FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHPG & ANOR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 527

MIGRATION – Persecution – review of Refugee Review Tribunal decision – status – refugee status – refusal – visa – protection visa – failure to consider relevant material – Tribunal decision set aside.

Migration Act 1958, ss.91X

Minister for Immigration & Multicultural Affairs v Yusef (2001) 206 CLR 323
Minister for Immigration & Multicultural & Indigenous Affairs v VOAO [2005] FCAFC 50
VAAD v Minister for Immigration & Multicultural & Indigenous Affairs FCAFC 117
SZHFC v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 1359
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407

First Applicant:	SZHPG
Second Applicant:	SZHPH
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3350 of 2005
Judgment of:	Cameron FM
Hearing date:	12 March 2007
Date of Last Submission:	12 March 2007
Delivered at:	Sydney
Delivered on:	13 April 2007

REPRESENTATION

Counsel for the Applicant:	Mr D. Godwin
Counsel for the Respondents:	Mr J.A.C. Potts
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing the decision of the second respondent dated 12 October 2005.

(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 12 July 2005.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3350 of 2005

SZHPG
First Applicant

SZHPH
First Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By an amended application dated 12 March 2007 and filed in Court on that day, the applicants seek review of the decision of the Refugee Review Tribunal ("Tribunal") dated 12 October 2005 which affirmed an earlier decision of the delegate of the Minister for Immigration and Multicultural Affairs ("Minister") dated 12 July 2005 refusing their applications for protection visas.

2. Section 91X *Migration Act 1958* (Cth) ("Act") provides that the Court must not publish the applicant's name.

3. The second applicant is one of the first applicant's sons. As he does not have a separate claim and applied for a protection visa as a member

of his mother's family, in these Reasons, the first applicant will be referred to as the applicant.

Background facts

4. The Tribunal described the applicant as follows:

> *… she was born in Kuala Lumpur, Malaysia, on 20 July 1947. She stated she was not fluent in any language but was able to speak Tamil, English, and Malay. The applicant stated she had no education. She did not provide employment details. She indicated she had two sons born in 1966 and 1969. In other documents she indicated she had five children. The applicant stated she and her husband separated in 1974. In her statement she stated she married again but her second husband deserted her. The applicant stated one of her sons was an Australian citizen. She stated she had a daughter-in-law and two grandchildren living in Malaysia.*
>
> …
>
> *The applicant stated she did not know her biological parents. She stated she was either stolen as an infant or her mother abandoned her. She stated her father was an Australian soldier.* (Court Book ("CB") pages 257-258)

5. The applicant claims to have been persecuted and to fear future persecution in Malaysia because of her ethnic background.

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4-11 of the Tribunal's decision (CB 257-264). Relevantly, they are in summary:

   a) the applicant stated she was forced by her "foster family" to marry when she was twenty one. She stated she had four children with her first husband but he "abused" her and she left him. The applicant stated the children were taken by an orphanage. She stated she married again and had another child. The applicant stated her second husband left her because of the "constant alienation" she experienced in society due to her "appearance";

b) the applicant stated she was subjected to mockery and hostility and ostracised by society due to her European features and she struggled to support herself and raise her children;

c) the applicant stated she often "ended up in detention centres arguing with" immigration officials who questioned her "legal status". She claimed the authorities in Malaysia doubted she was a citizen and detained her. The applicant stated she was released after she proved her identity;

d) the applicant stated she relocated frequently in Malaysia and each time she moved she suffered harassment by the authorities who suspected her of being connected to Australia or Britain;

e) the applicant stated that her son was also abused and bashed many times, that he was unjustly charged with offences and that she had to bribe officials to secure his release;

f) the applicant claimed her difficulties intensified after the Gulf War and September 11 attacks. She stated she was constantly attacked by "groupies" who assumed she and her son were foreigners. She claimed the source of the attacks were often Muslim organisations "operating in the soils of Malaysia under the cover of the government";

g) the applicant claimed that in November 2004 she was detained by police on the grounds that she did not have valid identification. She stated she was held for a month in a detention centre; and

h) the applicant stated she feared extremist Muslims in Malaysia, the authorities, and Muslims in general, who targeted her due to her ethnic background. She claimed she and her son would suffer life threatening harassment by these groups if they returned to Malaysia.

