FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHLO & ORS v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1837*

MIGRATION – Review of decision of the Refugee Review Tribunal – Tribunal erred in asking questions of the applicant designed to ascertain the content of privileged communication – whether evidence so obtained was material to the Tribunal's decision affirming the decision under review – whether constitutional writs should issue – discretion exercised in applicant's favour – application allowed.

SZHWY v Minister for Immigration and Citizenship [2007] FCAFC 64
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162

Applicants:	SZHLO & ORS
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3109 of 2005
Judgment of:	Nicholls FM
Hearing date:	8 May 2007
Date of Last Submission:	8 May 2007
Delivered at:	Sydney
Delivered on:	8 November 2007

REPRESENTATION

Counsel for the Applicant:	Nil
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Ms R Pepper
Solicitors for the Respondents:	Blake Dawson Waldron

ORDERS

(1) The reference to the first respondent be amended to read "Minister for Immigration and Citizenship."

(2) A writ of certiorari issue, quashing the decision of the second respondent.

(3) A writ of mandamus issue, requiring the second respondent to redetermine the matter according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3109 of 2005

SZHLO & ORS
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed in this Court under the *Migration Act 1958* (Cth) ("the Act") on 25 October 2005 seeking review of the decision of the Refugee Review Tribunal ("the Tribunal"), signed on 17 February 2005 and handed down on 9 March 2005, which affirmed the decision of a delegate of the respondent Minister to refuse a protection visa to the applicant.

Background

2. The applicants are a husband ("the applicant"), wife ("the applicant wife") and three daughters ("the applicant children"). The applicants are citizens of Egypt. One of the daughters was born in Australia in 2000. They arrived in Australia on 15 or 16 June 1999 and lodged an application for a protection visa with the first respondent's Department on 29 July 2004. This was refused and they sought review of that decision by the Tribunal.

The Applicant's Claims

3. The Minister has filed a bundle of relevant documents in this matter (the "Court Book" ("CB")). Only the applicant made specific claims under the Refugees Convention. The applicant wife and applicant children relied on their membership of his family.

4. The applicant claimed that he faced religious persecution in Egypt due to his religious beliefs and activities as a member of the Coptic Church. In particular, he claimed his houses in both Kuwait and Egypt were raided, that he was forced to leave Kuwait by the authorities and in particular, that he had been persecuted by Muslim fundamentalists. He further claimed that there is no protection for him and his family if they were to return to Egypt.

The Tribunal's Findings and Reasons

5. The applicant gave evidence at a hearing before the Tribunal on 11 February 2005. The Tribunal's account of what occurred is contained in its decision record at CB 81.5 to CB 84.2.

6. In its findings and reasons (reproduced at CB 84.3 to CB 86.5), the Tribunal accepted that the applicant and his family were Coptic Christians and that independent country information supported in a general way the applicant's claim that there was discrimination and threats or assaults sometimes against Christians in Egypt. Further, that police or state security do not always protect against such attacks. The Tribunal, however, did not accept that the applicant and his family suffered persecution in Egypt as they had claimed. The reason for this was that the Tribunal rejected the applicant's claims about persecution because it did not accept the applicant was a witness of truth (CB 85.4).

7. The Tribunal found that the applicant's claims about persecution in Egypt were "recent invention to facilitate his application for a visa" (CB 85.8) and therefore rejected his claims to have been persecuted in Egypt by Muslim fundamentalists. As a result, it also rejected other instances of claimed harm. The Tribunal concluded therefore that it was not satisfied that the applicant was a person to whom Australia owed protection obligations, and as no specific Convention claims

were made on behalf of the applicant wife and applicant daughters, their applications were also refused.

8. At the hearing before the Court the applicant appeared in person. He was assisted by an interpreter in the Arabic language. He was appointed as litigation guardian of the applicant daughters and also appeared to represent the applicant wife. Ms R Pepper of Counsel appeared for the first respondent.

The applicant's application

9. Before the Court was the applicant's application filed on 25 October 2006. The applicant relied on four grounds of review set out in that application, and on an outline of submissions filed on 3 May 2007. The applicant's application puts forward the following grounds of review:

> *"1. The Second Respondent committed jurisdictional error of law by misinterpreting the definition of persecution set out in s91R of the Migration Act 1958, and as a result asked itself the wrong question in purporting to determine whether Australia had protection obligations in respect of the Applicant.*
>
> *2. The Second Respondent made credibility findings against the Applicant based totally on the fact that the Applicant made an application for protection after some time had lapsed and after he had found that his business visa was unlikely to succeed.*
>
> *3. The Second Respondent did not give any consideration to the detailed and valid evidence given in relation to the reasons for delay.*
>
> *4. The Second Respondent made credibility findings against the applicant in the absence of any inconsistencies in the oral or written evidence of the Applicant or the plausibility of the claims."*

The respondent had filed written submissions on 7 May 2007.

