FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIPL v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 643*

MIGRATION – Review of decision of RRT – whether s.36(2)(a) Migration Act requires the Tribunal to assess an applicant, first against her country of nationality which in turn requires an investigation and determination of nationality or whether Tribunal can assess applicant against country of habitual residence without making a finding as to statelessness.

Migration Act 1958, s.36(6), Pt 2 Div 3

Koe v Minister for Immigration 148 ALR 353
Sepet and Bulbul v The Secretary of State for the Home Department [2003] UKHL 15
Taiem v Minister for Immigration [2001] FCA 611
Koe v Minister for Immigration (1997) 148 ALR 353
Mohamad Abdullah Al-Sallal v Minister for Immigration [1999] FCA 369
Htun v Minister for Immigration (2001) 194 ALR 244
SZAIX v Minister for Immigration [2006] FCA 3
NABE v Minister for Immigration (2004) 219 ALR 27
WAEV v Minister for Immigration [2003] FCAFC 181

The Rights of Refugees under International Law Cambridge 2005, Professor James C. Hathaway
The Cambridge Grammar of the English Language Cambridge 2002, Huddleston and Pullum
The Refugee in International Law Oxford University Press 1996, Guy S. Goodwin-Gill
The Law of Refugee Status Butterworths 1991, Professor James C. Hathaway
United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees

Applicant:	SZIPL
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL

File Number:	SYG 987 of 2006
Judgment of:	Raphael FM
Hearing date:	18 April 2007
Date of Last Submission:	18 April 2007
Delivered at:	Sydney
Delivered on:	17 May 2007

REPRESENTATION

Solicitors for the Applicant:	McMahons National Lawyers
Counsel for the Respondent:	Ms L Clegg
Solicitors for the Respondent:	Phillips Fox

ORDERS

(1) Application allowed.

(2) A writ of certiorari issue quashing the decision of the second respondent.

(3) A writ of mandamus issue remitting the matter to be determined according to law.

(4) First respondent to pay the applicant's costs assessed in the sum of $5000.00 pursuant to Part 21 Rule 21.02(2)(a) *Federal Magistrates Court Rules 2001*.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 987 of 2006

SZIPL
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. Part 2 Division 3 of the *Migration Act 1958* (the "Act") sets out the general provisions about visas that the Minister can grant. Under s.36 a class of visa known as a protection visa is identified:

> "**[36] Protection visas**
>
> (1) There is a class of visas to be known as protection visas.
>
> (2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> …
>
> (3) Australia is taken not to have protection obligations to 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.

…

> (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country."

2. "The Refugee Convention is the 1951 Convention Relating to the Status of Refugees and the Refugees Protocol is the 1967 Protocol Relating to the Status of Refugees. The expression "Convention" will be used to mean the Convention as amended by the Protocol.

Article 1A(2) of the convention defines a "refugee" to be any person who:

> '… owing to well founded fear of being persecuted for reasons of race, religion, nationality and 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [emphasis added]' "

Koe v Minister for Immigration 148 ALR 353 at 355 - 356.

3. The applicant is a woman who was born on 30 January 1975 in Syria. Her parents were Iraqis. Their relationship ended before the applicant was born. Shortly after her birth, her mother and her mother's then partner, who became the applicant's stepfather, fled to Iraq where they lived until 29 December 1994 when they returned to Syria via Jordan. The applicant remained in Syria where, for a bribe of $2,000.00 she obtained a Syrian passport in 2003 [CB 30-31]. The applicant then obtained a provisional spouse visa to enter Australia which she did on 17 April 2004. The arrangements with her "fiancé" did not result in marriage. On 23 September 2005 the applicant lodged an application for a protection (Class XA) visa with the Department of Immigration and Multicultural and Indigenous Affairs. On 16 November 2005 a delegate of the Minister refused to grant a protection visa and on 28 November 2005 the applicant applied for review of that decision. On 23 February 2006 following a hearing the Tribunal determined to affirm the decision under review and handed that determination down on 16 March 2006.

