

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHDO v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 632

MIGRATION – RRT decision – Nepali youth fearing forcible recruitment by Maoists – claim concerning membership of particular social group – not addressed by Tribunal – matter remitted.

Acts Interpretation Act 1901 (Cth), s.8

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.474, 483A

Migration Litigation Reform Act 2005 (Cth), Sch.1 cl.41

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

Applicant S v Minister for Immigration & Multicultural Affairs (2004) 217 CLR 387

Applicant S v Minister for Immigration & Multicultural Affairs [2001] FCA 1411

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

SZEAS v Minister for Immigration [2005] FMCA 1776

SZFKD & Anor v Minister for Immigration & Anor [2006] FMCA 49

SZGRA v Minister for Immigration & Anor [2006] FMCA 1097

Vanstone v Clark (2005) 147 FCR 299

Applicant:	SZHDO
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG2635 of 2005
Judgment of:	Smith FM
Hearing date:	12 April 2007
Delivered at:	Sydney
Delivered on:	12 April 2007

REPRESENTATION

Counsel for the Applicant: Applicant in person

Counsel for the First Respondent: Ms M Jolley

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 23 August 2005 in matter N05/50602.
- (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 20 January 2005.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG2635 of 2005

SZHDO
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application filed on 19 September 2005, which has been set down for a final hearing on whether the applicant is entitled to relief under s.483A of the *Migration Act 1958* (Cth) (“the Migration Act”) in relation to a decision of the Refugee Review Tribunal (“the Tribunal”) dated 4 August 2005 and handed down on 23 August 2005. The Tribunal affirmed a decision of a delegate made on 20 January 2005, refusing to grant a protection visa to the applicant.
2. The Court’s jurisdiction under s.483A was repealed by the *Migration Litigation Reform Act 2005* (Cth), but the repeal does not affect the continuance of this proceeding (see Sch.1 cl.41 of the amending Act, and *Acts Interpretation Act 1901* (Cth), s.8).

3. The Court has under s.483A the jurisdiction of the Federal Court under s.39B of the *Judiciary Act 1903* (Cth), but this is subject to s.474 of the Migration Act, so that I do not have power to send the matter back to the Tribunal unless I am satisfied that the Tribunal's decision was affected by jurisdictional error. I do not have power myself to consider whether the applicant qualifies for a protection visa, or any other permission to stay in Australia. It is irrelevant to my consideration of the case, whether the situation in Nepal has changed since the Tribunal addressed the applicant's claims.
4. For reasons which I shall explain, I have concluded that the Tribunal failed to appreciate and address an important element in the claims made by the applicant for refugee protection. It is well established that such an error is jurisdictional (see *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [55]-[63]). No discretionary reasons for refusing relief were argued by the Minister.
5. The applicant is a young man who was born in December 1986, and arrived in Australia before his eighteenth birthday. On 12 January 2005, he applied for a protection visa. He explained his reasons for seeking protection against return to Nepal in the body of his application. In answer to the question "Why did you leave that country?", he said:

I'm a teenager boy of 18 from remote area and one of the most Maoist affected area of Nepal. My father's name is [name]. He is an ex-army of India. I'm elder son of my family. I leaved my country because in Maoist violation and terror I felt totally unsecured. Maoist forced me to leave my country . It's not new news for the world today about the condition of Nepal and it's people. Maoist terrorism has looted peace, security, social rights, human rights and economy of the country, people have been suffering from Maoist violation directly and indirectly and I'm one of the victim of Maoist. In 2004, Maoist attacked my village [name]. That time I was in [the village] in my holidays of my +2 (XII) exam. Maoist attacked around 11:00 p.m. We heard a big boom first. After half an hour. Maoist started to bang our doors. They told us to open but of fear we have to open for them. They told us to stay in one room. We're dying of fear. We only heard continuous fire of guns, bomb, screaming with pain, shouting. We didn't believe we'll survive. Whole night they

