FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMEF v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1106*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming political persecution in Fiji – applicant not believed – delay in claiming protection – whether s.91R(3) of the *Migration Act 1958* (Cth) engaged from the fact of delay considered.

Migration Act 1958 (Cth), ss.91R(3), 424A

SZHFE v Minister for Immigration [2006] FCA 648
SZJGV v Minister for Immigration [2008] FCAFC 105

Applicant:	SZMEF
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 986 of 2008
Judgment of:	Driver FM
Hearing date:	4 August 2008
Delivered at:	Sydney
Delivered on:	4 August 2008

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents:	Ms T Quinn DLA Phillips Fox

ORDERS

(1) The application is dismissed.

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of $4,500.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 986 of 2008

SZMEF
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT
(revised from transcript)

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 25 March 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa.

2. The applicant is from Fiji and had made claims of political persecution. Background facts relating to those claims and the Tribunal decision on them are conveniently set out in the Minister's written submissions filed on 30 July 2008. I adopt as background for the purposes of this judgment with minor amendments paragraphs 2 through to 7.7 of those written submissions:

> The applicant is a male citizen of Fiji born on 14 November 1968. He arrived in Australia on 27 September 2007.[1] The applicant applied for

[1] court book ("CB") 28-29

a Protection (Class XA) visa on 25 October 2007.[2] The application was refused by a delegate of the Minister on 4 December 2007.[3]

The applicant applied to the Tribunal for review of the original decision on 19 December 2007.[4] The applicant gave oral evidence before the Tribunal on 5 February 2008.[5] The Tribunal wrote to the applicant on 7 February 2008 inviting the applicant to comment in writing.[6] The applicant provided a response by facsimile dated 12 March 2008.[7] The Tribunal signed a decision on 18 March 2008, and handed it down on 25 March 2008.[8]

The applicant's claims

The applicant claimed to fear persecution in Fiji because of his political opinion and Indian ethnicity, although at the hearing he stated that his claims relating to his ethnicity were related to his political activities in supporting the Qarase government, and being involved in a mostly Fijian party. He claimed to have been beaten, imprisoned and tortured. He claimed that he feared being harmed in the future by the Fijian military because of his political association with the SDL party.

Following the hearing in this matter, the RRT wrote to the applicant on 7 February 2008 inviting him to comment on information. The information related to:

a) The applicant's delay in obtaining a visa to come to Australia, travelling to Australia after he obtained a visa, and applying for a protection visa after he arrived in Australia.

b) The lack of documentary evidence to support the applicant's claim to have been affiliated with the SDL party, and to have been a public figure in support of that party.

c) The fact that country information did not indicate that the Fijian military was targeting or harming people simply because they were members of SDL or supported SDL at the 2006 election.

d) The fact that he did not claim to fear persecution because of his Indian ethnicity at the hearing.

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[2] CB 1-31
[3] CB 39-46
[4] CB 58-71
[5] CB 83
[6] CB 95-97
[7] CB 104-114
[8] CB 118-139

The applicant's adviser responded on 3 March 2008, seeking further time to provide a response. The Tribunal denied this request and signed a decision on the review. However, on 12 March 2008, the applicant provided a further submission to the Tribunal. It provided the applicant's explanation for the issues noted by the Tribunal in its letter of 7 February 2008. The Tribunal made a new decision taking account of the applicant's response. That decision was signed on 18 March 2008 and handed down on 25 March 2008.

The decision of the Tribunal

The Tribunal was not satisfied that the applicant faced future harm in Fiji for reason of his actual or imputed political opinion. It found:

a) The applicant's claims to have been beaten, threatened, and detained by the Fijian military and other ethnic Fijians in the past were not substantiated. The applicant's oral evidence in relation to these claims was vague and lacked detail.

b) The applicant delayed almost nine months after he began to be beaten on a daily basis, and after arriving in Australia delayed for one month before applying for a protection visa. The Tribunal found these delays to be inconsistent with a genuine fear of persecution.

c) The Tribunal did not accept that the applicant had the political profile he had claimed. It accepted that he might have been a low-level member of SDL and provided low-level assistance. However, beyond the applicant's assertions there was no evidence to suggest that the applicant's political profile went beyond that. He did not claim to have developed such a profile since he arrived in Australia.

d) There was no country information indicating that the Fijian military was targeting SDL members or supporters.

e) The applicant would not draw adverse attention to himself by expressing political views against the present government if he returned to Fiji. He had not done so in the past, and had not done so while in Australia, so there was no reason to think he would do so on his return to Fiji. The Tribunal was satisfied that this was not because of any fear that the applicant might hold.

f) The Tribunal considered the applicant's claim that the situation could change following the 2009 elections, if SDL won the election and the military retained power anyway. The Tribunal found that was mere speculation, and in event would not increase the risk to the applicant.

g) The Tribunal took the view that the applicant's claims associated with his ethnicity were essentially the same as his political claims. However, it found that in any case, it was not satisfied that the applicant would suffer harm for reason of his ethnicity.

3. The applicant relies upon a show cause application filed on 21 March 2008. The application is supported by an affidavit which makes legal submissions and which I accepted as a submission. The application is lengthy and contains extensive quotes from the Tribunal decision and from Court authorities.

