FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZBWJ & ORS v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 164

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision of the RRT affirming a decision of a delegate of the Minister not to grant the applicant a protection visa – applicants are citizens of Bangladesh – applicants are a husband, wife and child – claim that circumstances in Bangladesh have changed – second application to Tribunal – RRT-reviewable decision – requirements for a valid application – *functus officio* – judicial comity – where the decision of a delegate of the Minister has already been the subject of a valid review by the tribunal it is no longer an RRT reviewable decision.

PRACTICE & PROCEDURE – Whether second application to Tribunal permissible – abuse of process – costs – where third applicant is a child – no order for costs against a child.

Migration Act 1958 (Cth) ss.411, 412, 414, 416, 474

NAGC & Ors v Minister for Immigration [2002] FMCA 171
NAGC of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1506
SZBWJ & Ors v Minister for Immigration [2005] FMCA 508
SZBWJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 13
SZBWJ & Ors v Minister for Immigration & Citizenship & Anor [2007] HCATrans 100
Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343
Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
Jayasinghe v Minister for Immigration and Ethnic Affairs (1997) 76 FCR 301
SZIIV v Minister for Immigration [2006] FMCA 322 followed
SZBRB v Minister for Immigration & Anor [2007] FMCA 1093 followed
VQAW v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 251
SHWA & Ors v Minister for Immigration & Anor [2006] FMCA 451 followed
SZASP v Minister for Immigration and Citizenship [2007] FCA 771 followed.

First Applicant:	SZBWJ
Second Applicant:	SZBWK
Third Applicant:	SZBWL
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1830 of 2007
Judgment of:	Scarlett FM
Hearing date:	18 October 2007
Date of Last Submission:	18 October 2007
Delivered at:	Sydney
Delivered on:	21 February 2008

REPRESENTATION

Counsel for the Applicants:	Ms McGarrity (appeared *pro bono*)
Counsel for the Respondent:	Mr Reilly
Solicitors for the Respondent:	Blake Dawson Waldron

ORDERS

(1) The Application is dismissed.

(2) In the alternative, the Application is dismissed as an abuse of process.

(3) The Applicants are restrained from filing any further application for review of the decision of the delegate dated 1 December 1999 or the decisions of the Refugee Review Tribunal dated 27 March 2002 and 18 May 2007 or either of them without prior leave of the Court.

(4) The First and Second Applicants are to pay the First Respondent's costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1830 of 2007

SZBWJ
First Applicant

SZBWK
Second Applicant

SZBWL
Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. This is a second application for review of a decision of the Refugee Review Tribunal. The Applicants, who are citizens of Bangladesh, claim that the political situation has changed since the Refugee Review Tribunal reviewed their case.

2. The Tribunal decided on 18th May 2007 that it did not have jurisdiction to consider the second application for review. The Applicants claim that they have made a valid application and that the Tribunal has a statutory duty under s.414(1) of the *Migration Act 1958* (Cth) to review

the earlier delegate's decision and that, therefore, the Tribunal made an error of law when it found that it did not have jurisdiction.

Background

3. The Applicants are a husband, wife and son. The child, the Third Applicant SZBWL, was born 17th September 1998. Because he is not an adult, I have ordered that the First Applicant should be his litigation guardian for the purpose of the proceeding.

4. The Applicants applied for Protection (Class XA) visas on 5th November 1999. A delegate of the Minister refused their application on 1st December 1999, so the Applicants sought a review of the delegate's decision from the Refugee Review Tribunal.

Application to the Refugee Review Tribunal

5. The Refugee Review Tribunal, differently constituted, affirmed the delegate's decision on 27th March 2002. The Applicants then sought judicial review of that decision. On 7th August 2002 Federal Magistrate Driver dismissed their application (*NAGC & Ors v Minister for Immigration*[1]).

6. The Applicants appealed against that decision. On 21st November 2002, Emmett J dismissed the appeal (*NAGC of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs*[2]).

7. The Applicants then sought special leave to appeal to the High Court of Australia. They discontinued their application on 13th November 2003.

8. The Applicants then proceeded to make a further application to the Federal Magistrates Court for review of the delegate's decision. The application came before me on 18th April 2005. I dismissed the application (*SZBWJ & Ors v Minister for Immigration*[3]).