4. At the commencement of the Tribunal's findings and reasons it discusses what country the applicant's claims should be assessed

against; i.e. whether the applicant satisfies the Tribunal that she has a well founded fear of persecution for a Convention reason should she return to that particular country. The Tribunal says (at p. 10-11 of its reasons):

> "Independent sources confirm that Syrian males pass on the right to citizenship to their children (see, for example, Freedom House, "Women's Rights in the Middle East and North Africa: Citizenship and Justice")
>
> The applicant's stepfather, who is a Syrian national, has had custody of the applicant since birth, and remains in a good relationship with the applicant. There is no evidence before the Tribunal, however, that the stepfather has ever formally adopted the applicant. Therefore, on the evidence before it, the Tribunal is unable to be satisfied that the applicant is a Syrian national. It is satisfied, however, that Syria is the applicant's country of former habitual residence.
>
> There is only limited authority on the preliminary question of whether a legal right to return to a country is a necessary condition which must be satisfied before that country can be regarded as a country of "former habitual residence". The prevailing view is that it is not a prerequisite.
>
> Professor Hathaway argues that as "country for former habitual residence" is intended to establish a reference point for stateless applicants and is intended as an equivalent of a country of nationality, it implies a degree of responsibility for the protection of the applicant on the part of the relevant country. On his view, a right of return is necessary for a country to be considered as a country of former habitual residence, as the aim of the Convention is to prevent sending a person back to a country where a risk of persecution exists and if there is no possibility of returning to a country, there can be no risk of being returned to a country where there is a risk of persecution (JC Hathaway, *The Law of Refugee Status*, Butterworths, Canada 1991, pp59-63).
>
> The test put forward by Hathaway has been rejected by Professor Goodwin-Gill and by the Federal Court of Canada (G Goodwin-Gill, the *Refugee in International Law*, 2nd edition, Clarendon Press, Oxford 1996; *Desai v Canada* [1994] FCJ No 2032). The issue was briefly considered in *Taiem v MIMA* where Carr J suggested that the Tribunal would have been in error if it had found that a country was not considered as a country of former habitual residence simply because the applicant had no right to re-enter that country ((2002) 186 ALR 361 at [14]).
>
> Thus, the better view appears to be that a legal right to return to a country is *not* a necessary condition that must be satisfied before that country can be regarded as a country of "former habitual residence".
>
> The applicant has lived almost since birth until 1995 in Iraq. There is no evidence before the Tribunal that the applicant has any right of return to Iraq, since her stepfather and her family were forced to leave that country following the Gulf War. While the applicant live in Iraq for 20 years, and in Syria for nearly 10, her most

recent residence has been in Syria. The tribunal has therefore assessed the applicant against Syria."

5. The applicant argues that the Tribunal has fallen into jurisdictional error in the way in which it determined to assess her claims against Syria because a proper reading of Article 1A(2) of the Convention requires the Tribunal first to assess whether the applicant is a national of any particular country and to assess her claims against the country of nationality, unless she is a person who does not have a nationality in which case she should be assessed against the country of her former habitual residence. The applicant argues that the Tribunal, whilst finding that she was not a citizen of Syria, did not take the step of making a finding as to whether or not she was a citizen of Iraq but instead treated her as a stateless person because *"there is no evidence before the Tribunal that the applicant has any right of return to Iraq"*. It might also be argued that the determination of the applicant's nationality (or rather lack of it) was not made *"solely by reference to the law of that country"* as required under s.36(6) of the Act because the Tribunal, in respect of Iraq, did not look at the law of that country at all and in respect of Syria appears to have relied upon "independent sources" rather than the legislation of the country concerned. This failure by the Tribunal is a failure to comply with the legislation by not properly determining the jurisdictional fact of the applicant's true nationality or statelessness.

6. The respondent's answer to the applicant is contained in his counsel's written submissions at [29] – [32]:

> "[29] The practical effect of Article 1A(2) is that where a person who claims to be a refugee is found to be stateless (or without nationality) then he/she falls to be considered against his or her former country of habitual residence.
>
> [30] The Tribunal in this case accepted the applicant's claim that she was not a Syrian national, but (for good reasons) found Syria to be the applicant's relevant country of habitual residence and properly assessed her claims as against Syria.
>
> [31] It is difficult to see how a jurisdictional error was committed in the manner claimed. First, it appears that (contrary to what is pleaded by the applicant) the question of nationality (or statelessness) was considered by the Tribunal as the first question in any event: see RD 122.7 – 123.3. Then, having accepted the applicant's claims in this respect, the Tribunal went on to find that Syria was the appropriate

former country of former habitual residence: at RD 123.3 and confirmed later at RD 124.1.

