FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGUR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1946

MIGRATION – Review of RRT decision – where applicant provided Tribunal with documents supporting his claims – where Tribunal rejected documents – where Tribunal found applicant was not a credible witness – whether errors of fact-finding went to fundamental parts of claim – whether failure to consider relevant material – whether apprehended bias.

Applicant V324 of 2004 v Minister for Immigration [2004] FCAFC 259 Vu v Minister for Immigration [2005] FCA 1836 NADH of 2001 v Minister for Immigration [2004] FCAFC 328 SZHFC v Minister for Immigration [2006] FCA 1359 WAFP v Minister for Immigration [2003] FCAFC 319

Applicant: SZGUR

First Respondent: MINISTER FOR IMMIGRATION &

CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL

File number: SYG 2637 of 2006

Judgment of: Raphael FM

Hearing date: 15 November 2007

Date of last submission: 15 November 2007

Delivered at: Sydney

Delivered on: 28 November 2007

REPRESENTATION

Counsel for the Applicant: Mr R. Anthony

Counsel for the Respondent: Mr M.P. Cleary

Solicitors for the Respondent: Clayton Utz

ORDERS

THE COURT DECLARES THAT

(1) The decision of the Refugee Review Tribunal made on 7 August 2006 and handed down on 22 August 2006 is invalid and of no effect.

THE COURT ORDERS THAT

- (2) The matter be referred back to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law.
- (3) The First Respondent to pay the Applicant's costs assessed in the sum of \$5,000.00.
- (4) The name of the First Respondent be amended to "Minister for Immigration & Citizenship".

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2637 of 2006

SZGUR

Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

- 1. The applicant is a citizen of Nepal who arrived in Australia on 18 December 2004 and applied to the Department of Immigration and Multicultural Affairs for a protection (class XA) visa on 21 January 2005. A delegate of the Minister refused to grant the protection visa on 11 February 2005. The applicant sought review of that decision from the Refugee Review Tribunal which affirmed the delegate's decision on 30 May 2005. On 26 April 2006 the Federal Court set aside the Tribunal's decision and remitted the matter to be heard and determined according to law. The second Tribunal held a hearing which the applicant attended on 11 July 2006. On 7 August 2006 the second Tribunal determined to affirm the decision not to grant the applicant a protection visa and handed that decision down on 22 August 2006.
- 2. The applicant claimed to be a person to whom Australia owed protection obligations because of his association with the Communist Party of Nepal (Maoists) whose political philosophy he accepted and on whose behalf he became a political activist in 1996. He claimed to be involved in collecting donations for the Party and was also involved

in security. He would sometimes give education to ordinary people [CB 138]. He believed he would be killed if he returned to Nepal by either the army or the police. He had been a member of the Valley Committee which reported to the Central Committee. Although the applicant detailed his association with the Maoists in this way it was in fact through his association with his wife's family that the most serious concerns as to his own safety were expressed.

3. The applicant claimed that his two brothers-in-law, MM and YM, were killed on 24 January 2004 because of their affiliation with the Maoists [CB 137]:

"The Tribunal asked the Applicant if he could explain the details around, for example, the killing of MM. The Applicant stated that he thought MM was around 24-25 years of age, though he was not sure, and that he had gone to feed the animals when he was killed by the authorities in or around January 2004. The Tribunal asked the Applicant how he knew the details of the death of MM. The Applicant stated that there were a lot of witnesses to his shooting and that it was published in the newspaper. He stated that after he was killed, his father-in-law went to check and found that he had not been properly buried. The Applicant stated that people were annoyed because they conceded that although he should have been arrested, he should not have been killed."

