FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNXQ & ANOR v MINISTER FOR IMMIGRATION & ANOR — *[2009] FMCA 1223*

MIGRATION – Visa – Protection (Class XA) visa – review of Refugee Review Tribunal decision – citizens of India claiming fear of persecution on the basis of political opinion and religion – Hindus from Gujarat – credibility – relocation – whether Tribunal failed to comply with *Migration Act 1958* (Cth) s. 424 – whether Tribunal failed to comply with *Migration Act 1958* s. 424A – whether Tribunal failed to consider a part of the applicants' claim – natural justice – no jurisdictional error.

Migration Act 1958 (Cth), ss.36, 91X, 424, 424AA, 424A, 424B, 425, 425A, 474, 476

Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors (1996) 185 CLR 259; [1996] HCA 6
Abebe v Commonwealth (1999) 197 CLR 510

First Applicant:	SZNXQ
Second Applicant:	SZNXR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2290 of 2009
Judgment of:	Scarlett FM
Hearing date:	30 November 2009
Date of Last Submission:	30 November 2009
Delivered at:	Sydney
Delivered on:	14 December 2009

REPRESENTATION

The Applicant:	In person
Counsel for the Respondents:	Mr Reilly
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The Application is dismissed.

(2) The Applicants are to pay the First Respondent's costs fixed in the sum of $4800.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2290 of 2009

SZNXQ
First Applicant

SZNXR
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. This is an application for review of a decision of the Refugee Review Tribunal affirming a decision not to grant the applicants Protection (Class XA) visas. The applicants have filed an amended application seeking the issue of writs of certiorari and mandamus to quash the Tribunal decision and require the Tribunal to determine the application for review according to law.

2. The applicants claim that the Tribunal committed jurisdictional error by:

   a) Failing to comply with s. 424A of the migration Act;

   b) Failing to comply with s. 424 of the Act;

c) Failing to consider the first applicant's evidence and thereby breaching the rules of natural justice; and

d) Erring in law by depending on "the generalized facts and findings, provided by the secondary sources".

Background

3. The applicants are citizens of India from Gujarat. They are husband and wife. They arrived in Australia on 30th January 2009 and applied for Protection (Class XA) visas on 12th March 2009. Only the first applicant, the husband, made a claim for protection. The second applicant, his wife, is a part D applicant, who does not have her own claims to be a refugee, relying on being a member of her husband's family unit.

4. The applicants provided a statement by the first applicant in support of the application for a protection visa. In the statement, the first applicant claimed to have been "persecuted by the Muslims underworld people" and to have worked for a particular party, the BJP:

> *The BJP leader approached me and gave me the responsibility of taking care of my neighbours during that time. I only worked for the BJP when there was any election held. I used to tell people to vote for the BJP and I was a member of BJP.*[1]

5. The first applicant referred to clashes with groups of Muslims in 1998, 2000 and 2008. The final incident which the first applicant claimed caused him and his wife to leave India is described in his statement as follows:

> *In the middle of 2008, a procession of Muslims came and attacked us in the field. They wanted to kill me and my worker, my two workers were seriously injured and I escaped serious injury.*[2]

6. The Department of Immigration and Citizenship wrote to the first applicant on 28th April 2009, inviting him to attend an interview on 14th May. He attended the interview with the Minister's delegate and produced some documents with an English translation.

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[1] See Court Book at 33
[2] Court Book at 34

7. On 22nd May 2009 the Minister's delegate refused the applications for protection visas. In the Protection (Class XA) Decision Record, the delegate considered background country information about:

   a) Bharatiya Janata Party (BJP);

   b) Indian National Congress (INC);

   c) Babri Masjid;

   d) Godhra Train Fire;

   e) Gujarati Language; and

   f) Relocation.

8. The delegate expressed disbelief about the applicant's claims, saying:

> *At this point in the interview, when it came to detailed questioning about his claims, the applicant became very evasive, unclear, unwilling to provide a straight forward answer and was very hesitant in then providing some answers.*[3]

9. The delegate went on to state:

> *In his application (folio 43), the applicant claims to have been persecuted by the "Muslims underworld people". When asked what he meant by that, the applicant was unable to provide a plausible or coherent answer and just referred to the Babri Masjid incident again.*
>
> *Consequently, due to the applicant's lack of knowledge about his alleged persecutors and his evasive answer, I am not satisfied that he has been persecuted by Muslims…*
>
> *Consequently, due to the lack of documentary evidence, I am not satisfied that the applicant has been a member of the Bharatiya Janata Party (BJP).*[4]

10. The delegate went through the balance of the applicant's claims in detail but was not satisfied that the events referred to by the applicant had occurred. The delegate also considered that, if the applicant had the

[3] Court Book 54
[4] Court Book 55

troubles that he claimed, it would be safe and reasonable option for him to relocate to another state within India.