fought and captured [the village]. They were fighting till 9 a.m. of morning. When they leaved we came to know they took my mother jewellery and some cash from safety box. They had broke windows, doors and house was full of bullets, and bloods. They had used many people houses. They took loot from neighbours. They had destroyed all government offices except army camp. They had made hostages to chief district officer, DSP of police and many security man. Other remained army men were only defencing their camp though they succeed to safe it. Maoist took all hostages to near villages. They were dancing and singing shouting they had victory in their mission. My village was in misery. Everywhere there was dead bodies, blood and smells. [The village] remained with destroyed police station, government offices and public houses. We're like unconscious, crying. Many days we couldn't sleep and eat well. We cleaned whole village with the help of Red Cross. Environment was too smelly. After a week I left my village. I had to give my final exam. I was so afraid in that incident. Maoist had used teenagers from our near villages. Many people left village after that attack in [the village]. Maoist violation and terror was increasing. Killing, making hostages to teachers and students was on rise. There was no safe either in village or in cities. I returned to village after my exam. I found my father have been giving fund to the Maoist. If we stop giving fund anything can happen to our family member. Sometimes Maoist cadres used to come and tell me to come in their programs. They used to held programs in near villages. They wanted me to support them and tried to impress me with their fake policy. But I never went in their program though I had always fear when they come to force me to join and involve in their selfish war. We used to hear news from our near village that Maoist forcing people to join them. If not they were beaten and forbidden from village. Of course village people had to provide food for them but it was very difficult to live in [illegible].

6. It is clear, in my opinion, that the applicant in this statement raised a claim based not only on his personal experiences arising from the Maoist attack on his village, but also a general claim to fear the Maoists by reason of his being a teenager at risk of forcible recruitment and reprisal if he did not join them.
7. This also emerged in the applicant's responses to Question 41:

41 What do you fear may happen to you if you go back to that country?

Present situation in Nepal is critical. Maoist violation and terror has threatened the country and it's people. Without committing any crime people are suffering in bus mishaps, Maoist attack and even from authorities. It's very hard to live in terror when dead comes or you'll be used for war. Maoist activities are like animals. They do whatever they like. No one they excuse from child to old they've been killing. Maoist have created such fear that some people forcibly joined them. They have been kidnapping teenagers, teachers and students. In every war, they have been using people. So people are in fear when they'll be another victim of Maoist. Villages condition are worse than cities. We have to provide food, funds and shelter for them. If authorities found this they'll take any action and if we don't do this for Maoist they'll do anything. So it's hard to live in village and if I'm back to my country I have to go to my village because my family economic condition is not good that they can settle somewhere. There's more possible to be execute from Maoist to me. I've been hearing bad news that Maoist asks about me and threatened my family to returned me from where I'm. I'm fear to go back to my country because anything can happen to me. I've suffered once in [the village] attack from Maoist.

8. A further element in the applicant's fears of remaining in Nepal emerged from his answer to Question 44. This referred to reprisals by Nepalese security authorities against members of families who were suspected of supporting the Maoists, and, in particular, against young people in that position:

44 Do you think the authorities of that country can and will protect you if you go back? If not, why not?

I don't think that the authorities of my country can and will protect me if I go back to my country Nepal because authorities have been failed in giving protection to the people. It's been years to solve the Maoist terrorism to the authorities and they are hopeless about it. Maoist are killing and attacking people but there's no change in protection. Maoist violation and terror is increasing day by day but security has not progress. We have always fear. We people are hopeless that one day we'll feel secured. After the civil war in Nepal many things changed and many incident happened but innocent people suffered more and suffering because of negligence of authorities. Many family's member joined Maoist after they were victimised by

authorities without any crime. Authorities negligence and poor processing decision system has affected people. We have no peace in the country. We are in terror and fear when we'll be another victim of Maoist and authorities too. There's no way to feel secured.

Let's talk about the security of capital where's security is obviously good than other places but authorities have failed to stop violence in capital. Maoist blasts everyday in public area, place bombs in busy roads, educational institutions, kill people, loot house. They threatened people. I want to clarify that capital people has no protection then it's impossible to have protection for remote area people like me. To feel secured. VIP and high rank persons being killed in public areas means busy areas who have their personal security so it's impossible to get such protection to general people and we can't hope for their protection. We people are in middle between their war. If we raise voice or do something against Maoist we've to face them and if we are found giving food and shelter we have to face authorities. They think we are helping Maoist but they don't think we're forced. These two can do anything to us. Somehow, someday we gonna die as dog either by Maoist bullets or by authorities bullets. Situation of my country is going worse. Authorities can't handle the situation and protect people. Protection is poor. That's why I don't think I'll be given such protection and they can protect me as well.