[32] Second, even if it were the case that the former country of habitual residence was considered, identified or 'found' *before* making a 'definitive finding' as to statelessness, it would not render the decision invalid. Decisions are to be read as a whole and without an overcautious eye for error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. All that would be required is a finding as to statelessness at some point in the decision. There is no requirement that certain findings be made in any particular order."

7. In oral argument these submissions were complemented by the submission that if Article 1A(2) was given a purposive flexible and pragmatic construction which was required when interpreting international treaties there is no requirement to make a finding about the applicant's nationality in the circumstances of this case. The object of the convention is to treat uniformly persons seeking refugee status. All the Tribunal was required to do was to consider the applicant's claims against Syria, the country to which she could return, because it was her country of habitual residence.

8. I had considerable difficulty in understanding the respondent's submission notwithstanding the articulate presentation of Ms Clegg who appeared for the Minister. I appreciate that there is much debate about the manner in which international treaties should be interpreted. Indeed Professor Hathaway devotes an entire section in his book *The Rights of Refugees under International Law*, Cambridge 2005 to what he describes as "the perils of ordinary meaning". Hathaway supports an interpretation of the convention upon evolutionary principles and claims support for that position from the House of Lords in *Sepet and Bulbul v The Secretary of State for the Home Department* [2003] UKHL 15 before saying (at p. 67 – 68):

> " . . an interpretative approach that synthesizes foundational insights from analysis of the historical intentions of a treaty's drafters with understandings derived from the normative legal context and practical landscape within which treaty duties are now to be implemented is the most objective and legally credible means of identifying how best to make the treaty effective. It is an approach fully in line with the basic obligation of *pacta sunt servanda*, since it honours the original goals which prompted elaboration of the treaty even as it refuses to allow those commitments to atrophy through passage of time. It is moreover an approach to treaty interpretation that results in the marriage of the duty to advance a treaty's effectiveness with the more basic obligation to interpret text purposively, and in context."

9. I have no difficulty with interpreting the Convention in this way but I cannot strain the grammar so as to fix upon an interpretation that the clear words do not bear out. In *Taiem v Minister for Immigration* [2001] FCA 611 Carr J opined at [9]:

> "The current state of authority seems to be that a person may, for Convention purposes, have more than one country of former habitual residence. I agree, respectfully, with the view expressed by Lehane J in *Al-Anezi v Minister for Immigration and Multicultural Affairs* [1999] FCA 355 at [21] that in principle there is no obvious reason that this should be regarded as impossible. A person may have more than one nationality. **The object of the Convention is to treat uniformly persons seeking refugee status and relevantly to equate nationality with country of habitual residence where a person has no nationality - see *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421 at 427.**" [emphasis added]

10. But *Taiem* was a stateless person; he was a Palestinian. The Tribunal was therefore bound to make a finding as to his country of habitual residence. The question for decision in the instant case is whether assessing a person against their country of habitual residence is an alternative to assessing them against their country of nationality and not something that should only be done after a finding that no nationality exists.

11. At the risk of drawing fire from Professor Hathaway who at p.51 of *The Rights of Refugees* says:

> "There is, however, no doubt that literalism continues to have real appeal, particularly to governments and courts anxious to simplify their own task, or to be seen to be making "more objective" decisions. There is an undeniable comfort in the possibility of simply looking up a disputed term in the dictionary. Yet this is false objectivity at its worst, since it is surely right that "[e]tymological and grammatical bases are arbitrary and unreliable; their use is of limited theoretical value and fruitless as a method of proof." The risks of dictionary-shopping and of serious interpretive inconsistency are moreover magnified when there is more than one authentic linguistic version of a treaty, nearly always the case for refugee and other international human rights treaties."

