FEDERAL CIRCUIT COURT OF AUSTRALIA

SZUBI v MINISTER FOR IMMIGRATION & ANOR *[2015] FCCA 226*

Catchwords:
MIGRATION – Persecution – review of Refugee Review Tribunal ("Tribunal") decision – visa – protection visa – refusal – whether s.36(3) of the *Migration Act 1958* ("Act") requires only reasonably practicable steps to be taken.

ADMINISTRATIVE LAW – Allegation that the Tribunal's decision affected by jurisdictional error by reason that the Tribunal failed to advise the applicant that the interpretation of s.36(3) of the Act had changed since the primary decision was made.

PRACTICE & PROCEDURE – Application to reinstate proceedings summarily dismissed for non-attendance – relevant considerations.

Legislation:
Migration Act 1958, ss.36, 425, 474
Federal Circuit Court Rules 2001, rr.13.03C, 13.10, 16.05

Cases cited:
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Minister for Immigration, Multicultural Affairs & Citizenship v SZRHU (2013) 215 FCR 35
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 228 CLR 152
Minister for Immigration & Border Protection v SZSCA (2014) 314 ALR 514

Applicant:	SZUBI
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 698 of 2014
Judgment of:	Judge Cameron
Hearing dates:	17 December 2014, 27 January 2015

Date of Last Submission:	27 January 2015
Delivered at:	Sydney
Delivered on:	5 March 2015

REPRESENTATION

Solicitors for the Applicant:	Mr M. Jones of Parish Patience
Solicitors for the Respondents:	Ms Z. Taylor of Clayton Utz

ORDERS

(1) The applicant's applications in a case filed on 6 November 2014 and 23 December 2014 be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 698 of 2014

SZUBI
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 Nepal who arrived in Australia on 27 December 2012. On 21 February 2013 he lodged an application for a protection visa alleging that he feared persecution in Nepal because of his political opinion. On 27 August 2013 his 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. He was unsuccessful before the Tribunal and on 19 March 2014 sought judicial review of the Tribunal's decision with this Court.

2. The applicant's application was listed for its first court date on 14 April 2014. The applicant appeared in person and in his presence the matter was listed for a call-over on 8 October 2014. The applicant did not appear at the call-over on 8 October 2014 and on the application of the Minister the proceeding was dismissed pursuant to r.13.03C(1)(c) of the *Federal Circuit Court Rules 2001* ("Rules").

3. These reasons concern an application in a case filed by the applicant pursuant to r.16.05 of the Rules on 6 November 2014 seeking an order setting aside the orders made by this Court on 8 October 2014 on the basis that they were made in his absence. On 23 December 2014 the applicant filed a related application seeking to amend his initiating application.

Background facts

4. As summarised by the Tribunal, the applicant relevantly made the following claims in his protection visa application.

Primary application

5. In his visa application form the applicant claimed that he was a supporter of the Nepali Congress Party and had been targeted by Maoists. He claimed that the Maoists had sought from him large sums of money which he could not pay. The applicant claimed that he feared being murdered by the Maoists or other enemies because of his opposition to the Maoists and his refusal to make financial contributions to them. He claimed that the authorities would not protect him unless he bribed them.

6. Section 36(3) of the *Migration Act 1958* ("Act") provides:

> *(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.*

7. The delegate was not satisfied that the applicant was a person to whom Australia owed protection obligations. In reaching that conclusion, the delegate said:

> *I have considered whether the 1950 Treaty of Peace and Friendship between India and Nepal gives Nepali nationals the right to enter and reside in India.*
>
> *The balance of judicial authority is that the "right to enter and reside" in a country, as provided by section 36(3) of the Migration Act, must be a "legally enforceable" right, as the court found in* WAGH v MIMA *[2003] FCAFC 194.*

> *I note that in* SZGXK v MIAC *[2008] FCA 1891, the court held that, having regard to both the 1950 Treaty and relevant country information, Nepali citizens have the right to enter and reside in India, while in* SZNKZ v MIAC & Anor *[2009] FMCA 737 the court held that the 1950 Treaty does not afford Nepali citizens a "legally enforceable right to enter and reside" in India. Recent advice from DFAT states:*
>
> > *While there are no legally enforceable provisions for residence in India by Nepalese citizens, many thousands have done so for some time and travel by their nationals is freely permitted between the two countries.*
>
> *Having considered all the above matters, I am satisfied that Nepalese nationals do not have a current and legally enforceable right to enter and reside in India.* (footnote omitted)

Tribunal

8. The applicant appeared before the Tribunal on 5 February 2014 and relevantly stated that he knew he did not need a visa to enter India but had never travelled there. He said that even if he moved to India the Maoists from Nepal could follow him there and that there had been several cases where the Maoists had travelled to India to attack and kill people. He also said that the Indian government was unable to provide protection for its own citizens against the Indian Maoists and that the Indian Maoists had a connection with the Nepalese Maoists.

