FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIQB v MINISTER FOR IMMIGRATION & CITIZENSHIP *[2007] FMCA 1420*

MIGRATION – Review of Refugee Review Tribunal decision – where Tribunal made decision on the basis that applicant did not wish to attend hearing – where jurisdictional error – where delay in bringing application before the court – whether court should exercise its discretion to decline to refer a matter to the Tribunal.

Migration Act 1958, ss.441A , 441G

Xie v Minister for Immigration (1999) 167 ALR 188
Minister for Immigration v SZKKC [2007] FCAFC 105
SZBYR v Minister for Immigration [2007] HCA 26
Re Refugee Review Tribunal; Ex part Aala (2000) 204 CLR 82
Garrath v Minister for Immigration [2006] FCA 316
S58/2003 v Minister for Immigration [2004] FCA 451
Chen Shi Hai v Minister for Immigration [2000] HCA 19
SZDFO v Minister for Immigration [2004] FCA 1192

Kirby J, "The role of the judge in advancing human rights by reference to international human rights norms" (1988) 62 ALJ 514
Hathaway J, "The Evolution of Refugee Status in International Law: 1920-1950" (1984) 33 International and Comparative Law Quarterly 348
Crock M, "The Refugees Convention at 50: Mid-life Crisis or Terminal Inadequacy? An Australian Perspective" in Kneebone (ed) (2003), *The Refugees Convention 50 Years On* (Ashgate Publishing Limited: Aldershot)
Turk V, Nicholson F "Refugee protection in international law: an overall perspective" in Feller E, Turk V, Nicholson F (eds) (2003), *Refugee Protection in International Law* (Cambridge University Press: Cambridge)
Hyndman P, "Australian Immigration Law and Procedures Pertaining to the Admission of Refugees" (1988) 33 McGill Law Journal 716.

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

File number:	SYG1013 of 2006
Judgment of:	Raphael FM
Hearing date:	15 August 2007
Date of last submission:	15 August 2007
Delivered at:	Sydney
Delivered on:	6 September 2007

REPRESENTATION

Applicant in person

Counsel for the Respondent:	Mr T Reilly
Solicitors for the Respondent:	Blake Dawson Waldron

ORDERS

THE COURT DECLARES THAT

(1) The decision of the Refugee Review Tribunal made on 5 February 1999 is invalid and of no effect.

THE COURT ORDERS THAT

(2) The application for review be referred back to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law.

(3) The name of the First Respondent be amended to "Minister for Immigration & Citizenship".

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1013 of 2006

SZIQB
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The question which confronts the court in relation to this application for review of a decision of the Refugee Review Tribunal is whether the court should exercise its discretion to decline to refer a matter back to the Tribunal to be heard and determined according to law because of the apparent delay in bringing the application to the court. In making such a determination the court must consider current authorities as well as the purpose of the legislation under which the applicant has sought a visa to remain in Australia.

Narrative

2. The applicant is a citizen of the People's Republic of China. He arrived in Australia on 20 July 1997. On 6 August 1997 he lodged an application for a protection visa with the Department of Immigration

and Multicultural Affairs. On 26 February 1998 a delegate of the Minister refused to grant that visa and on 30 March 1998 the applicant sought review of that decision from the Refugee Review Tribunal.

3. The grounds upon which the applicant sought the protection of Australia was that he belonged to the particular social group of "homosexuals in China". He claimed to have been caught by the PSB, taken into charge and interrogated. He claimed that he and his family were subject to persecution and discrimination. On 24 November 1998 the Tribunal wrote to the applicant advising him that it had looked at all the material relating to his application but was not prepared to make a favourable decision on that information alone. It informed him that he was entitled to come to the hearing of the Tribunal to give oral evidence in support of his claims. He was required to tell the Tribunal whether or not he wished to come and informed that if he did not respond within 21 days of the date of the letter, the Tribunal would assume that he did not want to come to the hearing and that the Tribunal might make a decision on his case without further notice. Letters of this standard type were found by Cooper J in *Xie v Minister for Immigration* (1999) 167 ALR 188 to have failed to follow the requirements of the *Migration Act 1958* (Cth) ("the Act") at [23]:

> "The RRT had no statutory power to impose conditions on the applicant and his family as to the exercise of their statutory right to give evidence on the hearing of their application for review by imposing time limits within which an election to be heard must be made. Nor was the RRT entitled to make the assumption that failure to respond meant that the applicants did not wish to attend on the hearing and give oral evidence as was their entitlement."