11. After their applications for protection visas were refused, the applicants applied to the Refugee Review Tribunal for review of the delegate's decision.

Application for Refugee Review Tribunal Review

12. The Tribunal received an application from the applicants on 15th June 2009. No other documents were provided to the Tribunal with the application.

13. The Tribunal wrote to the applicants on 26th June 2009, inviting them to attend a hearing on 18th August 2009. As the applicants had given a Post Office Box number in Griffith as their address for correspondence, the Tribunal made arrangements for the hearing to be conducted by video conference, with the applicants in Griffith and the Tribunal Member and an interpreter in Sydney.[5]

14. At the request of the first applicant, the Tribunal changed the venue of the hearing to Darwin, as the first applicant was at that stage working in Palmerston, in the Northern Territory.[6] Again, the hearing was to be conducted by video conference. The first applicant attended the hearing, and gave evidence with the assistance of an interpreter in the Gujarati language.

15. After the hearing, on 28th August 2009, the applicant forwarded to the Tribunal a letter from a Member of Parliament in Gujarat, Pragjibhai Patel, MLA, dated "8-6-09".

The Refugee Review Tribunal Decision

16. The Tribunal made its decision on 26th August 2009, affirming the decision not to grant the applicants Protection (Class XA) visas.

17. In its decision, under the heading "Claims and Evidence", the Tribunal considered:

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[5] Court Book 64
[6] Court Book 68-69

a) The first applicant's claims in his protection visa application;

b) The claims made by the first applicant at the Departmental interview;

c) The claims made by the first applicant at the Tribunal hearing.

18. The Tribunal accepted that the applicants are nationals of the Republic of India, based on their Indian passports.

19. The Tribunal did not accept the first applicant's claims to have been persecuted in India because of his membership of the BJP, finding those claims to be "extremely vague and unsupported".[7]

20. It considered the independent country information that showed that the population of Gujarat was 50, 671,000 people, about 89.1% were Hindu, as opposed to 9.1% Muslim. The Tribunal was not satisfied that there was inadequate or ineffective State protection in Gujarat, and formed the view that the applicant's claim to fear harm from Muslims based on the applicant's account of the murder of several people in his village. The Tribunal stated:

> *Moreover, as was discussed with the applicant at the hearing, the Tribunal can find no evidence that members of the Hindu majority have been persecuted in Gujarat and it does not accept that as part of the about 89% majority he would have any difficulties because he is Hindu. When the Tribunal put this to the applicant at the hearing, he acknowledged that Muslims comprise only 9% of the population of Gujarat, but claimed that the whole world is facing a threat from terrorism, and so he therefore has some fear.*[8]

21. The Tribunal considered the question of whether the applicants could reasonably relocate within India to avoid the persecution that he claimed. The Tribunal stated:

> *When at the hearing the Tribunal put to him that India's population is now over 1.166 billion people, and he was part of the 80.5% Hindu majority, whereas Muslims in India only comprise 13.4%, and asked the applicant why it would not be reasonable for him to live elsewhere in Gujarat, or indeed elsewhere in India if he was having some problems in his local*

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[7] Court Book 87 at paragraph [50]

[8] Court Book 88 at [54]

area. In reply the applicant acknowledged that he could move elsewhere but he had a fear of terrorism. He claimed that politicians are also afraid of terrorism, and he is just a simple person.[9]

22. The Tribunal, however, was not satisfied that there was a real chance of the first applicant being harmed by terrorists, either because he was Hindu or because of his anti-Muslim activities. As to relocation, the Tribunal was satisfied that if the first applicant did not wish to return to his own village in India, then it would be reasonable for him to live elsewhere in Gujarat, or elsewhere in India, without there being a real chance of his being subject to serious harm amounting to persecution for a Convention reason because of his Hindu ethnicity or any other Convention reason.[10]

23. The Tribunal was satisfied that there was not a real chance that the first applicant would be subjected to serious harm amounting persecution for a Convention reason if he were to return to India. Thus, it was not satisfied that the first applicant was a person to whom Australia has protection obligations under the Refugees Convention and therefore did not satisfy the criterion in s. 36(2)9a) of the Migration Act for a protection visa.

24. As the second applicant had applied as a member of the first applicant's family unit and made no refugee claims of her own, she did not satisfy the criterion in s. 36(2)(b) because the first applicant did not satisfy the criterion in s. 36(2)(a).

Application to the Federal Magistrates Court

25. The applicants commenced proceedings in this Court by filing an application and an affidavit on 18th September 2009. They filed an amended application on 9th November 2009. They did not file any written outline of submissions.

26. The first applicant attended Court on the hearing day and told the Court that he had the authority to speak for his wife. His oral submissions did not address either his first or second grounds of review, being claims

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[9] Court Book 89 at [55]
[10] *Ibid* at [56]

that the Tribunal had failed to comply with the requirements of ss. 424A(1) or 424 of the Migration Act.

