRATION & ANOR* *[2009] FMCA 1249*

MIGRATION – Refugee Review Tribunal – whether Tribunal implicitly made a finding that the applicant was a national of PNG – whether Tribunal implicitly made a finding that the applicant was stateless – no implicit finding – jurisdictional error established.

*United Nations Refugees Convention*, Art.1A(2)

*Minister for Immigration v SZIPL* [2009] FCA 143
*SZIPL v Minister for Immigration* [2007] FMCA 643
*SZIPL v Minister for Immigration* [2008] FMCA 1501

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| Applicant: | MZYEG |
| First Respondent: | MINISTER FOR IMMIGRATION & CITIZENSHIP |
| Second Respondent: | REFUGEE REVIEW TRIBUNAL |
| File Number: | MLG 494 of 2009 |
| Judgment of: | Riley FM |
| Hearing dates: | 8 September & 2 October 2009 |
| Date of Last Submission: | 2 October 2009 |
| Delivered at: | Melbourne |
| Delivered on: | 2 October 2009 |

**REPRESENTATION**

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| Counsel for the Applicant: | In person |
| Solicitors for the Applicant: | In person |
| Counsel for the First Respondent: | Mr D. Brown |
| Solicitors for the First Respondent: | Australian Government Solicitor |
| Counsel for the Second Respondent | No Appearance |
| Solicitors for the Second Respondent: | Australian Government Solicitor |

**ORDERS**

(1) The decision of the Tribunal dated 26 March 2009 is set aside.

(2) The decision is remitted to the Tribunal for further hearing according to law.

(3) No order as to costs.

# FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

## MLG 494 of 2009

**MZYEG**
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

**REFUGEE REVIEW TRIBUNAL**
Second Respondent

## REASONS FOR JUDGMENT

1. This is an application for review of a decision of the Refugee Review Tribunal. The applicant may be a citizen of Papua New Guinea or he may be a citizen of West Papua. He applied to the Refugee Review Tribunal for review of a decision refusing him a protection visa. He made various claims to the Tribunal which the Tribunal rejected.

2. The essential issue before the court today is whether the Tribunal made a finding that the applicant was stateless. The Tribunal said, at paragraphs 90, 91 and 105 of its reasons for decision, the following:

> *90. The applicant has provided no travel documentation and he has presented no evidence of his identity. As a consequence the Tribunal can make no clear finding about the applicant's identity.*
>
> *91. In his visa application the applicant has claimed that he was born in PNG and has made various claims of his circumstances in PNG throughout the conduct of this review. In evidence to the Tribunal the applicant has made claims*

*that he may be West Papuan because his mother was born in West Papua. In evidence to the Tribunal the applicant has made contradictory claims that he is West Papuan and does not have PNG citizenship. The applicant's evidence to the Tribunal is also that he was born in Daru, PNG and has variously indicated that he has lived in Daru; the applicant gave evidence that he departed Daru when he travelled to Australia. On balance, the Tribunal considers that PNG is the applicant's country of former residence and will consider his claims accordingly.*

…

*105. The applicant has claimed that he is not from PNG. The Tribunal has already made a finding in relation to the applicant's country of former residence at [91] and does not accept the applicant's claims that he does not come from PNG. The applicant claims that he is not registered on the PNG census. The applicant has advanced no reasons or evidence to support this claim. However, the Tribunal accepts that given the last census conducted in PNG was in July 2000 and the applicant left for Australia and rowed to Badu Island at about the same time, the applicant may not have been included in the census. The applicant's additional claim is that because his name was not on the census he was told that he should return to West Papua. The applicant did not identify who told him that he should return to West Papua. The Tribunal has already discussed the matter of West Papuans being asked to return to West Papua and does not accept the claim that, if the applicant was present for the census, his name was not included in the census and that he was told to return to West Papua. In any event, the Tribunal does not accept that the applicant's omission from the census would of itself amount to serious harm. The Tribunal does not accept that the applicant's omission from the census would of itself amount to serious harm. The Tribunal is of the view that as the applicant has been absent from PNG for eight years he may experience some bureaucratic delays in the processing of documentation relating to his identity but this does not amount to serious harm or persecution as outlined in s.91R. The Tribunal finds that the fear harmed* (sic) *for reasons of not being included on the PNG census and being absent from PNG for a long period is not well-founded.*