10. At the hearing, the applicant made a number of claims in addition to those raised in the application. The Court also heard submissions from Ms Pepper on behalf of the first respondent. The first respondent also sought leave (which was granted) that the affidavit of Mr Oliver Young, a solicitor in the employ of the respondent's

solicitors, affirmed 7 May 2007, be filed and read in Court. The affidavit annexes a transcript of the Tribunal hearing of 7 February 2005.

11. At the conclusion of the hearing, I reserved judgment in this matter. When I subsequently came to my final consideration, I noted that the day after the hearing a Full Federal Court had handed down its judgment in *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 ("*SZHWY*"). By majority, the Full Court found that a question asking an applicant for review to divulge the content of conversation with his legal representative, without informing the applicant of his right to claim legal professional privilege, was asked in excess of the Tribunal's jurisdiction in that, in the circumstances, the Tribunal asked a question beyond its power. Given such jurisdictional error, the matter was remitted to the Tribunal to be redetermined in accordance with the law.

12. I noted that in the transcript ("T") at T 15.5 the following exchange occurred between the applicant and the Tribunal member:

> *"TM: You came here in 1999? When did you first see a migration agent, whether it was Ms Nicholas or anyone else?*
>
> *A: After I came here by 1 month I went to a solicitor called Samir, who is the one advised me to do the business. If like, I got my money here then you can, my life here will be okay??? in the business.*
>
> *TM: And did you ask him for any advice about migration or visas?*
>
> *A: No I didn't.*
>
> *TM: So, I'm trying to work out when you first asked someone about getting a visa?*
>
> *A: After I went to Madam Theresa."*

13. This exchange followed the Tribunal's considerable questioning of the applicant as to why he feared persecution in Egypt and Kuwait and was immediately preceded (from T 13.5) by the Tribunal seeking to ascertain from the applicant when he first raised these claims with anyone in Australia:

> *"TM: Mr [applicant] when did you first? After you came to Australia, when did you first tell someone about this, these details you're telling me now?"*

14. Given the exchange at T 15.5, and in light of *SZHWY*, I gave both parties the opportunity to make submissions. The respondent's submissions were filed on 29 October 2007. Nothing has been put by or on behalf of the applicants.

15. The Minister's submissions seek to distinguish these circumstances in the case before the Court now from what was before the Court in *SZHWY* on the basis that in the case before the Court now, the Tribunal did not impermissibly enquire into the content of the advice given by the solicitor to the applicant but merely enquired as to whether or not advice had been given.

16. The Minister's position is that in *SZHWY* (see [8]) the Tribunal asked the applicant "what did you talk to him [the solicitor] about" and the applicant replied, disclosing the substance of his conversation with the solicitor. With reference to the extract quoted above, the Minister's position is that the exchange in *SZHWY* is distinguishable on the basis that the Tribunal referred to the fact that the applicant went to see a solicitor. That is, it enquired into the objective fact of whether the applicant had asked the solicitor for advice, but did not ask a question seeking to "ascertain the content of a communication between [the applicant] and his solicitor." This was put with reference to *SZHWY* at [50], per Lander J:

> *"[50] It was argued that the next question (616) asked by the Tribunal was impermissible. It directly sought to ascertain the content of a communication between the appellant and his solicitor which was privilege. The further questions (622 and 626) should also not have been asked. Question 622, like question 616, directly seeks to ascertain the content of a communication between the appellant and his solicitor. Question 626 impermissibly seeks to ascertain the advice given by the solicitor to the appellant."*

17. The exchange in *SZHWY* is reproduced at [8]:

> "…

‘614. Tribunal Member Well if you first decided not to return in late December 2004, what did you think was going to happen?

