

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKHV & ANOR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1894

MIGRATION – RRT decision – Indian woman of low caste and Maoist political opinions – claims rejected by Tribunal on assumption that Maoist leaders were not persecuted in India – no evidence supporting its reasoning – relocation finding failed to consider whether refugee claims were geographically confined – matter remitted.

Migration Act 1958 (Cth), ss.91R(2), 91R(2)(d), 91R(2)(e), 91R(2)(f)

A v Minister for Immigration & Multicultural Affairs (1999) 53 ALD 545

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Minister for Immigration & Multicultural & Indigenous Affairs v VOA [2005] FCAFC 50

Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal (2002) 190 ALR 601

NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 37

Randhawa v Minister for Immigration, Local Government & Ethnic Affairs (1994) 52 FCR 437

Re Minister for Immigration & Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57

SFGB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 231

SZATV v Minister for Immigration & Citizenship [2007] HCA 40

VAAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 117

First Applicant: SZKHV

Second Applicant: SZKHW

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL

File Number: SYG 779 of 2007

Judgment of: Smith FM
Hearing date: 12 November 2007
Delivered at: Sydney
Delivered on: 12 November 2007

REPRESENTATION

Counsel for the Applicants: Mr R Nair
Counsel for the First Respondent: Ms R Francois
Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 23 November 2006 in matter 060738138.
- (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 29 July 2006.
- (3) The first respondent must pay the applicants' costs in the sum of \$5,000.
- (4) These orders shall not take effect until 1 December 2007.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 779 of 2007

SZKHV
First Applicant

SZKHW
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. The applicants are a husband and wife who came to Australia in 2006 and applied for protection visas. The husband shared some of the background of his wife, but it was his wife's fears, based on characteristics which she claimed made her vulnerable to persecution in India, which were relied upon by them as the grounds for seeking protection against return to that country. I shall refer to the wife hereafter as the applicant.
2. In a visa application which was completed without any apparent assistance, the applicant said that she belonged to a "*Christian schedule caste community*" in the State of Kerala in India. She said she

had not been treated equally in society, but had always been discriminated against. As a result of discrimination, she said:

I lost the hope in God and in my own Christian religion. This made me to become a member in People's War Group (CPI (ML)) Maoist Party. In the year 1999, I became an active member. Later in the year 2000, I became the secretary of the Radical women's movement for my district.

3. She claimed that after she married her husband, who belonged to the same community, false cases were instituted against her by his family to break up the marriage. Also, she had been attending classes run by the People's War Group ("PWG") "*where they taught about the principles of Marxism and Leninism*", and this attracted the attention of police who suspected she had links with PWG. She claimed to have been taken into custody, mistreated, held in detention, and eventually released on bail. In 2005 her house was damaged by government officials, household articles were thrown out, and she was forced to move to a slum area. She said: "*the reason for this act was due to the influence of the ruling upper caste or the so called higher caste people*".

4. She said that she thought that she would be persecuted if she went back, because "*I am active member of banned political party PWG*", and "*I have exposed caste politics and corrupted persons among the CPI(M) Party*". She said that, if she were sent back:

I will be killed definitely by the political and caste based organisational cronies who are in prominent position, against whom I have exposed their corrupt behaviour and activities. Furthermore, Indian police would re-open my old cases and arrest me again. I strongly believe that authorities would not protect me and I would continue to suffer and get tortured and face difficulties with the authorities and other prominent individuals.

5. The applicant's claims were not accepted by a delegate, although he accepted that she was "*a member of a schedule caste in India*". The delegate said: "*there is no evidence before me which suggests that membership of a political party in India attracts persecution*", and thought that she could relocate on return to India. The delegate refused the visa application on 29 July 2006.

