FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHWY v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1417

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of RRT decision affirming decision of a delegate of the Minister not to grant a protection visa – applicant is a citizen of Egypt claiming fear of persecution on account of his sexuality and on account of his religious views – credibility – legal professional privilege – procedural fairness – whether the Tribunal failed to comply with *Migration Act 1958* (Cth), s.424A – privative clause – no jurisdictional error.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91X, 420, 422B, 424A, 474
Evidence Act 1995 (Cth)

Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
WAAF v Minister for Immigration [2003] FMCA 36
Kioa v West (1985) 159 CLR 550
Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 72
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24
SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 2

Applicant:	SZHWY
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3740 of 2005
Judgment of:	Scarlett FM
Hearing date:	20 April 2006
Date of Last Submission:	20 April 2006

Delivered at:	Sydney
Delivered on:	27 September 2006

REPRESENTATION

Counsel for the Applicant:	Mr Gormly
Counsel for the Respondents:	Mr Kennett
Solicitors for the Respondents:	Blake Dawson Waldron

ORDERS

(1) The title of the First Respondent is changed to Minister for Immigration & Multicultural Affairs.

(2) The application is dismissed.

(3) The Applicant is to pay the First Respondent's costs fixed in the sum of $5,500.00 and I will allow (9) nine months to pay.

(4) The Applicant is to pay the setting down fee of $345.00 to the Collector of Public Moneys, Federal Magistrates Court of Australia, Level 16, Law Courts Building, Queens Square, NSW, 2000, within twenty-one (21) days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3740 of 2005

SZHWY
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. This is an application for review of a decision of the Refugee Review Tribunal. The Tribunal made its decision on 21st November 2005. The Tribunal handed down its decision the next day, 22nd November. The Tribunal affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs not to grant a protection visa to the applicant.

Background

2. The applicant is a citizen of Egypt who arrived in Australia on 9th November 2004. He applied for a protection (class XA) visa on 11th February 2005, and when it was refused he sought a review from the Refugee Review Tribunal.

3. The applicant lodged his application for review at the Registry of the Tribunal on 3rd August 2005. He nominated a migration adviser to act for him.

Review by the Refugee Review Tribunal

4. The applicant attended a hearing of the Tribunal on 19th October 2005. He claims a fear of persecution based on religious grounds, as he has left the Islamic faith and become a Christian. He also said that his greatest fear about returning to Egypt is that he is a homosexual. He fears that the community will harass him and he will not be able to get a job. His current partner gave oral evidence to the tribunal on his behalf.

5. In its findings and reasons, the Tribunal accepted that homosexuals form a particular social group in Egypt and that the applicant is an Egyptian national. The Tribunal did not, however, accept the applicant as a witness of truth (see Court Book page 551). The Tribunal set out the reasons for rejecting the applicant's credibility at pages 551 to 553 of the Court Book.

6. The Tribunal did not accept as truthful the applicant's evidence that he converted to Islam to Christianity and feared harm in Egypt because of that conversion. The Tribunal did not accept that the applicant converted from Islam or has practised Christianity, either in Egypt or Australia, and found that he invented those claims to assist his application for a protection visa.

7. The Tribunal did not accept that the applicant's father had threatened to harm him either because of his religious beliefs or his sexuality. The Tribunal specifically did not accept that the applicant had recorded a telephone conversation with his sister when he had not recorded any other conversations.

8. The Tribunal did accept that an advertisement in an Egyptian newspaper in January 2005 appeared to give authenticity to the applicant's claims for protection and accepted the truth of the information in it. However, the Tribunal did not consider that it assisted the applicant's case.

9. The Tribunal did not accept on the evidence before it that the applicant is a homosexual and has engaged in homosexual conduct in either Egypt or Australia.

10. The Tribunal expressed the view that there was no plausible evidence that the applicant would suffer persecution from the police, Egyptian authorities, the applicant's father or other family members, the community or anyone else in Egypt for any Convention reason if he were to return to Egypt. The Tribunal was not satisfied that the applicant had a well-founded fear of persecution in Egypt within the meaning of the Convention.

11. The Tribunal advised the applicant's adviser that the decision was to be handed down on 22nd November 2005. On 18th November the applicant's adviser submitted a further set of material in support of the applicant's case, including an additional statutory declaration and additional independent country information. The Tribunal noted that it had considered all the additional material submitted on 18th November 2005 but the decision remained unchanged. The Tribunal affirmed the delegate's decision not to grant the applicant a protection visa.

Application for judicial review

12. The applicant commenced proceedings by filing an application on 20th December 2005. He filed an amended application on 11th April 2006, seeking writs of certiorari, prohibition and mandamus. He relies on the following grounds:

    i) Denial of procedural fairness by breaching the applicant's legal professional privilege by requiring him to provide details of confidential communications with his solicitor. The requirements of procedural fairness were more strict in relation to credibility issues and the confidential communications between the applicant and his solicitor were relevant to his credibility; and

    ii) Failure to comply with the requirements of s.424A of the Migration Act in relation to the transcript of a telephone

conversation with his sister and an advertisement in an Egyptian newspaper in January 2005.