615. Applicant Well I don’t know, I told you that I was too confused, you know I had a actually one meeting as well with a solicitor in Lakemba, I believe he call Salah I think so, but he was you know, he was, he was a Muslim in the beginning so I was too afraid to speak in front of him about the Christianity or about the Homosexuality as well

616. Tribunal Member You came to him about

617. Applicant I came to him you know on a crazy idea about that I hate the Mobarak, the President

618. Tribunal Member You came to him what

619. Applicant I came to him you know on a crazy idea about that I hate Mobarak, it just came to me like that (clicks fingers)

620. Tribunal Member That you hated work? I can’t

621. Applicant The president of Egypt

622. Tribunal Member oh I see I see, so you told him that you didn’t want to go back for political reasons?

623. Applicant Yes

624. Tribunal Member Did you

625. Applicant Because I couldn’t tell him about the homosexuality because I was too afraid to tell him about that

626. Tribunal Member And what did he advise you to do?

627. Applicant Ah the, the solicitor?

628. Tribunal Member Hmm

629. Applicant Well he recommended to go for another meeting to discuss all the details

630. Tribunal Member And you didn’t go back

631. Applicant Yes for sure not

632. Tribunal Member Ok. Um, so you have had your passport issued for a while.’”

18. The Minister's position is that a mere enquiry into the objective fact of whether or not the applicant asked the solicitor for advice, without more, was not impermissible and did not fall within the ambit of the ratio of *SZHWY,* where the Tribunal, by contrast, had proceeded to make enquiries of the applicant as to what he had in fact discussed with his solicitor.

19. I do not agree with the Minister's submissions in this regard. I would have been persuaded to the Minister's submission if the Tribunal question had been in the terms, "and did you ask him for any advice?" (T 15.5). However, in my view, the additional words "about migration or visas," is an enquiry that "directly sought to ascertain the content of a communication between the [applicant] and his solicitor which was privileged" (*SZHWY* at [50]). This question is at least comparable to the question at 616 by the Tribunal in *SZHWY*. Even though the question in *SZHWY* was a general question about what was discussed at the meeting with the solicitor, and the question in the current case was specific about a particular topic and as to whether it was discussed or not, if anything, there is no essential difference in substance in that both questions were designed to ascertain the content of privileged communication.

20. While the Tribunal's questioning in relation to what was discussed with the solicitor was not as extensive as what occurred in *SZHWY*, in *SZHWY* the Court found (at [75], per Lander J) that the Tribunal was under an obligation to advise the applicant that he was entitled to refuse to answer the questions the Tribunal asked of him if they were to disclose the contents of a confidential communication he had with his lawyer for the purpose of obtaining legal advice. The Court was of the view (at [77], per Lander J) that the Tribunal should advise an applicant of their right to claim legal professional privilege if it appears that a question might give rise to a legitimate claim of that privilege, and (at [172]-[174], per Rares J) if there was, as in the case before the Court now, no waiver of the applicant's legal professional privilege as to what he may have discussed with his solicitor.

21. In considering whether relief should be granted, given that the granting of relief is discretionary even in light of an error in the exercise of the Tribunal's jurisdiction having been identified, the majority with respect

appears to have taken a different view of the facts before it in *SZHWY*. Lander J took the view (at [78]) that "[t]here is no suggestion in the Tribunal's reasons to indicate that the Tribunal had regard to the evidence which was volunteered or later given by the appellant in response to the Tribunal's questions." Nonetheless, in considering whether to allow the issue of the discretionary constitutional writs, his Honour said (at [80]):

> *"In considering whether the writs should issue the Court will keep in mind 'the high purpose of vindicating the public law of the Commonwealth of upholding the lawful conduct on the part of officers of the Commonwealth (and) of defending the rights of third parties under that law …':* Re Refugee Review Tribunal; Ex parte Aala [(2000) 204 CLR 82] *per Kirby J at 137."*

22. Rares J however found (at [192]) that the Tribunal had said that it had had regard to the evidence before it in rejecting the appellant's claims and that this evidence included the discussion with the solicitor:

> *"It follows that that evidence may have made a difference to the result. It was evidence taken by the Tribunal making a jurisdictional error. There is no reason not to set such a decision aside (*SAAP [(2005)] *215 ALR* [162] *at 185 [84] per Gummow J, 203 [174] per Kirby J, 212 [211] per Hayne J)."*

23. In the case before the Court now, the Tribunal did in part rely on the applicant's evidence as to what transpired between the applicant and his solicitor in finding that the applicant was not a witness of truth. The Tribunal found that had he been a witness of truth, he would have made a claim for protection in Australia at an earlier time (at CB 85.6):