4. The Tribunal in its findings and reasons commencing at [CB 140] did not accept that the applicant was involved in the Maoist movement and felt that he was unconvincing in providing relevant and pertinent detail which would have enabled the Tribunal to be satisfied that he had a ten-year involvement with it. The Tribunal was also not satisfied that the applicant's wife's family were Maoists and that some of their relatives were killed by reason of their involvement with the Maoists at [CB 141]:

"When the Tribunal sought details from the Applicant about the deaths of his claimed relatives such as MM the applicant provided some details. When asked how he knew about the details of those deaths the applicant stated that there were witnesses and that the information about their deaths was published in the newspaper. Significantly the Applicant did not provide personal information but rather deferred to press coverage of the events."

5. The applicant provided to the Tribunal some documents which were intended to be corroborative of his claims. The first document was an article written in English under the title "Eager to Return" [CB 115]. The second document was the applicant's translated marriage

certificate [CB 82] and the third was a letter from the applicant's brother [CB 63]. The applicant provided a newspaper cutting dated 25 January 2004 (translated) referring to the deaths of YKM and MM [CB 56-57] and an extract from Kantipur Online also referring to these deaths [CB 58]. The applicant also provided the Tribunal with an extract from a newspaper dated 9 July 2006 [CB 99] which referred to him as a person:

"... fighting for the democracy and the supporters of Maoists were forced to leave the country and asylum in the foreign countries, roaming around in the street as beggars in foreign countries."

It is the manner in which the Tribunal dealt with this corroborative evidence that forms the basis for the applicant's submissions that the Tribunal fell into jurisdictional error. The applicant claims that there were serious errors of fact-finding which went to the fundamental parts of the claim and that the Tribunal used irrelevant material upon no reasonable basis. I shall deal with each of the relevant documents and give consideration to their individual and cumulative treatment. I do not propose to make any reference to the copy letter from the Communist Party dated 11 December 2004 [CB 60] to which the Tribunal gave no weight. The matter was not pressed at hearing and I am unable to find any fault with the Tribunal's reasoning in regard to it.

The "Eager to Return" article

6. This article is best reproduced at [CB 116]. It relevantly states:

"There was an increasing trend of travelling abroad by various government officials and business entrepreneurs at the time of the then government, as they were reproached for helping the Maoist party.

Among few, [the applicant] is one of them. [The applicant] was serving for a company that alleged him for helping Maoist and was put under a critical observation due to which he was compelled to migrate abroad.

Going abroad was the urgency than his wish. [The applicant] who migrated abroad exhibited his affection and devotion towards Nepal and in his words said "We want peace and long term sustainability in heavenly Nepal itself." He further explains that the political crisis of Nepal should come into a strong conclusion where the power should lay in the hands of the people."

The article was handed to the Tribunal at the commencement of the hearing and discussion between the Tribunal and the applicant about it is found at [T4]-[T5]:

"Q20: Now, I'm conscious that you've just given me something new which I haven't had a chance to look at, so do you want to explain to me what this is about and what this magazine is?

A(I): That is tourism, you know, journal from the tourism and it just mentions that, you know, what, what is the situation at the moment, just explaining that in that magazine.

Q21: Ah hmm. And were you interviewed for this or how did you come to be in it? Because it's, is it an Indian magazine?

A(I): Yeah. Friends of mine, he asked me on the phone.

Q22: Ah hmm. Can you explain that to me a little more.

A(I): And I just told them that, you know, I'm staying here, explain why I'm here and they know, you know, now why I'm here.

Q23: And is this friend in India, is he?

A(I): No, not in India, from Nepal.

Q24: And do you have other things that you wanted to give to the Tribunal?

A(I): Yeah, I want to give the copy of that magazine.

Q25: Yeah. We've photocopied that page, which I think is the relevant page.

A(I): That should be fine."

The document was again referred to at [T28]:

Q148: In the hearing you told me that you had your shop, you know, like a tourist shop and you sold things for tourism, like you had a small business.

A(I): Yeah, that's right.

Q149: And in here it says you're working for a company.

A(I): No, there is not other company, that's my own business, own company.

Q150: Well, it says here, [applicant's name] was serving for a company that alleged him for helping Maoists and put him under critical observation.

A(I): No, that's my own business, my own, I didn't work to any other

company.

Q151: So is this article about you or is it somebody else?