27. The first applicant addressed his third ground, a claim that the Tribunal did not consider his evidence and failed to comply with the rules of natural justice. He claimed that the Tribunal failed to take into account the letter from the Member of Parliament, Pragjibhai Patel, that he had submitted after the hearing. He also claimed that he had not been given a chance to talk about his case at the hearing. He said that the Tribunal did not ask him any questions about his case.

28. The first applicant did not address the fourth ground in his amended application.

The First Respondent's Submissions

29. Counsel for the first respondent, Mr Reilly submitted that the Court cannot review the merits of the Tribunal's decision (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors*[11] at 272) and there is no error of law, let alone a jurisdictional error, in the Tribunal making a wrong error of fact (*Abebe v Commonwealth*[12] at [137]).

30. As to the applicants' first ground, claiming a breach of s. 424A of the Act, Mr Reilly submitted that the applicants had not shown that the Tribunal had relied on any "information" that would enliven an obligation under s. 424A(1) of the Act. Again, the Tribunal had put to the first applicant at the hearing that he was entitled to seek additional time to comment on or respond to information given to him during the hearing, but the first applicant said that he did not need any further time.[13] The Tribunal had not undertaken to give the applicant an opportunity to make written submissions.

31. As to the alleged breach of s. 424, he submitted that the Tribunal did not request any information under s. 424.

32. As to the third ground, Mr Reilly submitted that the Tribunal decision was quite detailed and plainly did examine the applicants' claims.

[11] (1996) 185 CLR 259; [1996] HCA 6
[12] (1999) 197 CLR 510
[13] Court Book 86 at [47]

Whilst the first applicant claimed that the Tribunal did not give him a chance to talk about his case, the Tribunal decision record shows that the first applicant gave a considerable amount of evidence and the Tribunal did ask him a number of questions about his case.[14]

33. Mr Reilly submitted that the applicants' fourth ground was hard to understand, but if it suggested that the Tribunal could not rely on material from Wikipedia, that was not correct. The Tribunal did discuss this material with the first applicant at the hearing.

34. Thus, it was submitted that all the applicant's grounds of review must fail.

Conclusions

35. Dealing first of all with the applicants' claims as set out in their amended application, the first ground claims:

> *The Tribunal member had failed to honour his undertaking. The requirements to put information to an applicant is contained in S424A which relevantly states:*
>
> *424A applicant must be given certain information*
>
> *1. Subject to subsection (3), the Tribunal must:*
>
> *a) give to the applicant, in the way that the Tribunal consider appropriate in the circumstances, particulars of any information that the Tribunal consider would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *b) Ensure, as far as is reasonably practicable, that the applicant understand why it relevant to the review and*
>
> *c) Invite the applicant to comment on it.*
>
> *It is my case that the Tribunal ignore its undertaking to give me an opportunity to make written submission about my claims, therefore the Tribunal had erred by denying me procedural fairness in respect of this issue.*

36. The Tribunal, in making its decision, considered the first applicant's own evidence about his claims and information about India in general

[14] Court Book 84-86

and Gujarat in particular taken from Wikipedia. In my view, Wikipedia is a legitimate source of independent country information and it is a matter for the Tribunal as to how much weight it places upon information from that source.

37. This information does not enliven an obligation under s. 424A(1) of the Act. Independent country information is excluded by s. 424A(3)(a) – "information that is not strictly about the applicant or another person and is just about a class of persons of which the applicant or other person is a member".

38. Again, the information provided by the applicant for the purpose of the review is excluded by s. 424A(3)(b) and information that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department, is excluded by s. 424A(3)(ba).

39. The Tribunal did put information to the applicant at the hearing and set out to follow the procedure in s. 424AA of the Act:

> *The Tribunal put to him that, as it had explained at the beginning of the hearing, he was entitled to seek additional time to comment on or respond to the information that had been given to him during the hearing that the Tribunal considered would be a reason for affirming the decision to refuse him a visa. Asked if he needed more time to comment or respond to the information, the applicant replied in the negative and said he did not need any further time.*[15]

40. There is no evidence that the Tribunal gave any undertaking to the applicant that it would allow him a further period of time to make a written submission. It offered him the opportunity, but he declined the offer.

41. The first ground in the amended application fails.

42. The applicants' second ground claims that the Tribunal failed to comply with s. 424 of the Migration Act, in that:

    a) The invitation was not given in accordance with s 424(3)(a) and 424B of the Migration Act:

[15] Court Book 86 at [47]

i) *The invitation did not specify the way in which the additional information may be given.*

ii) *The invitation did not specify the period within which the information was to be given.*

43. There was no request for information by the Tribunal, whether under the provisions of s. 424 of the Act or not. The Tribunal invite any person to give additional information.

