

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZORE & ANOR v MINISTER FOR IMMIGRATION & ANOR* [2011] FMCA 586

MIGRATION – RRT decision – Family members of Fijian émigré opposition group – Tribunal considered grounds of actual or imputed political opinion – failure to address separate integer based on membership of particular social group – matter remitted.

*Federal Court Rules (Cth), O.62*

*Federal Magistrates Court Rules 2001 (Cth), r.21.02(2)(c)*

*Migration Act 1958 (Cth), ss.36(2), 91R(1), 91S, 430, 476*

*Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (2003)*  
216 CLR 473

*Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs (2003)* 75 ALD 630

*Htun v Minister for Immigration & Multicultural Affairs (2001)* 194 ALR 244

*Minister for Immigration & Citizenship v SZCWF (2007)* 161 FCR 441

*Minister for Immigration & Citizenship v SZMDS (2010)* 240 CLR 611

*Minister for Immigration & Citizenship v SZLSP (2010)* 187 FCR 362

*Minister for Immigration & Ethnic Affairs v Guo (1997)* 191 CLR 559

*Minister for Immigration & Multicultural Affairs v Yusuf (2001)* 206 CLR 323

*NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2)*  
(2004) 144 FCR 1

First Applicant: SZORE

Second Applicant: SZORF

First Respondent: MINISTER FOR IMMIGRATION &  
CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL

File Number: SYG 2153 of 2010

Judgment of: Smith FM

Hearing dates: 24 February 2011 and 30 June 2011

Delivered at: Sydney

Delivered on: 12 August 2011

## **REPRESENTATION**

Counsel for the Applicants: Mr A Kumar

Solicitors for the Applicants: Sarom Solicitors

Counsel for the First Respondent: Ms K Morgan

Solicitors for the Respondents: Australian Government Solicitor

## **ORDERS**

- (1) The decision of the second respondent made on 30 August 2010 be quashed.
- (2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 27 May 2010.
- (3) The first respondent pay the applicants' costs as agreed or taxed under r.21.02(2)(c) and O.62 of the Federal Court Rules.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA  
AT SYDNEY**

**SYG 2153 of 2010**

**SZORE**

First Applicant

**SZORF**

Second Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**

First Respondent

**REFUGEE REVIEW TRIBUNAL**

Second Respondent

**REASONS FOR JUDGMENT**

1. The applicants are a mother and daughter of Fijian nationality. They rejoined other members of their family in Australia in 2009, and applied for protection visas on 10 December 2009. Their applications were refused by a delegate on 27 May 2010, and this decision was affirmed by the Tribunal on 30 August 2010. They now seek judicial review of the Tribunal's decision under s.476 of the *Migration Act 1958* (Cth). For the reasons which follow, I have decided that the decision was affected by jurisdictional error, and that the matter should be returned to the Tribunal for further consideration by a different member.
2. This is a case where it is difficult to narrate the full background to the applicants' refugee claims and the Tribunal's reasons without disclosing their identities, and perhaps thereby exposing them to

greater risks if they are required to return to Fiji. I have concluded that I can explain my reasons shortly, without including this background, which is amply set out in the Tribunal's statement of reasons and the Court Book.

3. The Tribunal's statement of reasons started with the usual template reference to authorities on the application of s.36(2) of the Migration Act and the definition of 'refugee' under the Refugees Convention. After summarising the evidence, the Tribunal set out lengthy extracts from reports received from its "*Country Advice & Information Team*" concerning matters relevant to the applicants' refugee claims. The Tribunal's shortly expressed "*Findings and Reasons*" were then structured by reference to what it said were four necessary elements:

75. *As stated earlier, to qualify as refugees the applicants must, firstly, be outside Australia; secondly, they must fear persecution for one or more of the reasons of race, religion, nationality, membership of a particular social group or political opinion; thirdly this fear of persecution must involve serious harm to them and systematic and discriminatory conduct; and fourthly, the fear must be well-founded.*

4. The Tribunal then made findings which were adverse for the applicants, by reference to the second, third and fourth of these elements. However, in my opinion, the Tribunal's discussion of the second element failed adequately to identify and engage with the refugee claims which were, in fact, before it. It did not identify all of the Convention 'reasons' raised by the applicants' claims. I am not satisfied that it rectified this deficiency obliquely in the course of its reasoning on the third and fourth elements.
5. In short, the applicants claimed that the family members whom they joined in Australia were prominent in the Fijian expatriate or émigré community in Australia, and were closely involved in a prominent émigré opposition group ("the Group") established in 2009, which was a response to a worsening political situation in Fiji during 2009. The Group organised from Australia a campaign of hostility to the Bainimarama regime, involving public demonstrations in Australia, publicity campaigns, and lobbying of the Australian and other foreign

governments to support the international isolation of the Fijian regime. The applicants personally shared their relations' political opinions, and took part in some of the protests. However, essentially their fears which led them to come to Australia and seek protection, were that they would be persecuted not just for their own political opinions or perceived political opinions if they returned to Fiji, but because they would be identified as members of a family which was prominent in the émigré Group based in Australia.