A(I): It's only wrong. That was, in general those were in abroad and those

who had problem.

Q152: So this is a reference to you or is this somebody else?

A(I): Yeah, because they are from other people also. My name is also there.

Q153: Well, it says here, [applicant's name], which I presume is you, sorry,

[applicant's name], how do you pronounce it?

A(I): [Pronounces name]

Q154: Yeah, Was serving for a company that alleged him for helping Maoists.

A(I): Yeah, I, you know, had my business and I used to support the Maoists,

you know, the people in the Maoists, company of Maoists.

Q155: You had your business and you used to support what?

A(I): That business is to survive, to, you know, look after my family, I had

that business.

Q156: So you weren't working for a company.

A(I): No, I was not, no, I was not working with any other company, that's

my own company, my own business."

In its findings and reasons the Tribunal said at [CB 141]:

"In the article titled Eager to Return (see Folio 39 current Tribunal file) there is a reference to the Applicant who was "serving for a company that alleged him for helping Maoist and was put under a critical observation due to which he was compelled to migrate abroad." As discussed with the Applicant at the hearing the Tribunal notes that this statement contradicts the Applicant's claim [at] the hearing that he was running his own business and was not working in a company. The Applicant at the hearing re-stated that he did not work with a company but that he was self-employed. In light of this the Tribunal does not place weight on the article as establishing that the Applicant is or was associated or imputed to be associated with the Maoist movement in Nepal."

The applicant argues that the Tribunal misconstrued his evidence, acted irrationally or failed to take account of a relevant consideration when the Tribunal made its findings in regard to the article. It places

emphasis on the fact that this evidence makes it clear that he was not working for a company and that the business was his own business (although at the first Tribunal the applicant had produced a certificate of incorporation indicating that he was the director of a company called Pramila Supplies, which was presumably the business he was referring to). Looked at without an eye attuned to discovering error, I cannot say that the Tribunal's reaction to the article was unreasonable. The article seems to indicate that the applicant was informed upon by someone with whom he worked. The applicant made a claim that he did not work with anybody. In those circumstances and given the understandably vernacular English in which the article was written, the Tribunal's decision to place little weight upon it was a decision the Tribunal would be entitled to make and entirely within the scope of its discretion: see, for example, Applicant V324 of 2004 v Minister for Immigration [2004] FCAFC 259 at 40; Vu v Minister for Immigration [2005] FCA 1836 at [52] per Siopsis J. In any event, the article could hardly be called corroborative. The information given was provided by the applicant himself and therefore cannot be any more persuasive than his own evidence.

The killing of YM and MM in January 2004

7. The Tribunal's findings about these killings are at [CB 141], extracted at [3] of these reasons. The Tribunal questioned the applicant about his brothers-in-law. At [T11] there is the following conversation:

"Q61: Now, I noticed in the previous file that you handed in some newspaper articles and said that these people who had died were relatives of yours. Is that correct?

A(I): Yeah, some of my relatives, you know, they were killed.

Q62: And how does that relate to your claims?

A(I): Because, you know, myself and my family, we all were Maoist and supporting the Maoists and they were killed, you know, and, you know, they will certainly also, you know, kill, kill me certainly because, you know, my relatives, they were killed.

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Q63: Ah hmm. And who are these relatives?

A(I): One my brother-in-law and one my wife's uncle and my in-law's relatives."

At [T13]-[T14] the Tribunal questioned the applicant upon how MM was killed:

"Q76: Ah hmm. And how was he killed?

A(I): He's just a supporter of, you know, Communist Party and he has not involved, he is not very active member. He was supporting only very lightly in the village. And he was reported earlier when he went to ... the animal, you know, the cow in the village and he was seen by the authority and, you know, he, they tried to get him and he was, he run away, was running away. And, you know, they could have just catched him and arrested him and put in a gaol or somewhere but, you know, they didn't do that but they, you know, they just fire him and kill him.

Q77: And how do you know that?