9. The Applicants appealed against that decision. On 22nd February 2006, the Full Court of the Federal Court (Moore, Nicholson and Emmett JJ)

[1] [2002] FMCA 171
[2] [2002] FCA 1506
[3] [2005] FMCA 508

dismissed their appeal (*SZBWJ v Minister for Immigration and Multicultural Affairs*[4]).

10. The Applicants then sought special leave to appeal to the High Court of Australia. On 2nd March 2007 Callinan and Gummow JJ refused special leave to appeal (*SZBWJ & Ors v Minister for Immigration & Citizenship & Anor*[5]).

11. The Applicants then brought another application to the Refugee Review Tribunal on 20th March 2007. This application sought a further review of the decision of the delegate made on 1st December 1999.

The Refugee Review Tribunal Decision

12. The Tribunal, in a decision[6] signed on 18th May and posted to the Applicants on 22nd May 2007, found that it had no jurisdiction to review the decision. It found that the notice of the delegate's decision incorrectly stated the time in which an application for review may be made to the Tribunal and that the Applicants had not therefore been validly notified of the decision. Accordingly, time had not started to run for the purposes of the time limit specified in s.412 of the Migration Act.

13. Nevertheless, the Applicants had lodged an application for review within the time limit wrongly specified in the notification letter and the Tribunal had accepted the application and conducted a review. Having done so, it had discharged its functions to review the delegate's decision.

14. The Tribunal noted that the Applicants had submitted that the political situation in Bangladesh had changed since the earlier review, but held:

> *However, changed circumstances do not provide any legal basis for the Tribunal to accept a second review application, or to reconsider the delegate's decision: see MIMA v Thiyagarajah (2000) 199 CLR 343 at [30], MIMA v Bhardwaj (2002) 209 CLR 597 at [7]*[7]

[4] [2006] FCAFC 13
[5] [2007] HCATrans 100
[6] Court Book 279- 282
[7] Court Book 282

15. The Tribunal held that it had no jurisdiction to review a delegate's decision twice, referring to *Jayasinghe v Minister for Immigration and Ethnic Affairs*[8] and *SZIIV v Minister for Immigration and Multicultural Affairs.*[9]

16. The Tribunal decided that it did not have jurisdiction in the matter.

Application for Judicial Review

17. The Applicants commenced proceedings in this Court on 12th June 2007 by filing an application and supporting affidavit. They filed an amended application on 10th August 2007. The First Respondent has filed a Response claiming that the Tribunal decision is not affected by jurisdictional error.

Submissions

18. Counsel for the Applicants, Ms McGarrity, submits that the only issue raised on the application for judicial review is whether the Tribunal erred in law in finding that it did not have jurisdiction to consider the Applicants' second application to review the decision of the delegate.

19. Subsection 414(1) of the Migration Act provides that, relevantly, if a valid application is made under s.412 for review of an RRT reviewable decision, the Tribunal must review the decision. A decision to refuse to grant protection visas to the Applicants is an RRT-reviewable decision (s.411(1)(c)).

20. Ms McGarrity referred to the decision of Emmett FM in *SZBRB v Minister for Immigration & Anor*[10] where her Honour held at [30] that once a delegate's decision had been reviewed by the Tribunal, the decision was no longer an RRT-reviewable decision. She submitted that the Applicants disagreed with that decision for two reasons:

    a) There is no basis in the text of s.411 for finding that once a decision of the delegate has been reviewed by the Tribunal it ceases to be an RRT-reviewable decision; and

[8] (1997) 76 FCR 301
[9] [2006] FMCA 322
[10] [2007] FMCA 1093

b) The possibility of a decision of the delegate being reviewed by the Tribunal more than once is specifically envisaged by s.416 of the Migration Act.

21. Counsel for the Applicants referred to *VQAW v Minister for Immigration and Multicultural and Indigenous Affairs*[11] where Ryan, Lindgren and Sundberg JJ recognised that there is no definition of a "valid application" in the Migration Act.[12] For an application to be valid, it must comply with the requirements of s.412.

22. The Applicants submit that their application was a valid application because:

i) it was made in the approved form;

ii) it was given to the Tribunal within the time limit; and

iii) the review fee was not payable.

23. The Applicants submit that as long as the requirements in ss.411 and 412 are satisfied there is nothing in the legislative scheme precluding them from bringing a second or even a third application for review of a delegate's decision. They applicants note that in *SZHWA & Ors v Minister for Immigration & Anor*[13] I accepted that the Act does not expressly preclude a further review application being submitted to the Tribunal.