6. The fact that their claimed fears of persecution related to their membership of their family unit, arising from the political activities of their expatriate relatives, was in my opinion clearly raised in the brief insertions in the mother's visa application. She said that she left Fiji: "*... as I have been verbally abused and threatened by some military personal in Fiji. It is because of the involvement of my [relative] in the Australian based [Group]. ... The involvement of my [relative] with the [Group] based here in Australia is one of the main cause of my fear in returning back to Fiji*".

7. A refugee claim based on the applicants' membership of a family group was also clearly raised in several submissions which were made to the Department and to the Tribunal by and on behalf of the applicants. For example, a leader of the Group submitted:

*There is a strong possibility that given [her relation's] active role in [the Group] [she] and her children could be subjected to victimisation and discrimination while living in Fiji where, like many others perceived to have any link to those that oppose the Regime, they will never ever be considered for any government jobs or assistance and fear the possibility of being picked up at anytime to be roughened up by the Military. Such is the typical vengeful spirit of the Bainimarama led military government. (Court Book p.62, see also pp.59, 70-71, 100, 101, 144, 167)*

8. In my opinion, this basis for the applicants' claims for protection in Australia was maintained in their evidence when interviewed by the delegate on 22 February 2010, and by the Tribunal at its hearing on 20 August 2010. Moreover, in my opinion, the applicant mother indicated that the persecution she feared included the infliction of physical harassment and gross indignity as an unprotected relative of perceived opponents of the regime. In this respect, she noted her

connections with the Methodist Church, whose leaders had been perceived as opponents of Prime Minister Bainimarama's coup, and whose female relatives had suffered serious harassment. Thus, at the delegate's interview:

41. *The mother was asked to explain what she meant when she noted on her protection visa application that she was scared for your life in Fiji. She stated that she has this strong fear that the military will interrogate her because of her [relative's] anti Fijian military regime activities with [the Group] in Australia. She stated that in December 2006 the military arrested some prominent women in Fiji, like [names], who opposed the regime and made them to take off their clothes and run naked in the military barracks. She added that if they can do this sort of things to prominent women, they will have no hesitation to do similar things to a person like her.*

...

46. *The Mother was asked what she thought might happen to her if she returned to Fiji. She stated that if she returns there is very strong chance for her being arrested and interrogated by the military and they may punish her under the new Decree introduced in December 2009 that criminalises anti Fijian military government activities by Fijians overseas which imposes up to 7 years imprisonment.*

9. In my opinion, the applicant mother maintained this fear at the hearing by the Tribunal. It summarised her evidence in this respect:

59. *At the hearing the Mother reiterated the claims she has made in her protection visa application and at the Departmental interview that she fears that if she returns to Fiji, under the new Decree, she may be arrested and humiliated like was done to some prominent Fijian ladies and some senior clergy of the Church who spoke out against the Fijian military regime. She reiterated that she may be targeted because of [her relatives' Group's] anti Fijian military regime activities in Australia and her own participation at [the Group's] protest rally in Sydney in December 2009. In response to a Tribunal enquiry she stated that apart from being a member of [the Group] and taking part in this rally she has not participated in any other activity against the Fijian military regime in Australia. She added that she has however, attended some [Group] private*

*meetings and assisted with the provision of refreshments to those who attended. She also commented that [the Group] has not arranged any public protest activity since the December 2009 protest in Sydney.*

10. Having considered the pages of the transcript to which I was taken by counsel for the Minister, I do not accept her submissions that the applicants' fear of serious harassment based on family membership was abandoned, nor that the applicants abandoned their claim to fear serious victimisation and retaliation if they returned to Fiji, by reason of the on-going political activities of their relatives residing in Australia. The pages to which counsel took me included the following passages:

*MEMBER: Now you stated in your application that you have been verbally abused and threatened by some military personnel in Fiji.*

*MOTHER: Yes the soldiers.*

*MEMBER: Can you tell me what happened?*

*MOTHER: We were in church and the soldiers came in and they started abusing us. They were swearing at us as well as two other extended family members. They would ride in their military trucks and drive by and just drive around the church and say "What are you people doing in there, go home. Go do something useful with your lives".*

*MEMBER: When was this?*

*MOTHER: This was the time when a number of church leaders, the president and a few other church leaders were taken to the camp, the army barracks and we as a church family would gather together and just worship and pray.*

*MEMBER: So these church leaders were arrested, is that what you are saying?*

*MOTHER: Yes the leaders of the Methodist Church.*

*MEMBER: So do you remember when they were arrested?*

*MOTHER: In 2009 June or July, in that timeframe.*

*MEMBER: So when the arrest happened, were you in Fiji?*

*MOTHER: Yes I was in Fiji. I had just returned from Australia.*

...