Submissions

13. Counsel for the applicant, Mr Gormly, submitted that the Tribunal decision involved jurisdictional error and that it should be regarded, in law, as no decision at all (*Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [76]). Therefore, he submits, the privative clause provisions in s.474 of the Migration Act do not apply to the Tribunal's decision.

14. The first ground relied upon by the applicant dealt with procedural fairness and legal professional privilege. The applicant's written outline of submissions includes a transcript of an exchange between the Tribunal member and the applicant about his consultation with a solicitor in Lakemba. The applicant told the Tribunal the solicitor was a Muslim so he was "too afraid to speak in front of him about the Christianity and the homosexuality as well".

15. The Tribunal Member asked him "What did you talk about?" and the applicant said that he told him he hated the President of Egypt, which the Tribunal Member as "So you told him you didn't want to go back for political reasons?' The applicant agreed, so the Tribunal Member asked "And what did he advise you to do?" to which the applicant replied that the solicitor recommended another meeting "to discuss all the details". The applicant said he did not go back to the solicitor.

16. Counsel for the applicant submits that this interrogation by the Tribunal constitutes a clear breach of the applicant's legal professional privilege. In the circumstances of a Tribunal hearing, where the applicant was not legally represented but was assisted by a migration agent, the applicant's responses did not amount to consent to waive legal professional privilege. He submitted that the Tribunal was under a duty to accord procedural fairness to the applicant (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

17. One requirement of procedural fairness was the obligation to observe the applicant's legal professional privilege. The applicant relies on the

following *obiter* comment from Driver FM in *WAAF v Minister for Immigration* [2003] FMCA 36 at [23]:

> *The RRT is not bound by the rules of evidence but, in my view, applicants are entitled to legal professional privilege on the basis of procedural fairness.*

18. The applicant also relies on the meaning of "procedural fairness" set out by Mason J in *Kioa v West* (1985) 159 CLR 550 at 584-5:

> *In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.*

19. Counsel for the applicant submits that the requirements of procedural fairness here were affected by the following:

- The Tribunal's decision turned entirely on the applicant's credibility.
- There was ample corroborative evidence which the Tribunal dismissed because of its credibility finding.
- Because of the Tribunal's concerns about the applicant's testimony about his sexuality, any corroboration by his sexual partners could settle the question of his sexuality.

20. These factors meant there were higher standards of procedural fairness in relation to credibility issues.

21. The applicant submitted that s.422B does not exclude legal professional privilege because the privilege does not fall within the matters with which s.422B is expressed to be concerned (s.422B (2)).

22. It does not matter that the Tribunal did not explicitly reason on the information gleaned from its interrogation about what advice the Lakemba solicitor gave to the applicant. Procedural fairness is directed to the obligation to give the applicant a fair hearing, so it is necessary to look at what procedural fairness required the Tribunal to do in the course of conducting the review (*Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 72 at [14] and [19]).

23. The applicant further submits that procedural fairness required the Tribunal to respect the applicant's legal professional privilege and it does not answer the breach of procedural fairness to say that the Tribunal did not explicitly use or give weight to the information obtained. The principles of procedural fairness focus on procedures rather than outcomes. Denial of procedural fairness is a jurisdictional is a jurisdictional error:

> *…where the relevant breach is the failure to observe fair decision-making procedures, the bearing of the breach upon the ultimate decision should not itself determine whether the constitutional writs of certiorari and mandamus should be granted. If there has been a breach of the obligation to accord procedural fairness, there is jurisdictional error for the purposes of s. 75(v) of the Constitution. (per McHugh J in SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24 at [83])*

24. The applicant submitted that because the information the subject of the privilege related directly to the credibility of the applicant, the findings of which were used to dismiss corroborative evidence, it cannot be said confidently that the denial of procedural fairness could have made no difference to the outcome.

25. The applicant's second ground deals with a claim that the Tribunal breached the provisions of s.424A of the Migration Act in respect of two documents:

a) The transcript of the telephone conversation between the applicant and his sister on 25th January 2005; and

b) The advertisement in the Egyptian newspaper in January 2005.

26. The applicant submits that the Tribunal did not comply with s.424A (1) in that it did not give written notice of its intention to use the documents as part of its reasons for its adverse credibility findings. The Tribunal also used its findings on credibility to reject the corroborative evidence, including that from the applicant's partner.

27. It is also submitted that the documents referred to were not covered by the exception in s.424A (3) of the Act, because the applicant did not give either of them to the Tribunal for the purposes of the application for review. They had been provided for the purposes of the application

for a protection visa (*SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 2 at [6]-[9]).

