FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLMD & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 724

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – invitation to attend Tribunal hearing sent only to first applicant – in the application for review the second applicant had authorized the Tribunal to write to the first applicant instead of to her – the first applicant was thereby her agent although not an authorized representative under s.441A – the hearing invitation addressed to the first applicant was also effective as an invitation to the second applicant to attend hearing – no breach of s.425.

Migration Act 1958, ss.425, 425A, 441G

SZKDB v Minister for Immigration [2007] FMCA 1036

First Applicant:	SZLMD
Second Applicant:	SZLME
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3180 of 2007
Judgment of:	Cameron FM
Hearing date:	21 May 2008
Date of Last Submission:	21 May 2008
Delivered at:	Sydney
Delivered on:	21 May 2008

REPRESENTATION

The First Applicant appeared in person

Counsel for the Respondents: Ms S.A Sirtes

Solicitors for the Respondents: Sparke Helmore

ORDERS

(1) The application be dismissed.

(2) The applicants pay the first respondent's costs fixed in the amount of $4,400.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3180 of 2007

SZLMD
First Applicant

SZLME
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicants are citizens of India. The first applicant alleges that as a businessman in India he was subjected to demands for money and was threatened and physically assaulted by thugs. The applicants arrived in Australia on 28 March 2007.

2. The second applicant is the wife of the first applicant. As she has no claims separate from those of the first applicant, he will be referred to in these reasons as "the applicant".

3. The applicant claims to have feared persecution in India because of extortionists and corrupt authorities.

4. After his arrival in Australia, the applicant lodged an application for a protection visa. This was refused by the Minister's delegate on 30 May 2007. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental decision. The applicant was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

5. For the reasons which follow, the application will be dismissed.

Background facts

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4 – 5 of the Tribunal's decision (Court Book ("CB") pages 60 – 61). Relevantly, they are in summary:

   a) thugs demanded money from him because he was a businessman. When he asked the police for help they asked for bribe money. He refused to pay the police and they did not help him;

   b) the thugs damaged his property and threatened and harmed him. He was physically assaulted on several occasions;

   c) he left India because he did not think he could get effective protection in that country;

   d) if he returns to India he will be at the mercy of the government and the extortionists and the government and the extortionists may harm or mistreat him; and

   e) legal action would inflame the thugs and the police against him and they would do more harm.

The Tribunal's decision and reasons

7. On 19 July 2007 the Tribunal wrote to the applicant to advise that it had considered all the material before it in relation to his application but was unable to make a favourable decision on that information alone (CB 50 – 51). The Tribunal invited the applicant to a hearing on 20 August 2007 to give oral evidence and present arguments. The applicant was advised that if he did not attend then the Tribunal might

make a decision on his application without further notice. The applicant did not respond to that letter and neither he nor his wife appeared before the Tribunal on the day and at the time he was scheduled to appear. Consequently, the Tribunal proceeded to make a decision on the review.

8. 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 reasons:

   a) the Tribunal noted that the applicant did not provide any further information to support his claims nor did he give the Tribunal the opportunity to explore relevant aspects of his claims;

   b) without further information from the applicant the Tribunal was not satisfied:

      i) that the applicant was a businessman or that he was subject to demands for money by thugs;

      ii) that he asked the police to help him, that they asked for bribes or that they did not help him;

      iii) that thugs damaged his property, threatened or harmed him; or

      iv) that he suffered any harm in India or fled India fearing harm.

Proceedings in this Court

9. In his amended application filed in Court today, the applicant pleaded the following grounds:

   1) The Tribunal misunderstood or misconstrued the term "political opinion" as it appears in the Refugees Convention.

2) *The Tribunal made findings in the complete absence of evidence.*

3) *The Tribunal failed to issue a meaningful invitation to the second applicant to attend a hearing pursuant to s.425 Migration Act.*

4) *The Tribunal failed to review the file of the DIAC.*

10. Dealing with each of these grounds in turn:

Misapplied test of the term "political opinion"

11. This ground has no relevance to this claim. The claim as made makes no reference to the applicant's political views or to any views which might be imputed to him. The applicant's written submissions implicitly recognise this when they say that the applicant is in fact a member of a "social group", presumably a particular social group. This was the claim which was propounded and considered. However, regardless of whether the applicant was indeed a member of such a group, or even whether it might be considered that he made a claim to fear persecution for political reasons, he failed to put before the Tribunal adequate evidence that the events he claimed occurred had indeed occurred. This has nothing to do with the proper test to be applied and everything to do with the applicant's failure to attend the Tribunal hearing. The first asserted ground of review does not disclose a basis upon which the Tribunal's decision might be set aside.