44. The applicants' second ground of review is inappropriate and does not succeed.

45. The applicants' third ground of review claims:

> *The Tribunal did not consider my evidence, the delegate of the Minister and Refugee Review Tribunal never look at my problem in connection with my sever (sic) persecution back to my country because of my membership with BJP. The Tribunal in its decision of failed in its written statement that breach the rules of natural justice.*

46. The only evidence of what went on at the hearing comes from the Tribunal Decision Record. The Tribunal's account of the applicant's evidence at the hearing is quite detailed, going from paragraphs 34 to 47 on pages 84 to 86 of the Court Book. The Tribunal set out how it put to the applicant various questions about his evidence and how it offered him the opportunity to make a further written submission, which he declined. The applicant's claim, made in Court, that he was not allowed to say anything at the hearing is contradicted by this statement by the Tribunal:

> *The Tribunal asked the applicant if he had any other claims or matters he wished to put before it before the hearing close, and he replied in the negative.*[16]

47. The applicants complain that the delegate of the Minister never looked at his problem, but it should be made clear that the Court does not consider the delegate's decision, which is a primary decision. The Federal Magistrates Court has no jurisdiction in relation to a primary decision (s. 476(2)(a)).

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[16] Court Book 86 at [46]

48. The applicants' claim that the Tribunal never looked at the first applicant's problem in connection with his severe persecution back in his own country because of his membership of the BJP appears to be an attempt at merits review, which is not available on judicial review (*Wu Shan Liang*[17]).

49. The applicants also claim in their third ground that the Tribunal breached the rules of natural justice. This claim is not particularised and there is no evidence of any breach of natural justice.

50. The applicants' third ground of review fails.

51. The applicants' fourth ground is, with respect, hard to understand:

> *I like to raise several questions of erred of law in respect of which Federal Magistrates Court is required to resolve because the Tribunal member was unanimous but heavily depended in handling of the issues based on the generalized facts and findings, provided by the secondary sources.*

52. The first applicant did not address this ground of review in his oral submission to the Court. If it is a challenge to the Tribunal's use of independent country information in general, it is well established that the Tribunal may rely on this information and give it such weight as it thinks fit. If, however, it is a claim that the Tribunal must not refer to a source such as Wikipedia, which may not always be accurate, then it seems to be clear that the Tribunal may indeed do so, although it is always a matter for the Tribunal as to what weight it gives to information from this source. It is noteworthy, as Mr Reilly of counsel pointed out, that the Tribunal specifically discussed this information from Wikipedia with the first applicant at the hearing and gave him the opportunity to reply to it.[18]

53. The applicants' fourth ground does not disclose any jurisdictional error.

54. The first applicant's main complaint at the hearing appeared to be unrelated to any of the grounds in his amended application, except that it was a claim that the Tribunal did not consider what he referred to as

[17] *supra*
[18] Court Book 85 at [43]

the letter from the BJP, which he considered had important probative value as to his membership of that party.

55. The document to which he referred was the letter from Pragjibhai Patel MLA, a politician from Gujarat. This letter, dated 8-6-09, was submitted by the first applicant by fax on 28th August 2009 and is set out on page 77 of the Court Book:

> ***CERTIFICATE***
>
> *This is to certify that I know (SZNXQ)*[19] *Resi. @ Abasana, Taluka Detroj, District Ahmedabad since last five years as per my knowledge. He is sincere, Honest and hard worker. He bears good moral character.*
>
> *I wish him success in future.*
>
> ➢ *(signed)*
>
> - *(Pragjibhai Patel)*
> - *M.L.A., Gujarat* [20]

56. The letter is a character reference. It bears no reference to the first applicant's membership of the BJP and it has no probative value at all as far as the first applicant's refugee claim is concerned.

57. The applicants have not established any jurisdictional error.

58. An independent examination of the Tribunal decision does not disclose any arguable breach of the Migration Act. The Tribunal complied with s. 425 of the Act by inviting the applicants to a hearing and providing an interpreter in the Gujarati language, as requested. No claims have been made as to any failure by the interpreter. The hearing invitation complied with s. 425A of the Act. The delegate made it clear that the credibility of the applicants' claim was in issue, and this was clearly discussed with the first applicant at the hearing. The second applicant, as has been noted, did not take part in the hearing.

59. There is no jurisdictional error. Accordingly, the Tribunal decision is a privative clause decision as defined by s. 474(2) of the Migration Act.

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[19] The name of the first applicant is not published to comply with s. 91X of the Migration Act
[20] Court Book 77

Privative clauses are final and conclusive and not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account (s. 474(1)).

60. The application will be dismissed. There remains the question of costs.

I certify that the preceding sixty (60) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Adriana Coutman

Date: December 2009