6. The applicant appealed, and attended a hearing of the Tribunal on 12 October 2006. A description of the hearing is in the Tribunal's statement of reasons. The applicant maintained her claims to have belonged to a scheduled lower caste group, to have worked with a Maoist organisation, and to be in danger of being arrested by authorities. She repeated her claims that her house and herself were attacked in 2005, and she said that as a result of the attack she had developed a hearing problem. The Tribunal invited her to submit evidence in support of that claim after the hearing, and she did so, being medical records showing treatment for a bilateral hearing problem.
7. The applicant described her involvement in political activities, in which she said she was an organiser. She was unable to show a document to substantiate her claims at the hearing, but the Tribunal gave her further time. She then submitted further documents, being a certificate from the Communist Party of India that she had been a member since 1999, and an affidavit from her mother confirming her involvement in a radical movement.
8. She also submitted a certificate from a parish priest, stating that she had taken refuge in Australia "*due to adverse situations as she fought for equal justice and against discrimination to the down trodden Christians like the Christian Fishermen Community*". She also submitted baptismal and marriage certificates issued by Catholic churches.
9. The applicant told the Tribunal that she had been a Christian all her life, as her parents were also Christians and that she attended church regularly. The Tribunal tested that claim against her knowledge of the Bible.
10. The Tribunal affirmed the delegate's decision, in a decision handed down on 23 November 2006.
11. In its statement of reasons, the Tribunal identified relevant independent country information concerning scheduled caste groups in India. It said: "*an overwhelming body of information indicates that members of the dalit community continue to experience forms of discrimination throughout India*". The US State Department's latest report said:

“discrimination against dalits covered the entire spectrum of social, economic and political activities, from withholding of rights to killings and was not solely practiced by high-caste Hindus against the lower castes in dalits”. The Tribunal said: *“the literature on Christians of Scheduled Caste origin indicates that they suffer the same disabilities and violence as their Hindu counterparts”*.

12. In relation to the People’s War Group, the Tribunal said that it had been founded in 1980, and *“claims the mantle of violent peasant revolution”*. Its ambitions and operations covered the whole of India, and it was a *“proscribed organisation under India’s Unlawful Activities (Prevention) Act 1967”*. It was listed by the US State Department as a terrorist group. The Tribunal said: *“its activities are widely documented and include: guerrilla warfare, murder, political assassination, kidnapping, theft and extortion”*. Country information described its organisation within India, making it clear that it was currently active and had leaders operating within India.
13. In its *“Findings and Reasons”*, the Tribunal said that it was of the view that *“it is more probable than not that she is a member of a lower caste group”*. However, it said it did not have *“credible evidence to indicate that she has been subject to an unequal treatment that constitutes serious harm as to amount to persecution because of her caste”*. It said: *“there is no credible evidence before the Tribunal that indicates that she was deprived [of] her means of subsistence in the community in India”*.
14. It is arguable that this finding reflected a too demanding application of s.91R(2)(d), (e) and (f) of the *Migration Act 1958* (Cth), by applying a test of *“deprives”* rather than *“threatens the person’s capacity to subsist”*. However, this point has not been argued before me. I do not need to address it, since I have found other jurisdictional errors affecting the Tribunal’s decision.
15. The Tribunal gave no weight to the hospital records produced by the applicant, on the basis that they did not show that her hearing problem was causally related to a Convention reason.
16. It concluded that the applicant *“did not provide any persuasive or plausible basis for why the higher caste groups would single her out*

for persecution in her community". It noted that she claimed that this had occurred not only because of her caste, but also because of her political activism. However, it said:

As the Tribunal noted to the applicant in the hearing, by her [own] admission she attended school only up to year 10. With her minimal educational background, the Tribunal finds it implausible that she would have been a lower caste leader engaged in political education in her community as to attract the adverse attention what she describes as 'enemies in the higher caste' groups.