24. The Applicants submit that the Tribunal erred in adding to the requirements for a valid application a fourth requirement, that the Tribunal has not previously reviewed and made a determination in relation the decision of the delegate. In other words, once the Tribunal has exercised its statutory duty to review the delegate's decision it is rendered *functus officio.*

25. The Applicants submit that the Tribunal, in finding that it had no jurisdiction to review a delegate's decision twice, simply relied on the decisions in *Jayasinghe v Minister for Immigration and Ethnic Affairs (supra)* and *SZIIV v Minister for Immigration and Multicultural*

[11] [2003] FCAFC 251
[12] [2003] FCAFC 251 at [4]
[13] [2006] FMCA 451 at [22]

Affairs[14]. They submit that the Tribunal in the case under review and Driver FM in *SZIIV* misconstrued the decision in *Jayasinghe.*

26. The Applicants seek to distinguish the decision in *Jayasinghe* from the present case, submitting that the Applicants do not seek the reconsideration or re-opening of a decision by the Tribunal in relation to an application for review but an independent consideration of a second application for review.

27. It is the Applicants' case that the Tribunal's statutory function to review a decision is separately enlivened each time a valid application is submitted to the Tribunal and that the principle in *Jayasinghe* that the Tribunal may only exercise its statutory function to review a decision once is not relevant where a second valid application is submitted to the Tribunal.

28. The Applicants submit that, by implication, *SZHWA* was wrongly decided when I found that it would lead to absurd consequences if the Tribunal were to be required to consider a second application for review of a delegate's decision.[15] The Act, they claim, envisages that very absurdity and sets out a procedure in s.416 for dealing with that situation. They rely on the decision of Moore J in *SZASP v Minister for Immigration and Citizenship*[16] accepted in *obiter* that s.416 may be applicable in circumstances such as those in the present case:

> *Section 416 also potentially has work to do in circumstances where the notification of a delegate's decision was not properly made and where applications for review to the Tribunal are not being regarded as being out of time.*[17]

29. The Applicants submit that, unlike the case in *SZHWA,* the case under review is exceptional in the sense that their ability to make a second application to the Tribunal is the consequence of an error by the delegate. The insufficient notification of the delegate's decision meant that time had not begun to run for the purpose of the 28 day time limit.

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[14] Wrongly referred to in the written submission as *SZILV v Minister for Immigration and Multicultural Affairs*
[15] [2006] FMCA 451 at [24]-[26]
[16] [2007] FCA 771
[17] [2007] FCA 771 at [17]

30. The Applicants submit that Turner FM erred in deciding *SZJQY & Ors v Minister for Immigration & Anor*[18] which was a case where the applicant had lodged a second application for review of a decision of the delegate. In that case, the delegate had incorrectly notified the applicant of the period of time within which he was required to lodge an application for review. His Honour held that the Tribunal was correct in finding that it did not have jurisdiction to consider the second application. His Honour found that a failure to specify the time limit for review correctly did not affect the validity of the decision. The decision was valid and the Tribunal was *functus officio.*[19]

31. The Applicants also refer to Tribunal's statement that "changed circumstances do not provide any legal basis for the Tribunal to accept a second review application, or to reconsider the delegate's decision."[20] They note that the Tribunal relied on the decisions in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (supra) and *Minister for Immigration and Multicultural and Indigenous Affairs v Bhardwaj* (supra).

32. The Applicants submit that the decision in *Thiyagarajah* differs from the present case because:

    a) The present case does not involve the reconsideration or reopening of a Tribunal decision, but rather the Tribunal's statutory duty to review the decision of the delegate upon a second valid application being made.

    b) The claims made by the applicants in the second application, that their circumstances have changed, are not being relied upon as the sole or even a partial legal basis for the Tribunal's jurisdiction to review the delegate's decision.

33. The Applicants also submit that the decision in *Bhardwaj* differs from the present case on its facts. In *Bhardwaj* an error by the Tribunal led to a hearing being held in the applicant's absence, leading to an unfavourable decision. The issue was whether the Tribunal had the

[18] [2007] FMCA 713
[19] [2007] FMCA 713 at [6]
[20] Court Book at 282

power to hold another hearing and make a second decision in favour of the applicant.