The Tribunal's decision and reasons

7. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the

United Nations Convention relating to the Status of Refugees 1951, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). The Tribunal's decision was based on the following findings and reasons:

a) the applicant was subjected to social ostracism because of her skin colour and facial features;

b) the applicant, who did not readily belong to any of the major ethnic groups and did not have access to the small European community, could suffer social isolation and ostracism in Malaysia but this did not amount to persecution;

c) independent country information did not indicate that Europeans or Malaysians of European descent are targeted or mistreated to such an extent as to constitute persecution;

d) the Tribunal did not accept as credible the applicant's claim that she was targeted either by the authorities, by Muslims or anyone else in Malaysia because the applicant was considered to be or suspected of being European;

e) the Tribunal found that the applicant fabricated these claims to enhance her protection visa application. Accordingly, the Tribunal did not accept as credible the applicant's claim that she was targeted by society and the State in Malaysia because she was considered to be or suspected of being European. The Tribunal did not accept as credible the applicant's claim that she was detained and harassed as a foreigner or that she was targeted by groups of Muslims either at her home or in the street, in Kuala Lumpur or elsewhere in Malaysia. The Tribunal did not accept as credible the applicant's claim that she was denied identification documents commonly available to citizens of Malaysia.

f) the applicant suffered corruption by government officials in Malaysia;

g) although the Tribunal accepted that corruption exists in Malaysia and that the applicant might encounter official corruption there, the Tribunal was satisfied that the applicant would not be targeted by corrupt officials for a Convention reason;

h) any corruption encountered by the applicant will be corruption which adversely impacts on an entire population and that persons such as the applicant, namely Europeans or Malaysians of European descent, are not subjected to more corruption in Malaysia than anyone else;

i) the applicant was assaulted by two police officers in December 2004;

j) the attack against the applicant by two police officers in 2004 was an isolated crime perpetuated by two rogue police officers. Citizens of Malaysia have access to protection by the state and the Tribunal was satisfied that the authorities in Malaysia would take action against the rogue police officers who attacked the applicant if she pursued the matter with either the police or human rights organisations in Malaysia;

k) in any event, the applicant is unlikely to suffer a similar attack in the future;

l) the applicant's decision to remain silent regarding the attack meant that she decided not to access the state protection that was available to her;

8. The Tribunal's conclusion may be summarised by quoting the following passage:

> *The Tribunal is satisfied that both applicants are citizens of Malaysia. It accepts [the applicant's] claim that she was assaulted by police in December 2004 while trying to report an attack on herself and her son. It accepts the applicants' claim that they suffered from official corruption in Malaysia. It also accepts [the applicant's] claim that she suffered social ostracism in Malaysia because of her skin colour. However, the Tribunal finds that the applicants greatly exaggerated the difficulties they experienced in Malaysia and it does not accept as credible the applicants' core claims that they were constantly harassed and targeted by the authorities, Muslims, and others, throughout Malaysia because [the applicant] looks European.* (CB 265)

Proceedings in this Court

9. The grounds of the application can be summarised as follows:

   a) the Tribunal failed to address the correct question and take into account relevant considerations when it

      i) found that the applicant "decided not to access the State protection that was available to her"; and

      ii) failed to refer to or consider material before it, including material relating to the Malaysian police royal commission when it held that "the police are not commonly implicated in such activities";

   b) the Tribunal's decision was not based on probative material or logical grounds. This ground was particularised as follows:

      > *The RRT relied upon illogical and perverse reasoning when it found that the First Applicant "decided not to access the State protection that was available to her" because she did not report to the police an attack by the police in circumstances where the police told her they would kill her and her family if she told anyone about the attack.*

   c) the Tribunal failed to make findings on all the applicant's claims in that it failed to make a finding on the first applicant's claim that she was denied police protection because she has a son who was an Australian citizen.

10. Dealing with each of these grounds in turn:

The Tribunal failed to address the correct question and failed to take into account relevant considerations

Decision not to access state protection

11. The applicant's evidence relevant to this ground is found at CB 263-264:

> *…the applicant stated that in 2004 she suffered a serious assault by the police. The applicant stated she and her son were in their car when they were attacked by a group of Muslims. She stated*

> *she did not know why the group attacked them but she assumed it was because she looked European. The applicant claimed she and her son went to the police to lodge a complaint but the police would not take the case because they did not believe their "people" would act in the way she described. She stated she insisted on lodging a complaint and she argued with the police. She stated they accused her of being "rude". The applicant stated that the police told her son to go away and they subsequently beat, raped and otherwise mistreated her. She stated they told her not to tell anyone otherwise they would kill her and her family. The applicant stated she did not tell anyone what happened. She stated she will be killed by the "the Muslims" if she returns to Malaysia.*

12. Significantly, as appears in the quotation on the Tribunal's findings and reasons quoted above at paragraph 8, the Tribunal accepted the applicant's claim that she had been assaulted by police in December 2004 while trying to report an attack on herself and her son. The question raised by this asserted ground of review is whether, having accepted that the assault took place, the Tribunal's finding at CB 267 that the applicant's:

> *…decision to remain silent regarding the attack effectively meant that she decided not access the State protection that was available to her*

was arrived at following a failure by the Tribunal to consider the applicant's evidence that the police had told her to keep quiet about the assault on pain of death.