The Minister accepts that in acting as it did in this case the Tribunal fell into jurisdictional error. The applicant did not notify the Tribunal and the Tribunal did proceed on the basis that he did not wish to attend a hearing. The Tribunal accepted that the applicant was homosexual but found at [CB65]:

> *"The Tribunal notes that the country information indicates that there are no laws against homosexuality in China. This makes the applicant's claim that he was detained for being homosexual and gaoled highly unlikely. He does not claim that the PSB arrested him as being a public nuisance or for some similar type of offence. In any even the applicant's claim that he was let out of gaol by a kindly prison officer is, in the Tribunal's view, totally farfetched. As a result the Tribunal does not accept*

that the applicant had any problems with the authorities as a result of his homosexuality before his departure from China."

It is clear from this summation of the Tribunal's reasons that if the applicant had attended before it these matters would have been discussed and the applicant would have had an opportunity to persuade the Tribunal that the situation for homosexuals in China was far more dire than suggested in the Tribunal's reasons.

4. The applicant claimed in evidence given before the court that he had left the address which he had given to the Tribunal in December 1998. This was after the invitation to the hearing but before despatch of the Tribunal's reasons for decision. He claims that he did not receive the Tribunal's reasons for decision. He says that he moved to Wagga Wagga where he remained for approximately one year. The applicant had a migration agent. He was asked what contact he had with the migration agent regarding his application. He claimed that he telephoned the migration agent at regular, lengthy intervals. He maintains that he was told that the matter was still under review. He took no steps to approach the Tribunal itself and allowed seven years to pass before in 2006 meeting "a friend" who told him that he should find out about the result of the Tribunal hearing because it was possible that he might be able to obtain a work permit. He authorised his friend to approach the Tribunal and a copy of the decision was obtained. The applicant then set about bringing this application. Interestingly, although he told the court that the migration agent had let him down and had said that he was no longer acting as a migration agent, the applicant approached him to witness the signature on the affidavit accompanying the application. The applicant provided no further explanation for the delay in commencing these proceedings.

Discussion

5. In light of the concession by the First Respondent that a jurisdictional error occurred which deprived the applicant of an opportunity to attend and give evidence before the Tribunal, the only question before me was whether I should exercise my discretion not to remit the matter to the Tribunal because of the delay on the part of the applicant in making this application. As a result of the recent decision of the Full Bench of

the Federal Court in *Minister for Immigration v SZKKC* [2007] FCAFC 105 I am not concerned with any time limits on making the application because no evidence has been provided to me that the decision of the Tribunal was ever actually notified to the applicant in a manner prescribed under ss.441A or 441G of the Act or as required by that decision. But, notwithstanding that the application to this court was therefore "in time", the Minister urged that I should exercise my discretion not to remit the matter to the Tribunal to be heard and determined according to law because of the inordinate delay of the applicant in bringing these proceedings.

6. The discretionary nature of constitutional writs was explained by Kirby J in *SZBYR v Minister for Immigration* [2007] HCA 26 at [52]-[57], quoting extensively from the decision of the court in *Re Refugee Review Tribunal; Ex part Aala* (2000) 204 CLR 82. At [57] his Honour said:

> "In my own reasons in *Aala* I indicated that the 'public character of the legal duties' which the remedies were designed to uphold meant that 'ordinarily, [relief] will issue where the preconditions are made out". I went on to acknowledge:
>
> > "But circumstances will occasionally arise where it is appropriate to withhold the writ because a party has been slow to assert its rights, has been shown to have waived those rights, or seeks relief in trivial circumstances or for collateral motives, and where the issue of the writs would involve disproportionate inconvenience and injustice.""