17. The applicants have submitted that this reasoning reflects assumptions as to the likely educational qualifications of an active supporter of the Maoist political movement, which seems surprising, and was unsupported by any evidentiary basis. There is substance in these criticisms, but I need not address them further.
18. Based on that reasoning, the Tribunal concluded: "*on the evidence the Tribunal is not satisfied that the applicant was subject to persecution or is likely to suffer persecution in India because of her membership of a particular social group*".
19. It then addressed her "*religious background*" as if she had claimed separately to have been persecuted as a Christian. However, she had not so claimed. The Tribunal concluded from her failure to demonstrate "*basic knowledge*" of the Bible, that it was "*not satisfied that the applicant is a Christian*". In the course of this reasoning it referred to the parish priest's certificate, and said that it would give no weight to that certificate. It did not address her baptismal and marriage certificates. The applicants submit that this part of its reasons also reveals jurisdictional error, but again I do not need to examine these submissions.
20. Under the heading "*political opinion*", the Tribunal returned to considering whether it was satisfied by the applicant's claims to have been persecuted by reason of her political opinions and activities. It said that it gave "*little weight*" to the documents she had tendered after the hearing in support of that claim. This was because "*given her profile, it is not plausible that [the] applicant would have engaged in any serious level of activity to attract the adverse attention of the*

higher caste groups or the Indian authorities”. The reasoning of the Tribunal in support of its opinion on plausibility was:

As the Tribunal noted to the applicant, if senior members of her organisation are still able to reside and work in India, it does not seem plausible that a lower profiled member of the organisation could be targeted by enemies of the political organisation rather than senior members themselves. The Tribunal notes that in spite of her claims that she was arrested and tortured and then released on conditional bail, the applicant was not able to provide any credible corroborative information in the form of court documents or police statements issued against her to assist such claims. On the evidence the Tribunal is accordingly not satisfied that the applicant faced or faces persecution at the hands of the members of other political organisations in her community in India.

21. The Tribunal’s reference to its exchange with the applicant at the hearing is to the following passage:

The Tribunal then spoke to the applicant about her claims that she was attacked. She said she was attacked in 2005. The Tribunal asked why she was attacked. She said she was attacked because she was hated by several enemies. The Tribunal then put it to her that given her profile as someone with very little education and who was only an organiser, it does not seem plausible that enemies of her political organisation could have signalled her out for attack. The Tribunal then proceeded to ask her if there are senior members of her political organisation still resident in India. She said there are. The Tribunal then put it to her that her claim that she was targeted are not credible in view of the fact that she had a low profile because of her educational background. The Tribunal noted to her in particular that if senior members of her political organisation are still able to live and work in India, it does not seem plausible that an ordinary organiser of the organisation could be in peril of her life as to make her want to leave the country. She responded by saying that she was targeted because she was advising and educating ordinary people about the many flaws in the political organisations and the major parties in India.

22. The applicants argue that the Tribunal’s reasoning when rejecting her political claims reveals jurisdictional error, because it was based upon evidence which did not exist. It is submitted that there was no evidence before the Tribunal that “*senior members*” of the Maoist PWG “*are*

still able to live and work in India” without being “*targeted*” and being “*in peril of their lives*”. Moreover, evidence to the contrary was before the Tribunal, which suggested a strong likelihood that the leaders of the PWG and the Maoist Communist Party were in fact being hunted down by Indian authorities when they resided and worked in India.

23. I have above recited the country information identified by the Tribunal itself, which leaves little doubt that the Indian authorities are probably targeting leaders at all levels of the PWG and the Maoist Communist Party.
24. Counsel for the Minister submitted that the Tribunal may have drawn from country information which it did not identify in its statement of reasons, but which it was entitled to draw upon based on its broad experience in refugee matters (cf. *A v Minister for Immigration & Multicultural Affairs* (1999) 53 ALD 545 at 555, *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [32], and *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* (2002) 190 ALR 601 at [263]).
25. However, I would not conclude that the Tribunal drew from such experience in the present case. Indeed, in my opinion, it did not. It extracted relevant country information about the PWG which is directly inconsistent with the line of reasoning which it later followed. In my opinion, it failed to appreciate the true significance of that information, and to take it into account when assessing the plausibility of the applicant’s claims.
26. Counsel for the Minister also submitted that the applicant herself provided evidence to the Tribunal, allowing it to conclude that senior members of her political organisation were able to live and work in India without being targeted.
27. However, I do not read the applicant as having given such evidence. It is true that the Tribunal put this idea to the applicant during the hearing. But on its account of her response which I have extracted above, she did not concede what was put to her. Rather, she responded by saying that she had been targeted because of her subversive activities among ordinary people. That response did not allow the

Tribunal to have concluded that she was saying that her leaders and more senior members of the organisation were not also being targeted.