A(I): Because he was my close, you know, brother-in-law and that's why, you know, I knew what actually happened.

Q78: Ah hmm. Do you know any other details about it?

A(I): So other time, you know, he used to do the same routine job but, you know, he was not watched that time, but that particular day the army was, you know, watching, watching from one of the hillside and some other, must be there was some report by, you know, the people, you know, about his presence in that area.

Q79: And was he a Maoist?

A(I): He was a Maoist, he was a supporter of Maoist Party.

Q80: So did anybody witness him being killed by the army or do you just think that that's what happened?

A(I): Yeah, it was, you know, there was a lot of witnesses and, you know, that's why it was published in the paper about the details. That's why, you know, I couldn't go, I couldn't go there because I was hiding and, and when my father-in-law, when he went and check, you know, he was buried and he was not covered, you know, he, his head was, you know, under, under and, you know, leg was outside and he was not even covered by the, you know, by the mud. And even some, you know, witness people, you know, they, they complain that, you know, why he shouldn't be killed, you know, he should have arrested, he shouldn't be killed. And those people who said that, they were also, you know, watched by the authority and, you know, they also had some problem."

It is not at all clear why the Tribunal implicitly thought that the applicant had to be a witness of the killings in order for them to have taken place. The newspaper articles to which the Tribunal refers do not contain the details given by the applicant in response to question 80. There is no mention of what the father-in-law found when he went to check on the body. That seems to me entirely inconsistent with the statement made by the Tribunal that the applicant did not provide personal information but rather deferred to press coverage of the events. He did provide some very personal information. It cannot be said that the Tribunal was unaware of that information, but having noted it the Tribunal then made an entirely inconsistent finding for which no satisfactory reason is given.

Marriage registration certificate

8. The marriage registration certificate translation is found at [CB 52]. It is reproduced as an annexure with the names removed. The Tribunal's comment on the document is found at [CB 141] in its findings and reasons:

"In regard to the Applicant's claimed Marriage Certificate (see Folio 27 Tribunal file) which the Applicant claims establishes his relationship by marriage to the M family the Tribunal notes that the entry in the certificate refers to the Applicant marrying IKA, not IKM. At the hearing the Applicant claimed to explain this by stating that it was completed after the marriage and hence had his wife's married not maiden name. When the Tribunal pointed out to the Applicant that the form referred to a Miss not a Mrs then it would be expected that the maiden name would be entered on the form the Applicant claimed that it was a mistake. As such the Tribunal does not place weight on the document as establishing that the Applicant is related to MM or YM named in newspaper articles as persons killed by the Nepalese authorities."

- 9. The discussion with the Tribunal in regard to the marriage certificate relevantly commences at [T15]:
 - Q92: So when did you get this marriage certificate and what was the reason of providing it to the Tribunal?
 - A(I): Just to explain that, you know, my wife's ... before and the surname now is different, just to prove that, you know, my wife's brother who was killed was from the same family.

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Q93: Ah hmm. So do you have the original of this?

- A(I): Yeah, I've got the original. Marriage certificate. This one.
- Q94: So why do they issue marriage certificates in English?
- A(I): I just had this translated into English.
- Q95: So have you got the original that's not in English?
- A(I): Yeah, I've got that original copy at home.
- Q96: So I don't understand it. It's got all these stamps on it as though it was the original but it's in English.
- A(I): There is one agency in Kathmandu, they do the translation of any, and that is recognised world-wide. They even had the website, you know, that name of that agency.
- Q97: O.K. The difficulty I have, that it actually doesn't give your wife's name as M but it gives it as your surname, A.
- A(I): Because this, this certificate was, you know, written after the marriage and after the marriage my wife's name, it changed as my surname. That's why, you know, it's written and my surname, her surname and my surname is the same.
- Q98: But it says Miss, it doesn't say Mrs. It says Miss I ... A. Miss before married. See, that's singular. Do you want to have a look?
- A(I): Yeah, I think it looks like \dots must be some mistake, you know, yeah, it can be inquire. Yeah, but the daughter of Mr \dots M."