13. The Tribunal makes no express finding concerning whether its acceptance of the applicant's evidence that she was assaulted by police in December 2004 includes acceptance of her allegation that she was told not to tell anyone otherwise the police would kill her and her family. I infer that it does because elsewhere in its decision the Tribunal clearly stated when it did not believe the applicant's evidence. If it had not believed this aspect of her evidence I infer that it would have said so, particularly as this conclusion would have been an important one to articulate given its relationship to the assault allegation which was accepted as truthful. However, the issue to decide is whether the Tribunal failed to consider the death threat when arriving at its conclusion quoted above. Again, the Tribunal's decision

does not make an express observation on the issue but its reference to the applicant's "decision to remain silent regarding the attack" must be read as a reference to her decision being motivated by the death threat. Consequently, I am of the view that the Tribunal arrived at its conclusion on this issue having taken the death threat into account.

Failure to consider material

14. Having concluded that the Tribunal did turn its mind to the threat made to the applicant the consequential question for the Court is whether, notwithstanding the threat, the State provided adequate protection against persecution to the applicant such that the threat was no more than an isolated incident which, as the Tribunal put it, was the act of two "rogue police officers" against which no State can guarantee protection to all citizens all of the time given that crimes take place despite attempts by States to protect their citizens (CB 267). In this regard, the Tribunal found:

> *The Tribunal is satisfied … that rogue police officers in Malaysia, or other public servants acting illegally, are not permitted to perpetrate crimes with impunity. It is satisfied that the authorities in Malaysia would have taken action against the rogue police officers who attacked the applicant if she pursued the matter with either the police or human rights organisations in Malaysia. The Tribunal finds that [the applicant's] decision to remain silent regarding the attack effectively meant that she decided not to access the State protection that was available to her. The Tribunal finds that the attack on the applicant in December 2004 was an isolated incident of criminal conduct by two rogue police officers in a particular place and time. It is satisfied that the police in Malaysia are not commonly implicated in such activities and it finds that the applicant is unlikely to suffer a similar attack in the future.* (CB 267)

15. The applicant submits that, in arriving at this conclusion, the Tribunal failed to have regard to evidence which was before it which contradicted that conclusion. In this connection, counsel for the applicant took the Court to the US Department of State Country Report of Human Rights Practices – 2003 (Malaysia), which spoke of police corruption and the establishment of a royal commission (CB 185, 187), Amnesty International's accusations of human rights abuses against the

Malaysian police (CB 145-146, 161-162), the release of the royal commission report referred to in what appears to be a weblog of one MGG Pillai (CB 153), a report by the *International Herald Tribune* dated 17 May 2005, describing the royal commission report on the Malaysian police (CB 156-160) and the Tribunal's reference at CB 260-1 to a later US Department of State Human Rights Report, reproduced at CB 310 ff. which recorded police abuse of detainees.

16. Amnesty International's allegations quoted by Associated Press at CB 145 include the following passages:

> *Malaysia's police procedures should be revamped to curb human rights abuses that include a "pattern of torture and ill-treatment" of detainees, the human rights group Amnesty International said Thursday.*
>
> *Suspects have reported being blindfolded, sexually humiliated, or beaten with instruments such as batons and hockey sticks while being held for interrogation, the group said in a report released in Kuala Lumpur.*
>
> *"There is a pattern of torture and ill-treatment being inflicted on suspects in custody, especially during interrogation," the report said.*

17. The weblog of MGG Pillai says at CB 153:

> *THE ROYAL COMMISSION ON THE POLICE issues a damning report. The police are corrupt, abusive, high-hand, obsolete, behind the times, stuck in a groove, take the law into their hands. So damning that it recommends 125 possible ways to revamp it to what it should be: as guardians of law and order. It reveals corruption so bad that one police officer admits to assets of RM34 million. This is but a tip of the iceberg. It strains credulity that only one police officer is corrupt in a police force that is now shown in an official investigation to be gangsters in uniform.*

18. The *International Herald Tribune* report on the royal commission findings contain the following paragraph:

> *A damning report on Malaysia's police issued Monday by a government-appointed commission of inquiry, asserts that the country's law enforcers constitute the government's most corrupt department and are guilty of "extensive and consistent abuse of human rights.*

19. If these matters had not been taken into account by the Tribunal then this would indicate that it had failed to take into account material relevant to its inquiry which, in turn, would indicate jurisdictional error: *Minister for Immigration & Multicultural Affairs v Yusef* (2001) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ; *Minister for Immigration & Multicultural & Indigenous Affairs v VOAO* [2005] FCAFC 50 at [11]-[13]; *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* FCAFC 117 at 70.