> *"On the applicant's evidence, although he had seen a solicitor in relation to setting up his business about 1 month after coming to Australia, and had seen a migration agent on a couple of occasions, he did not mention to those people, until after he had been in the country for some considerable time, that he was persecuted in his country. The Tribunal does not accept as plausible the applicant's evidence that he did not make a claim for protection for more than three years after arriving in Australia because he was afraid for his safety in this country."*

The Tribunal then said (at CB 85.8):

> *"The Tribunal finds that his claims about persecution in Egypt are recent invention to facilitate his application for a visa so that he and his family can remain in Australia and the Tribunal rejects those claims."*

24. That the applicant saw a solicitor and did not discuss with the solicitor, nor raise with the solicitor, issues relevant to applying for a protection visa, was clearly a part of the Tribunal's reason for rejecting the credibility of the applicant's claims and for ultimately affirming the decision under review. With reference to what Rares J said at [192], the evidence (as the Tribunal said, "the applicant's own evidence") in the case before me now included evidence as to the discussion with the solicitor. Given that this was evidence that may have made a difference to the result, and that it was evidence taken by the Tribunal making a jurisdictional error, in the absence of any other relevant reason, I cannot see any reason not to set aside the Tribunal's decision.

25. I did also consider in relation to this issue, submissions made by Ms Pepper at the hearing to the effect that in the event that the Court were to find jurisdictional error in the Tribunal's decision (albeit at that time the issue of legal professional privilege had not arisen), that nonetheless the Court should take into account in exercising its discretion that the applicant, after arrival in Australia, delayed three and a half years after arrival in Australia before applying for a protection visa.

26. With reference to *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 per McHugh J at [80] and per Hayne J at [211], I do not see that the time taken by the applicant after arriving in Australia to apply for a protection visa is a relevant factor in the Court's consideration whether to grant the discretionary relief sought, even in cases where, while the delay was explained, it may be unwarrantable, and even if the applicant were said to come with "unclean hands" (per McHugh J at [80]).

27. That the applicant took some time after arrival in Australia to apply for a protection visa in spite of his having claimed to have suffered persecution in Egypt was a matter that was plainly before the Tribunal and relevant to its consideration of his claims. A reading of the transcript of the hearing and the Tribunal's decision record reveals that

the Tribunal was focussed on this issue to some extent and that it played an important part in its reasoning leading to it affirming the decision under review. Save for the Tribunal asking the applicant to divulge the content of a privileged communication, the Tribunal was entitled to explore the applicant's delay in seeking protection to the extent that it was a factor relevant to the credibility of his claims. To the extent that the High Court per McHugh J made reference to an applicant coming to a Court with "unclean hands" I do not see the applicant's delay in applying for a protection visa as being such as to deny the relief which he seeks. That the Tribunal took a particular view of the delay is a matter for the Tribunal and relevant to the exercise of its jurisdictional function. For the purposes of the exercise of the Court's discretion it cannot be said that the delay remains unexplained. It is of course a matter for the Tribunal (subject to its question regarding what was discussed with the lawyer), properly within the exercise of its discretion, that it took a particular view of the delay and the applicant's explanations for it.

28. In the context of the exercise of the Court's discretion however and, as to whether the applicant should be granted the relief that he seeks, I am also guided in this case by what Lander J said in *SZHWY* (at [82]):

> *"In considering whether the writs should issue the Court will keep in mind 'the high purpose of vindicating the public law of the Commonwealth of upholding the lawful conduct on the part of officers of the Commonwealth (and) of defending the rights of third parties under that law …': Re Refugee Review Tribunal; Ex parte Aala [(2000) 204 CLR 82] per Kirby J at 137."*

29. I do not see the delay in applying for a protection visa as directly relevant to the exercise of the Court's discretion. I distinguish the situation where the delay is in seeking relief following the handing down of the Tribunal's decision, from delay in seeking the protection visa. To the extent that the delay may signal some "unclean hands" it does not relate to seeking relief in the context of a complaint about the Tribunal's decision. No such argument was pressed in this matter. The applicant received the Tribunal's decision and nothing was put to the Court about delay or "unclean hands" in terms of pursuing judicial review of that decision.

30. The applicant is entitled to relief for the reasons stated by the majority in *SZHWY*. I make orders remitting this matter to the Tribunal for reconsideration.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: A Douglas-Baker

Date: 8 November 2007