9. Clear support for a general concern by the applicant as a member of a particular social group of young people was given by country information which was before the Tribunal, parts of which it extracted in its reasons. This included a highly authoritative report by the United Nations Commission on Human Rights published in January 2005, which reported that: *“the human rights crisis in Nepal deepened throughout 2004 and risks deteriorating even further if opportunities for a peaceful solution to the conflict are not seized”*. The report summarised the human rights context of this opinion, and contained the following two paragraphs:

4. *Serious human rights violations reportedly carried out by CPN-M forces in 2004 were especially centred around their policy of mass abduction, particularly of students, youths and teachers, with a view to indoctrinating impressionable young minds and enlisting the active involvement of children in the conflict. As the CPN-M movement appears to be*

losing popular support – there were increasing incidents of villages revolting against the abusive behaviour and deadly tactics of the Maoists at the end of 2004 – they have sought to fill their ranks with children, whether as porters, camp followers, propagandists or soldiers. There are many reports of encounters with “Maoist” children as young as 12 who do not understand what they are fighting for, but who nonetheless are ready to kill and be killed. Children are also coerced into acting as porters of ammunition and equipment and, as such, are exposed to the same dangers as combatants. The systematic targeting of schools, students and teachers by the CPN-M has brought the educational system to a standstill in large parts of the country, which will have a devastating social and economic impact on the country far into the future.

...

6. *On the side of the security forces, consisting of the Police, the Armed Police Force and the Royal Nepalese Army (RNA) under a unified command, reports of serious and systematic human rights violations have increased throughout 2004, particularly in regard to disappearance, torture, arbitrary detention and summary execution. A climate of impunity continues to pervade the security forces down to the lowest levels, despite an increase in investigations and courts-martial of alleged abusers. An intensification of the conflict throughout the year has produced pressure on local commanders to produce “results”, which reportedly has produced higher body counts. To that end, there were reports throughout the year of security forces entering villages disguised as Maoists. Those who cooperated with the “false Maoists” – even out of fear – were sometimes executed by the security forces in front of their neighbours as an example and later reported as having been killed in an “incident”. Reports persisted throughout the year of summary executions by the security forces of unarmed youths and even children who were suspected Maoists or of having cooperated with the Maoists.*

10. In the delegate’s decision refusing the protection visa, there was no suggestion that the applicant was not a person at risk if he returned to Nepal. The reasoning of the delegate was that Australia did not owe protection obligations to him, due to the delegate’s opinion that the applicant could find a safe haven in India. However, the delegate’s

reasoning appears to have been affected by errors such as I found in *SZEAS v Minister for Immigration* [2005] FMCA 1776 at [35]-[36], *SZFKD & Anor v Minister for Immigration & Anor* [2006] FMCA 49 at [43]-[44], and which Lloyd-Jones FM addressed in *SZGRA v Minister for Immigration & Anor* [2006] FMCA 1097. I do not need to explore the delegate's reasoning further, since the present Tribunal did not go down the same pathway.

11. The applicant attended a hearing before the Tribunal. A transcript has not been put into evidence by either party, but a description was given in the Tribunal's reasons. It is clear that the Tribunal questioned the applicant mostly, if not entirely, about his own personal experiences in his village and in Kathmandu. However, in my opinion the applicant clearly maintained a claim to have fear by reason of his youth and education, and the Maoists' activities directed at Nepalese young people. For example, he told the Tribunal in relation to his last visit to his village:

The Applicant said he had to go back to [his village] because he was worried about his father and mother. He went to see his parents and stayed in [his village] for another two months. He helped his parents in their shop but did not do so regularly because the Maoists might see him. They used to come and tell his father and the Applicant that they wanted the Applicant to join them in their fight against the army. Two of the Applicant's friends were pushed into joining the Maoists. One of them was killed a few months ago in a battle against the army.

I asked the Applicant if the Maoists had approached him during his last stay in [his village]. The Applicant stated that if a person does not agree with the Maoists they may receive threats. He said that they were nice to the Applicant and his father in the beginning, but later tried to force young people to join their cause. The Maoists said that if the Applicant did not support or join them 'anything might happen' to him. I asked the Applicant if anything had happened to him. His mother and father did not want him to stay in [his village] so he left for safety reasons. He went to Kathmandu where he stayed with his sister for about five to six months. He occasionally stayed with his aunt in Kathmandu in that time. His younger brother remained in [his village].

12. At the end of the hearing, the Tribunal reported the applicant as saying:

The Applicant stated that the Maoists seek to take one son from each family. They looted his family's home. He loves his country and wished to stay there but he was forced to leave Kathmandu and go to a foreign country. When asked how he knew the Maoists were looking for him in Kathmandu, he stated his father told him they were coming to the address in [his village] and looking for him. His father told him to hide.