The Tribunal does not suggest that the marriage registration certificate is false in any way. It does not suggest it is a forgery or fabrication in terms but it effectively says the same because it dismisses it having any value to establish the applicant is associated with the M family because it refers to the person whom he married by her married surname. It was pointed out to the Tribunal that the wife was described as the granddaughter of Mr FPM, and the daughter of Mr HPM. The Tribunal makes no reference to the fact that the wife's name as it appears on the marriage certificate also appears on the applicant's application for a protection visa found at [CB 4] and interestingly that the daughter's name contained in that document, "Pramila", is the name of the company that the applicant founded and of which he was a director found at [CB 59].

- 10. The applicant argues that the Tribunal's dismissal of the applicant's claims regarding the killings of YM and MM is unreasoned and lacks any rational foundation. This error, he argues, was compounded by the dismissal of the marriage registration certificate and thus the dismissal of any connection between the applicant and the two young men whose deaths were reported in the press. It is the connection with these young men that justifies the applicant's fear of persecution if he should return.
- 11. In *NADH of 2001 v Minister for Immigration* [2004] FCAFC 328 Allsop J (with whom Moore and Tamberlin JJ agreed) considered the assessment of facts by the Tribunal at [115]:

"By and large fact-finding is a task within jurisdiction, though factual error is not necessarily mutually exclusive of jurisdictional error: Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S20/2002 (2003) 198 ALR 59. Where fact-finding has been conducted in a manner which can be described, as here, as in substantial respects unreasoned, and mere assertion lacking rational or reasoned foundation, at times as plainly and ex facie wrong and as selective of material going one way, these considerations may found a conclusion that the posited fair-minded observer might, or indeed would, reasonably apprehend that the conclusions had been reached with a mind not open to persuasion and unable or unwilling to evaluate all the material fairly. How else, the fair-minded observer might ask, can one explain the largely unreasoned rejection of documents as vague, when they plainly were not, and as not saying the appellants were Catholics, when expressly or impliedly they did?; and how does one explain not dealing with answers which revealed an apparently detailed knowledge of the Christian religion and the Catholic faith, when a conclusion is drawn that persons are not Christian based on weighing some answers to questions of less than central importance? The answer to these questions might be that the Tribunal lacked an appreciation of the need to weigh all the material. If that were the case it would itself support a conclusion of jurisdictional error. The answer might also be the lack of an ability or willingness to deal with the material before it with a mind open to persuasion fairly evaluating all the material."

His Honour returned to the consideration of this problem in *SZHFC v Minister for Immigration* [2006] FCA 1359 at [31]-[33]:

"This, in my view, is the hardest and most difficult argument in the appeal. It is one that is not easy to resolve. It involves the difference between the asserted failure of a Tribunal to attend to the jurisdictional task and making an error of a factual character within jurisdiction.

The High Court has on a number of occasions been at pains to point out that jurisdictional error should not be analysed by positing the related, but different taxonomy of fact and law. The question of the existence of jurisdictional error is not to be answered by posing this different question and answering it. What may be a

factual error may in fact mask a jurisdictional error. For instance, if factual errors are made because incorrect questions are being asked the fact that the symptom of the problem is a factual error will not gainsay the proposition that there has been a failure to attend to the jurisdictional task.

More difficult is the question of the execution of the jurisdictional tast. In the case of *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328 in the Full Court, the Court was dealing with, what was on the facts of the case a failed attempt to exercise jurisdiction. Within that context, the court was not willing to conclude that when the Tribunal said certain documents showed something that the Tribunal had really turned its mind to even considering the documents given that the statements about the contents of the doucments were so unconnected with reality. That was a case where the difference between making a mistake about what a document said and simply not attending to the task of considering the material put forward was found. The difference between those two matters was recognised and the conclusion was that the tribunal had not looked at the documents in a way that fulfilled its jurisdictional task."