The question of delay in a migration case was considered indirectly by Wilcox J in *Garrath v Minister for Immigration* [2006] FCA 316. His Honour first considered the decision of Madgwick J in *S58/2003 v Minister for Immigration* [2004] FCA 451 in relation to which he said at [59]:

> "*S58* was a migration case. At [21], Madgwick J said:
>
> > "in my opinion it would be quite wrong, even if the applicant has a good case on its merits for constitutional relief and notwithstanding the possible importance of the case to him, to sanction such a long and poorly explained delay. Where there is a formal time limit, I would not extend time to permit him to claim the relief sought. Further, I would as a matter of discretion decline, on the ground of the applicant's long and unsatisfactorily explained delay, to grant any relief to which he might otherwise be entitled."

> The delay in *S58* amounted to five years."

And then continued at [62]:

> "Nonetheless, constitutional relief is a discretionary remedy. There is ample authority for the proposition that excessive, unexplained delay will justify a court in refusing constitutional relief, even to an applicant who has otherwise made out a good case. In determining, for this purpose, what amount of delay should be considered excessive, it will always be necessary for the court to examine all of the circumstances of the case. The longer the delay, the more difficult it will be for an applicant to resist a respondent's invocation of the court's discretion. Although there is not, and should not be, a rigid rule, a delay of five years would ordinarily be extremely difficult to excuse. So the result in S58 is not surprising. Similarly, in relation to Marks. Although the delay in that case was less (17 months), that delay had to be examined in the context that it was a delay in litigation concerning termination of employment, an area in which expedition has always been thought particularly important, and the delay was being measured against the particular times specified by the High Court Rules.
>
> The delay in this case was a little under two years, from 11 April 2002 when the MRT's decision was published, to 18 March 2004, when the present proceeding was commenced in the Federal Magistrates Court. A delay of two years in seeking constitutional relief is a delay of such significance as to call for explanation, if a court is not to reject the case on discretionary grounds."

7. The Minister in the instant case says that the delay of seven years was longer even than that in *S58* and has gone totally unexplained. The cross-examination of the applicant revealed a distinct lack of enthusiasm about chasing the Tribunal for its decision. Mr Reilly argues that this is reprehensible conduct disqualifying the applicant from being able to rely on the jurisdictional error. Certainly the applicant's story changed between the evidence he gave in response to my questions and those put by Mr Reilly. He told me that he had not communicated with the migration agent because he was concerned that he would ask for money but he went, in 2006, to the agent to get an affidavit witnessed, the one attached to the RRT decision that he had said he had never seen. The applicant told the court that he had moved from the address he gave to the Tribunal to Wagga Wagga in December 1998 so he did not receive the Tribunal's letter of February 1999 enclosing the decision. There is no evidence about the sending or receipt of the letter in the court book. I am prepared to accept that the applicant did not receive it. Whilst I am not able to make any findings as to whether the applicant found out about the decision prior to 2006 I

can readily understand that whilst he was free to continue to live in Australia undisturbed by the Department or its officers there was no incentive to do so. He wished to stay in Australia. Why would he take steps that might result in his being returned to China? I do not consider his actions (or more accurately, lack of actions) as inimicable to an application for refugee status.

8. Although the law requires that a judge exercising judicial discretion in a matter such as this must take into account all circumstances, I would respectfully suggest that this should be done in the context of the rights sought to be enforced by the applicant. In this case the rights sought to be enforced are the obligations that Australia voluntarily entered into when it became a party to the *Refugees Convention* as amended by the 1967 *Refugees Protocol* which obligations were translated into domestic law through the *Migration Act*. That Act established procedures for dealing with claims for asylum, the most important of which is that the assessment of the factual basis of such claims is vested entirely in the Minister through his delegates or through the independent Refugee Review Tribunal. Courts are in no way concerned with consideration of the merits of an applicant's claims. Their duty, simply put but difficult to articulate, is to ensure that the merits reviews carried out under the Act are carried out lawfully and in the absence of jurisdictional error.

9. Historically, the Refugees Convention was developed in the years following the Second World War. His Honour Justice Kirby has commented extra-judicially that "[o]ne of the most notable legal phenomena of the period since the Second World War has been the ratification of large numbers of international human rights conventions"[1]. Prior to 1951, the refugee crisis following the Bolshevik Revolution had prompted the first international response to refugees in 1922, and prior to the 1951 Convention other agreements were enacted, reflecting the increasing concerns of the international community regarding refugees, including the *Convention relating to*

[1] Kirby J, "The role of the judge in advancing human rights by reference to international human rights norms" (1988) 62 ALJ 514 at 514.

the International Status or Refugees in 1933 and the *Convention concerning the Status of Refugees coming from Germany* in 1938[2].