3. Article 1A(2) of the Refugees Convention defines a refugee to be any person who:

> *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*

4. When the matter was first before the court on 8 September 2009, the first respondent relied on written submissions and oral submissions to the effect that the Tribunal had found that the applicant was a citizen or, at least, a national of PNG. The hearing was adjourned to enable both parties to provide fuller submissions on the question of the applicant's nationality, if any. The first respondent argued in court today that it is implicit in the Tribunal's reasons for decision that the Tribunal made a finding that the applicant is stateless.

5. I provided to the parties today a series of decisions in the matter of *SZIPL v Minister for Immigration*. The first of those is a decision of Federal Magistrate Raphael in the matter *SZIPL v Minister for Immigration* [2007] FMCA 643. His Honour said, at paragraph 12, that:

> *I am satisfied that in order to properly determine whether or not an applicant is truly a refugee a Tribunal must first examine the existence or otherwise of his or her nationality. Only when it is satisfied on the basis of the law of the country of claimed nationality that an applicant is stateless should it apply the test based upon that person's country of habitual residence.*

6. The decision of Federal Magistrate Raphael was relied upon and approved in a decision of Federal Magistrate Driver in the matter of *SZIPL v Minister for Immigration* [2008] FMCA 1501. However, Federal Magistrate Driver's decision was overturned on appeal in the matter of *Minister for Immigration v SZIPL* [2009] FCA 143. The error concerned procedural fairness rather than any matter of substance in the decision of Federal Magistrate Driver. His Honour said at paragraph 35:

> *However, it is plain from the wording of the Refugees Convention that a claim of being persecuted by reference to a country of habitual residence only arises where a claimant has no nationality. It would only be if the Tribunal had been unable to determine the issue of nationality that the Tribunal would have needed to consider a claim as against a country of habitual residence.*

7. The first respondent in the present case now says that there was an implicit finding in the Tribunal's reasons for decision that the applicant was stateless. I note that the Tribunal said, in paragraph 90 of its reasons for decisions, that it can make no clear finding about the applicant's identity. The first respondent submits that this contains a finding that the Tribunal was unable to make a clear finding about the applicant's nationality. However, I am not persuaded that the Tribunal's reasons, either in paragraph 90 or taken as a whole, contain an implicit finding that the applicant had no nationality.

8. It seems to me that the Convention makes the issue of nationality so critical that it is incumbent upon the Tribunal to make a clear finding one way or another. That is, it is incumbent upon the Tribunal to make a finding that an applicant is a national of one country or another, or no country at all. I consider that I ought to follow the decisions of Federal Magistrates Raphael and Driver, mentioned previously, for reasons of judicial comity, but also because they seem to me to be correct.

9. The confusion in the Tribunal's reasons about the status of the applicant, his citizenship or nationality, and his origins generally, were highlighted by the fact that, originally, the first respondent submitted that the Tribunal had implicitly found that the applicant was a national of PNG, but today submits that the reasons of the Tribunal contain an implicit finding that the applicant is stateless.

10. It seems to me that the Tribunal has, in fact, avoided dealing with a critical issue in its reasons for decision. It is not appropriate for the court, by implication, to fill a deficiency in an area where the Tribunal was so uncertain itself.

11. There is no doubt that a failure to make a finding about such a critical matter as the applicant's nationality, if any, is a jurisdictional error.

Accordingly, I consider that the application must be allowed, and the matter must be remitted to the Tribunal for further consideration.

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**I certify that the preceding eleven (11) paragraphs are a true copy of the reasons for judgment of Riley FM**

Associate: Ashika Kanhai

Date: 15 December 2009