20. But did the Tribunal fail to take this material into account? The applicant submits that there is a clear inference available that the Tribunal did not consider the material which reported the findings of the Malaysian police royal commission and the Amnesty International information concerning the Malaysian police. However, counsel for the Minister identified several passages which suggest otherwise. The decision contains the following passages:

> a) *Both applicants attended the hearing and provided evidence. They submitted documents from external sources dealing broadly with historical and current issues in Malaysia, including human rights conditions (see folios 21-189).* (CB 260)
>
> b) *The Tribunal stated that the applicant's claim of constantly suffering harassment and mistreatment by authorities and Muslims in Malaysia was not supported by external sources of information.* (CB 263)
>
> c) *The Tribunal commented that information from external sources did not support [the second applicant's] or his mother's claim that European's* [sic] *are targeted by anyone in Malaysia.* (CB 264)
>
> d) *It is satisfied by information from external sources summarised above, some of which was provided by the applicants, that citizens of Malaysia have access to effective protection by the State.* (CB 267)

21. In arriving at its conclusion, the Tribunal said that it had:

> *…considered the applicants' claims, the way those claims were presented, and information from external sources relevant to claims.* (CB 266)

22. A simple reference to evidence in an omnibus fashion does not necessarily indicate that the Tribunal has had proper regard to it. A review of the decision might suggest that although the Tribunal says that it has considered a document, in fact it had not – with the consequence that it has not finished its jurisdictional task which requires that consideration: *SZHFC v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 1359 per Allsop J at [39] and [40].

23. It is not insignificant that the Tribunal records the fact that the applicants did not directly comment on the material they supplied to the Tribunal nor indicate to it how that information was relevant to their claims. (CB 260) The content of the country information supplied to the Tribunal on the subject of police misconduct in Malaysia is so at variance with the Tribunal's finding that, had it been properly considered, it ought to have been discussed and reasons given for its rejection. As McHugh J said in *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 422-423 [64], [65]:

> *There is some authority in the Full Court of the Federal Court for the proposition that s 430(1) requires the reasons of the Tribunal to refer to evidence contrary to findings of the Tribunal. However the contrary view was taken by differently constituted Full Courts in* Ahmed v Minister for Immigration and Multicultural Affairs, Addo v Minister for Immigration and Multicultural Affairs *and* Sivaram v Minister for Immigration and Multicultural Affairs. *In* Addo, *the Court said:*
>
> > *Section 430(1) does not impose an obligation to do anything more than to refer to the evidence on which the findings of fact are based. Section 430 does not require a decision-maker to give reasons for rejecting evidence inconsistent with the findings made. Accordingly, there was no failure to comply with s 430(1) of the Act.*
> >
> > …
> >
> > *It is not necessary, in order to comply with s 430(1), for the Tribunal to give reasons for rejecting, or attaching no weight to, evidence or other material which would tend to undermine any finding which it made.*

> *In my opinion, this passage correctly sets out the effect of s430(1)(c) and (d). However, the obligation to set out "the reasons for the decision" (s 430(1)(b)) will often require the Tribunal to state whether it has rejected or failed to accept evidence going to a material issue in the proceedings. Whenever rejection of evidence is one of the reasons for the decision, the Tribunal must set that out as one of its reasons. But that said, it is not necessary for the Tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal.*

24. I infer that the Tribunal did not have regard to the Amnesty International and Royal Commission information in question because:

    a) it was contained in 167 “folios” of material which was supplied to it by the applicant without her identifying why the information was relevant and, as a consequence, it may have been overlooked or its significance not appreciated; and

    b) the portions relevant to this discussion dealt in considerably more detail with discipline problems in the Malaysian police force than did the country information cited by the Tribunal in its decision and, at least in respect of the royal commission report details, was more pointedly relevant to the issue in question than the generic country information relied on.

25. The conclusion I draw from these facts is that although the Tribunal may have read the written material, it did not give it adequate consideration because, if it had, it would have either concluded that the Malaysian police were sufficiently ill-disciplined that the applicant had a reasonable basis for fearing to make a complaint or it would have said why its conclusion was otherwise.