*MEMBER: So what you told me when the coup happened in December 2006 you knew that this regime was different and you had this feeling that you had to be very careful otherwise bad consequences might happen so you did not speak out and you did not take part in any activity against the regime, against the government?*

*MOTHER: That would be true because I knew that in doing so I would be ... I feared for my life. I knew that in my heart I was in fear because a number of people, ladies were taken to the camp, who were leaders who spoke out and were taken to the camp, they were beaten and there were things done to them that are, you just would never imagine. As Fijians things that were done to them would never been done to other Fijian and these things were done to these women at the military camps so yes I did not speak out because of the fear of that.*

...

*MEMBER: Okay. Now [Mrs Applicant], can you give me any example of receiving mistreatment by the regime or any of its members in Fiji before you came to Australia?*

*MOTHER: [Mr Member] there was nothing done directly to me, to injure me or to hurt me. What really hurts me is psychological, the swearing, that was the verbal abuse and the psychological abuse that was being carried on. It seemed that the more we worship together the more we strive to be together as a church group and as individuals the more they try and push back and be abusive to us psychologically.*

*MEMBER: So you mentioned of being sworn at another time when the arrest happened in July 2009. Is that what you are referring to about the swearing?*



*MOTHER: That was the incident but from then on I was ... That was the incident that you referred to but from then on I was scared because in Fiji the soldiers watch everything and as soon as you speak out about any particular issue against the regime, all of a sudden without warning you would be taken, you have to be very careful.*

...

11. In its “*Findings and Reasons*”, in my opinion, the Tribunal isolated the applicants’ fears of persecution “*for reasons of ... political opinion*”, and did not recognise their separate claim to fear by reason of their membership of a “*particular social group*” constituted by or with their expatriate family group. It is well established that fears arising from membership of a socially recognised family group can provide a separate Convention reason for refugee status, and this is recognised in s.91S of the Migration Act with the proviso that the feared targeting of the claimant as a family member must relate to Convention related fears of another member (see *Minister for Immigration & Citizenship v SZCWF* (2007) 161 FCR 441 and cases cited therein).
12. The Tribunal’s findings on the claimed Convention ‘reasons’ when it addressed the ‘second element’ contained no discussion of the legal and factual issues in relation to a ‘family membership’ refugee claim of the applicants, and its satisfaction as to the existence of a Convention claim was confined to the applicants’ claims based on their own actual and imputed political opinions. It said:
  77. *On the basis of evidence before it, the Tribunal is satisfied that the applicants’ fear of persecution is based on imputed political as well as actual political opinion. The Mother’s imputed political opinion is political opinion attributed to her from the political opinion of the Daughter, [and her relatives] expressed through their [Group] involvement in Australia. The Daughter’s imputed political opinion is political opinion attributed to her from the political opinion of the Mother expressed by her by participating in the Methodist Church organised rally in Fiji; and the Mother, [and her relatives] political opinion expressed in Australia through their [Group] involvement. The Mother’s actual political opinion stems from her participation in the Methodist Church organised rally in Fiji*

*and her [Group] involvement in Australia. The Daughter's actual political opinion stems from her [Group] involvement in Australia. The Tribunal is therefore satisfied that the applicants satisfy the second element of the refugee definition.*

13. In my opinion, it is appropriate to infer from this limited discussion that the Tribunal failed to address a separate, and possibly important, added component or 'integer' of the applicants' refugee claims based on their family relationship with persons who had, and could be expected to continue to be, leaders of an émigré pro-democracy opposition group. It therefore made the jurisdictional error which is well established in the jurisprudence, of failing to address "*one part of the claim for asylum*" which the Tribunal was bound to consider (cf. *Htun v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 244 at [13] and [42], also *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2)* (2004) 144 FCR 1 at [55]-[63]).
14. The Tribunal purported to provide a statement of reasons complying with s.430 of the Migration Act, and I am prepared to draw the inference from the absence of discussion of this important issue that it was not considered according to law (cf. *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [34]-[35], [68]-[69], [75]; *Applicant WAAE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630 at [47]; *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 at [33]-[36]; and *Minister for Immigration & Citizenship v SZLSP* (2010) 187 FCR 362 at [43]-[49], [55], [72], [91]-[92], [98]).
15. I am unable to find that the Tribunal addressed this component of the applicants' fears, or, at least that the Tribunal isolated and addressed it according to law, in the course of its somewhat obscure reasoning in its later paragraphs 81 and 82. Principally, because the structure of the Tribunal's reasoning in these paragraphs directed their contents to "*the third element of the refugee definition*", i.e. whether the feared harms relating to the Convention claims found by the Tribunal in the 'second element', could amount to 'persecution' as defined in s.91R(1) for the purposes of the Migration Act. It concluded: "*the Tribunal is not satisfied that the applicants' fear of persecution amounts to serious*