4. There are essentially, however, four allegations made by the applicant. The first is that the Tribunal failed to comply with s.424A of the *Migration Act 1958* (Cth) ("the Migration Act"). The applicant also asserts bias on the part of the Tribunal in the manner which he was invited to comment on adverse information. Secondly, the applicant asserts a failure to consider all aspects of relocation. Thirdly, the applicant asserts that the Tribunal misconstrued or overlooked a claim by him based upon his Indian ethnicity. Finally, there are assertions that the Tribunal exceeded its powers in the making of its decision. The affidavit repeats the asserted breach of s.424A.

5. I have before me as evidence the court book, filed on 29 May 2008.

6. At the commencement of today's hearing the applicant requested an adjournment. The application was based on the fact that his former solicitors have recently ceased acting for him and he wished to obtain alternative representation. The applicant told me from the bar table that his solicitor had demanded additional money when he saw him last week and he was unable or unwilling to pay. If that were the case, then it would be hard to see how an adjournment would help. However, the applicant's assertion of the reason why his solicitors withdrew is not consistent with correspondence sent by those solicitors to the Court. The solicitors wrote to the registry on 29 July 2008 advising of their withdrawal. That letter states that the solicitors last wrote to the applicant on 18 July 2008 seeking his instructions in the matter and drawing attention to relevant court orders. That letter is annexed to the solicitor's letter to the Court. That letter addressed to the applicant's address for service urgently requested instructions and referred to two previous letters of 19 June 2008 and 11 July 2008 concerning the same

matters. The letter notes that the solicitors had attempted to call the applicant on his mobile phone but a message stated that the phone was no longer in service. The letter stated that if the solicitors did not hear from the applicant by 25 July 2008, they would be duty bound to inform the Court that they had no instructions and withdraw.

7. The applicant told me from the bar table that he had changed his address to 3/A Dunsmore Street, Rooty Hill, New South Wales, 2766, some weeks ago. However, he had apparently not informed his solicitors of that change of address until last week. Curiously, he also told me that he relied on his solicitors to undertake all matters for him including advising the Court and the Minister's solicitors of any change of address for service. Needless to say, no notice of change of address was filed.

8. It is unfortunate that the applicant is no longer legally represented, but in my view he is the author of his own misfortune by putting himself out of contact with his solicitors. I refuse the request for an adjournment.

9. There is, in my view, no substance to the grounds for review relied upon by the applicant. First, there was no breach of s.424A. The applicant labours under the misapprehension that there was some obligation under that section for the Tribunal to disclose its own reasoning process. That is incorrect. There was also an extraordinary allegation of bias on the part of the Tribunal by accurately quoting the terms of s.424A(1). The allegation is nonsense.

10. Secondly, there was no relocation finding made by the Tribunal, and there was no obligation to make such a finding. The Tribunal did not accept that the applicant would suffer persecution anywhere in Fiji.

11. Thirdly, there was no misconstruction or misunderstanding of a claim based upon ethnicity. The applicant's protection visa claims were essentially, political ones. The Tribunal decision records that there was a discussion about the applicant's claims at the hearing on 5 February 2008 where the issue of race was raised. In a post hearing submission the applicant's advisor asserted that the applicant had raised a claim of race based persecution which had not been dealt with or dealt with properly. The allegation was supported by what purported to be a short

extract from the transcript of the Tribunal hearing. The Tribunal deals with that issue in its reasons at CB 136 and 137. The Tribunal went back to the audio recording of the hearing and inserted into its reasons its own version of the relevant portion of the transcript.

12. In my view, the Tribunal's version is more reliable than that presented by the applicant's advisor. The applicant's advisor's version was a very short summary of what was actually said which misrepresented the sense of what was being said. On the Tribunal's version, which I accept, the applicant was not really raising a claim based on race. He was simply referring to the racial composition of his favoured political party as a part of his political claims. In any event, the Tribunal was careful to consider and deal with a claim of Indian ethnicity if it had been raised.

13. Finally, I agree and adopt for the purposes of this judgment the Minister's submissions in relation to the fourth ground:

> *This ground alleges that the* [Tribunal] *based its decision on personalised opinions and did not accept the applicant's reasonable explanations, thereby denying him procedural fairness. In purported support of this complaint the applicant quotes various aspects of the* [Tribunal's] *appraisal of his evidence as, for example, lacking authenticity, and detail, and quotes the* [Tribunal's] *findings rejecting his explanations for his delay in applying for a protection visa.*
>
> *It is not a breach of procedural fairness requirements to reject an applicant's claims. Indeed, the* [Tribunal's] *task necessarily involves an assessment of whether or not the applicant's claims are true, and whether or not they give rise to a well-founded fear of persecution. These are findings of fact, which are not susceptible to judicial review. The mere fact of rejecting an applicant's claim does not give rise to any jurisdictional error.*

14. The Minister's submissions also properly raise an issue not raised by the applicant. That issue is the applicant's delay in applying for a protection visa in Australia. I incorporate in this judgment paragraphs 17 to 21 of those submissions:

> *Although the applicant had not sought to rely on his conduct after departure from Fiji, the* [Tribunal] *referred to what the applicant*

had done after his arrival in Australia at two points in its decision (see [9.2] and [9.5] above).