28. I can find no evidence in the material before me which allowed the Tribunal to have made the factual finding or assumption upon which it rejected the applicant's claim as implausible. Its critical reasoning therefore arrived at a conclusion without any evidence for the fact which the Tribunal believed disproved the applicant's claims of persecution. On established authority, that defect constituted jurisdictional error (see *Minister for Immigration & Multicultural & Indigenous Affairs v VOA* [2005] FCAFC 50 at [5] and [13], *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [77], and *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 at [19] and [28] applying *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-357).
29. I note that this issue was fully explored with both counsel in the course of today's hearing. It was, in my opinion, sufficiently raised by paragraph 10 of the applicant's written submissions filed on 1 November 2007, and fell within the grounds raised by the application. Counsel for the Minister sought an opportunity to make further written submissions, but I declined that opportunity. In my opinion, counsel was given a fair opportunity to present all the arguments available to the Minister, without needing to make further written submissions on the point.
30. For the above reason, I consider that the Tribunal's reasoning which rejected the applicant's claims to fear persecution based on her political opinions and activities was affected by jurisdictional error. However, I need to consider its further reasoning, before concluding that the applicants are entitled to have their matter remitted to the Tribunal.
31. This is because the Tribunal also addressed whether the applicant could relocate within India. It stated the conclusion that "*she could have moved to any other part of India or to a bigger city such as Mumbai, to avoid any adverse attention she faced in her community*".
32. Referring to her experiences in her local community, the Tribunal might appear to have addressed "*practical or other type of impediment*

in her way in moving to another region of India". It appears to have formed the view that there were none, based on her ability to come to Australia. Whether this reasoning reflected a proper assessment of the practical problems facing the applicant in ordinary life in India, is not a matter I need further to explore. I do not need to address the submission of the applicant that the Tribunal's discussion showed a failure properly to appreciate and apply the principle of "practical reality" established in *Randhawa v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 52 FCR 437 and *NAIZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 37.

33. In my opinion, the Tribunal's reasoning in relation to relocation shows a different error, which was found by the High Court in *SZATV v Minister for Immigration & Citizenship* [2007] HCA 40. In that case, the High Court accepted that a finding that a refugee applicant was able to relocate to a region where objectively there was no appreciable risk of the occurrence of the feared persecution, could remove the obligations on Australia under the Refugee's Convention. Their Honours said at [24]:

What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality.

Their Honours at [26], also pointed out that an assessment of the option of relocation requires a consideration of the nature of the persecution feared by the refugee claimant. They said:

However, in other cases the conduct or attribute of the individual which attracts the apprehended persecution may be unsusceptible of a differential assessment based upon matters of regional geography.

In the case before them, they said that the Tribunal's reasoning involved an assumption that a person who had suffered persecution in one region would not be persecuted if he relocated, but only if he ceased to engage in anti-government political activities. They said at [32]:

By this reasoning the Tribunal sidestepped consideration of what might reasonably be expected of the [applicant] with respect to his “relocation” in Ukraine.

34. In the present case, the Tribunal did not address how the applicant could relocate elsewhere in India without continuing to face a risk of persecution based on her caste and her Maoist political opinions. In my opinion, it fell into the same error as in *SZATV*, by assuming that the applicant would in other parts of India cease to reveal herself as a person of low caste and an active Maoist supporter, in any manner which might bring her to the attention of the persecutors of low caste Indians or the Indian authorities. Such potential persecutors were not, on the evidence before the Tribunal, found only in her former locations in Kerala.
35. In my opinion, the Tribunal’s reasoning in relation to relocation also miscarried, and reveals jurisdictional error. I would therefore not conclude that the Tribunal’s ultimate conclusion can be supported on the basis of its relocation finding.
36. For the above reasons, the applicants have made out an entitlement to the relief they seek by way of writs of certiorari and mandamus.

I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 22 November 2007