9. Following the Tribunal hearing, the applicant provided a letter dated 10 February 2014 in which he relevantly claimed:

   a) he did not have a legally enforceable right to enter and reside in India. The 1950 Treaty of Peace and Friendship between India and Nepal ("Treaty") did not have legal effect under Indian domestic law and did not impose an obligation on India to allow entry to all Nepalese citizens; and

   b) the Indian authorities could send him back to Nepal at any time.

The Tribunal's decision and reasons

10. On 12 February 2014 the Tribunal affirmed the delegate's decision to refuse the applicant a protection visa. In doing so, it discussed s.36(3) of the Act in the following terms:

> *The Full Federal Court in* ... MIMAC v SZRHU *[2013] FCAFC 91 held that the term 'right' in s.36(3) should not be restricted to a right in the strict sense which is legally enforceable. Rather, it should include the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of enforcement; or a liberty, permission or privilege which does not give rise to any particular correlative duty upon the state in question.*

11. The Tribunal found that the Treaty did not deal with the rights of Nepalese nationals to enter India but was concerned with their treatment once they entered India. It referred to information on the website of the Indian Bureau of Immigration which had been provided to it by the Department of Foreign Affairs and Trade ("DFAT"). That information indicated that:

    a) Nepalese citizens entering India by land or air did not require a passport or visa. Those entering by air were required to show any one of a number of valid identity documents to establish their Nepalese citizenship;

    b) Nepalese citizens had to be in possession of their passports when entering India from places other than Nepal and those with valid Nepalese passports, such as the applicant, could enter India by air directly from Australia; and

    c) unlimited stay in India was guaranteed to Nepalese citizens and there were no restrictions on their ability to remain, reside or work there.

    The Tribunal also referred to other country information indicating that Nepalese citizens could attend school and access health services in India, that millions of Nepalese citizens worked and owned property in India, that there were sizeable Nepalese communities in India, that there was a population which moved between the two countries and that the border movement between them had led to transnational social networks.

12. The Tribunal found that, as a matter of practical reality, the applicant had a right to enter and reside in India but had not availed himself of that right.

13. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution or that there was a real risk that he would suffer significant harm in India.

14. The Tribunal also considered whether the Indian authorities might return the applicant to Nepal or a third country. It was not satisfied that the applicant had a well-founded fear that he would be returned to Nepal from India and found that there was nothing to suggest that the Indian authorities would send him to a third country. In connection with those findings, the Tribunal noted DFAT advice that Nepalese citizens in India could be forcibly removed if convicted of a crime in India or Nepal and found that there was no other independent information to suggest that Indian authorities could or would return a Nepalese citizen to Nepal for any other reason. It noted that in his protection visa application the applicant had not claimed that he had been convicted of any crime and there was no suggestion that he would engage in criminal activity in the future.

Application for reinstatement of the proceeding

15. In the circumstances of this case I find that the considerations relevant to whether the order dismissing the application filed on 19 March 2014 should be set aside are whether the applicant's explanation for his non-attendance on 8 October 2014 is a satisfactory or adequate one and whether the application for judicial review would have reasonable prospects of success if the order dismissing that application were to be set aside. At the hearing of the present interlocutory application the applicant agreed that the latter point should be determined by reference to his proposed amended application, not by reference to the original version of the application.

Satisfactory explanation

16. In his affidavit in support of the application to reinstate, the applicant deposed that he believed that he suffered from depression, saying that he sometimes forgot about things he had to do and had forgotten about the listing on 8 October 2014. He said that it was only on 28 October 2014 that he had remembered that he had had to attend Court on 8 October 2014. He also submitted that once he realised what had happened he acted quickly to seek the reinstatement of the matter.

17. The applicant did not adduce any medical evidence to suggest that he suffered from a depressive illness and submitted that he had simply been describing his state of mind.

Consideration

18. A party who commences a proceeding assumes a responsibility to prosecute that case with diligence. Simple forgetfulness, while human, is not a satisfactory explanation for failing to attend to that obligation. Something more is required.

19. I do not think that the applicant's explanation for not attending on 8 October 2014 is satisfactory.

Arguable case

20. The application to reinstate the proceeding will not be granted unless the applicant's proposed application for judicial review has reasonable prospects of success. Unless it has such prospects it would be liable to be dismissed pursuant to r.13.10(a) of the Rules were it to be reinstated.

21. In proceedings for judicial review of a Tribunal decision the Court's task is to determine whether that 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, for present purposes the applicant must demonstrate that he has reasonable prospects of proving that the Tribunal's decision is affected by jurisdictional error.

22. By his application in a case filed on 23 December 2014, the applicant sought to amend his application to make the following allegations:

    1. *The Tribunal denied procedural fairness to the Applicant and failed to conduct the hearing in the manner required by section 425 of the* Migration Act 1958.