34. In *Bhardwaj*, Gleeson CJ referred to Canadian authority to the effect that the principle of *functus officio* should not be strictly applied if the Tribunal has failed to discharge its statutory function and 'there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation'.[21]

35. For the First Respondent, the Minister for Immigration and Citizenship, submitted that the Migration Act has been construed o a number of occasions as not empowering the Tribunal to re-exercise a power of review of a delegate's decision, because the Tribunal is *functus officio* (see *Jayasinghe; SZASP*).

36. Mr Reilly, for the Minister, submitted that *SZASP* was a decision on appeal from this Court and is therefore a binding authority. Unless *SZASP* can be distinguished the application must be dismissed.

37. Counsel for the Minister submitted that the Applicants' contention that *SZASP* is distinguishable because the Tribunal held in this case that the original delegate's decision was not notified properly, so the application was not out of time. He went on to submit:

> *However this is irrelevant as the Tribunal's decision in this case and the reasoning in SZASP were both based on the Tribunal lacking jurisdiction because of it being functus officio due to an earlier decision of the Tribunal, not because of the application before it being out of time. The Applicants' submissions refer to the observations on s 416 of the Act in SZASP at [17], but that paragraph expressly states that s416 only operates 'where an application is made to the Tribunal for review of a delegate's decision* ***not previously the subject of review by the Tribunal****' (emphasis added).*[22]

[21] (2002) 209 CLR 597 at [7]
[22] First Respondent's Written Submissions at [9]

Conclusions

38. To my mind, the starting point is whether the decision of the delegate was an RRT- reviewable decision. In *SZBRB v Minister for Immigration & Anor* (supra) Emmett FM held:

> *[30] The applicant's allegation of a breach of s.416 of the Act is misconceived in that s.416 is relevant only to a review of 'an RRT reviewable decision'. The Delegate's decision that the applicant was seeking to have the Tribunal review had already been the subject of a valid review. In the circumstances, the Delegate's decision was no longer 'an RRT reviewable decision' (see s.411 of the Act).*
>
> *[31] Where the Tribunal has performed its statutory function there is no further function or act for the person authorised under the statute to perform.*

39. On appeal, Rares J found her Honour's reasoning to be "unarguably correct."[23] I am bound to follow that decision.

40. It follows that *SZIIV v Minister for Immigration and Multicultural Affairs and SZJQY & Ors v Minister for Immigration & Anor* are not wrongly decided and, by the principle of judicial comity, I am bound to follow those decisions. I am not persuaded that I was wrong in *SZHWA & Ors v Minister for Immigration & Anor.*

41. Where the decision of a delegate of the Minister has already been the subject of a valid review by the Refugee Review Tribunal it is no longer an RRT reviewable decision under s 411. Where the Tribunal concludes that it has already discharged its function under the Act to review the Delegate's decision and a second application for review is not a valid application because the Tribunal no longer has jurisdiction in relation to that decision, there is no jurisdictional error.[24]

42. Section 416 has no relevance in circumstances such as the present case where the Tribunal has already conducted a valid review of the delegate's decision.[25]

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[23] *SZBRB v Minister for Immigration and Citizenship* [2007] FCA 1452 at [19]
[24] *SZBRB v Minister for Immigration & Anor* [2007] FMCA 1093 at [32]
[25] *SZASP v Minister for Immigration & Citizenship* [2007] FCA 771 at [17]

43. No jurisdictional error has been made out. The Tribunal decision is a privative clause decision and is therefore final and conclusive (s.474(1)).

44. The application will be dismissed.

45. I am satisfied that the application is an abuse of process[26] and this is, of itself, a ground for dismissal. An abuse of process will almost inevitably lead to dismissal with costs, and I propose to dismiss this application with an order for costs in favour of the First Respondent.

46. I note that the Third Applicant is a child and, in the exercise of my discretion, I consider it inappropriate to make a costs order against a child. The order for costs will be made against the First and Second Applicants, who are adults.

47. In the circumstances, I propose to order that the Applicants are restrained from filing any further applications for review of the decision of the delegate dated 1st December 1999 or the decisions of the Tribunal dated 27th March 2002 and 18th May 2007 without the prior leave of the Court.

I certify that the preceding forty-seven (47) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Virginia Lee

Date: 15 February 2008

[26] *SZASP* at [23]