*harm and therefore they do not satisfy the third element of the refugee definition”.*

16. Consistently with that structure, the Tribunal appears to have considered the harms which would be faced by the applicants in Fiji by reference to their political opinions and their perceived political opinions arising from the political activities of their relations. A key finding is: *“the Tribunal considers that, like previously, the Mother may face some verbal abuse or threats from the soldiers on her return to Fiji if she engages in the Methodist Church activities, however, the Tribunal does not consider verbal abuse or threats to constitute ‘serious harm’”.*
17. Some other parts of the reasoning of the Tribunal in paragraph 82 are obscurely expressed and have uncertain evidentiary foundations. At times the Tribunal might appear to be addressing the applicants’ position as members of the family of the Australian émigré activists. However, I am not persuaded on a fair reading of the Tribunal’s reasoning that these references show that it sufficiently identified and separately addressed the risks faced by the applicants merely as members of the family of prominent members of the Australian pro-democracy Group. Particularly, where the Tribunal appears not to appreciate properly the serious fears of the applicant mother that she would be victimised, not just with *“verbal abuse or threats”*, but also physically harassed as a vulnerable female member of a family whose politically active members were inaccessible to the Fijian regime.
18. Even if the Tribunal’s reasoning in relation to its ‘third’ and ‘fourth’ elements of the refugee definition should be read as recognising the applicants’ separate ground to fear persecution as members of a family of émigré political activists, its reasoning did not clearly address their separate risks in this respect according to law. It was obliged to assess the future risk of this persecution by reference to a test of whether *“there is a real chance of persecution”*, which is satisfied *“even though the possibility of the persecution occurring is well below 50 per cent”* (see *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-572). However, the Tribunal appears in paragraph 82 to have dismissed the risk of physical victimisation which

was explained by the applicant mother, upon findings made on a higher level of probability.

19. The Tribunal's findings expressly directed at "*the fourth element of the refugee definition*" are equally unclear as to the refugee claims which they addressed. It said only:

83. *The Tribunal also finds that the applicants fail to meet the fourth element of the refugee definition as their fear of persecution is not well-founded because there is no real chance of them being persecuted if they return to Fiji as they or [their relatives] are not high profile and prominent opponents of the Fijian military regime to bring them to the attention of the regime and consequently being targeted by them. There is no instance of ordinary or leading [Group] members or their families being targeted by the Fijian military regime.*

20. Counsel for the applicant developed several arguments challenging the rationality and evidentiary basis for these findings. In particular, the Tribunal gave what might appear dubious weight to 'country' advice that there was no instance of a Group member or leader being persecuted in Fiji, in circumstances where the political activities of the Group commenced in 2009, and were directed from outside Fiji by people unlikely to have had any intention of returning to Fiji under its current regime. It is therefore difficult to see what weight could be given to the absence of evidence that they had been persecuted in Fiji in the past.
21. Putting this evidentiary concern to one side, I am unable to find in paragraph 83 or elsewhere in the Tribunal's reasoning a satisfying indication that the Tribunal ever separately addressed the applicants' claim that they faced a real chance of serious harm if they returned to Fiji purely by reason of their membership of a family which, from outside Fiji, was leading an apparently significant émigré protest movement directed at Fiji's international standing.
22. In my opinion, it was incumbent on the Tribunal at the start of the path of the reasoning which it followed, adequately to identify all the elements in the applicants' claims to have Convention-related fears of persecution, before embarking upon an assessment of the nature and risks of persecution ensuing in relation to each of those claims. As

McHugh and Kirby JJ explained in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473:

*31 In a case like the present, defining the particular social group and the type of harm feared is fundamental in determining whether a member of that group has a well-founded fear of persecution. Only by defining the group and its characteristics or attributes, actual or imputed, can a tribunal of fact determine whether the harm feared is well-founded and is causally related to the particular social group. (citation omitted)*

23. I have therefore concluded that the Tribunal made a jurisdictional error in the present matter, by failing to engage in the necessary analysis of the applicants' separate claims referable only to their membership of their family, in which other members of the family with Australian residence were leading an émigré political opposition group.
24. This conclusion means that I do not need to examine the other grounds of jurisdictional error which were submitted on behalf of the applicants.
25. I am satisfied that the applicants are entitled to relief, and that costs, including reserved costs, should follow the event.

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**I certify that the preceding twenty-five (25) paragraphs are a true copy of the reasons for judgment of Smith FM**

Date: 12 August 2011