10. The historical context of the Convention's development has been considered by many learned authors:

> "The Refugees Convention is often described as a product of the Cold War – designed to allow western countries to use international law to trumpet their freedoms to the eastern bloc. It was also a product of a time when humanity came together to express a collective sense of horror at the human rights abuses perpetrated during the Second World War. Central to the creation of a regime for protecting the basic human rights of individuals was (and is) the notion that no person should be returned to a situation where his or her fundamental human rights are threatened. Put another way, the principle of non-refoulement in refugee law was created with the recent memory of refugees being denied protection by countries of first asylum, with catastrophic consequences for those seeking protection. "[3]

See also Turk V, Nicholson F "Refugee protection in international law: an overall perspective" in Feller E, Turk V, Nicholson F (eds) (2003), *Refugee Protection in International Law* (Cambridge University Press: Cambridge) at 4-5:

> "The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin. For half a century, they have clearly demonstrated their adaptability to changing circumstances. Beginning with the European refugees from the Second World War, the Convention has successfully afforded the framework for the protection of refugees from persecution whether from repressive regimes, the upheaval caused by wars of independence, or the many ethnic conflicts of the post-Cold War era."

The significance of the fundamental humanitarian purpose of the Convention was emphasised in the *dicta* of Kirby J in *Chen Shi Hai v Minister for Immigration* [2000] HCA 19 at [47]:

> "[47] While courts of law, tribunals and officials must uphold the law, they must approach the meaning of the law relating to refugees with its humanitarian purpose in

---

[2] See Hathaway J, "The Evolution of Refugee Status in International Law: 1920-1950" (1984) 33 International and Comparative Law Quarterly 348 at 352-67.

[3] Crock M, "The Refugees Convention at 50: Mid-life Crisis or Terminal Inadequacy? An Australian Perspective" in Kneebone S (ed) (2003) *The Refugees Convention 50 Years On* (Ashgate Publishing Limited: Aldershot) at 56

> mind. The Convention was adopted by the international community, and passed into Australian domestic law, to prevent the repetition of the affronts to humanity that occurred in the middle of the twentieth century and earlier. At that time Australia, like most other countries, substantially closed its doors against refugees. The Convention and the municipal law giving it effect are designed to ensure that this mistake is not repeated."

11. To grant sanctuary and to save human life is one of the noblest endeavours a nation can undertake. It is not one that Australia has ever shirked. While Australia ratified the Refugees Convention in 1954 and the Refugees Protocol in 1973, Parliament did not enact legislation that implemented Australia's Convention obligations until much later. The first formal articulation of Australia's refugee policy occurred in 1977[4] by the then Minister for Immigration and Ethnic Affairs, Hon. Michael MacKellar[5]. Of the Convention obligations assumed by Australia, it was said:

> "As a matter of humanity, and in accord with international obligations freely entered into, Australia has accepted a responsibility to contribute toward the solution of world refugee problems. To this end: It has ratified the Convention on the Status of Refugees; it is a member of the Executive Committee of the United Nations High Commission for Refugees and contributes to the resettlement funds of the UNHCR; it recognizes the need through its immigration policy to fulfil the legal obligations required by the Convention and to develop special humanitarian programs for the resettlement of the displaced and/or the persecuted. These steps, taken as an involved member of the international community, must now be complemented by the adoption and application of an ongoing refugee policy and refugee mechanism."