I am particularly sensible of the fact that the first thing one notices about the structure of Article 1A(2) is that there is a semi-colon after the phrase "*is unwilling to avail himself of the protection of that country;*". The use of the semi-colon is described by Huddleston and

Pullum: *The Cambridge Grammar of the English Language*, Cambridge 2002 as a secondary boundary mark:

> "While the terminal full stop marks the boundaries between successive sentences, the comma, semi-colon and colon normally mark boundaries within a sentence and hence can be regarded as secondary boundary marks. They indicate a weaker boundary than the full stop, and we will see that there are grounds for regarding the comma as weaker than the colon or semi-colon, so that these indicators may be arranged into a hierarchy of relative strengths as follows:
>
> **. > :**
>
> **; > ,**"

12. The placing of the semi colon before the word "or" in the sentence *"or who, not having a nationality and being outside the country of his former habitual residence as a result of such events"* indicates a termination of one part of the definition of refugee and the commencement of another. The use of the word *"or"* indicates an alternative but an alternative subsequent in time to the first form of definition. In both grammatical construction and sense the second definition is dependent upon the exclusion of the first. If the country of her habitual residence was to be a true alternative to country of nationality so that the Tribunal could choose either why would the drafter have included the words *"not having a nationality"*? 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. In this case the applicant did not seek to persuade the Tribunal that she was stateless. She merely said that she could not return to Iraq. The Tribunal was therefore obliged to consider whether or not she was a national of Iraq on the basis of that country's laws as they were at the time of the decision and it failed to do so. It then proceeded to assess the applicant against the conditions existing in Syria, rightly stating that it was not required to be concerned as to whether or not she could return to that country, although assessment against the country of habitual residence is only available to a stateless person. The Tribunal therefore misunderstood both the Migration Act and the Convention, a jurisdictional failure which renders its decision nugatory.

13. The *UN Handbook on Procedures and Criteria for Determining Refugee Status* (referred to in *Koe v Minister for Immigration* (1997) 148 ALR 353 at 359 by Tamberlin J) provides a useful discussion on the relevant phrase in Art 1A, indicating that its application pertains only to stateless applicants:

> "[101] This phrase, which relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of stateless refugees, the 'country of nationality' is replaced by 'the country of his former habitual residence' and the expression 'unwilling to avail himself of the protection. . .' is replaced by the words "unwilling to return to it". In the case of a stateless refugee, the question of 'availment of protection' of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition he is usually unable to return".

This is further supported in Goodwin-Gill's discussion of Art 1A(2) in *The Refugee in International Law*, Oxford University Press 1996, p.41, which clearly distinguishes between applicants with a nationality and the provisions in the Convention which apply to applicants who are stateless:

> "Article 1A(2) of the Convention makes separate provision for refugees with a nationality and for those who are stateless. For the former, the relevant criterion is that they should be unable or unwilling to avail themselves of the protection of their State of nationality, while the latter should be unable or unwilling to return to their State of former residence."

Such a reading accords with the purpose of the Article. In *Koe v Minister for Immigration* (supra) Tamberlin J discussed the objectives of Art 1A (at 360):

> "The objective of the Convention is to provide a practical humanitarian solution to the problems of refugees. It should be interpreted with this objective in mind. . .
>
> The identification of the relevant country serves two purposes under Art 1(A). First, the term forms part of the threshold test for refugee status. The claimant must be outside the country of nationality. As a stateless person does not have a country of nationality the Convention, in referring to the country of former habitual residence, looks to an equivalent relationship. This equivalent reflects the underlying concept that a refugee is a person without national protection. The second purpose of identification of the relevant country is to provide the proper reference point for the assessment o the degree of risk of persecution."