28. For the first respondent Minister, it is submitted that the Tribunal is not bound by the rules of evidence (s.420(2) (a) and the provisions of the *Evidence Act 1995* (Cth) in relation to "client legal privilege" have no application. Counsel for the first respondent, Mr Kennett, submitted that the statutory powers of the Tribunal to obtain information (ss.424 (1) and (2) and 427(3)) do not abrogate the common law doctrine of legal professional privilege. If a communication is subject to the privilege, a person may properly refuse to disclose it to the Tribunal, and the Tribunal's powers do not extend to requiring disclosure.

29. With respect, I agree with the above submission and adopt it.

30. As to the claim of breaches by the Tribunal of s.424A(1), counsel for the first respondent submitted that both of the documents referred to had been submitted to the Tribunal, in different ways, as part of the applicant's application for review. Hence, they were covered by the exception in s.424A (3) (b).

Conclusions

31. I am satisfied that the first ground, claiming a breach of legal professional privilege, does not show a jurisdictional error on the part of the Tribunal. Section 420 (2) of the Migration Act provides:

> *The Tribunal, in reviewing a decision;*
>
> *(a) is not bound by technicalities, legal forms or rules of evidence; and*
>
> *(b) must act according to substantial justice and the merits of the case.*

32. The Tribunal asked the applicant questions about a conversation with a solicitor. I am satisfied that the conversation was privileged and the applicant would have been entitled not to answer questions about that conversation. I agree with the comment by Driver FM in *WAAF* (supra) at [23] that applicants are entitled to rely on legal professional privilege even though the Tribunal is not bound by the rules of evidence.

33. I do not agree with the comment by counsel for the first respondent at paragraph 8 of his written outline of submissions:

> *Further, and with respect, that observation was clearly wrong to the extent that it relied on procedural fairness as the source of the obligation.*

34. In my view, his Honour's dictum should be seen in the context of the particular case, where the Tribunal sought to question the applicant about the contents of a letter to his migration adviser, who may or may not be a legal practitioner, the letter having been taken from the applicant's possessions without his consent. His Honour was making it clear that legal professional privilege is a matter upon an applicant can rely, and it would constitute a breach of procedural fairness for a Tribunal to seek to override such a claim if made.

35. I am satisfied that neither s.424 nor s.427 allows the Tribunal to do away with an applicant's right to refuse to disclose the contents of communications with his or her legal adviser. It is important that an applicant should be made aware that there is such a right of legal professional privilege. In the case before me, the applicant was accompanied by his migration agent, who should have warned the applicant that he had a right not to disclose the contents of his conversation with the solicitor.

36. I am not satisfied that a jurisdictional error has been made out.

37. Turning now to the second ground, that the Tribunal failed to comply with the provisions of s.424A (1) in respect of two documents, I am satisfied that the transcript of the telephone conversation with the applicant's sister was information given by the applicant for the purpose of the application. The applicant's migration adviser specifically drew the Tribunal's attention to this document in her submission on the applicant's behalf dated 17th October 2005:

> *It is clear from the transcript of the telephone conversation with his sister dated 25th January 2005 (submitted to DIMIA) that (the applicant's) father has taken all avenues including legal to ensure the capture of his son.*[1]

[1] The applicant's name has been removed from this quotation to comply with the provisions of s 91X of the Migration Act.

38. In my view, the information about the telephone conversation falls specifically within the exception in s.424A (3) (b), being information that the applicant gave for the purpose of the application.

39. The advertisement from the missing persons column of the Egyptian newspaper was submitted to the Department of Immigration and Multicultural and Indigenous Affairs by the applicant's agent on 24th June 2005 in support of his claims for a protection visa.[2] The advertisement was not in English.

40. The applicant attended the Tribunal and gave oral evidence on 19th October 2005. During the course of the hearing, the Tribunal Member asked the applicant about the date of the newspaper advertisement. The applicant said that it was 26th January 2005. The Tribunal then records:

> *The interpreter translated the advertisement for the Tribunal and the written translation was placed on the Tribunal file; essentially, it is the same as the translation submitted by the applicant as contained in the submission of the applicant's adviser dated 24th June 2005. The Tribunal asked him how it could be sure that he had not arranged for that advertisement to be placed to assist his claims to be a refugee. He said that his father had a family meeting.*[3]

41. The applicant continued to advance the advertisement as a document supporting his claims. In my view, at that stage the advertisement came to be a document containing information given by the applicant for the purpose of the Tribunal hearing. Accordingly, it falls within the area of s.424 (3) (b) and therefore s.424A (1) does not apply.

42. There is no breach of s.424A of the Migration Act. In my view, no jurisdictional error is shown and the Tribunal decision is a privative clause decision as defined by s.474 (2) of the Migration Act. Accordingly, the decision is not subject to orders in the nature of prohibition, mandamus or certiorari, which the applicant seeks (s.474(1) (c)).

---

[2] See Court Book at page 543
[3] See Court Book at page 547

43. The application will be dismissed with costs. I note the setting down fee prescribed by the regulations has not been paid, and I will make an order accordingly.

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

Associate: S.Polley

Date: 22 September 2006