First, it considered that the delay of one month between the applicant's arrival and making an application for a protection visa was relevant in determining that the applicant did not have a genuine fear of persecution.

Second, it considered that the applicant had not engaged in any political activities in Australia that would suggest that he would engage in activities in Fiji in the future.

These facts are similar to SZHFE v Minister for Immigration and Indigenous Affairs *[2006] FCA 648, where a question arose as to whether the* [Tribunal] *erred in not applying section 91R(3) to disregard the fact that the applicant had been in Australia for seven years before applying for protection. Jacobson J (upholding Driver FM) concluded that no error existed, as the* [Tribunal] *was satisfied that the applicant's stay in Australia was motivated by the applicant's desire to undertake education courses in order to achieve permanent residency, and not for the purpose of strengthening a refugee claim. Jacobson J noted further that:*

> [30] The effect of the submission is that section 91R(3) is **only enlivened where an applicant seeks to rely on conduct in Australia** to support a claim to have a well-founded fear of persecution. In my opinion this is plainly the effect of section 91R(3) and the subsection is not enlivened in the present case. *(emphasis added)*

The Full Court in SZJGV v Minister for Immigration and Citizenship *[2008] FCAFC 105 did not expressly overturn SZHFE. However, in obiter comments, it considered it was arguable that section 91R(3) would still apply in circumstances where the applicant does not seek to rely on their conduct in Australia, particularly conduct that may be seen to be prejudicial to an applicant's interests (at [26]):*

> A second question which does not arise on these appeals and need not be resolved is whether s.91R(3) is enlivened only when an applicant seeks to rely on his or her conduct in Australia to support a claim to be a refugee. There may be cases in which the decision maker becomes aware of relevant conduct from other sources. The evidence may be prejudicial to an applicant who will not seek to rely on it.

> Even so, it is arguable that s.91R(3) will be engaged and will require the decision maker to disregard the evidence.
>
> *In* SZJGV *(this was particularly relevant to the facts of* SZKBK[9]*), the Court at [22], concluded that "inaction can constitute conduct within the meaning of section 91R(3)". However, those facts can be distinguished from the present case in that the 'inaction' referred to in* SZKBK *was the what the* [Tribunal] *considered was the failure to actively pursue his refugee-related conduct in Australia. In the present case, the* [Tribunal] *was referring to the applicant's failure to do anything.*
>
> *The first respondent contends that* SZHFE *remains good law. It was open to the Full Court in* SZJGV *to overrule* SZHFE *but it did not do so, despite its obiter comments in* SZJGV *at [26]. However, the Full Court explicitly did not resolve this issue, and the first respondent maintains that Jacobson J's position was correct.*

15. In *SZJGV v Minister for Immigration* [2008] FCAFC 105 at [22], the Full Federal Court touched upon the issue of the significance of the fact of making a protection visa claim for the purposes of s.91R(3). Importantly, the Court adopted a submission by the Minister that the section can only be sensibly applied once primary findings of fact have been made. For myself I find it hard to see how the simple fact of making a protection visa claim could be a relevant fact for purposes of s.91R(3). In my view, the act of making a claim could not be conduct to enhance the claims; it was the claims itself. However, the fact of the timing of making a claim may be material. For example, an applicant may seek to rely upon his promptness in making a protection visa claim in order to enhance the claim, that might well engage s.91R(3). It is hard to envisage any circumstances in which delay in making a claim for protection could enhance those claims.

16. I accept that the section may be engaged on the basis of inaction as well as on the basis of action. I also accept that the section may be engaged independently of any reliance sought to be placed on particular facts by an applicant. However, it is clear from this Tribunal decision that the Tribunal did not regard the applicant's delay in

[9] In *SZKBK*, the Tribunal considered the 'inaction' of the applicant in not attending church more regularly and locating a church in Australia, was the critical conduct that had to be disregarded for all purposes.

seeking protection in Australia as enhancing in any way his protection visa claims. It is clear from what the Tribunal says in its reasons at CB 134 that the applicant's delay in seeking protection in Australia cast doubt on the genuineness of his fear of persecution. Where the Tribunal does not see anything in specific facts or circumstances that could (or could be intended to) enhance a protection visa claim s.91R(3) is not engaged. There was, in this case, no need for the Tribunal to consider the application of the section.

17. I find that the Tribunal decision is free from jurisdictional error. Accordingly, the decision is a privative clause decision and the application must be dismissed.

18. The application having been dismissed, costs should follow the event. The Minister seeks an order for costs fixed in the sum of $4,500. Scale costs in this instance would be $5,000. The applicant queried the amount of the costs sought. I am satisfied that costs of not less than $4,500 have been reasonably and properly incurred on behalf of the Minister when assessed on a party and party basis. I will order that the applicant is to pay the first respondent’s costs and disbursements of and incidental to the application, fixed in the sum of $4,500.

I certify that the preceding eighteen (18) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 6 August 2008