His Honour then dealt with the situation before him where the Tribunal was shown a book with a list of Pathan names in it but concluded that there were not Pathans in the list of those killed, missing or made widows or orphans by the riots. His Honour concluded in that regard at [38]-[42]:

"The Tribunal here did not fail to address claims of the appellant. Rather, in my view there has been revealed what I am prepared to conclude for the purposes of argument is an error of a not insignificant character in the assessing of the material. It is not a question of failure to deal with the claim. It is, to put it neutrally, a question of failing to form the correct conclusion in relation to material that was placed before the Tribunal.

It seems to me, without intending to qualify in any way the words of the Full Court in *NABE*, that what must be identified is that from the character and quality of the error, together with any other relevant circumstances, it an be concluded by the court on review, that notwithstanding the reference to the document for some reasons, whether deliberate or unintentional, the Tribunal has not in fact finished its jurisdictional task by considering the document.

Multiple examples could be given and perhaps it does not assist to do so; but if a Tribunal in its reasons said that it had looked at document X and it was of no assistance because it was a blank sheet of paper apart from the heading, it might be said to be more than a factual error if in fact the document which was before the tribunal had cogent and compelling material in relation to the applicant's claims. One might be able to conclude that the only conclusion that can rationally be drawn is that the Tribunal, in saying that it had considered a document, had not in fact considered that document. Whether or not that was deliberate would not matter. It might then be

able to be said that the Tribunal had not completed its task because it simply had not broached the task of examining material that the applicant had put forward for its consideration. Though not without some hesitation, I have come to the view that in this case the quality of the error is such that the explanation for the error may be misreading or a lack of precise attention to the detail that the document exhibited but that, in my view, is no more than saying that, within jurisdiction, an error, though a serious one, was committed."

12. I do not think that Allsop J was resiling in SZHFC from what he had said in NADH. What occurred in the latter case was a clear fact-finding error, whereas what occurred in the former was an error in the process of reasoning. This is more what occurred in the instant case where the Tribunal was "selective of material going one way" by ignoring the personal details provided about the body and relying only on the fact that the applicant made reference to the press reports when considering the killing of the two brothers-in-law. It was similarly selective in relation to the marriage certificate by looking only at the reference to the bride and the title "Miss" and having no regard whatsoever to the fact that she was named as the grand-daughter and daughter of two people with the name of M. The respondent argues that the marriage certificate falls within the category of documents considered at [40] of SZHFC because the document was considered and was not given weight because of the lack of credibility of the oral evidence. The respondent says that if that was an error then it was one within jurisdiction. I am not satisfied that the reason the marriage certificate was not given weight was because of the oral evidence. It is not expressed that way by the Tribunal which uses the "mistake" that was discussed with the applicant in the naming of his wife. Where the Tribunal found that the brothers-in-law were not killed because of their involvement with the Maoists, the only grounds for making that wide finding in the face of the press reports was that the applicant relied on the press reports. Consideration of a document means consideration of it as a whole and not only of the material that goes one way. Whether that is indicative of a mind not open to persuasion or is a failure to consider important or relevant material going to a central consideration (WAFP v Minister for Immigration [2003] FCAFC 319 at [19]) is difficult to say. I would be inclined to take the findings of the Tribunal on the report of the death of the brothers-in-law and the marriage certificate together and tend towards the former and I am satisfied that a jurisdictional error of this type requires the decision to be quashed.

The relationship with these two young men is essential to the applicant's claim and if findings about that relationship are tainted with jurisdictional error then the only safe thing to do is to refer the matter back to the Tribunal to be heard and determined according to law.

13. I will declare that the decision of the Refugee Review Tribunal made on 7 August 2006 and handed down on 22 August 2006 is invalid and of no effect and I will order that the matter be referred back to the Tribunal differently constituted to be heard and determined according to law. If constitutional writs are required they will be so ordered. The respondents shall pay the applicant's costs assessed in the sum of \$5,000.00.

I certify that the preceding thirteen (13) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 28 November 2007

Annexure – Marriage Certificate

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