26. This event has to be seen in the context of the applicant’s claim to be persecuted by reason of her European background and thus potentially an act of persecution.

27. Notwithstanding that, in general, the Tribunal did not accept as credible the applicant’s claim that she was targeted by anyone in Malaysia because she was considered to be or suspected of being European, detained and harassed as a foreigner and denied identity documentation

commonly available to Malaysian citizens, it did accept that she was attacked by two police officers in December 2004. The way the Tribunal treated that attack indicates that it considered it to have been racially motivated and to have been Convention-based persecution. Had it not, it would not have needed to give consideration to whether the applicant had access to State protection. Having found that the applicant suffered no more than social ostracism because of her appearance, rather than persecution, a consideration of State protection is otiose unless the attack which was accepted to have occurred was considered to be persecutory in nature. Whether, given that it appears to have been an isolated incident, that was a correct factual conclusion is not a matter for determination by this Court in proceedings for judicial review.

28. Consequently, the Tribunal did not exercise its jurisdiction fully in that it did not take account of relevant material, the consequence of which is that its decision is affected by jurisdictional error.

The Tribunal relied upon illogical and perverse reasoning

29. The applicant submits that if, as I find, the Tribunal accepted that the applicant had been threatened with death by the police, for the Tribunal to then describe her as having had a choice whether or not to make a complaint about that behaviour is illogical because, in reality, she had no such choice.

30. However, a conclusion on illogicality depends on more than this. It also depends on a finding by the Tribunal that the Malaysian police force was so ill-disciplined that the assault and the threat of December 2004 were more than isolated crimes perpetuated by two rogue police officers (which is what, at CB 267, the Tribunal found them to have been) and were, instead, reflective of a more general malaise within the police force (such as that suggested by the findings of the royal commission which were not referred to by the Tribunal) such that a complaint by the applicant would only cause her more trouble and possibly even see the threat acted upon. However, that was not the Tribunal's finding and, absent that factual foundation, no conclusion of illogicality on the basis advanced can be drawn.

The Tribunal failed to make findings on all the applicants' claims in that it failed to make a finding on the first applicant's claim that she was denied police protection because she has a son who was an Australian citizen

31. The applicant's counsel took the Court to a passage in the applicant's statutory declaration submitted with her protection visa application form (CB 32-37):

> *My son is always abused and bashed with my present there; they don't come and find out about me or my son properly and straight away abuse and harass us. I was denied police protection many times and I suspected of being in connection with the Australian and British and this is because of my disability to speak the local language clearly and moreover they find out that my eldest son Rama Row is a citizen of Australia.*

32. The applicant submits that this paragraph should be read as the applicant saying that she was persecuted not only because of the perception of her having a connection with Australia and Britain but also because one of her sons is an Australian citizen. But the final portion of that paragraph should be seen, with the remainder of the paragraph, in the broader context of the applicant's statutory declaration. When seen in the context, what the applicant is shown to be asserting is that she is persecuted because she is perceived not to be a Malaysian and the fact that one of her sons is an Australian citizen only reinforces this perception:

> *Since I didn't have formal education, I can't read write in English, Malay or Tamil languages. My Malay accent also differs a little bit from others. It was difficult for me to convince the police and the immigration officials in Malaysia whenever they questioned my legal status. Often I ended up in detention centres arguing with them.*
>
> *The Malaysian authorities often disputed my claims of Malaysian citizenship in all my attempts to seek some benefits from the government during my financial hardships. Police often detain me often suspicious of my identity until I proved my real identity to them.*
>
> *My son is always abused and bashed with my present there; they don't come and find out about me or my son properly and straight away abuse and harass us. I was denied police protection many times and I suspected of being in connection with the Australian*

> *and British and this is because of my disability to speak the local language clearly and moreover they find out that my eldest son Rama Row is a citizen of Australia.* (CB 34-35)

33. Given that the applicant claims to have had an Australian father, leading to what the Tribunal accepted as social ostracism because of her skin colour and facial features, the fact that she also has a son who is an Australian should be seen as part of the same issue. The issue of the word "moreover" should be understood as the applicant explaining her claim to race-based persecution by adding a further reason for it. It is not a separate basis for her ill-treatment.

34. The only alternative approach would seem to be to identify a ground of Convention-based persecution other than that of race, but that has not been attempted. For instance, it was not alleged that the applicant was persecuted because she was a member of a particular social group, such as Malaysian parents of Australian citizens.

Conclusion

35. As the Tribunal's decision is affected with jurisdictional error, it must be set aside and the matter remitted to the Tribunal for determination according to law.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Cameron FM.

Associate: Parisra Thongsiri

Date: 13 April 2007