Similarly, in *The Law of Refugee Status*, Butterworths, 1991 at 61 Hathaway considers that the concept of 'former habitual residence' is "*intended to establish a point of reference for stateless refugee claimants that is the* ***functional equivalent*** *of a country of nationality"* [emphasis added]. Further, in *Mohamad Abdullah Al-Sallal v Minister for Immigration* [1999] FCA 369, Katz J states at [9]:

> "[9] . . .In *Maarouf v Canada (Minister of Employment and Immigration)* [1994] 1 FC 723 at 739 (Fed TD) (referred to with apparent approval by Tamberlin J in *Koe v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 289 at 298), Cullen J said that the concept of habitual residence,
>
> > " . . . seeks to establish a relationship to a state which is *broadly comparable to that between a citizen and his or her country of nationality. Thus the term implies a situation where a stateless person was admitted to a given country with a view to a continuing residence of some duration, without necessitating a minimum period of residence.*" "

The above indicates that the purpose of the 'country of former habitual residence' test is to allow the claims of stateless individuals to be assessed in an equivalent manner to applicants with a nationality.

14. The applicant also raised some additional matters which she claimed constituted jurisdictional error on the part of the Tribunal. These were:

a) That the application was assessed only against official government policies rather than street level reality;

b) The Tribunal only looked at past harm as an integer of a well founded fear; and

c) The Tribunal did not consider the applicant as a member of a particular social group, namely Iraqi women in Syria.

In regard to the first matter I am satisfied that the independent country information quoted by the Tribunal at [CB 121], particularly the final paragraph concerning the active participation of Syrian women in public life, allows the Tribunal to draw a clear inference that it is not only the constitutional position of women that was being discussed but also the factual "on the ground" position. With regard to the second point I am satisfied that the Tribunal, having considered independent country information about the Syrian attitude to Muslim extremists and

the fact that the applicant's close family remained in Syria, had enough information to make a properly considered decision as to whether the applicant was likely to suffer harm in the future. Finally, there is nothing in the applicant's evidence that would indicate that she was maintaining she had any particular problems because she was an Iraqi woman as opposed to just a woman in Syria. The Tribunal, whilst having a duty to consider any formulation of a claim that can be extracted from the available evidence (see *Htun v Minister for Immigration* (2001) 194 ALR 244 at [7] per Merkel J, and at [42] per Allsop J) is not obliged to make findings in relation to claims upon which no evidence whatsoever has been advanced.

In *SZAIX v Minister for Immigration* [2006] FCA 3, Madgwick J determined that the Tribunal had a duty to consider any formulation of a claim that is either "*clearly and expressly so asserted*" (at [50]), or a claim that "'*clearly arises' on the material before a decision-maker*" (at [52]).

However, the Tribunal is not required to consider claims which do not arise from the materials before it. This was enunciated in *NABE v Minister for Immigration* (2004) 219 ALR 27 at [60], citing the decision of Selway J in *SGBB v Minister for Immigration* (2003) 199 ALR 364:

> "His Honour, in our view, correctly stated the position when he said (at [18]):
>
> > '*The question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.*'
>
> This does not mean that the Tribunal is only required to deal with claims expressly articulated by the applicant. It is not obliged to deal with claims which are not articulated and which do not clearly arise from the materials before it."

Similarly, in *WAEV v Minister for Immigration* [2003] FCAFC 181 the court considered:

> "[52] . . .there is a difficulty in criticizing a Tribunal for failing to consider an argument which is not raised by an applicant before it, at least if the argument is not one which is self-evident."

15. I did raise *in arguendo* the question of s.36(3) of the Act and this resulted in a submission from the respondent that I should use my discretion not to grant relief even if I found a jurisdictional error on the part of the Tribunal because the Tribunal's task under that sub-section would be to assess the applicant against Syria which it did and found her claims wanting. I cannot accede to that request; firstly because it seems to me possible that on a proper construction of the applicant's nationality she will be found to be an Iraqi and the Tribunal will have to assess her first against that country, and secondly because my reading of the decision is that the Tribunal made an assumption that the applicant could return to Syria notwithstanding that it accepted that she was not a national of that country and had travelled over here using a false passport. If the applicant was to be assessed against Syria under s.36(3) then it would have to be properly satisfied that she did have a right to reside in that country and this would involve a further enquiry.

16. I will make orders granting a writ of certiorari quashing the decision of the Refugee Review Tribunal and a writ of mandamus requiring the application to be remitted to the Refugee Review Tribunal to be determined in accordance with law. I will make an order that the first respondent pay the applicant's costs which I assess in the sum of $5,000.00.

I certify that the preceding sixteen (16) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 17 May 2007