       Particulars

       The Tribunal interpreted the effect of subsection 36(3) of the Act in the light of the judgment of the Full Federal Court in Minister for Immigration v SZRHU *[2013] FCAFC 9. The delegate had considered that subsection relying on previous interpretations which held that the subsection only applied to a legally enforceable right, and that the* Treaty of Peace

and Friendship *between India and Nepal did not provide such a right. The Tribunal did not at any time advise the Applicant that it was intending to apply a different interpretation and that the interpretation and finding of the delegate was no longer relevant to the issues before the Tribunal.*

2. *The Tribunal misinterpreted subsection 36(3) and applied it incorrectly to the circumstances of the case.*

Particulars

The expression "all possible steps" in 36(3) implies that the decision maker must consider the individual circumstances of the Applicant and come to a conclusion about whether it would be reasonably practicable for the Applicant to avail himself of a right to enter India, by analogy with the approach taken by the High Court in Minister for Immigration v SZSCA *[2014] HCA 45. The Tribunal considered only whether there would be a real chance of persecution or a risk of significant harm to the Applicant.*

23. He placed no reliance on the original form of his application for the purposes of his application to reinstate the proceedings.

Proposed ground 1

24. The applicant's first proposed allegation was that the Tribunal had an obligation pursuant to s.425 of the Act to inform him that the interpretation of s.36(3) of the Act had changed in the period between the delegate's decision and its decision. At the time of the delegate's decision s.36(3) was understood to refer to a legally enforceable right to enter and reside in a third country but at the time of the Tribunal's decision and subsequently s.36(3) has been understood to refer to the freedom to enter a third country lawfully and reside there, albeit that that liberty might be withdrawn: *Minister for Immigration, Multicultural Affairs & Citizenship v SZRHU* (2013) 215 FCR 35.

25. Section 425 of the Act relevantly requires the Tribunal to advise an applicant of any issues arising in relation to the decision under review, that is to say, the delegate's decision. In his written submissions the applicant noted that in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 the High Court held that an applicant before the Tribunal is entitled to assume

that the reasons given by the delegate would identify the issues in the case unless the Tribunal were to identify some other issue and bring it to the applicant's attention.

26. The relevant issue was whether the applicant had taken all possible steps to avail himself of his right to enter and reside in India and I conclude that the applicant was aware of it as an issue in his Tribunal review because he addressed it in his 10 February 2014 written submissions to the Tribunal. The fact that the applicant was unaware of the Full Court of the Federal Court's statement of the meaning of s.36(3) in *SZRHU* was not relevant to his awareness of the issue posed by s.36(3) of the Act. It was his responsibility to ensure that his understanding of the law was up-to-date.

27. In any event, the transcript of the Tribunal hearing which was admitted into evidence in this proceeding records at p.14 that the Tribunal said to the applicant:

> *Q: In determining whether these provisions apply there are several relevant considerations, whether you are able lawfully to enter and live in India, either temporarily or permanently ...*

That was a correct expression of the issue presented by s.36(3) as its operation has been explained in *SZRHU*. The Tribunal was not required to explain to the applicant why the issue was characterised in that way.

28. For those reasons, the first ground of the proposed amended application would not have reasonable prospects of success were leave to be granted to rely on it.

Proposed ground 2

29. The applicant also wished to allege that, when determining under s.36(3) whether an applicant has taken all possible steps to avail him or herself of a right to enter and reside in a third country, the Tribunal must determine whether it would be reasonably practicable for the applicant to exercise that right. The applicant sought to draw an analogy between s.36(3) and the internal relocation principle, which is to the effect that an applicant facing persecution in one part of his or her country of habitual residence will not be entitled to protection

under the Refugees Convention if it is reasonably practicable that he or she relocate to a different part of that country where persecution would not be faced: *Minister for Immigration & Border Protection v SZSCA* (2014) 314 ALR 514. The applicant observed that in *SZSCA* the High Court had extended the reasoning applicable to internal relocation to a case where an applicant had already relocated within Afghanistan but said that circumstances in the new location had changed such that new risks had developed which raised the practicability of him remaining there. The present applicant submitted that if such considerations are to be taken into account "in respect of internal relocation, or even remaining in the same place within the same country", then a similar question of reasonable practicability must inform the operation of the term "all possible steps" in s.36(3).

30. The applicant's argument propounds a symmetry in approach which the unambiguous terms of s.36(3) do not accommodate. The words "all possible steps" are emphatic and more demanding than a test requiring reasonably practical steps be taken. The Parliament could have drawn the test by reference to an applicant's reasonable efforts and the fact that it has not done so cannot have been inadvertent. The sub-section means what it says and so the second ground of the applicant's proposed amended application would not have reasonable prospects of success were leave to be granted to rely on it.

Conclusion

31. As the applicant has not provided a satisfactory explanation for his failure to attend court on 8 October 2014 and the grounds he would wish to press were he granted leave to reinstate his proceeding do not have reasonable prospects of success, his applications in a case filed on 6 November 2014 and 23 December 2014 will be dismissed.

I certify that the preceding thirty-one (31) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 5 March 2015