13. In my opinion, the material that was before the Tribunal did raise “a potential” for the applicant to be found to have well-founded fears based on membership of a “particular social group” within the Convention definition of refugee. His claim to fear forcible recruitment and reprisal was comparable to the situation found by Carr J in *Applicant S v Minister for Immigration & Multicultural Affairs* [2001] FCA 1411 at [42]-[48]. His Honour’s findings were accepted in the High Court (see *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387 at [13] and [50]).
14. In my opinion, in the face of the expressed concerns of the applicant supported by the country information which I have referred to above, the Tribunal was required to address whether the applicant, if he returned to Nepal, would fall within a group identifiable with the features referred to by the High Court in *Applicant S* (supra) at [36]. As was said in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473 at [31], where a refugee claim based upon membership of a particular social group is raised, it is the obligation of the Tribunal to make findings defining the group and then assessing the risk that its members face.
15. The reasoning of the present Tribunal contains no recognition that the applicant had raised a fear as a member of a group, nor any attempt to assess whether he would be perceived, whether by the Maoists or the Nepalese authorities, as a member of a particular group at risk at the hands of either the Maoists or the Nepalese authorities. This allows an inference that this element in the claims was overlooked (see *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [35], [69], [75], and *Vanstone v Clark* (2005) 147 FCR 299 at 359-360).
16. The Tribunal’s reasoning was given shortly:

In light of the independent evidence cited above I accept that politics in Nepal are marked by violence and that the Maoists continue to commit human rights abuses. I accept that the village of [the Applicant's village] was the subject of attack by the Maoists in 2004. I accept that some members of the Maoist group entered the Applicant's family home and removed cash and jewellery. I accept that a battle between the Maoists and the army continued throughout the night of the attack.

However, I do not accept the Applicant's claims that the Maoists on numerous occasions approached the Applicant's parents in [his village] in an attempt to locate the Applicant. I am not satisfied that the Maoists are looking for the Applicant in [his village], Kathmandu or throughout Nepal.

On the material before me I find that there is no credible evidence that the Applicant is a person whom the Maoists would make the subject of persecution. I do not accept there is a real chance that he will suffer serious harm should he return to [his village] or Kathmandu. On one occasion back in 2004, the Maoists stole from the Applicant's family during a village attack in [his village]. My finding that the Applicant is not sought by the Maoists is supported by the Applicant's evidence before the Tribunal that he returned to Nepal on at least two occasions after the village was attacked in 2004. On each occasion he stayed in his village for a period of about two months. It was his evidence that he helped his father in their grocery shop. Had he been sought by the Maoists as claimed, it begs belief that the Applicant would risk his safety by returning to his village.

In his evidence the Applicant claimed that his parents on one occasion had not informed him about the Maoists seeking him, because at that particular time he was sitting examinations in Kathmandu and they did not want to worry him. It was his evidence that he became aware of the Maoists' further interest in him when he returned to [his village] after sitting his examinations. I am not satisfied that the Applicant's parents would not warn the Applicant if the Maoists had in fact been seeking him.

Accordingly, I find that the Applicant does not have a well founded fear of persecution for a Convention reason should he return to Nepal in the reasonably foreseeable future.

17. In my opinion, this reasoning reveals the Tribunal addressing only the element in the applicant's claims that he personally had been targeted

by the Maoists in the past, and that that targeting would continue if he returned. In my opinion, this focus is confirmed by the Tribunal's ultimate rejection of the claim that the Maoists "*had in fact been seeking him*" as the reason "*accordingly*" that the Tribunal found that the applicant "*does not have a well founded fear of persecution for a Convention reason*".

18. I am unable to read the opening sentence in the previous paragraph where the Tribunal said: "*on the material before me I find that there is no credible evidence that the Applicant is a person whom the Maoists would make the subject of persecution*", as addressing the general social group claim made by the applicant. In my opinion, it would have been irrational for the Tribunal not to have treated the United Nations report as "*credible evidence*", lending support to such a claim. This suggests that it overlooked the real implications of the UN report. Rather, the sentence appears explained by the subsequent reasoning of the Tribunal in the same paragraph, which focused only on whether the Tribunal accepted that the applicant personally had been "*sought by the Maoists as claimed*" in the past.
19. I therefore am satisfied that the Tribunal's decision was affected by jurisdictional error, being a failure of the Tribunal fully to address the claims which were before it and which "*clearly arise from the materials before it*" (See *NABE* at [60]).
20. The applicant is therefore entitled to writs of certiorari and mandamus.

I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 30 April 2007