The Minister outlined four principles upon which Australia's approach to refugees would be based, the first two relevantly being:

> "1. Australia fully recognizes its humanitarian commitment and responsibility to admit refugees for resettlement.
>
> 2. The decision to accept refugees must always remain with the Government of Australia. "[6]

The administration of refugee claims essentially remained a matter of internal government procedure for several years. The Determination of Refugee Status Committee, a body composed of four members from

[4] See York B, *Australia and Refugees, 1901-2002: Annotated Chronology Based on Official Sources: Summary*, 2003, Department of the Parliamentary Library at 9
[5] Commonwealth Parliamentary Debates, House of Representatives, 24 May 1977, p 1714.
[6] Ibid.

government departments, made recommendations to the Minister regarding the acceptance of refugees upon a 'detailed documentary assessment'[7]. The *Migration Act 1958* was then amended in 1980 such that the Minister was to determine an applicant's refugee status within the meaning of the Refugees Convention and the Refugees Protocol. In 1992 the Refugee Review Tribunal was established under the *Migration Reform Act 1992*, to review on the merits decisions of the Minister, on the basis of the Convention definition.

12. In recent years the number of persons seeking asylum has dramatically increased. Movement between countries has become easier. Nationalist movements in post-colonial or post-Soviet administered countries have created underclasses through the regeneration of apparently forgotten differences. Discrimination and persecution of minorities is rife. At the same time, universal methods of communication have created huge pools of unfulfilled demand for improved living conditions and opportunities. Economic migrants have joined the queues of the truly persecuted seeking a better homeland. These changes have produced in reception countries concerns that the obligations entered into over half a century ago are open to abuse. Changes have been made to immigration laws throughout the world. Although the changes have been severely criticised, it cannot be said that Australia has turned away from its fundamental obligations. It may place hurdles in the way of accessing those obligations, and it may have made the tests as to the availability to access those obligations harder, but the obligations remain. Thus it is that any person claiming the protection of this country is entitled to explain his or her need to a decision-maker. The decision-maker is the sole judge of whether the need is sufficient**.** It is not the place of the courts to concern themselves with the merits of an applicant's claim. As Tamberlin J stated in *SZDFO v Minister for Immigration* [2004] FCA 1192:

> [8] The structure of the legislation, being the *Migration Act* and in particular s.474 of that Act, as interpreted by the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 only entitles the Federal Magistrates Court or this Court to interfere with what the Tribunal has done if there is found to be what is referred to as jurisdictional error …

[7] Hyndman P, "Australian Immigration Law and Procedures Pertaining to the Admission of Refugees", (1988) 33 McGill Law Journal 716 at 727

> [11] Within the kinds of boundaries that I have just identified the findings of fact and the assessment of evidence is a matter for the Tribunal in the exercise of the executive power. The Parliament has chosen not to permit the courts to review factual material beyond the proper confines of identifying jurisdictional error. It is against that legal background that the appellant needs to understand the reasons for the disposition of his appeal.
>
> [12] It should be plain, I hope, from what I have said that it is simply outside my statutory authority and judicial authority to make up my own mind as to whether Australia owes the appellant protection obligations."

13. The responsibility placed on the decision-maker and the Tribunal is a high responsibility and it is one that the courts must ensure is honoured. The courts cannot pick and choose for which claimants it will enforce the obligations. So far as the courts are concerned, the claims of all claimants are equal at the stage at which those claims are made; for it is not for the courts to assess those claims, and to pick and choose between claimants would be doing just that. It would be effectively taking a view of the claim which is not within the court's power. I cannot see how the court can apply its discretion differently because of the factual circumstances surrounding the persecution alleged without trespassing into this forbidden area. This is particularly the case when the applicant has, through some jurisdictional error, not had an opportunity of a hearing before the Tribunal. This is not to say that the court cannot exercise its discretion to refuse to grant relief in any case where a jurisdictional error preventing an appearance before the Tribunal or in the Tribunal's consideration of the claims has occurred. But because delay is consistent with wishing to remain in the country, and wishing to remain in the country is consistent with a claim of refugee status there would, to my mind, have to be something more than the period of delay involved to persuade me to exercise my discretion against remitting a matter such as the one before me where the applicant's claims have not been fully tested. "Something more" consistent with the views expressed above could not arise out of the facts surrounding the applicant's claim. It could arise from the applicant's conduct in regard to the claim, but, again, not simply delay. In the instant case nothing more has been established to my satisfaction given my finding that the applicant did not receive the decision.

14. I will therefore give a declaration that the decision of the Refugee Review Tribunal made on 5 February 1999 is invalid and of no effect. I will order that the matter be remitted to the Tribunal to be heard and determined according to law. I will order that the constitutional writs be issued if required.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 6 September 2007