The Tribunal made findings in the absence of evidence

12. The applicants say that the Tribunal made findings in the absence of evidence but in reality it did not make findings of fact. Its decision was based on an inability to make positive findings because of the dearth of evidence before it.

13. When the Tribunal said in the fourth paragraph on p.7 of its decision (CB 63) that the applicant had "not suffered any harm in India", this was no more than a different way of expressing the Tribunal's earlier conclusion that it was not satisfied that the applicant had suffered harm. It did not amount to a finding. Consequently, the second pleaded ground does not disclose any error on the part of the Tribunal.

Breach of s.425

14. As to the alleged failure to issue a meaningful invitation to the second applicant to attend the hearing, some background facts need to be noted at the outset. The first matter to observe is that the Tribunal found at p.6 of its decision (CB 62) that the applicants had been served with a s.425A notice. This conclusion was based on evidence rehearsed by the Tribunal in the final paragraph on p.4 of its decision (CB 60) where it is recorded that on 19 July 2007 the Tribunal sent its s.425A notice. The notice itself appears at CB 50 – 51 and it is to be observed that a registered post sticker is reproduced on that letter and that at the bottom right hand corner of the first page of that letter (CB 50) the following note appears:

> *Mailed W/ "What is a hearing?" on 19/7/07.*

15. The Tribunal's conclusion that the letter had been sent was well based and thus it was entitled to proceed to make its decision when the applicants failed to attend its hearing.

16. However, it should also be noted that in their outline of submissions the applicants concede that they failed to attend the Tribunal's hearing and that the Tribunal had given them the opportunity to "present more information about their claim". It is to be inferred from their submission that their failure to attend the Tribunal's hearing arose out of financial hardship and distance, because they live in the country, which matters are referred to on the final page of the outline of submissions.

17. Having concluded that the s.425A notice was in fact posted on 19 July 2007, the next matter to consider is whether or not the fact that it was addressed only to the applicant and not to both applicants, or a second notice sent to the second applicant, affects in any way the validity of the Tribunal's decision.

18. In the application for review which the applicants lodged with the Tribunal, the second applicant signed a declaration, reproduced at CB 47, which includes the following:

> *Unless I advise the Tribunal otherwise, I authorise the Tribunal to communicate with Applicant 1 or his or her authorised recipient about this application.*

Applicant 1 in that document is the applicant in these proceedings.

19. It thus must be concluded that the second applicant was authorising the Tribunal to communicate with the applicant on her behalf. I do not think that such appointment amounts to the appointment of the applicant as an authorised representative under s.441G of the Act, because it is an authority less expansive than s.441G contemplates. Nevertheless, the letter was sent to the second applicant's agent, her husband, at the address on the review application as the legislation requires.

20. I have been referred by counsel for the first respondent to the decision of Smith FM in *SZKDB v Minister for Immigration* [2007] FMCA 1036 and I respectfully agree with what his Honour has said there concerning the effect of the declaration in the review application to which I have referred.

21. Consequently, I find that the s.425A notice was properly and adequately given to the second applicant, and that the third pleaded ground in the amended application does not disclose any error on the part of the Tribunal.

Failure to review departmental file:

22. At p.4 of its decision the Tribunal stated that it had before it the department's file relating to the applicants and it can be concluded that it based its review on the information in that file, if only because there was no other information available to it apart from independent country information.

23. Clearly the Tribunal did review the material in the departmental file, but just as that information failed to satisfy the Minister's delegate that the applicants were entitled to protection visas, so it failed to convince or satisfy the Tribunal.

24. I conclude that the departmental file and the application for protection visas were properly considered by the Tribunal, but as the applicants

failed to attend the Tribunal hearing the outcome of their review application was almost inevitable.

Conclusion

25. For these reasons, jurisdictional error on the part of the Tribunal has not been demonstrated.

26. Consequently, the application will be dismissed.

I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 6 June 2008